

Music (00:00):

Ketsa. "Mission Ready." Raising Frequency, <https://freemusicarchive.org/static.Le>].

Trudy (00:09):

Welcome to Hotwash. I'm Trudy.

Christine (00:11):

And I'm Christine. We're emergency management and public health professionals,

Trudy (00:15):

Nerds talking about law and policy of emergencies.

Christine (00:19):

Today on episode two of Hotwash we're talking emergency declarations and orders. We'll be joined by Maggie Davis, a colleague and expert on state emergency response who has been tracking COVID-19 orders around the country. We're all broadcasting from home, so please excuse our sound quality.

Music (00:39):

Music

Christine (00:47):

Welcome back. We are living in some interesting times right now. I hope everyone is staying safe and sane out there. Here in Maryland we're under a stay at home order. So we're all recording this remotely from our homes, and we're joined today by our fabulous colleague Maggie Davis. Hey Maggie, how are you?

Maggie (01:04):

I'm doing well . Hanging in there.

Christine (01:06):

So Maggie, can you give a little background about yourself before we get into this?

Trudy (01:10):

We like to find out how people ended up in this field that until like six weeks ago was considered a kind of unknown field to most people.

Maggie (01:20):

Yeah, of course. So like both of you. I also went to law school at the university of Maryland and while there I focused in health care law and policy and then after graduation I did some work at some other nonprofits related to different aspects of health policy and then was offered a interesting position at the center to work directly on initially outreach with emergency preparedness but with a lens towards public health emergency preparedness and I initially thought it'd be interesting to learn more about public health disasters. I did a little bit of work on it during my master's program I did before law school

and did some like pandemic tabletops then, so it's a little interesting to fast forward a decade later and to have the grad school practice become real life.

Christine ([02:08](#)):

Emergency declarations and emergency orders are everywhere in the news these days. Of course there's also been a lot of confusion about them. The legality of the orders, the enforceability even really where the authority to issue these types of orders come from. I've seen some really confused conversations online and even some incorrect or inaccurate statements by members of the media about what emergency orders are. Professor Trudy, can you provide us a little bit of general information about emergency orders?

Trudy ([02:39](#)):

Sure. So with the caveat that it varies state to state. All States in the United States allow their governors through a legal framework to declare a state of emergency. And this comes from in many States, the constitutional power of the governor who acts as sort of the state's commander in chief. And then are also statutory provisions that outline what those emergency declaration powers are, what those emergency declarations must include, and also how long those emergency declarations can last. And in a lot of States, there are provisions for how to, how the state legislature can overturn those emergency declarations if they feel that they're being used improperly. And so what we are seeing right now is a lot of States governors using those emergency declarations. Now again, this would vary state to state, but most emergency declarations give governors a broad range of powers, which is something that makes sense in the context of a natural or man-made disaster or a public health catastrophe in order to help them respond.

Trudy ([03:45](#)):

So one of the things that you see in a lot of statutes is the governor has the ability to suspend any rule, regulation or statute in the state in order to help respond. Again, this makes sense and a lot of times we see this with regulatory things such as one of the examples that comes up a lot is road weight limits, so how much traffic and how much weight trucks can carry on certain roads. You see that being lifted in times of emergency because it's just not something we're really worried about. In this current time of coven 19 we're seeing much broader powers being used. We're seeing issues of orders to stay at home or shelter in place. We're seeing orders to close businesses that aren't considered essential and I know Maggie's going to talk to us more about what is essential and we're seeing orders for quarantine and isolation as well as some. Some States are looking at testing and treatment and rationing supplies because we're seeing limits on personal protection equipment and other kinds of medical supplies. And all of these fall under those broad powers that all States grant their governors in the statutory framework. So one of the questions that comes up is, is it constitutional? And the short answer is yes, the governor has these powers. If he's doing it according to the framework that's laid out and he's not overstepping certain constitutional bounds, then that is the power that's been granted to the governor.

