

Coronavirus vs. Constitution: What can government stop you from doing in a pandemic?

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The Sacramento Bee
By Haley Fowler*

1 Public closures, a ban on gatherings, quarantine notices and orders for isolation have become increasingly common as the coronavirus continues to spread across the United States. Officials in Washington state and San Francisco are limiting the number of people allowed to attend public gatherings. The governor of California joined them on Thursday in urging the cancellation of all events with more than 250 people in attendance.

2 The governor of Kentucky, a Bible belt state, has asked churches and other religious institutions to temporarily cancel services. But if it seems these actions are infringing on individual freedoms guaranteed by the U.S. Constitution, think again. “You don’t have a right to assemble against the backdrop of known public health risk,” James G. Hodge told McClatchy News. Hodge is the director of the Center for Public Health Law and Policy at Arizona State University, an affiliate of the Network for Public Health Law. As the number of COVID-19 cases climbs, he said, the types of “aggressive measures” taking place in some parts of the country will be used elsewhere.

3 As of Thursday, more than a dozen states from California to North Carolina have declared a state of emergency to try and stop the spread of the coronavirus. Hodge said those declarations help shape how public health officials can respond at the state and local level, enabling them to act fast while instituting forms of social distancing — “which is one of the only tools we have available to us” during a public health crisis like the coronavirus pandemic, he said. Officials typically have to go through legal processes to close an establishment or shut down public gatherings, Hodge said. But under a state of emergency, everything is expedited. “It’s not that we don’t have time for First Amendment interests, it’s that we must act fast,” he said. “What was opened today can be closed tomorrow.”

4 That doesn’t mean communities in the U.S. will see the kind of large-scale lock-downs happening in Italy and China, Hodge added. But there are circumstances under which a voluntary recommendation can become involuntary. A man in Missouri left quarantine to attend a father-daughter dance at a nearby hotel, McClatchy reported, prompting county health officials to warn “he must remain in his home or they will issue a formal quarantine that will require him and the rest of his family to stay in their home by the force of law.”

5 When someone opts to evade such recommendations, Hodge said, public health authorities can seek a court order mandating their compliance. “Some of those basic liberties are going to be truncated for a brief period,” he said. “Most Americans understand the need for that.” But these types of public closures and requests for self-quarantine aren’t without good reason — it’s “flattening the curve,” Vox reported.

6 If officials don’t stop the rapid spread of coronavirus, or at least slow it down, epidemiologists have said the health care system could be “overwhelmed by a sudden explosion of illness that requires more people to be hospitalized than it can handle,” according to Vox.

7 Still, these measures aren't undertaken without due process. "The government does have sweeping powers to combat communicable disease but there are limits," said Jay Stanley, a senior policy analyst at the American Civil Liberties Union. Stanley told McClatchy News officials have a set of guidelines to follow when it comes to making these decisions — it has to be overwhelmingly in the public interest, rooted in rational, scientific ends and done by the least intrusive means possible. There must also be a mechanism to challenge it.

8 Officials can't, for example, use COVID-19 as an excuse or pretext "to achieve illegitimate ends" like shutting down a protest or discriminating against certain groups, he said. Hodge said these types of measures aren't designed to be punitive, they're protective — and they don't "trip any constitutional safeguards when done right." He pointed to a case from the 1980s in West Virginia where a man who officials suspected had tuberculosis was involuntarily confined in quarantine. The man argued he was denied due process when the trial court delayed appointing him an attorney, and judges agreed. That, Hodge said, is an example of what not to do in a public health emergency. "There really are definitive checklists of things you have to show to utilize quarantine and isolation powers at the level we're going to see," he told McClatchy.

9 But he said state and local health authorities know that — "this is not guesswork." The coronavirus hasn't caught the public health system off guard so much as prompted them to operate on a much larger scale than usual, Hodge said. "It gets a lot easier when Americans act on their own volition and self-quarantine pursuant to public health directives," he said. "Most Americans will respond that way." The CDC has guidelines on legal authorities governing isolation and quarantine as well as the types of laws and regulations that come into play during a pandemic.

