Interplay of Federal, State, and Local Health Emergency Orders

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OUTLINE OF PRESENTATION

- Introduction of Presenters
  - Bill Ihrke, La Quinta City Attorney (bihrke@rutan.com)
  - Jenny Farrell, Dana Point Assistant City Attorney (jfarrell@rutan.com)
  - Ajit Thind, La Palma City Attorney (athind@rutan.com)
- Brief History of Federal Emergency Proclamations
- Current Federal Laws and Regulations
- State and Local Laws and Regulations
- General Summary of the Interplay of Federal, State, and Local Laws for Public Health Emergencies

DEFINITIONS OF PUBLIC EMERGENCY

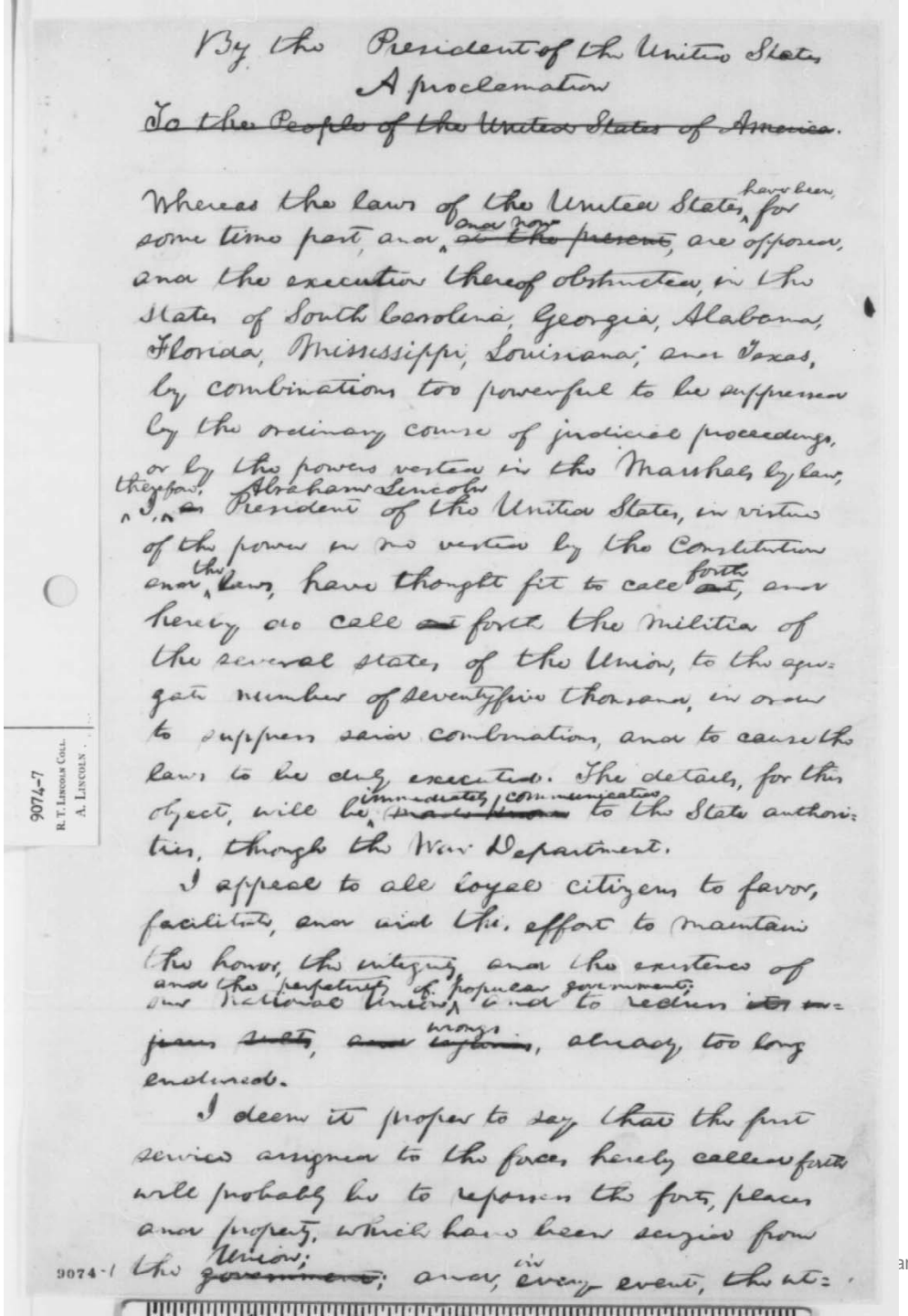
- Black's Law Dictionary: "Emergency" is "[a] sudden unexpected happing; an unforeseen occurrence or condition; perplexing contingency or complication of circumstances; a sudden or unexpected occasion for action, exigency; pressing necessity." (5th ed. (1979), p.469, col.2.)
- Federal Law: "Public Health Emergency" means, among other definitions, "Any communicable disease event as determined by the [CDC] Director with either documented or significant potential for regional, national, or international communicable disease spread or that is highly likely to cause death or serious illness if not properly controlled." (42 C.F.R. §70.1 [CDC Regulations].)