Christine ([05:14](#)):

So one thing that we're seeing in the news, is people being arrested for breaking these emergency orders. So Trudy, they are enforceable in that way?

Trudy ([05:24](#)):

So when the governor issues orders, they are enforceable by law. And again, a lot of States lay out what that enforcement can look like. So in this state, Maryland for example, if you disobey an order, you can be arrested or fined, can be arrested and jailed for up to a year in some situations and you can be fined three to \$5,000 depending on the order. And whether it's actually advisable to be arresting and putting people in jail right now. And a pandemic outbreak is a different question.

Christine (05:54):

So you mentioned that different States do different things, and Maggie, you in true law school form, compiled a state survey on emergency orders. So tell us about that. What themes or trends are you noticing?

Maggie (06:09):

Yes, this project started mostly as an exercise to wrap my own head around what was happening nationally because there was some questions come as like, well what does all this mean? And we're talking about this state. I say someone's like California just enacted that, or New York just enacted this or this is happening in Ohio. And I'll say this is probably one of the first times where we have had the same disaster in every state, plus the district of Columbia happening at the same time. And being able to see in real time how different States respond to essentially the same problem. And what's interesting is really the themes that are consistent across and then some of the kind of unique aspects of each state.

Maggie (06:51):

So starting with some of the themes, I say the emergency orders really fall into three goals for these extreme powers. One to reduce transmission rates or what we've heard a lot about a flattening the curve to, to protecting and creating stuff, supply a personal protective equipment. So this includes emergency orders that have like suspended nonessential surgeries that would use a 95 mat or have really limited the private commerce of personal protective equipment. So limiting whether or not private citizens and not healthcare workers had purchased. The third one is somewhat unique to this emergency and it's a series of orders that are really aimed at preventing this public health disaster from blending into a true economic disaster for our business communities. So this is where you see a lot of support on expanding on employment benefit, on providing relief funds for small business owners or other sorts of employers that in order that must shut down their operation in order to achieve the primary goal of reducing the transmission rate.

Maggie (08:04):

So that's kind of the three main categories. And then what's been really interesting is that state by state uniqueness of it, but I will say the majority of States are using probably their most restrictive orders with a lot of people have been talking about these stay at home orders where the governor has mandated that you should be staying in your residence in less. You are leaving for an essential tasks such as working in a central business or going to get supplies like groceries or going to seek medical care. 29 States and the district of Columbia have a stay at home order. Seven States have a partial stay at home order, so that's either States like Pennsylvania which has enacted stay at home orders in a County by County basis, not statewide, so only part of the state is under a stay at home order or some States have enacted stay at home order for specific populations such as anyone over the age of 65 which is one of the groups of highest concern for this disease. But then there are 14 States that have no stay at home orders, but some of that is also culturally. It's not necessarily meaning that those States aren't responding with the same sense of urgency. I think it's a state recognition of home order isn't necessary

to curb transmission rates because the culture of their state doesn't have a lot of opportunities to congregate closely together. For example, three of the States that I would say in this category are North Dakota, South Dakota and Wyoming, which are already dispersed population. A stay at home order. They've closed non-essential businesses and closed schools, which are the main areas where people would congregate. They're seeing, you know, there isn't a need to have that more restrictive measure to meet the goal of reducing the transmission rate.

Christine ([10:08](#)):

Do you both of you, do you think that this sort of mixed bag approach to orders, to some of these stay at home orders and closing everything but central businesses, do you think that hinders our ability as a country to effectively combat this pandemic?

