

What Is a Public Health “Emergency”?

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On March 27, 2014, Massachusetts Governor Deval Patrick declared the state’s opioid-addiction epidemic a public health emergency. The declaration empowered the Massachusetts public health commissioner to use emergency powers to expand access to naloxone, an opioid antagonist that can reverse overdoses; develop a plan to accelerate the mandatory use of prescription monitoring by physicians and pharmacists; and prohibit the prescribing and dispensing of hydrocodone-only medication (Zohydro, Zogenix), which had been recently approved by the Food and Drug Administration, amid much controversy.¹ The governor also allocated \$20 million for addiction-treatment services.

The public health problem — the advent of a potentially dangerous new drug following 140 deaths due to heroin overdoses in 4 months and a 90% increase in unintentional opiate overdoses between 2000 and 2012 — warranted a robust response. Nevertheless, Patrick’s unusual invocation of emergency public health powers, which are traditionally reserved for infectious disease outbreaks, natural disasters, or acts of terrorism, offers an opportunity to consider some important questions. Should widespread injuries, such as those caused by opiates or motor vehicle crashes, be viewed as public health emergencies? Should chronic health conditions such as hypertension or obesity be similarly categorized? When should normal lawmaking processes, and the

typical rights afforded to individuals and entities, be suspended to protect public health?

State laws providing public health emergency powers permit designated officials — typically governors and their top health officers — to take extraordinary legal actions. The laws provide flexibility in responding to emergency situations, when adherence to ordinary legal standards and processes could cost lives.

State laws vary in their definitions of “emergency” or “disaster.” Many refer to an occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from a natural phenomenon or human act (see table). Some mention only the magnitude of the potential harm, not its source. Others — including the Massachusetts law — provide no definition, leaving it to the governor to determine what constitutes an emergency.

Once a public health emergency is declared, designated officials can harness powers that are typically unavailable without legislative approval, by issuing emergency orders. These expansive powers may include deploying military personnel, commandeering property, restricting freedom of movement, halting business operations, and suspending civil rights and liberties. Emergency orders can also tap resources reserved for the proverbial rainy day.

Emergency powers sit largely outside the ordinary structures of checks and balances. Even when time-limited, they’re generally re-

newable at the governor’s discretion; only some of them can be terminated by the legislature (see table).

The spirit of emergency-powers laws seems to enshrine three key criteria for suspending normal lawmaking processes: the situation is exigent, the anticipated or potential harm would be calamitous, and the harm cannot be avoided through ordinary procedures. The archetypal scenario is the sudden outbreak of a highly communicable, lethal disease — such as the unlikely event of an Ebola outbreak in a U.S. city — when immediate action is required to avert catastrophe. In such circumstances, acute concern for public health is believed to outweigh substantial trade-offs of values we ordinarily hold dear, including individual autonomy, due process, and democratic lawmaking.

Recognizing the extraordinary nature of emergency powers, officials have invoked them infrequently. We know of only three other instances of their use in the modern era in Massachusetts; each arose from a sudden, short-term crisis, and the orders issued were quite limited in scope. Massachusetts governors invoked the powers to assume state control of a nursing home on the brink of sudden closure in the 1970s, to tap into a private source when a town’s water supply ran dry in 1993, and to conduct aerial spraying to combat eastern equine encephalitis in 2006.² Other states have invoked emergency powers in response

Illustrative State Laws on Emergency Powers for Public Health.				
State	Statute	Definition of “Emergency” or “Disaster”	Key Executive Powers	When Powers End
Indiana	Emergency Management and Disaster Law (Indiana Code §10-14-3)	Occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from any natural phenomenon or human act, including an epidemic and public health emergency	Act as militia commander-in-chief; suspend laws relating to the normal conduct of state business; use all available government resources; commandeer or use private property; control freedom of movement relating to evacuation and the disaster area; suspend or limit the sale, dispensing, or transportation of alcohol, explosives, and combustibles; and appropriate emergency or contingency funds (General Assembly also plays a role in appropriations)	Earlier of termination by the governor or by concurrent resolution of General Assembly or passage of 30 days (unless renewed by governor)
Massachusetts	Declaration of Emergency Detrimental to the Public Health (Mass. Gen. Laws Ch.17, §2A)	Not defined	Public health commissioner can take action and incur liability necessary to maintain public health and prevent disease (subject to approval of governor and Public Health Council)	On governor’s declaration
Pennsylvania	Governor and Disaster Emergencies (35 Pa. Cons. Stat. §7301)	Not defined	Act as military commander-in-chief; suspend laws relating to normal order of government business; use all available government resources; commandeer or use any private, public, or quasi-public property; control freedom of movement relating to evacuation and the disaster area; and suspend or limit the sale, dispensing or transportation of alcohol, firearms, explosives, and combustibles	Earlier of termination by the governor or by concurrent resolution of General Assembly or passage of 90 days (unless renewed by governor)
Washington	Washington State Emergency Management Act (Ch. 38.52 R.C.W.)	Event or set of circumstances that demands immediate action to preserve public health, protect life, protect property, or provide relief to any stricken community overtaken by such circumstances; or that reaches such a dimension or degree of destructiveness as to warrant the governor’s declaring a state of emergency	Control freedom of movement of persons; exercise powers without regard to procedures and formalities of law; enter into contracts and incur obligations on behalf of the government; use existing government resources; and commandeer private services and equipment	When terminated by the governor after restoration of order in the affected area