DEFINITIONS OF PUBLIC EMERGENCY (cont.)

- Federal Law: "Public Health Emergency" also means, among other definitions, any communicable disease event described in a declaration by the U.S. Secretary of Health and Human Services or determined by the Director–General of the World Health Organization, in accordance with International Health Regulations to constitute a Public Health Emergency of International Concern. (42 C.F.R. §70.1 [CDC Regulations].)
- Various State and Local Law Definitions.

HISTORY OF FEDERAL LAW & EMERGENCY ORDERS

- 1st (or certainly 1 of the most notable) Declarations of National Emergency by President Abraham Lincoln.
- On April 15, 1861, just three days after the attack on Fort Sumter, President Abraham Lincoln issued a proclamation calling forth the state militias, to the sum of 75,000 troops, in order to suppress the rebellion from the Confederate States.
- The proclamation also summoned Congress to return for an extraordinary session beginning on July 4, "to consider, and determine, such measures as, in their wisdom, the public safety, and interest, may seem to demand."



By the President of the United States
A proclamation
~~To the People of the United States of America.~~

Whereas the laws of the United States, have been for some time past, and now are opposed, and the execution thereof obstructed, in the States of South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana, and Texas, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the Marshals by law, therefore, I, Abraham Lincoln President of the United States, in virtue of the power in me vested by the Constitution and the laws, have thought fit to call forth, and hereby do call forth the Militia of the several States of the Union, to the aggregate number of seventy-five thousand, in order to suppress said combinations, and to cause the laws to be duly executed. The details, for this object, will be immediately communicated to the State authorities, through the War Department.

I appeal to all loyal citizens to favor, facilitate, and aid this effort to maintain the honor, the integrity, and the existence of our National Union, and the perpetuity of popular government; and to redress wrongs already too long endured.

I deem it proper to say that the first service assigned to the forces hereby called forth will probably be to repossess the forts, places and property, which have been seized from the Union; and in every event the ut-

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HISTORY OF FEDERAL LAW & EMERGENCY ORDERS (*cont.*)

- Subsequent Federal Emergency Proclamations:
- Woodrow Wilson (Feb. 5, 1917): "I have found that there exists a national emergency arising from the insufficiency of maritime tonnage to carry the products of the farms, forests, mines and manufacturing industries of the United States, to their consumers abroad and within the United States."
- Authority: the 1916 Shipping Act (Sept. 7, 1916; 39 Stat. 729) -established the U.S. Shipping Board

HISTORY OF FEDERAL LAW & EMERGENCY ORDERS (*cont.*)

- Starting with Franklin D. Roosevelt in 1933, presidents asserted the power to declare emergencies without limiting their scope or duration, without citing the relevant statutes, and without congressional oversight.
(*Source:* H. Rep. No. 95-459, at p. 7 (1977).)
- Executive Order (EO) 6102 (April 5, 1933): Forbid the hoarding of gold coin, gold bullion, and gold certificates in the continental United States."
- Authority: Trading with the Enemy Act of 1917, as amended by the Emergency Banking Act in March 1933. (Public Law 73-1, 48 Stat. 1 (March 9, 1933).)

HISTORY OF FEDERAL LAW & EMERGENCY ORDERS (*cont.*)

- Eventual Judicial Response:
  Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)

➢ Executive order directing the U.S. Secretary of Commerce to seize the plants of steel companies in labor dispute invalid as exceeding constitutional power of the president.

