Law and the Public's Health

One of the most important legal issues arising in public health policy is the source of legal power to address issues affecting the public's health. This issue of *Law and the Public's Health* examines the question of gubernatorial executive power, an increasingly important source of power in the case of laws that protect and advance public health.

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USING GUBERNATORIAL EXECUTIVE ORDERS TO ADVANCE PUBLIC HEALTH

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The law is a critical tool to address public health concerns. One important constraint on the government's ability to use law as a public health tool, however, is the separation of powers created by the U.S. Constitution and echoed in state constitutions. Within this framework, the legislative branch creates policies and allocates funding, the executive branch enforces laws and establishes precise rules, and the judicial branch interprets laws and resolves disputes, creating a system of checks, balances, and oversight for each branch.[1]

The gubernatorial executive order (GEO) is an increasingly visible legal tool within the public health arsenal that may blur some of the traditional lines created through the separation-of-powers framework. At the federal level, executive orders are rooted in the President's constitutionally granted "executive power."[2] GEOs are also significant sources of law in every state.[3] However, the meaning of "executive order" and the basis of a governor's executive order authority varies by state. Historically, governors have issued informal orders through directives or letters, but issuing formal GEOs is a more contemporary phenomenon. As gubernatorial orders have been formalized, interest in them has grown.[4] Yet, little has been written describing how GEOs can be used as a public health tool, as well as the advantages and disadvantages of such an approach.

SOURCES OF GUBERNATORIAL EXECUTIVE ORDER AUTHORITY

Federal or state laws may permit the issuance of a GEO. The power to issue a GEO may arise from a federal law that requires action at the state level.[4] For example, recently governors have issued GEOs in response to the federal Patient Protection and Affordable Care Act's mandate requiring states either to create and operate a state health insurance Exchange or permit the federal government to carry out the Exchange.[5] New York Governor Andrew Cuomo used a GEO to create a state health insurance Exchange[6] after a bill to establish an Exchange failed in the state legislature.[7]

Various state laws and cases also authorize governors to issue executive orders, and some states authorize GEOs using more than one legal mechanism. According to a survey conducted by the Council of State Governments, among the 50 states, 26 have explicit GEO authority in their state constitutions and 37 authorize GEOs through legislation. Governors' authority to issue GEOs is also recognized in the case law of seven states. Furthermore, in 18 states the governor's general responsibility to execute the state's laws includes the ability to issue GEOs.[3] Through these varied legal mechanisms, governors issued more than 3,400 executive orders from 2004 to 2005.[8]

Many GEOs are not specifically relevant to public health. For example, during 2004 and 2005, 33% of all GEOs consisted of appointments, 6% ordered flying of flags at half-mast, 3% ordered pardons, and 1% established state holidays.[8] Other types of GEOs directly affect the public's health.

USING GEOs TO IMPROVE PUBLIC HEALTH

Governors use GEOs to address various state concerns without directly involving the legislative or judicial branches. In the public health context, GEO uses include tackling public health emergencies, establishing new programs and entities, directing or reorganizing agencies, increasing the profile of an issue, and controlling state operations.

Addressing public health emergencies

GEOs related to disaster-relief activities represented 11% of all GEOs issued during 2004 and 2005.[8] Disaster-relief activities involve emergency preparedness and response efforts that can directly affect the public's health. The Deepwater Horizon Oil Spill off the Gulf Coast provides a powerful example.

In April 2010, an offshore drilling unit leased to BP exploded, creating the largest offshore oil spill in U.S. history.[9] The immediate health concerns for response workers and people residing near the spill included respiratory problems, skin irritation, headaches, dizziness, eye irritation, and nausea. Exposed workers also reported injuries, faintness, and fatigue, as well as musculoskeletal and psychosocial symptoms.[10] After proclaiming and extending a state of emergency,[11,12] Louisiana Governor Bobby Jindal issued a GEO in June 2010 that permitted out-of-state emergency medical technicians to practice in Louisiana as long as they were licensed and in good standing in another state. The GEO suspended any legal requirements that would prohibit their practice.[13] In issuing this GEO, Governor Jindal relied on a Louisiana statute authorizing the governor to suspend any state statutes or regulations "if strict compliance with the provision . . . would in any way prevent, hinder, or delay necessary action in coping with the emergency."[14] Through this GEO, Governor Jindal increased the availability of medical care for the surge of disaster victims when there were not enough local providers to address medical needs.