Maggie ([10:24](#)):

I think one of the benefits of how we have set up our system that each of these States are able to address this public health crisis. In a way that they're seeing culture, not every needs the same tools and letters to address the three main concerns, which are reducing transmission, protecting, increasing the supply chain for healthcare system and helping to make sure that this public health is after doesn't create long lasting impacts to our economic future. So there are some things that States have done consistently because it's clear step that takes such as closing the schools because public schools, there's just a lot of people congregating close together and it's a common vector of transmission. Think of our flu season, you could see a flu go through a school system pretty regularly. Some of the flexibility where states are able to address you need kind of factors to their culture. That might be a cause of transmission or a way to reduce transmission. For example, Nebraska, one of their ways that they've limited transmission, people traveling out of state is they actually put limits on non-resident Turkey hunting. Yes. I will say out of this project, I think I've seen a lot of joy in some of these unique orders that tell you a little bit about the state's culture. It really does kind of hit home that we are a collective nation of states that bring kind of unique aspects to our country. So that Nebraska who's limiting non-presidential turkey hunting, so Nebraskans can still go Turkey hunting. It's just not non-Nebraska.

Trudy ([12:23](#)):

You can't go to Nebraska to go turkey hunting.

Maggie ([12:28](#)):

You have states like Alaska that have enabled some of their smaller, less accessible communities, more power to kind of restrict movement and manage their own, kind of spreading the disease vector and protection so that they, they have a lot of communities that are testable by their, so they've allowed these kind of local control to manage, okay, who's going to be able to use the small comuter claim to go from that small community, maybe a larger community. Then you've got some States like Florida that yesterday banned the rental of Airbnb's. Florida has huge tourism economy and knowing that they would like to, you know, help mitigate the flow of people. They've said, you know, a lot of people come to Florida to go see the beaches to go on vacation and they're like, you know, for the remaining time of the pandemic, we're just not gonna let you guys come visit and rent an Airbnb. So I think this kind of unique power enables each state to address particularly challenges that they would be facing that.

Christine ([13:36](#)):

The last question I was going to ask in this section was just about essential businesses. I think it's incredibly interesting that pre COVID-19, I don't think people really considered our food supply, how grocery stores and fast food chains and restaurants are essential. But that's clearly what a lot of panic during this pandemic is all about. I admit to doing some panic buying of my own.

Trudy ([14:04](#)):

Can we come to your house for toilet paper?

Christine ([14:09](#)):

No.

Trudy ([14:09](#)):

No, you don't have any, or no, because you won't share it?

Christine ([14:13](#)):

No, I don't have any. We've made the transition to the European-style bidet.

Trudy ([14:20](#)):

Oh, very good. I think there was a question before I interrupted.

Maggie ([14:27](#)):

I think we're talking about essential business.

Trudy ([14:29](#)):

Yes. That was it. Maggie, bringing us back.

Maggie ([14:34](#)):

States have really varied on how they close essential businesses and whether they are saying they're closing all non-essential businesses or a defined list of non-essential businesses. It's probably easier to talk about the businesses that are commonly considered essential like grocery store and food establishment. Even though a lot of the food establishments now have the restriction of either no dine-in on premises or extremely limited on from its assigning across the country. But I will say in some people have been surprised at what is considered an essential business. You have office supply stores that are considered essential businesses, gas stations, auto repair shop. You also have some places that have their kind of brick and mortar retail stores that are still open. Such as, I think there's some stories that have gone around like GameStop remaining open or was in one of the States where brick and mortar stores can remain open as long as they limited the number of patrons. But I'll tell you, there's probably some people in the country who think in a time of stay at home orders access to new video games is essential.

Christine ([15:41](#)):

Definitely.

Trudy ([15:42](#)):

Yeah. I'm sure people are making that argument.