➢ Limited what a president could do in such an emergency, but did not limit the emergency declaration power itself.

HISTORY OF FEDERAL LAW & EMERGENCY ORDERS (*cont.*)

- *Youngstown Sheet & Tube Co. v. Sawyer* (*cont.*):

➢ "The contention is that presidential power should be implied from the aggregate of his powers under the Constitution. Particular reliance is placed on provisions Article II which say that 'the executive Power shall be vested in a President'; that 'he shall take Care that the Laws be faithfully executed'; and that he 'shall be Commander in Chief of the Army and Navy of the United States.'" (343 U.S. at 866-867.)

➢ No federal statute relied on, on other presidential powers not authorizing the taking of private property in this case.

➢ In other words, there needs to be an act of Congress...

HISTORY OF FEDERAL LAW & EMERGENCY ORDERS (*cont.*)

- A 1973 Senate investigation found several declared emergencies remained in effect (Sen. Report 93-549):
  - 1933 banking crisis and no hoarding of gold;
  - 1950 Korean War emergency declaration;
  - 1970 emergency regarding a postal workers strike;
- 1971 emergency in response to inflation.

HISTORY OF FEDERAL LAW & EMERGENCY ORDERS (*cont.*)

- The 1976 National Emergencies Act (NEA) is the federal law passed to end all previous national emergencies at the time, and to formalize the emergency powers of the president. (Pub.L. 94–412, 90 Stat. 1255, 50 U.S.C. §1601 *et seq.*)

➢ NEA empowers the president to activate special powers during a crisis but imposes procedural formalities.

➢ Handful of Exceptions to NEA, of note:

  - No-Bid & Other Rule Exemptions for National Defense Contracts (10 U.S.C. §2304; 50 U.S.C. §1431 *et seq.*)

HISTORY OF FEDERAL LAW & EMERGENCY ORDERS (*cont.*)

- Powers available under NEA are tied to (at least) 136 emergency powers the U.S. Congress has defined by law.
- Since NEA was enacted, every president has declared multiple national emergencies.
- NEA works in tandem with other federal laws authorizing emergency powers:
  - 1988 Stafford Act (42 U.S.C. §5121 *et seq*.) (replacing the 1974 Disaster Relief Act and used for natural disaster relief authorization);
  - 1961 Foreign Assistance Act (22 U.S.C. §2318(a)(1), allows federal assistance to foreign countries or international organizations); ***and***
  - 1944 Public Health Service Act (42 U.S.C. §§201 *et seq., &* 247d).

FEDERAL LAW & REGULATIONS

- If the U.S. Health & Human Services Secretary determines, after consultation with public health officials, that (1) a disease or disorder presents a public health emergency, or (2) a public health emergency, including significant outbreaks of infectious diseases or bioterrorist attacks, otherwise exists, then...
- Secretary may take such action as may be appropriate to respond to the public health emergency, including making grants, providing awards for expenses, and entering into contracts and conducting and supporting investigations into the cause, treatment, or prevention of a disease or disorder. (42 U.S.C. §247d.)

FEDERAL LAW & REGULATIONS (*cont.*)

- Procedural Aspects for Public Health Emergencies:

➢ Determination of a public health emergency terminates upon Secretary declaring it no longer exists, or 90 days after the date the determination was made, whichever occurs first.

➢ Determinations may be renewed by the Secretary (on the basis of the same or additional facts).

➢ Not later than 48 hours after making a determination under this subsection of a public health emergency (including a renewal), the Secretary shall submit to the Congress written notification of the determination. (42 U.S.C. §247d.)

FEDERAL LAW & REGULATIONS (*cont.*)

- Substantive Aspects when there is Public Health Emergency:

➢ Public Health Emergency Fund in the U.S. Treasury, and the Secretary must plan for expedited distribution of funds to appropriate agencies and entities, appropriated as necessary.

➢ Funds may be used for coordination among Federal, State, local, Tribal, and territorial entities and public and private health care entities; to make grants, provide for awards, enter into contracts, and conduct supportive investigations; and facilitate and accelerate advanced research and development of qualified pandemic products. (42 U.S.C. §247d.)

➢ Multiple other reporting and compliance requirements.

