

Summary of Recommendations for Fulfilling Governmental Responsibilities in a Federal System

Compiled and edited by the Editorial Committee

The editors asked the authors to provide their best recommendations for legal action in response to COVID-19. Recommendations for *Fulfilling Governmental Responsibilities in a Federal System* concern the challenges of vigorous pandemic control in a federal system and tightly networked world. Topics addressed include preemption, immigration enforcement, and international cooperation. Recommendations include both calls for urgent action now, as well as longer term changes that reflect the way the pandemic has highlighted deeper problems in American law and policy. We have organized the recommendations into federal, state, local and Tribal guidance.

Each recommendation is referenced back to its author(s). Please refer to specific chapters for a complete list of recommendations on a particular topic.

Action at the Federal Level

- Congress and the White House should jointly convene an independent commission of inquiry to conduct a thorough public investigation of the federal and state government preparation for and response to COVID-19 (Anderson and Burris, Assuring)
- To strengthen the state and local response to COVID-19, Congress should use its appropriations power to
 - o Provide more funding to state, Tribal and local governments to fill COVID-19 related budget gaps and to implement supports, accommodations, and legal protections to enable individuals, families, employers, landlords, school systems and local communities to comply with social distancing recommendations and restrictions
 - This financial support should not be conditioned on adopting a less cautious approach to social distancing restrictions (including school closures) or face covering requirements
 - o Provide more funding to state, Tribal and local governments to support testing and contact tracing (Silverman, Contact Tracing; Wiley, Federalism; Hoss and Tanana, Upholding Tribal Sovereignty; Gable, Mass Movement)
 - Funding should require the employment of a culturally sensitive, linguistically competent contact-tracing workforce reflecting the make-up of the community (Silverman, Contact Tracing)
- To better support Tribal pandemic response efforts, the federal government should
 - o Honor trust responsibility and consultation requirements as outlined by federal law
 - o Provide funding directly to Tribes rather than through Tribal-serving organizations
 - o Provide funding mechanisms directly to Tribes at rates equal to or higher than those provided to states and local governments
 - Do not delay in the distribution of such funds
 - Do not use Tribal-serving organizations or entities as proxies for funding directly to Tribes
 - o Require state and local government recipients of COVID-19 grants and cooperative agreements to meaningfully consult with Tribes in the disbursement of funds or services and to document such consultation as a condition of funding
 - o Sufficiently fund Indian Health Service, Tribal health facilities, and Urban Indian health centers
 - o Provide more stable funding for other Indian health programs, including permanently reauthorizing the Special Diabetes Program for Indians (Hoss and Tanana, Upholding Tribal Sovereignty)
- To prevent unnecessary international spread of the pandemic, ICE should cease deporting individuals who are infected with COVID-19 (Parmet, Immigration)
- Congress should take vigorous action to reverse the president's decision to withdraw from the WHO, including
 - o Immediately hold hearings on the legal authority and potential impacts of the president's decision to withdraw from WHO
 - o Pass a joint resolution that 1) formally disapproves of President Trump withdrawing from WHO, establishing the clear conflict with the executive that would provide the grounding for a legal challenge, 2) requires continued participation in WHO, and 3) affirms its interpretation of the 1948 joint resolution: that WHO withdrawal would require joint executive and congressional approval
 - o If the president vetoes the resolution, Congress could

override the veto. Alternatively, Congress could pass a concurrent resolution, which does not require presidential signature, though lacks force of law. Either action would bolster Congress's position that a unilateral withdrawal violates separation of powers principles

- o Lastly, Congress should pass a resolution to authorize litigation against the president to block withdrawal action (Wetter and Friedman, US Withdrawal)
- Congress should continue to appropriate funding WHO action (Wetter and Friedman, US Withdrawal)
- The federal government should support essential policy experimentation by minimizing preemption or other interference with reasonable local control measures (Anderson and Burris, Is Law Working)
- The president should appoint, and the Senate only confirm, judges receptive to legal theories protective against the misuse of state and federal preemption (Haddow et al., Preemption)
- Congress must fund the administration of the forthcoming election. As state budgets are stretched, the federal government must step up and assist the states in administering the upcoming federal election during the public health emergency (Becker, Elections)
- Courts need to reconsider their role and be more willing to apply a Burdick test to balance which measures are necessary to facilitate the right to vote, while maintaining the integrity of the ballot (Becker, Elections)