Maggie ([15:44](#)):

So it has been interesting. I will say of some common threads of businesses that are not able to work remotely and are being consistently kind of shuttered under these orders are the ones that have close contact with other people. So things like barbershops, nail salon, tattoo parlors, massage parlors have all been in some places expressly told to stop work because by the function of their business they are touching other people so you cannot socially distance as a tattoo artist, and this kind of runs into one of the main balancing acts of this entire pandemic response, which is how do we best control the spread of the disease while not shuttering elements of our economy. How do we in that meantime of when they need to be closed, make sure that those business owners are able to sustain, able to still pay their rent, able to pay their employees, make sure their employees have health care. And that's an area where you've actually seen the federal government step in and develop mechanisms to provide essentially bridge loan to these small businesses. We don't know yet whether what's happened so far is enough. But that's the balancing act right now of how long do we keep these drastic social distancing measures in place at the level they're at that we know are hurting certain sectors of our economy out of necessity. And how do we make sure that once a vector has passed that we can safely have those sectors of our economies start and close to normal as they were before the outbreak.

Trudy ([17:34](#)):

One of the things that seems like a lot of states agree on is that liquor stores are considered essential businesses. I mentioned this, Maggie, because I know you have looked into this, but another business that has been somewhat controversial and then I think was just decided for us by the federal government was guns and ammunition stores and whether those were essential. I don't know if you have any insight into what, what the universal consensus on liquor stores is, and how that happened. Or if you want to talk any about that.

Maggie ([18:13](#)):

So Pennsylvania actually shut down their liquor stores and did not find them to be essential. So there are a few States that have not found them essential. I don't know whether Pennsylvania has changed its mind since the last time I was checking their liquor store closure orders for the few States that have the order, but for the majority of States they have declared not only that liquor stores are essential, but there are a number of States that have passed executive orders to make it easier for bars and restaurants to actually distribute liquor. Usually it's just beer and wine. So maybe not hard liquor even though Nebraska, which I'm sorry Nebraskans if you're listening cause I feel like I'm picking on you, as a state, passed one expressly allowing take out cocktails. They have, there is an emergency order out there from the great state of Nebraska that says yes restaurants you can make a to-go martini now just for the emergency.

Christine ([19:11](#)):

Sometimes you just need a martini.

Maggie ([19:13](#)):

It's definitely interesting on the liquor delivery side. To the other question about guns and ammunition, there isn't a lot of consensus within the states. The States haven't had a lot of emergency orders regulating gun sales or ammunition sales. The few that I've seen have really focused on making sure that

social distancing measures are considered. So like one state has required that any gun or ammunition sales are by appointment only. So there hasn't been kind of a widespread stance on gun and ammunition sales.

Christine ([19:53](#)):

So Maggie, you've mentioned a couple really interesting orders, two from Nebraska alone, but let's move on to pick on from other states now. What are some of the other exemplary or interesting or quirky orders that you've seen?

Maggie ([20:07](#)):

I would say two interesting orders that really go to an effort to curb transmission of the disease that I find really unique is states have now required using single use plastic bags at the grocery stores. So at first glance that might seem like a very odd order to happen, but we have heard from some public health experts is that people have really focused on grocery shopping that the use of cloth bags, while better for our environment overall does lead to a higher chance for transmitting the disease. Because your cloth bag is more likely to, you know, pick up germs along the way. People are unlikely to disinfect them and just general concerns that way. So some States have actually either required that grocery store is use single use bags. A side note, if you have cloth bags, please disinfect them. And then some other states have taken less overt action and have waived the tax they placed on single use grocery bags. At this point they're really focused on trying to limit the potential way that this disease could spread. So that was one really interesting one. The other one is that there's a number of laws that have increased the ability to make hand sanitizers. We talked about panic buying earlier and one of the early panic buying items was hand sanitizer. Some states like I believe Connecticut have passed an executive order allowing kind of what they call unique manufacturers of hand sanitizer, which by my out of state reading sounded like they're going to let distilleries make hand sanitizer, the way that Dogfish Head brewing has started making hand sanitizer. So Dogfish Head brewing has also been making hand sanitizer as a way to increase the supply chain of hand sanitizer. And then some States in the effort to make hand sanitizer more widely available have expressly allowed compound pharmacists to make their own hand sanitizer. And for listeners that may not know what a compound pharmacy is, or compounding pharmacy, they're not that common, but they're actually pharmacies where the pharmacists are able to mix medicines on the premises and give them out. So they are kind of what you would imagine a more old school pharmacy from decades ago. Where they played basically had a recipe and made the recipe of the pharmaceutical taking it out to the patrons. There are still some of these compounding pharmacies in the nation. So the states that still have them have are a large part enabled them to start compounding hand sanitizers.