FEDERAL LAW & REGULATIONS (*cont.*)

- Communicable Diseases:

➢ HHS Secretary: Ultimately has statutory responsibility for preventing the introduction, transmission, and spread of communicable diseases in the U.S. (42 U.S.C. §264(a).)

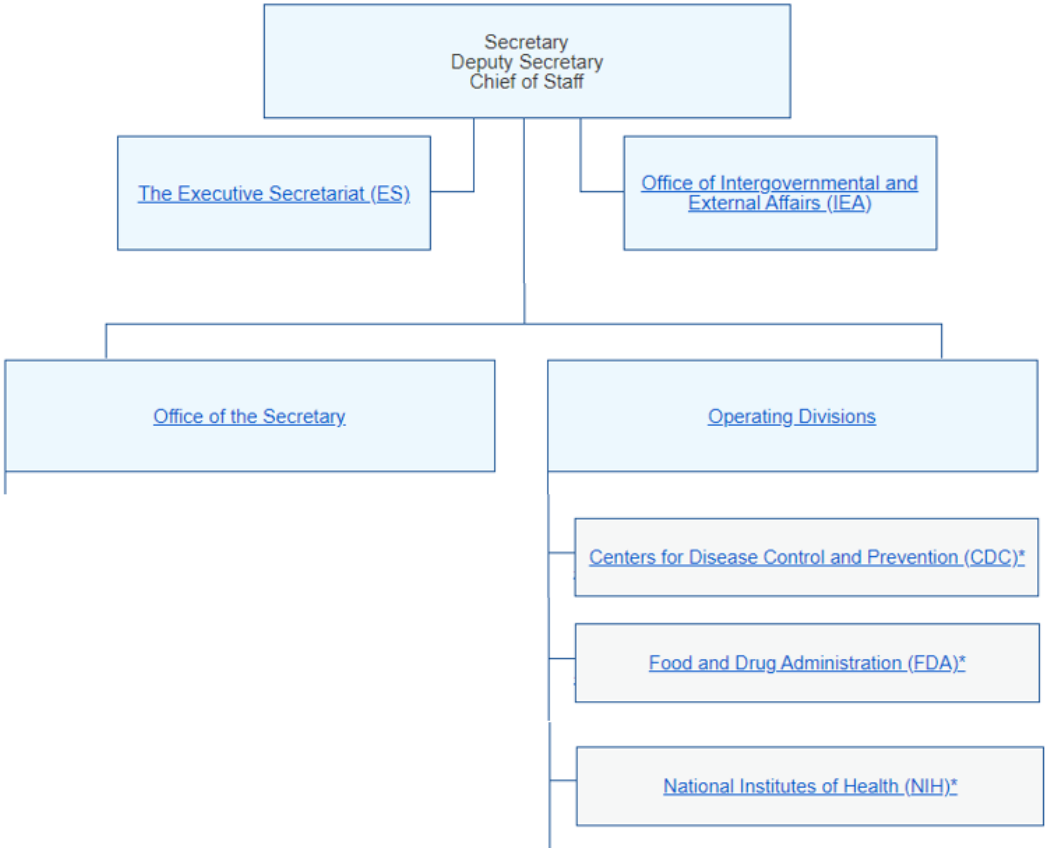
➢ Preemption: Federal statutes and regulations do not preempt State laws (including regulations and provisions established by political subdivisions of States), except to the extent in conflict with an exercise of Federal authority in 42 U.S.C. §§ 264 or 266 [quarantine in war-time]. (*Id.,* §264(e).)

➢ Penalties: Violation without permission of quarantine officer *shall* be punished by a fine of up to $1,000 or imprisonment up to 1 year, or both. (*Id.,* §271(a).)

FEDERAL LAW & REGULATIONS (*cont.*)

HHS Organizational Chart

Select an Office below to see specific organizational charts.



FEDERAL LAW & REGULATIONS (*cont.*)

- Implementation & Authorizations for Controlling Communicable Diseases:

➢ Centers for Disease Control and Prevention (CDC)

➢ Food & Drug Administration (FDA)

➢ National Institutes of Health (NIH)

➢ Other Agencies (*e.g.*, FEMA)

FEDERAL LAW & REGULATIONS (*cont.*)

- Prevention of Spread of Communicable Diseases by Interstate and Foreign Quarantine (CDC – 42 C.F.R., Parts 70 & 71)

➢ If CDC Director determines measures taken by State or political subdivisions are insufficient to prevent the spread of communicable diseases to any other State, Director may take such measures to prevent such spread of the diseases as deems reasonably necessary. (42 C.F.R. §70.2.)

