

OUR VIEW

Oregon ‘emergency’ law lacking in clarity

The Legislature must clarify the Oregon governor’s authority to issue emergency orders in a public health crisis.

Gov. Kate Brown has been issuing orders curtailing the freedoms of Oregonians with no expiration date. Does that sound right to you?

Willamette University Professor Paul Diller wrote about the issue on his blog. Willamette Week did a story about it.

One way to think about what’s going on is to look at the example of Oregon City. Oregon City Mayor Dan Holloday had talked about re-opening businesses in his city before Gov. Kate Brown lifted her “Stay Home, Save Lives” executive order. Attorney General Ellen Rosenblum responded by sending him a letter on April 24.

If you were to try to sum up what Rosenblum wrote, it was basically: Don’t do it or you will be in trouble. “The governor has authority under ORS 401.165(1) to declare a state of emergency when she determines either that an emergency has occurred or is imminent,” Rosenblum wrote. “The type of emergencies covered under this authority expressly include diseases. The governor declared a state of emergency on March 7, 2020, through Executive Order 20-03, in response to the threat to public health and safety caused by the spread of COVID-19. The governor has not terminated that state of emergency. Nor has the Legislative Assembly.”

The letter goes on to say the governor has powers to protect public health including to control or limit entry and “movement within and the occupancy of premises in any public area subject to or threatened by a public health emergency if such actions are reasonable and necessary to respond to the public health emergency.” Violating the executive order could lead to criminal or civil penalties, Rosenblum wrote.

According to news reports since that letter was issued, Oregon City will be following the governor’s order. So, debate over? Not really. Gov. Brown’s executive orders do basically

what similar governor’s orders have done in other states — shut down schools and almost all businesses. The difference is the Oregon governor is not clearly compelled by law to periodically justify continuing them. Brown’s initial declaration of an emergency actually included a 60-day limit. That means it will expire in the second week of May unless she renews it. If she didn’t renew it, the orders she issued related to it — such as Stay Home, Save Lives — would also expire. But if she renewed it, the other orders would presumably stay in effect indefinitely because that’s the way they were written.

Oregon has two statutes covering such issues, as explained by professor Diller. One is the one that Rosenblum mentioned in her letter. That one has no expiration date. The second more recent statute describes authority the state has during a public health crisis and has a renewable 14-day limit on orders issued.

So which one takes precedence? It’s not crystal clear. Diller wrote that the more recent statute generally takes precedence. But the more recent statute also does not say it limits the governor’s authority in the first. Another legal consideration, though, is what would be the point of putting the limit in the second statute if it is not important?

Nothing we have written should be taken as justification for violating the governor’s executive orders. If there was a time when a governor needed the power to issue emergency orders, it is now. Brown has been explaining why she has continued the emergency. But there is a lack of clarity in the law that the Legislature should address. If the state of Oregon is going to deprive residents of essential freedoms, it is not outrageous to suggest — even during a public health crisis — that there be a legal requirement to regularly renew the justification.

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OTHER VIEWS

Review surveillance

Editorial from The Pittsburgh Post-Gazette:

The FBI apparently makes a habit of violating policies meant to protect U.S. citizens from unwarranted surveillance, something Congress should address in a rewrite or repeal of the Foreign Intelligence Surveillance Act.

That’s the most obvious and alarming conclusion in a recent memo by Michael Horowitz, inspector general for the U.S. Department of Justice, as he continues to look at how the FBI goes about seeking warrants for secret surveillance of Americans.

A report Horowitz’s office released late last year found “at least 17 significant errors or omissions” in the FBI’s applications for secret wiretaps of Carter Page, an adviser to Donald Trump’s 2016 presidential campaign. The FBI was not, the inspector general’s office discovered, following its own procedures to ensure the court was made aware of facts that might weigh against allowing wiretaps.

The office found no evidence of political bias, just sloppiness in following procedures aimed at making sure a target’s rights were protected from FBI overreach. So, the next obvious question was the one Horowitz’s team is looking at now: Was this sloppiness confined to Page’s case or its usual practice?

The latter would seem to be the case, judging by the inspector general’s review of 29 applications seeking surveillance of U.S. persons under FISA.

The FBI failed to provide the inspector general’s office with the files for four of the applications, and a review of the remaining 25 found errors and discrepancies in all of them, with an average of 20 problems each. The office made no judgment, for now, regarding the severity of the mistakes found, but they’re important because they involve so-called Woods Files — the documents justifying each factual claim in the FBI’s applications to spy on U.S. citizens.

This initial review is worrisome because it points to sloppiness in the FBI’s handling of a very sensitive matter: spying on American citizens. And whether the mistakes were significant — as were many in Page’s case — the inspector general’s conclusion is one Congress should take to heart in looking at FISA: “(W)e do not have confidence that the FBI has executed its Woods Procedures in compliance with FBI policy.”

Given that, the FBI’s response to Horowitz’s latest memo — that it believes it has corrected the errors in its procedure with checklists and other reforms — is not heartening.

The FBI says it needs the ability to spy on U.S. citizens to protect the nation from terrorism. The Woods Procedures were supposed to be citizens’ guarantee that the courts reviewing applications to spy on them were being given the fullest possible picture of the evidence for such warrants. As Horowitz’s recent memo shows, that is not happening.

Congress needs to take a hard look at Horowitz’s ongoing probe and either drastically reform or repeal FISA.