Self-Isolation Orders Pit Civil Liberties Against Public Good in Coronavirus Pandemic

March 17, 2020

NPR

By David Wellna

1 When local health officers issued simultaneous orders on March 16 for all residents of seven counties in the San Francisco Bay area to "shelter at their place of residence," Arnab Mukherjea thought it was "a bit draconian" for him as well as his wife and two young children. "Let's be honest, this is pain, but a little bit of pain right now may be worth it," said the California State University, East Bay professor of health sciences and resident of Contra Costa county, one of the jurisdictions affected by the stay-at-home edicts. "If we do this correctly, it will indeed get us faster to those things that are highly prioritized in our day-to-day lives, particularly for those who are in vulnerable communities."

2 But one of the nation's top quarantine experts says the San Francisco area orders are likely to be challenged in court and judges will have to balance individual civil liberties and constitutional rights against the need to protect public health. "There's no question that if you've been exposed to the virus, but not showing currently symptoms, that there could be a quarantine order and that it could be enforced by law," says Georgetown University Law School's Lawrence Gostin, director of the O'Neill Institute for National and Global Health Law. "But once you start getting into what might colloquially be called an en masse quarantine or a lockdown where government will actually aggressively enforce it, then you're getting into territory that implicates the most fundamental constitutional rights and the right to freedom of movement, the right to freedom of travel."

3 There is likely to be little tolerance for those who assert such freedoms in the midst of a fear-inducing pandemic — especially when such persons have been found to be infectious. In Kentucky, sheriff's deputies last weekend surrounded the home of a 53-year-old man who refused to self-isolate after testing positive for the coronavirus. "We're going to be out here 24/7 for two weeks," Nelson County Sheriff Ramon Pineiroa told *The Kentucky Standard* while standing outside the man's residence. "It's a step I hoped I would never have to take," Gov. Andy Beshear said at a news conference shortly thereafter, "but we can't allow one person who we know has this virus to refuse to protect their neighbors."

4 Under Kentucky law, the state health and family services department is authorized to issue and enforce quarantines if it believes "that there is a probability that any infectious or contagious disease will invade this state." Georgetown's Gostin says the case of the Kentucky man differs significantly from the San Francisco shelter-in-place orders. "If you have a lawful quarantine order for somebody who is known to pose a risk to the public, it should be enforceable by law, by the civil penalty, criminal penalty or literally police presence and not allow you to leave your home. That's justified," says Gostin. "What isn't justified necessarily is to do that en masse, to have a complete lockdown."

5 Authorities have been ordering persons into isolation when they were suspected of carrying infectious diseases since at least the 14th century. Ships at that time approaching the Italian city of Venice from abroad were required to anchor offshore for 40 days; "quarantine" is derived from quaranta, the word for 40 in Italian.

6 The coronavirus pandemic has also led to a kind of reverse quarantine, in which institutions with vulnerable residents such as nursing homes bar outside visitors — including family members — from entering to minimize the risk of infection. "Prior to this crisis, we had rarely seen these kinds of group orders imposed," says American University's Washington College of Law professor and leading quarantine expert Lindsay Wiley. "They don't raise the same level of constitutional concerns as mandatory orders applicable to everyone in an entire geographic area, including many who are unlikely to have yet been exposed."

7 Even while he's on board with the Bay Area's 21-day shelter-in-place order, which allows people to leave their homes only for "essential" activities, public health professor Mukherjea worries the public's compliance could wane as the days go by. "I think if the government is not transparent about what is happening with our local [coronavirus] numbers in terms of case counts," says Mukherjea, "you may see that the average person says, 'my day-to-day life is affected so dramatically, but nothing good is happening, why bother?' "

8 American University's Wiley says if compliance with orders confining people to their homes is not voluntary, there could be major problems. "I'm certain that the health authorities behind this order are very much hoping not to enter a situation where there are mass arrests and people crowding the local jails," she says.

9 The key for Georgetown's Gostin, who wrote the Model State Emergency Health Powers Act for the Centers for Disease Control and Prevention, is for authorities to strongly recommend self-isolation for large populations but not have to enforce it. "The first thing we want in this coronavirus response is to keep our head — not to be disproportionate, not to be draconian, but to gain the public's trust," says Gostin. "And once you lose the public's trust, once you cross a line that the public thinks is too far, we will be on the losing side of this battle."