Establishing new public health programs and entities

Governors can use executive orders to establish new programs to address pressing public health concerns.[8] By issuing Executive Order 72 in 2005, New Jersey's Acting Governor Richard Codey created a new program[15] addressing the abuse of anabolic steroids, which have been linked to increased risks of cancer, cardiovascular disease, and mental health issues, as well as harmful effects on the immune, hormonal, and metabolic systems.[16] Executive Order 72 requires the state department of education to work with the interscholastic athletic association to randomly test athletes for steroid use and incorporate steroid education into school curricula. It also requires the department of health to randomly test dietary supplements for steroid contamination. Finally, the GEO mandated the development of an anti-steroid advertising campaign, the creation of public service announcements to be displayed at school games, and the establishment of a Steroid Awareness Week.[15]

Asserting that chronic disease is "the biggest threat to the health of Pennsylvania's residents," in 2007 Governor Edward Rendell used a GEO to create the Governor's Chronic Care Management, Reimbursement, and Cost Reduction Commission. The Commission is required to create a statewide chronic care information system, implement and evaluate disease management programs, work with insurance companies, and otherwise support the use of chronic care disease management.[17] While this GEO and the Commission were scheduled to expire in 2010, the Pennsylvania House of Representatives attempted to save the Commission by unanimously voting to establish it through legislation, although the bill did not emerge from the Pennsylvania Senate.[18]

Directing public health agencies

Governors can issue executive orders that require public health agencies to take specific actions. Pursuant to this power, in December 2010, New York Governor David Paterson issued a GEO addressing hydraulic fracturing[19] (also known as "fracking") in the extraction of natural gas from New York's Marcellus Shale deposit. Some forms of fracking have been controversial due to concerns about the possibility of contaminated drinking water,[20] respiratory diseases, and chronic conditions such as endocrine dysfunction.[21]

Governor Paterson's GEO requires the New York Department of Environmental Conservation (DEC) to (*1*) review public comments on a draft environmental impact statement analyzing the effects of hydrofracking, publish a revised statement, and hold hearings on the revision; and (*2*) identify conditions that should be incorporated into hydrofracking permits "to protect public health and the environment."[19]

Governor Paterson issued this GEO after vetoing legislation that would have imposed a moratorium on hyrofracking. This GEO nonetheless delayed the DEC's ability to issue hydrofracking drilling permits.[22] As this example demonstrates, when a GEO is substituted for legislation, it can help the governor retain control over a policy decision.

Reorganizing public health agencies

Of all GEOs, fewer than 3% reorganize state administrative agencies.[8] However, this reorganization remains a potentially potent use of GEOs. For example, in an attempt to improve public health, Governor Pat Quinn of Illinois used a GEO in April 2010 to transfer the Diabetes Prevention and Control Program (which includes diabetes-related grants administration, the state diabetes commission, and the "diabetes, asthma, and pulmonary disorder educational prevention functions") from the state's Department of Human Services to its Department of Public Health (DPH).

In conducting this transfer, Governor Quinn cited his authority under the state constitution to "reassign functions among or reorganize executive agencies which are directly responsible to him" and his authority under state statutory law to transfer an agency in whole or in part.[23] After this GEO was issued, statutory language related to the program was altered to reflect the transfer.[24] In this case, an administrative change originally established by a GEO—which is subject to expiration, may change with subsequent administrations, or may be legislatively overturned—became permanent through a statute.

The transfer of a program, such as the reorganization of an agency, allows the governor to improve public health with a GEO by optimally assigning programs to agencies with the most expertise and infrastructure to implement them. Governor Quinn specifically cites the expertise of DPH to award grants, develop programs, and provide education to justify this transfer.[23] At the same time, in states where transferring authority using a GEO is permitted, relocating or reorganizing an agency creates an opportunity for a governor to make changes that may reduce the agency's ability to address a health concern. The governor, for example, could use a GEO to transfer oversight of a program from a public health department to a department less versed in public health.