➢ CDC Director may conduct public health prevention measures at U.S. airports, seaports, railway stations, bus terminals, and other locations where individuals may gather to engage in interstate travel. (*Id.,* §70.10(a).)

FEDERAL LAW & REGULATIONS (*cont.*)

- A person with a communicable disease in the communicable period shall not travel from one State to another without a permit from the health officer of the State, if such permit is required under the law applicable to the place of destination. (42 C.F.R. §70.3 [Interstate Quarantine Provisions].)
- Persons violating Interstate Quarantine regulations subject to $100,000 fine if violation does not result in a death or 1 year in jail, or both, or $250,000 fine if violation results in a death or 1 year in jail, or both, or as otherwise provided by law. Violations by organizations are subject to $200,000 fine per event if the violation does not result in a death or $500,000 fine per event if results in a death or as otherwise provided by law. (42 C.F.R. §70.18 [same].)

FEDERAL LAW & REGULATIONS (*cont.*)

- Health Industry Guidance / Development & Licensure of COVID-19 Vaccines (FDA- Federal Food, Drug, and Cosmetic Act (21 U.S.C. §301 *et seq.*; 21 C.F.R., Ch. I.)

➢ Medical Devices and PPE Guidance (www.fda.gov/emergency-preparedness-and-response/counterterrorism-and-emerging-threats/coronavirus-disease-2019-covid-19)

➢ Non-Binding Recommendations for Industry Issued without Prior Public Comments for COVID-19 Vaccine "Fast Track" (21 U.S.C. §371(h)(1)(C); 21 C.F.R. §10.115(g)(2).)

FEDERAL LAW & REGULATIONS (*cont.*)

- NIH is the primary Federal agency for conducting and supporting medical research. (42 U.S.C. §281.)
- Multiple Institutes relating to Public Health (*e.g.,* National Institute of Allergy and Infectious Diseases).
- Organized into Divisions with various Offices
- NIH Director – Appointed by the President (*Id.,* §282.)
- Responsible for Grants & Financial Assistance/NIH Enclave (*see, e.g.,* 42 C.F.R. §52b.1 *et seq.*; 45 C.F.R. §3.1 *et seq.*)

FEDERAL LAW & REGULATIONS (*cont.*)

- Bringing ALL of Federal authority together for COVID-19:

➢ January 31, 2020, HHS Secretary declared a public health emergency under the Public Health Service Act.

➢ March 13, 2020, President issued "Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak" under the National Emergencies Act.

➢ CDC issues and updates "measures to prevent such spread of the diseases as deems reasonably necessary" (*e.g.,* face coverings, stay at home if sick, etc.). www.cdc.gov/coronavirus/2019-ncov/

STATE LAWS & REGULATIONS

- Totally Unscientific, General Survey of States
- Structurally, Not Too Dissimilar from U.S. Approach
  - ❖ Legislative Authorization
  - ❖ Ability and/or Mandate for Executive Action
  - ❖ State Departments of Health Services/Public Health for Assisting Executive Action
  - ❖ Political Subdivisions: Local Health Officers and Enforcement Mechanisms throughout the State

STATE LAWS & REGULATIONS (*cont.*)

- Ability to Compel Action under a Public Health Emergency: *Jacobson v. Commonwealth of Mass.,* 197 U.S. 11 (1905)

➢ Case involved the U.S. Constitutional validity of Massachusetts statutes relating to vaccination.

- ❖ Law Back Then: A board of health of a city or town, if, in its opinion, it is necessary for the public health or safety, shall require and enforce the vaccination and revaccination of all the inhabitants thereof.
- ❖ The Cambridge City Board of Health adopted in February 1902 a regulation requiring all inhabitants to get vaccinated or revaccinated for smallpox.
- ❖ Regulation empowered a named physician to enforce the vaccination.

STATE LAWS & REGULATIONS (*cont.*)

- *Jacobson v. Commonwealth of Mass.* (cont.)

➢ Criminal complaint charged Defendant Jacobson for refusing and neglecting to comply with vaccination requirement. Found guilty and subject to fine of $5.