Christine ([23:04](#)):

So did you want to also talk about emergency orders and the upcoming election?

Maggie ([23:10](#)):

I've done a deep dive recently. So to Trudy, this is super nerdy, to Trudy's point earlier about each governor has different abilities in the law to, you know, supersede regulations or statutes finding that some, so I'll give Virginia as the current example that I have, the governor of Virginia doesn't appear to have the ability to supersede statute, which is a problem because a lot of the election law is governed in statute. They have our, we have a upcoming election, some jurisdictions scheduled in may, some in June where the governor has the ability to move the election up to 14 days under a declared emergency. But

it doesn't appear to have the ability to change the election to like an all vote by mail like States like Idaho are doing until I know the, the Commonwealth and the board of elections are really working to figure out some potentially creative lawyering to enable them to run an election in a manner that would appropriately protect the health and safety of the voters.

Trudy ([24:23](#)):

I think you could make the argument that voting is an essential function, but I agree that the logistics, I mean getting people to stand six feet apart might take up a lot of room, but then you think about going into the voting booth, are you going to disinfect every time somebody leaves the voting booth?

Maggie ([24:43](#)):

So there, there's just a lot of elements to it. I think the consensus from a lot of registrars is that it's easier to promote social distancing and an all vote by mail system. But very few States have the capacity to process and all the vote by mail system. And it's really highlighting some interesting processes we have that work great in a normal time frame but that are difficult to adjust to a socially distant society.

Christine ([25:14](#)):

So speaking of things that are difficult to adjust in our new socially distancing society, let's talk about the criminal justice system.

Maggie ([25:26](#)):

I think there is the beginnings of a trend for states to help minimize the spread within the criminal justice system. So to back up, the main concern within the criminal justice system is that people in detention, if the disease exposure happens while they're in detention, it's very likely that that is going to have kind of a spread of disease. Um just because you have a lot of people closely together, very difficult to socially distance within a detention facility and the ability to have kind of enhanced cleaning measures might also be really limited in some of these facilities. They have really tried to work on at a front end of the criminal justice system. So for police officers that are encountering people violating the law on the street, instead of arresting them in all cases for minor offenses, giving them a bench warrant or take it to appear for a hearing rather than actually physically detaining them and taking them to the local jail. I think eights are starting to take those sorts of measures. The bigger question on the civil liberty side, some states have taken the stance of limiting visitor access for people in longer term detention and in some cases that limitation of access has also been a limitation on a prisoner's counsel. Serious criminal justice concern of a detainees, right to a speedy trial of right to counsel, and really their fundamental rights as a person involved in the criminal justice system. The courts are just a little slow to adapt to new technologies. That's not uncommon in the judicial system there.

Trudy ([27:24](#)):

I would agree it's not common anywhere based on based on how distance learning is going for a lot of public schools. I would say the adaptation to technology is a challenge in most sectors. Maggie knows this because you have drug me kicking and screaming into Microsoft teams. So we're not picking on any sector in particular here.

Maggie ([27:47](#)):

No, no, not no sector in particular. It's a particular challenge with the justice system is that we do have a right to a speedy trial constitutionally in the United States and there are some true concerns of whether

this pandemic is going to really hinder a person's right to a speedy trial. Kind of circling back to the beginning of the episode when we talked about whether or not the stay at home orders are enforceable and the notion that you could be in a lot of states, jailed or fined for violating some of these orders. It would be highly ironic to arrest and detain someone for violating a social distancing measure. And I don't think there is a benefit to a lot of States to actually detain someone for violating some of these more restrictive emergency orders. And I would hope that a lot of States that if they have individuals that are violating these orders would issue a subpoena requested to come to a hearing rather than physically arrest them and detain them.