to influenza outbreaks and natural disasters. An opiate emergency was declared by Florida’s surgeon general in 2011 to crack down on “pill mills” — medical practices issuing excessive numbers of opioid prescriptions.³ Since this declaration and the ensuing orders were directed by the state legislature, however, they didn’t raise the same concerns about risks of unchecked executive power that most emergency declarations would.

The scope of emergency health

powers prompted spirited exchanges in 2001, when academics drafted the Model State Emergency Health Powers Act (MSEHPA) after the September 11 attacks and the anthrax threats. The initial version defined “public health emergencies” as including “epidemic diseases,” raising concern that it could apply to diseases such as annual influenza or HIV–AIDS.⁴ Although the revised MSEHPA narrowed the definition of emergencies, many state laws are drafted broadly enough that

they seem potentially applicable to garden-variety health threats.

Certain applications of emergency powers to common health threats may incite minimal controversy and confer meaningful benefits. Tapping emergency funds can provide access to desperately needed public health services, such as substance-abuse treatment, that might otherwise go unfunded. Still, respect for democratic governance suggests that appropriations decisions should ordinarily remain in the

control of a democratically accountable legislature.

Emergency-powers laws may also be used with little objection to send a signal to legislatures that a problem urgently requires attention. For example, a governor can create a task force to consider how to address a health harm. Emergency declarations can generate publicity and spur political progress when legislative gridlock or the influence of special interests has thwarted needed action.

Notably, legislative inaction regarding opioid addiction was not a problem in Massachusetts; prescription-monitoring mandates were in process, and legislators were considering related bills — the consolidated version of which was recently enacted.⁵ Moreover, regular executive-branch processes — nonemergency executive orders and agencies' administrative rulemaking procedures — permit action to be taken on health problems when legislatures appear stuck.

Because they sidestep normal rulemaking processes in which affected parties can raise concerns and highlight legal vulnerabilities, orders issued through emergency powers may be especially susceptible to challenges under federal law, which state laws cannot suspend. Zogenix, the manufacturer of Zohydro, brought such a challenge, alleging that Patrick's ban on its product was unconstitutional. A federal judge agreed, ruling that it was preempted by the federal government's supreme role in drug regulation.

Some applications of emergency powers raise heightened concerns. For example, emergency orders may interfere with pri-

vate business interests. By longstanding tradition, executive actions affecting private interests are subject to judicial review to ensure that officials have acted within their authority and followed appropriate procedures. However, given the vast discretion that emergency powers grant officials and the suspension of rulemaking procedures, meaningful judicial review may be elusive, even if permissible. Although the hallmarks of a traditional emergency — exigency, calamitous harm, unavoidability of harm through ordinary processes — may justify relaxing such legal protections, health threats related to noncommunicable diseases or commonplace injuries seldom will.

Most important, concerns about due process are amplified when emergency orders restrict individual freedoms and property rights. The notion that highly coercive measures such as mandatory blood tests, quarantines, or property seizures could be imposed for common threats without democratic procedures and full due process offends our constitutional values. The lack of clear triggering thresholds for terminating emergency powers is particularly troubling, creating the possibility that critical legal protections might be suspended indefinitely.

There is also an instrumental reason to be concerned about the overuse of emergency powers. If this crucial tool is used too readily, public health officials may find themselves like the boy who cried wolf: their warnings about emergencies may go unheeded. Moreover, the public may lose trust in health officials, which may result in a loss of political

legitimacy as well as a backlash against public health laws more generally.

Governor Patrick's declaration, in our view, does not venture far down this rabbit hole. Most of the policies that were advanced to address the opioid-addiction crisis in Massachusetts were prudent. But the declaration sets a troubling precedent in the eyes of some who believe that law can be a positive force for public health. Faced with a substantial public health problem such as opioid addiction, officials may be tempted to use their emergency powers. But like opiates, those powers should be used only when needed.

Disclosure forms provided by the authors are available with the full text of this article at NEJM.org.

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