➢ Defendant argued, *inter alia,* vaccination requirement violated 14th Amendment to U.S. Constitution, namely:

- ❖ No state may make or enforce any law abridging the privileges or immunities of citizens of the United States,
- ❖ nor deprive any person of life, liberty, or property without due process of law,
- ❖ nor deny to any person within its jurisdiction the equal protection of the laws.

STATE LAWS & REGULATIONS (*cont.*)

- *Jacobson v. Commonwealth of Mass.* (cont.)

➢ Supreme Judicial Court of Mass. upheld the conviction.

➢ U.S. Supreme Court affirmed:

❖ The authority of the state to enact this statute is the police power.

❖ U.S. Supreme Court recognized the authority of a state to enact quarantine laws and "health laws of every description."

❖ Police power of a state (and political subdivision) must embrace, at a minimum, "such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety." (*Id.,* at 25 [citations omitted].)

STATE LAWS & REGULATIONS (*cont.*)

- *Jacobson v. Commonwealth of Mass.* (cont.)
  - ❖ The liberty secured by the U.S. Constitution to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint.
  - ❖ "This court has more than once recognized it as a fundamental principle that 'persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state[.]" (*Id.,* at 26 [citations omitted].)
  - ❖ Legislature required the inhabitants to be vaccinated only when, in the opinion of the board of health, that was necessary for the public health.
  - ❖ 100% appropriate for a legislature to refer a public health question to a board of health composed of persons residing in the locality affected, and appointed because of their fitness to determine such questions.

STATE LAWS & REGULATIONS (*cont.*)

- *Jacobson v. Commonwealth of Mass.* (cont.)

➢ General Summary: Broad Authority for Legislatures to Enact Laws Allowing State and Local Agencies to Command Action by Inhabitants when a Public Health Emergency Is Determined to Require It.

➢ Case Does Recognize Possibility a State Law may go too far if it goes, "beyond the necessity of the case, and, under the guise of exerting a police power, invaded the domain of Federal authority, and violated rights secured by the Constitution[.]" (*Id.,* at 28.)

STATE LAWS & REGULATIONS (*cont.*)

- How California Law Works:
  - Emergency Services Act (Cal. Gov. Code §§8550 *et seq.*)
  - State Law has 3 conditions or degrees of emergency:
    - "State of war emergency" – No proclamation needed by Governor / triggered by enemy attack or receipt by the state of a warning from the federal government indicating that an enemy attack is probable or imminent;
    - "State of emergency" - duly proclaimed existence of conditions of disaster or of extreme peril to the safety of persons and property within the state caused by, among other conditions, epidemic or animal infestation or disease;
    - "Local Emergency" - duly proclaimed existence of conditions of disaster or of extreme peril to the safety of persons and property within the territorial limits of a county, city and county, or city. (Cal. Gov. Code §8558.)

STATE LAWS & REGULATIONS (*cont.*)

- How California Law Works (*cont.*)
  - Governor:
    - State Health & Human Services Agency
      - State Department of Public Health (jurisdiction over response and guidance concerning infectious diseases)
  - Political Subdivisions
    - County (and City and County of San Francisco)
      - Board of Supervisors
      - County Public Health Office or Agency (must be appointed)
    - Cities
      - "Charter" or General Law
      - City Councils with either Directly Elected or Rotating Mayors
      - Possibly – Local City Health Officer or Office

STATE LAWS & REGULATIONS (*cont.*)

- How California Law Works (*cont.*)
  - Powers of the Governor
    - Expend any appropriation for Emergency Services.
    - Make, amend, and rescind orders and regulations, which have the "force and effect of law."
    - Must coordinate the preparation of plans and programs for the mitigation of the effects of an emergency by the political subdivisions.
    - Suspend any regulatory statute, or statute prescribing the procedure for conduct of state business, or the orders, rules, or regulations of any state agency.
      (Cal. Gov. Code §§8566, 8567, 8569, 8571.)
  - All of these powers Deployed during COVID-19

STATE LAWS & REGULATIONS (*cont.*)

- How California Law Works (*cont.*)
  - Director of State Department of Public Health
    - Appointed by the Governor, confirmation by State Senate.
    - Holds office at the pleasure of the Governor.
    - Must be a licensed physician and surgeon, who has demonstrated medical, public health, and management experience.
    - Consistent with law, may adopt rules and regulations as are necessary to govern the activities of the department and may assign to its officers and employees such duties at director's discretion.
    - County sheriffs shall execute lawful orders of the department. (Cal. Gov. Code §§11152, 11158; Health & Saf. Code §§131000, 131005, 131010.)
  - Governor has "incorporated by reference" DPH Director's rules or regulations.