Action at the State Level

- States should consider amending their constitutions and/or statutes imposing balanced budget requirements to permit deficit spending in times of crisis (Wiley, Federalism)
- State governments should permanently remove state preemption of more protective local laws related to COVID-19 response (eg, mask and physical distancing mandates), economic security (eg, minimum wage, paid leave, employment protections), equitable housing (eg, eviction moratoria, rent control, source-of-income antidiscrimination), municipal broadband, and civil rights (eg, antidiscrimination laws, sanctuary cities)
 - o Governors and other authorized officers should use their emergency powers to suspend preemptive laws preventing effective and equitable local responses
 - o Where necessary, state legislatures should amend state emergency laws to authorize the suspension of preemptive laws
 - o Legislatures should remove state preemption of more protective local laws related to COVID-19 response (eg, mask and physical distancing mandates), economic security (eg, minimum wage, paid leave, employment protections), equitable housing (eg, eviction moratoria, rent control, source-of-income antidiscrimination), municipal broadband, and civil rights (eg, antidiscrimination laws, sanctuary cities)

(Haddow et al., Preemption; Anderson and Burris, Is Law Working; Lawton, COVID-19; Gable, Mass Movement)

- Legislatures should repeal all state preemption laws that penalize localities or local officials that enact, enforce, or attempt to enact or enforce preempted or potentially preempted laws (eg, laws subjecting localities and local officials to fines, civil liability, removal from office, and loss of funding)(Haddow et al., Preemption)
- Legislatures, and voters in states that allow voter initiatives, should adopt structural reforms to strengthen home rule in alignment with the National League of Cities Principles of Home Rule for the 21st Century (Haddow et al., Preemption)
- Those responsible for appointing judges, and voters in states that elect judges, should select judges receptive to legal theories protective against the misuse of state preemption (Haddow et al., Preemption)
- Legislators or the executives should expand voter options to include easy mail and early voting
 - o Election officials should prioritize efforts to recruit new poll workers and provide an adequate number of convenient and appropriate voting locations (Becker, Elections)
- State governments should respect Tribal authority and jurisdiction to promote the health and welfare of their communities and to implement COVID-19 response measures on their lands, including curfews, checkpoints, mask wearing, and other requirements
- State governments should enact law to require consultation with Tribes if the state or local government is making law or policy that impacts the Tribe
- To better support Tribal pandemic response efforts, agencies should
 - o Consult with Tribes on any matters that impact Tribal communities
 - o Work with Tribal governments to enter into data sharing and mutual aid agreements or memoranda of understanding without requiring Tribes to waive sovereign rights as a condition of these agreements
 - o Share COVID-19 related public health data with Tribes (Hoss and Tanana, Upholding Tribal Sovereignty)

Action at the Local Level

- Local governments and residents should support resolutions, lobby state lawmakers, and call for state executive action in support of local authority to enact more protective laws related to COVID-19 response (eg, mask and physical distancing mandates), economic security (eg, minimum wage, paid leave, employment protections), equitable housing (eg, eviction moratoria, rent control, source-of-income antidiscrimination), municipal broadband, and civil rights (eg, antidiscrimination laws, sanctuary cities)(Haddow et al., Preemption)

- Local governments and residents should advocate for state legislation or ballot measures expanding home rule authority in alignment with the National League of Cities Principles of Home Rule for the 21st Century (Haddow et al., Preemption)
- Election officials should prioritize efforts to recruit new poll workers and provide an adequate number of convenient and appropriate voting locations (Becker, Elections)

Action at the Tribal Level

- Tribal governments should consider entering into data sharing and mutual aid agreements or memoranda of understanding with neighboring jurisdictions, Tribal Epi Centers, and clinics to support and coordinate COVID-19 responses, working with Tribal counsel to ensure that Tribal sovereign rights are not compromised in such agreements (Hoss and Tanana, Upholding Tribal Sovereignty)