Red and Blue America Agree That Now Is the Time to Violate the Constitution

March 25, 2020

The Atlantic

By Adam Chilton, Kevin Cope, Charles Crabtree and Mila Versteeg

1 When local health officers issued simultaneous orders on March 16 for all residents of seven counties in the San Francisco Bay area to "shelter at their place of residence," Arnab Mukherjea thought it was "a bit draconian" for him as well as his wife and two young children. "Let's be honest, this is pain, but a little bit of pain right now may be worth it," said the California State University, East Bay professor of health sciences and resident of Contra Costa county, one of the jurisdictions affected by the stay-at-home edicts. "If we do this correctly, it will indeed get us faster to those things that are highly prioritized in our day-to-day lives, particularly for those who are in vulnerable communities."

2 Countries are taking extraordinary measures to slow the COVID-19 pandemic. Many of these measures limit individual freedom and may also violate rights guaranteed by national constitutions. Italy's complete lockdown, enforced by criminal penalties, probably violates its constitution. Norwegian lawmakers have proposed an emergency law that temporarily gives the government unprecedented power to override the constitution and national laws to thwart the virus. Meanwhile, without consulting the Israeli Parliament, Prime Minister Benjamin Netanyahu enacted emergency regulations allowing for stunning surveillance power to combat the virus. Never one to waste a good crisis, Hungary's Viktor Orbán will likely be able to rule by decree for the foreseeable future.

3 The United States now faces this same dilemma: To what extent should the Constitution be violated to fight the coronavirus? Lockdowns, especially ones that apply to people who haven't tested positive for the virus, are constitutionally questionable. The threat by the leaders of Newark, New Jersey, to prosecute residents who spread false information about the virus—if carried out—could violate the First Amendment. Some people in California have challenged the city of San Jose's authority to force a gun shop to close, citing their right to arm themselves. Perhaps most alarming, the U.S. Department of Justice "has quietly asked Congress for the ability to ask chief judges to detain people indefinitely without trial during emergencies."

4 To assess how Americans weigh the trade-off between preserving civil liberties and halting the spread of the coronavirus, we conducted a survey last week, just as state and local governments were beginning to implement their most restrictive policies yet. The survey reveals a remarkable willingness to tolerate civil-rights violations in order to confront the pandemic, regardless of party affiliation.

5 We presented a nationally representative sample of 3,000 U.S. residents with eight possible policy responses to the outbreak, all of which may be unconstitutional, including forced quarantine in a government facility, criminal penalties for spreading misinformation, bans against certain people entering the country, and conscription of health-care workers. We also asked our sample to imagine that public-health officials had reviewed the policies and estimated that each would likely save some number of lives, hypothetical figures that we provided.

6 A majority of respondents supported all eight of these policies, most by considerable margins. The proposals with the lowest support were seizing businesses and banning all citizens and noncitizens outside the country from entering, but these policies still had 58 and 63 percent support, respectively. The proposals with the highest levels of support were banning noncitizens from entering the country (85 percent) and conscripting health-care professionals to work despite risks to their own health (78 percent). Both policies burden a defined minority of the population, so it's not surprising that large majorities support them. But criminalizing speech based on its content, an idea antithetical to modern American constitutionalism, was also very popular: About 70 percent of respondents supported restricting people's ability to say things that may qualify as misinformation. Likewise, 77 percent of respondents support suspending all religious services and gatherings, thereby restricting religious freedom. And even when we explicitly told half of our sample that the policies may violate the Constitution, the majority supported all eight of them—even the speech restrictions.

7 Perhaps the most striking feature of our results is the broad bipartisan endorsement of these liberty-restricting policies. Like other surveys, ours reflected a huge gap between Democrats and Republicans in approval of President Donald Trump's handling of the pandemic: 34 percent of Democrats expressed approval, while 88 percent of Republicans did. One might have reasonably concluded that different policy preferences were driving these responses: that Democrats want aggressive government intervention, which they feel the president has failed to deliver, while Republicans—encouraged by Trump's early dismissal of the outbreak—prefer a wait-and-see or laissez-faire approach.