STATE LAWS & REGULATIONS (*cont.*)

- How California Law Works (*cont.*)
  - Political Subdivisions / Cities, Counties, and City and County
    - Local emergency may be proclaimed by the governing body, or by official designated by ordinance adopted by that governing body.
    - Local emergency cannot remain in effect for a period in excess of seven days unless it has been ratified by the governing body.
    - Governing body must review the continuing need at least once every 60 days until local emergency is terminated.
    - Full power to provide mutual aid to any affected area in accordance with ordinances, resolutions, emergency plans, or agreements.
  - Local Ordinances/Municipal Codes Usually Include Powers Triggered during Proclaimed Local Emergency.

STATE LAWS & REGULATIONS (*cont.*)

- How California Law Works (*cont.*)
  - Political Subdivisions / Cities, Counties, and City and County (*cont.*)
    - Governing body or designated officials may promulgate orders and regulations necessary to provide for the protection of life and property (including curfews).
    - Emergency orders and regulations and amendments and rescissions must be in writing and given widespread publicity and notice.
    - Governing body must terminate local emergency at the earliest possible date that conditions warrant.
      (Cal. Gov. Code §§8630-8634.)
  - City Managers or Emergency Coordination Officers Usually Are Designated Officials who can Promulgate Orders and Regulations.

STATE LAWS & REGULATIONS (*cont.*)

- How California Law Works (*cont.*)
  - Political Subdivisions / Cities, Counties, and City and County (*cont.*)
    - Specific Power to preserve the political subdivision and its ability to be governed during emergencies.
    - Governing body may provide for succession of officers who head departments having duties in the maintenance of law and order, or in furnishing public services relating to health and safety.
    - Governing body must meet as soon as possible, and need not be within the political subdivision, whenever local emergency occurs.
    - Governing body must ascertain damage to the political subdivision and its personnel and property, and must perform its functions in the preservation of law and order and providing local services. (Cal. Gov. Code §§8550 - 8669.7.)
  - Penalties for failing to comply with local emergency orders: misdemeanor, punishable by a fine not to exceed $1,000 or imprisonment for not to exceed 6 months or both. (*Id.,* §8665.)

STATE LAWS & REGULATIONS (*cont.*)

- How California Law Works (*cont.*)
  - A county local health officer (must be graduate of a medical college) may take any preventive measure that may be necessary to protect and preserve the public health from any public health hazard during any "state of war emergency," "state of emergency," or "local emergency."
  - "Preventive measure" means abatement, correction, removal or any other protective step that may be taken against any public health hazard that is caused by a disaster and affects the public health. (Cal. Health & Saf. Code §§ 101005, 101040.)
  - Clearly, unincorporated areas of county subject to enforcement by local health officer and sheriff. (*Id.,* §§101029, 101030.)
  - According to Cal. Attorney General, cities within a county are bound by county rules and regulations adopted during a county proclaimed local emergency. (62 Ops.Cal.Atty.Gen 701 (1979).)

SUMMARY OF INTERPLAY: FEDERAL / STATE / LOCAL LAWS

- State Orders and Regulations Govern the Respective States on Responding to Public Health Emergency relating to Communicable/Infectious Diseases, AND:
  - Preempted by exercise of Federal authority if in conflict,
    - Implemented through the Political Subdivisions,
      - Able to be Supplemented by Political Subdivisions (*i.e.,* municipalities and designated appointees),
        - Local Public Health Officers may also be able to mandate and/or recommend responsive action.

CONCLUSION

- City Attorney "War Stories" and "Real Life" Advice
- Continue the Conversation "virtually live"
  - Roundtable Discussion to Hear About Other Cities (not just California) and Municipal Orders during the Pandemic
  - PLEASE JOIN:
    Wednesday, September 30 @ NOON (Eastern Standard Time)
- Questions
- Concluding Remarks & Thank You