# The Model Act: Is It the Best Way to Prepare for the Next Public Health Emergency?

*Kenneth Wing*

The *Model State Emergency Powers Act* (the Act) has received considerable publicity from the mass media and many state legislators. I will discuss here concerns I have with both the process in which it has been presented and four key points.

The original version of the Act was first published in November 2001. Since then the Act has been modified at least once, some of the more controversial terms toned down, and a disclaimer added indicating that the Act is no longer officially endorsed by any agency or individual. The version I refer to is dated December 2001, downloaded from the CDC Web site in January 2002.

## Problems with the process

First, a model act is the most cumbersome and ineffective way I can think of to inform the general public or state policy makers about important policy choices. We would all be better served with a description of the points that should be included in such a statute and some insightful defense of the necessity and feasibility of achieving them. Statute drafting is a technical and instrumental job—one that should follow, not precede, the more fundamental task of deciding what that statute ought to say.

Second, every state has a different set of statutes already in place. Even if a state chooses to adopt any or all of the Act, appropriate legislation to implement that choice will depend greatly upon the preexisting legal structure of that particular state. A one-size-fits-all act is of marginal value.

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## Problems with specific provisions

I find four specific provisions of the Act to be most questionable: the establishment of an emergency planning commission, the extensive reporting requirements, the legislation of gubernatorial powers, and the expansion of public health emergency powers.

### Planning commission

The emergency planning commission is described by the Act as a commission of legislators, judges, local public health officials, and other interested persons appointed by the governor that is empowered to write a public health emergency plan. I question why such an agency might be necessary or effective. If the objective of the Act is that the state should empanel still another study commission or advisory body, it seems unnecessary to include this commission in an already cumbersome legislative package.

On the other hand, if a state were to create the commission and give it binding regulatory authority, there would be serious constitutional objections. The principles of separation of powers impose limits on the legislature's ability to delegate legislative-type decisions to independent agencies and to give any authority to a governmental body made up of members of a mix of judicial, legislative, and executive actors. For that matter, no state law can authorize a commission to exercise binding authority over what the federal government can do, which is among the things the Act empowers the commission to address.

### Extensive reporting

The Act requires that health care providers and coroners or medical examiners report within 24 hours all cases of illness or health conditions that may be potential causes of a public health emergency.

If I'm reading the language of the Act correctly, it would take information collection to an unprecedented extreme. Every doctor and pharmacist would become an enforcement arm for a central public health authority. This would be no little or infrequent matter, as these providers would be required to report all *potential causes* of public health emergencies. The extent of the power of the public authority to investigate these reports is not clear, but as written, it is virtually without limit. There are no provisions for the protection of confidentiality or privacy, although a later article of the Act immunizes public officials from liability for exceeding their powers.

State and local public health agencies have long struggled to maintain a user-friendly public image and a posture that emphasizes their public health—not their public safety—character. The public health authority created by the Act would permanently obliterate that distinction.

 

## *Governor's powers*

The Act would authorize the governor to declare a state of public health emergency. Apart from concerns I have with the extent of the emergency powers envisioned by the Act, I have a more basic constitutional concern. Under the constitutional structure in most states, the governor has inherent powers to act in an emergency, apart from any powers that may be created by the state's statutes. The exact limits on the governor's emergency powers are not clear, as, by their nature, they are infrequently exercised and litigated.

At a federal level, although the Supreme Court has been anything but clear in its specific description of foundational principles in this area of the law, it has been fairly consistent in holding that the implied powers of the chief executive are at their broadest when they have been authorized by legislation (as is the usual case) and extant but limited when they are carried out in the absence of legislation. They are at their least—some members of the Court would say they are nonexistent—when the president acts in areas where the legislature has specifically attempted to delineate what the chief executive can and cannot do.

Assuming that the state courts would follow the lead of the Supreme Court in defining the implied powers of the chief executive, the Act—by defining what can be done by whom and under what circumstances—would necessarily limit the authority of the governor to act in any ways other than those set out in that legislation. A statute drawn in anticipation of the most recent public health emergency may actually inhibit the discretion of the governor to act in another unanticipated fashion.

The first thing that needs to be done in a state like Washington is to sort out the inherent emergency powers of the governor to act in the absence of legislative authority. These powers allow the government to react to emergencies that have not been expected or that would make the normal operations of government infeasible: floods, a major disaster at Hanford, some sort of disease outbreak—or, as we now anticipate, some sort of bioterrorist attack.

Currently the governor is empowered to act in an emergency in whatever way he or she thinks appropriate. The court can adjudicate the legitimacy of those actions on a case-by-case basis. The legislature can enact, post hoc, remedial legislation. With most problems in most times, that is, admittedly, not a recipe for good public policy making. For emergencies of the sort we are considering here, it is the proper and more workable order of action. That's not just my own idea of good policy, it's the way the state and federal constitutions read or, to be more accurate, it is what has been read into our constitutional structure in order to make it workable.

It is entirely possible that the most basic assumption underlying the Act is flawed. If, in fact, there is a need for some remedial legislation of the type outlined in the Act, it may need to be federal legislation, not state legislation. Anthrax doesn't respect state borders. Whatever public health emergency we experience in Washington is likely to be a problem for Oregon and Idaho and, for that matter, Canada. Think about the number of Washingtonians that get on and off airplanes, trains, or Interstate 5 each day. In both practical *and* constitutional terms, public health emergencies that reach across state borders can only be resolved at the federal level. Interstate problems, including interstate public health emergencies, are the province of congressional, not state authority; in fact, interstate activities are one area in which the states *cannot* act even in the absence of federal action.

## *Emergency powers*

The most controversial and draconian of the act's provisions are the special emergency powers given to a central public health authority. What is it that we cannot do now, under existing statutory enactments or through the implied powers of the governor, that we need to empower some public authority to do through such sweeping legislation? Is there any reality-based evidence that American providers need to be regulated in such a fashion during an emergency?

As I reflect on what we learned in fall 2001 about the behavior in a public health emergency of government officials, medical care providers, businesses and property owners, and thousands of ordinary Americans, neither then nor now do I find myself wishing that the Act had been in effect.

There are some things I do wish had been in existence and will be in the next comparable scenario: more funding for state and local health departments, new procedures for communicating across jurisdictions and from public health to public safety agencies, better training for emergency medical personnel, and so on. I find little to suggest that what we need is the ability to quickly suspend civil rights and empower public health officials with unlimited authority to command and control all public and private resources. If Washington is ever faced with a public health emergency, I would prefer that we respond to it on a case-by-case basis and in the ad hoc way anticipated under our constitutional system.

## *Resources*

The Model State Emergency Health Powers Act.
www.publichealthlaw.net/MSEHPA/MSEHPA2.pdf

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*This article is a summary of a longer essay, which is available from the author.*