Trudy ([28:57](#)):

And so is that why we're seeing, Maggie, some states talking about, and activists, and I think largely and a lot of academic circles as well, calling for the release of nonviolent people in detention centers. So some of them are those pre trial people that you're talking about or some of them people who have already had their day in court, but they are at higher risk, and they're nonviolent. I think I remember reading that there was a call to release some of those people that are in detention centers as well.

Maggie ([29:28](#)):

Well, I think that another issue in the broader criminal justice reform movement for those individuals that are already serving a sentence after being found guilty of a crime or pleading a crime are in a detention facility. But the majority of those individuals are not convicted of violent crimes. So this leads into the kind of concern of we have a lot of people that have been incarcerated for nonviolent offenses such as marijuana possession or possession of other scheduled substance that are not a physical threat to society, and there is a kind of ongoing conversation of whether or not it is useful or a reasonable thing to do to have those individuals detained at all for that length of time. You think back to the 1990s and a lot of these mandatory minimums for drug sentencing, there are a lot of individuals that are serving very long sentences for crimes that in some states now would not even be have an individual arrested for on the state level. So I think there is a movement to highlight the need to have some of these offenders released, and it is just particularly concerning to advocates that on top of what they see as an injustice of them being detained for some of these crimes for so long to begin with that they're also exposed to a public health concern and at a higher risk while being continually detained.

Christine ([30:59](#)):

Maggie, you sort of touched on consumer protections and protecting the economy with some of these orders, but I know that in many States there are orders specifically prohibiting evictions and foreclosures during this time.

Maggie ([31:13](#)):

So a lot of States have really looked at both sides of the economic concern. It's not just the business owners being able to maintain their businesses and their employees. It's also the employees that are now really concerned about meeting their basic needs. We know that there are a number of areas in the country where there is difficulty in accessing and continuing to have housing, so some of the States have really stepped up and proactively address this concern by using their emergency power to either delay eviction and foreclosure proceeding, pivot those proceedings. In some cases they've also taken a step of prohibiting the ability to for utility providers to turn off service for nonpayment, so things like water, gas, electricity. In some states, it's expressly the internet and they're really looking at both ends to make sure that both the businesses can maintain operations, but also that the employees and individual

people are not irreparably harmed for their own fundamental basic needs as part of the response to this pandemic.

Christine ([32:22](#)):

Maggie, where can listeners find more information about this, all of these orders? I know you've done a lot of work, so it'd be great to get that out to people.

Trudy ([32:31](#)):

Who likewise want to do deep dives into these intricacies.

Christine ([32:34](#)):

Other nerds, welcome!

Maggie ([32:36](#)):

Yes, so on the CHHS website, which is <https://www.mdchhs.com/>, we have posted a publicly available list of the survey of all of the 50 states plus the District of Columbia, of what we have looked at. So in the survey you will see the jurisdiction, their emergency declaration, both when it went into effect for this pandemic and when it is going to terminate or the conditions in which it would terminate whether the state has a stay at home order, the status of the public schools, soldier of non-essential businesses, limitations on public gatherings, as well as some examples of efforts to address medical surge and treatment, the supply chain, public benefits and consumer protection. So that survey is available through our website. We're updating it every couple of days. The date of when it was last updated, you can see at the top. I've been trying to get it as real time as possible, but the governors are not all on the same schedule for these orders even though I will say they tend to be clustered on Mondays and Fridays.

Trudy ([33:47](#)):

So I think that's going to wrap it up for us. We really want to thank Maggie for joining us for her passion about emergency declarations and her willingness to make spreadsheets and for talking to us about this because it's clear you've done a lot of research out there. Stay tuned for our next episode and in between. Stay safe.

Music ([34:06](#)):

Music