Increasing the profile of a public health issue

A governor may also rely on a GEO to raise the prominence of a public health issue, particularly through the creation of a task force or board. Task forces and boards allow the governor to set priorities, elevate the salience of an issue, and provide a venue for expert input.[8]

For example, Virginia Governor Tim Kaine established the Governor's Commission on Climate Change in December 2007 to develop a state climate change action plan. In establishing the Commission, he acknowledged that the state had taken certain steps to address climate change but that "additional tools and resources" were necessary. Governor Kaine charged the Commission with inventorying gas emissions, evaluating their consequences (including impacts on health), and identifying policy options.[25] The Commission released a report in December 2008 finding that climate change would be likely to adversely affect the health of Virginians, with a particular impact on children, the elderly, and other vulnerable populations.[26] These findings contributed to enactment of state legislation related to climate change and renewable energy, including legislation authorizing local governments to create green roof incentives, requiring investor-owned utilities to obtain 15% of their distributed energy from renewable sources, and creating incentives for the use of advanced biofuels.[27] Through this GEO, Governor Kaine helped to establish a knowledge base and focus the political agenda on climate change, which led to state legislative action.

Controlling state operations

While overseeing the management of their state, governors face many administrative decisions that can affect public health. As the head of the executive branch and state administration, the governor has certain powers to direct the action of the state as a market participant and to take public health into account.

In 2009, Governor Paterson used this power to prohibit state agencies from purchasing bottled water to "promote sound environmental practices," encourage use of New York's tap water, conserve energy, reduce emissions of greenhouse gases, and save taxpayer dollars.[28] Colorado followed suit when, in 2010, Governor Bill Ritter, Jr., used a GEO to prohibit state agencies from purchasing bottled water unless "water supply is unavailable, bottled water is needed to protect safety and health, and for use in emergencies."[29]

The power to control state operations also allows governors to issue executive orders related to state employment and facilities. Governor Kaine used this power in 2006 to issue a GEO that, with few exceptions, prohibits "smoking in offices occupied by executive branch agencies and institutions, including institutions of higher education," buildings operated by the executive branch, and state vehicles "to improve the health of employees and minimize health risks in the workplace."[30] In so doing, Governor Kaine relied on powers derived from both the Virginia Constitution and relevant state laws.[31,32] Until Virginia enacted legislation addressing environmental smoke in state and local government buildings in 2009,[33] this GEO protected state employees and visitors in state buildings and vehicles from secondhand smoke exposure.

DISCUSSION AND POLICY IMPLICATIONS

GEOs advance public health by establishing and implementing state policies. GEOs may be especially important public health tools when legislation, regulation, or litigation is not immediately available or sufficient. To effectively advocate for a GEO that could advance the public's health, public health professionals must appreciate its advantages and disadvantages.

A GEO's primary advantage is to allow for swift formulation and implementation of public health policy. With fewer decision makers to convince, advocating for a GEO may be less cumbersome than advocating for

legislation. The speed with which GEOs can be issued may be particularly useful to tackle a pressing public health problem that demands immediate attention. The inherent flexibility and adaptability of GEOs also allow for rapid responses to changing circumstances. Additionally, GEOs provide opportunities to test innovative public health programs that, if successful, could be incorporated into state law through legislation.

Despite these benefits, GEOs present certain disadvantages. Most notably, each state places its own limitations on the scope of GEOs, which could potentially limit their public health utility. Furthermore, a governor's successor may override any GEO with a superseding GEO or by failing to renew an expiring one. The state legislature may enact a bill overriding a GEO or the courts may rule that a GEO exceeds the governor's authority and is therefore invalid.

In deciding whether to advocate for a GEO rather than an alternative legal tool, it is important to recognize that GEOs are not appropriate for addressing public health issues in every state. However, particularly during legislative gridlock or inaction by a state agency, a GEO may be a useful instrument for change. The GEO may be especially helpful as an incremental step in advancing a public health policy that may otherwise face stagnation. Such an action could set the stage for more comprehensive or permanent change.

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