8 But our findings suggest that's not the case. Democrats and Republicans alike are willing to sacrifice civil liberties to fight the virus. The two groups show almost identical levels of support for detaining sick people in government facilities, conscripting people to work, prohibiting the spreading of misinformation, and banning all people (citizens and noncitizens alike) from entering the country. Seventy-four percent of Democrats supported each of the eight proposed policies, while 71 percent of Republicans did. This small disparity contrasts with several recent survey findings showing that Americans with different political affiliations are responding to the crisis very differently. For example, *The Atlantic* reported on Friday that blue states are responding more aggressively to the outbreak than red states are, and an *NBC News/Wall Street Journal* poll conducted last week found that Democrats were 28 percentage points more likely to be concerned about someone in their family getting the COVID-19 than Republicans. Even so, both sides are convinced that aggressive measures are needed to save lives.

9 Often, efforts to roll back civil liberties face political opposition, but now bipartisan support for rights-restricting COVID-19 responses could smooth the path for constitutional erosion. James Madison predicted as much when he described constitutional rights as “parchment barriers,” easily transgressed when the majority is so inclined. And indeed, history presents numerous examples of liberty violations made in the face of security threats: the Alien and Sedition Acts signed into law by President John Adams, Japanese American internment camps during WWII, and the use of torture after 9/11. After the threat has subsided, Americans must recognize any constitutional violations for what they were, lest they become the new normal.

How the Coronavirus Could Trigger a Backslide on Freedom Around the World

March 16, 2020

The Washington Post

By Allie Funk and Isabel

1 Last Tuesday, Moscow banned gatherings with more than 5,000 attendees until April 10, arguing that the move was necessary to limit the spread of covid-19. While such restrictions may be essential during a public health emergency, the announcement came on the same day President Vladimir Putin endorsed a proposal allowing him to remain in office until 2036. In Russia's largest city — where the opposition has previously mobilized tens of thousands of people despite government efforts to suppress them and where there were just 20 confirmed cases across the country at that point — the decision to restrict free assembly is worthy of scrutiny.

2 Russia is not alone. Authorities worldwide are using the coronavirus as a pretext to crack down on human rights for political purposes. Though some limitations are undoubtedly necessary to address a pandemic, there is a real risk that this crisis could trigger a lasting global backslide in fundamental freedoms — and it's already started. For example, while a pandemic creates an ideal situation for disinformation, many governments are using this threat to justify heavy censorship, smothering independent sources of information along with any legitimately harmful content. Iran, a leading Internet freedom violator, has become the epicenter of the Middle East's coronavirus outbreak. During the government's scramble to respond, Internet connectivity dipped and Wikipedia's Farsi edition was temporarily blocked, according to civil society group Netblocks — just as similar blunt restrictions were imposed amid nationwide protests in November.

3 China has also deployed its sophisticated censorship apparatus against people contradicting the government's narrative and those simply seeking health information. CitizenLab found 45 keywords censored across the live-streaming platform YY and 516 on WeChat, including “Wuhan + CCP + Crisis + Beijing” and “Supplementary + Western medicine + Coronavirus.” Given these platforms' global user base, this silencing of information reaches far beyond China. And, using its controversial Protection from Online Falsehoods and Manipulation Act (POFMA), Singapore ordered Facebook to restrict domestic access to the States Times Review's page. While the page may have published some problematic coronavirus-related content, it is run by a government critic, and authorities have repeatedly invoked POFMA to suppress dissenting voices.

4 Moreover, authorities are citing covid-19 to expand their monitoring capabilities beyond what is necessary for public health surveillance. In China, residents must use a new app that determines their health status, assigning a color-coded designation based on unspecified criteria to dictate whether they can move freely. It appears to automatically share users' location with police. Moscow is following a similar playbook, using citywide, real-time facial recognition to identify people breaking quarantine. Over the past year, Muscovites have experienced protest-related arrests and connectivity disruptions, and this new biometric system will be used beyond tracking quarantine violators and long after the outbreak.

5 Finally, like Moscow last week, some governments are restricting large gatherings to increase social distancing. In some cases, this may be necessary; the U.S. Centers for Disease Control and Prevention recommended such an action on Sunday. But not all countries have good records on free assembly. Despite reporting no cases within the country at the time, a Kyrgyzstan court originally banned mass rallies in Bishkek partly because of the coronavirus. The decision came just days after a protest in support of a jailed politician ended in a violent clash, with police arresting numerous attendees. The coronavirus was also cited to ban an International Women's Day rally.