Finally getting a close-up look at Castle Rock

Social distancing is considerably easier when you’re 20 miles from the nearest paved road. And more than twice that distance from the closest Big Mac.

I decided on a recent sunny Saturday that an ideal place to get far away from people — including any who might be serving as unwitting hosts to coronavirus particles — was the uninhabited wilds of northern Malheur County.

(This would, I hardly need point out, also protect everybody else, in the event that one of those unwitting virus-carriers is me.)

My destination was much more precise than I implied with that line about the uninhabited wilds of northern Malheur County. As descriptions go, that’s about as explicit as telling an interstellar traveler to look for an asteroid in the general vicinity of the Milky Way.

Which is to say, there’s a lot of wild country in northern Malheur County, and scarcely any people.

The place I wanted to visit was a landmark that I’ve been seeing regularly for more than three decades, but always from a vantage point some dozens of miles distant. This vestige of ancient volcanic eruptions is called Castle Rock.

The name strikes me as lacking in creativity, considering how common it is to brand any tower of rock as Castle Rock or Butte or Peak or whatever.

But I suppose the name satisfies the basic criteria since Castle Rock,



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though lacking a moat, ramparts adorned with colorful flags, and longbow-wielding knights, at least commands the surrounding terrain the way castles are supposed to.

My longstanding fascination with Castle Rock derives mainly from its ubiquity on Baker County’s southern horizon. No other landform manages to insinuate itself into so many views from the places I like to hike.

Based solely on elevation, it’s a middling mountain. At 6,837 feet, Castle Rock’s summit wouldn’t merit a mention on a map of the Elkhorns or the Wallows.

But because its peak juts well above its base, rather like a hitchhiker’s extended thumb only somewhat larger, Castle Rock’s tallest digit is distinctive even at a great distance.

This pinnacle is visible from almost any prominent point in southern Baker County. But several times, while taking in the vista from a pass or peak in the Wallows, I’ve been surprised, as I look to the south, to be able to pick out the slender precipice even amid the smudgy haze of late summer.

Surprised and not a little pleased, as though I had glimpsed a familiar face in a crowd of strang-

ers. Yet my affinity for Castle Rock had never lured me closer than Ironside, along U.S. Highway 26 east of Unity. And you can’t even see the peak from there, deep in the valley of Willow Creek.

It pains me to consider that I needed a pandemic to persuade me to take a trip I could easily have made any time in the past 30 years. But you underestimate the power of procrastination at your peril.

My wife, Lisa, and I and our kids, Olivia and Max, have been taking advantage of the local wealth of rarely visited public land to indulge our interest in hiking, and exploring, while heeding the advice of medical experts.

I don’t mean to boast. The truth is that it’s ridiculously easy to be socially responsible, in these viral times, when you go to places such as the land that lies between Highways 26 and 20.

Have a look at an Oregon highway map to get a sense of what I mean. This is one of the biggest chunks of blank space, with just a few place names — and not a single town — in an area measuring about 40 miles on each side of a rough square.

After pulling off Highway 26 at Ironside and heading south on Rose Creek Road, we drove about 45 miles on roads ranging from recently graded gravel to sections that probably haven’t felt the gouge of a bulldozer’s blade since the Carter administration. In a span

of about five hours we saw a single vehicle — and it was on a road a couple of drainages away.

It turned out that after waiting so many years to actually go to Castle Rock I would have done well to put off the trip for just a few more weeks.

As we approached the last of the road junctions I had plotted with the aid of a BLM paper map and the detailed pixels of Google Earth, I could see that the route leading to the peak was blocked by snowdrifts.

I was disappointed, but not greatly so.

We never intended to actually climb Castle Rock anyway. We’re a family of hikers, not rock-climbers, and we have neither the ropes nor the ability to suppress acrophobia necessary to safely reach such precarious places.

But we had a fine two-hour hike, just the same, through pleasantly varied terrain. We hopped over a foot-wide ephemeral stream that carries snowmelt into Bully Creek. We saw yellow bells and buttercups and a few patches of phlox, my favorite spring desert wildflower. We walked between the bone-white skeletons of junipers scorched by a wildfire some years ago, and Max, as always entranced by geology, was waylaid by some stony outcrops.

(Castle Rock, by the way, has a Baker County connection, so to speak, even though it officially belongs to Malheur. The volcanic ash that solidified into Pleasant Valley tuffstone, the distinctive

stone that forms the facing for some of Baker City’s noteworthy structures, including Baker City Hall, the Carnegie Library (Crossroads Art Center) and the Baker County Courthouse, erupted between 15 million and 16 million years ago from vents in the Castle Rock area. Then, as now, volcanic eruptions do not heed county lines.)

Eventually we climbed to a knoll where, suddenly and most gratifying to me, Castle Rock came into view, about 4 miles away. It was a trifle strange to see it from so close. I hadn’t realized how many trees grow on its lower slopes, or the extent of the ridges that radiate from the peak. From my previously distant views I had a sense that the point jutting from something like a plateau.

I vowed that, having come this close, I won’t wait 30 years to return and walk right to the base of the peak.

I believe Max would go back today. During the hike he detoured to investigate a trio of barrels that served as cattle troughs. Inside one was a dead mouse, proving, I suppose, that curiosity can prove fatal to mice as well as to their feline nemeses. Max seemed more impressed by this than by Castle Rock. And in his personal story of our trip I’m sure the mouse has a much more prominent place in the plot than the mountain does.

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