6 Similarly, El Salvador barred gatherings with more than 500 people on Wednesday, even with no confirmed cases. Iraq, which has been rocked by protests for months, has also prohibited public gatherings. Even liberal democracies risk normalizing emergency measures. For example, to track infections, the United States reportedly pressured airlines to provide international travelers' phone numbers and email addresses. It is important to communicate with and monitor infected passengers, but it is also crucial to ensure that any information collected is not misused and that these practices do not continue long after.

7 Certain limitations on fundamental freedoms are unavoidable during public health crises. But such restrictions must be transparent, and necessary and proportionate to limiting the outbreak. Temporarily curbing mass gatherings can be justified, as long as authorities are transparent and provide details about when restrictions will be lifted. Yet much of the enhanced surveillance and censorship of recent weeks does not meet these standards.

8 If governments are allowed to impose indefinite and disproportionate restrictions on access to information, free expression, free assembly and privacy in the name of stopping covid-19, the negative effects will extend far beyond this outbreak. People will suffer a lasting deterioration in basic freedoms, and they will lose confidence in the institutions tasked with protecting them. That means that when the next public health threat emerges, both governments and citizens may be even less prepared to respond appropriately.

Stop It With the Coronavirus Curfews Already

March 17, 2020

Reason

By Matt Welch

1 Now that sports have been effectively canceled, there is apparently a new competition afoot in this coronavirus-cursed country: Politicians vying to see who can impose the most freedom-infringing clampdown in the name of flattening the curve. New Jersey Gov. Phil Murphy on Monday evening "strongly suggested" a statewide curfew between 8 p.m. and 5 a.m., with exceptions made only for emergencies and "essential travel," whatever that means. For now, this designation falls short of an official order, resting instead in the vaguely threatening legal zone of strong discouragement, though the governor has literally promised "more draconian steps" in the future.

2 The move came concurrently as a "shelter in place" order for the 7 million residents of six counties in the San Francisco Bay Area, who are now permitted to leave their own homes only "to provide or receive certain essential services or engage in certain essential activities and work for essential business or government services." Violating the order is a misdemeanor that—according to the order!—"constitutes an imminent threat and creates an immediate menace to public health." Don't worry, though; San Francisco Police Chief William Scott said that cops will be taking a "compassionate, commonsense approach" to enforcement. "We're absolutely considering that," New York City's clownpants mayor Bill de Blasio added this morning.

3 It is worth thinking this stuff through a bit more than your average politician. I sit squarely on the worst-case-scenario side of the spectrum and have been practicing the kinds of social distancing de Blasio is only belatedly preaching, but there are at least four main commonsense objections to curfews that arise even before you start considering the constitutionality and massive economic impact of it all.

4 1) Shutting most everything down creates *real* shortages, not just the no-toilet-paper-at-Whole-Foods kind. The more people and industries you order locked down, the more supply chains get broken, the more stores shutter, the fewer goods are available. We all still need stuff, even if we're sitting indoors all day. And in cramped, big cities like New York, where living space is at a premium, there is frequently neither storage space nor predilection for stocking up on weeks' worth of food at a time.

5 2) Compressing the commercial day will mean more people shopping together in close quarters. The smart play until now among germaphobes has been hitting up the local Rite Aid in the wee small hours. Mayors, county executives, and governors are increasingly foreclosing that option.

6 3) Law enforcement has more urgent priorities than policing the free movement of citizens. At a moment when National Guard reservists are being called up to build emergency ICU capacity, do we really want available man/womanpower scaring peaceable residents straight?

7 4) Human beings do not have a limitless capacity for self-imprisonment. We are about to see a *lot* of resentment from the healthy Youngs about how they no longer have jobs or the ability to make student loan payments because of draconian governmental measures to combat a disease disproportionately affecting the Olds. But even setting that aside, in the absence of V-1 bombs flying overhead, people are eventually going to bust out of their containment. Setting up legal regimes in contravention of human nature is a recipe for all kinds of trouble.

8 How do these curfews and mandatory quarantines end? No really, how do they? What does success look like? When is the "emergency" over? We see very little acknowledgment that these questions are even relevant, let alone attempts to answer them amid the cascade of competitive shutdowns.

9 I, too, urgently hope that people mostly stay the hell away from each other over the coming weeks. But not at gunpoint, and not in such a way that creates new and perhaps even worse pathways for unhealthy behavior. Let's be careful out there both personally and governmentally.