

Draconian COVID-19 Lockdown Powers: It's a Slippery Slope from Handwashing to House Arrest

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“Everything can be taken from a man but one thing: the last of the human freedoms — to choose one’s attitude in any given set of circumstances, to choose one’s own way.”—Viktor Frankl

We still have choices.

Just because we’re fighting an unseen enemy in the form of a virus doesn’t mean we have to relinquish every shred of our humanity, our common sense, or our freedoms to a nanny state that thinks it can do a better job of keeping us safe.

Whatever we give up willingly now—whether it’s basic human decency, the ability to manage our private affairs, the right to have a say in how the government navigates this crisis, or the few rights still left to us that haven’t been disemboweled in recent years by a power-hungry police state—we won’t get back so easily once this crisis is past.

The government never cedes power willingly.

Neither should we.

Every day brings a drastic new set of restrictions by government bodies ([most have been delivered by way of executive orders](#)) at the local, state and federal level that are eager to flex their muscles for the so-called “good” of the populace.

This is where we run the risk of this whole fly-by-night operation going completely off the rails.

It’s one thing to attempt an experiment in social distancing in order to flatten the curve of this virus because we can’t afford to risk overwhelming the hospitals and exposing the most vulnerable in the nation to unavoidable loss of life scenarios. However, there’s a fine line between [strongly worded suggestions for citizens to voluntarily stay at home and strong-armed house arrest orders](#) with penalties in place for non-compliance.

More than [three-quarters of all Americans have now been ordered to stay at home](#) and that number is growing as more states fall in line.

[Schools have cancelled physical classes](#), many for the remainder of the academic year.

Many of the states have [banned gatherings of more than 10 people](#).

At least three states (Nevada, North Carolina, and Pennsylvania) have [ordered non-essential businesses to close](#).

In Washington, DC, residents face [90 days in jail and a \\$5,000 fine](#) if they leave their homes during the coronavirus outbreak. Residents of Maryland, Hawaii and Washington State also risk severe penalties of up to a year in prison and a \$5,000 fine for violating the stay-at-home orders. Violators in Alaska could face [jail time and up to \\$25,000 in fines](#).

Kentucky residents are [prohibited from traveling outside the state](#), with a few exceptions.

New York City, the epicenter of the COVID-19 outbreak in the U.S., is [offering its Rikers Island prisoners \\$6 an hour to help dig mass graves](#).

In San Francisco, [cannabis dispensaries were included among the essential businesses allowed to keep operating](#) during the city-wide lockdown.

New Jersey's governor [canceled gatherings of any number](#), including parties, weddings and religious ceremonies, and warned the restrictions could continue for weeks or months. One city actually [threatened to prosecute residents who spread false information](#) about the virus.

Oregon [banned all nonessential social and recreational gatherings](#), regardless of size.

Rhode Island has [given police the go-ahead to pull over anyone with New York license plates](#) to record their contact information and order them to self-quarantine for 14 days.

South Carolina's police have been [empowered to break up any public gatherings of more than three people](#).

Of course, there are exceptions to all of these [stay-at-home orders](#) (in more than 30 states and counting), the longest of which runs until June 10. Essential workers (doctors, firefighters, police and grocery store workers) can go to work. Everyone else will have to fit themselves into a variety of exceptions in order to leave their homes: for grocery runs, doctor visits, to get exercise, to visit a family member, etc.

Throughout the country, [more than 14,000 "Citizen-Soldiers" of the National Guard have been mobilized](#) to support the states and the federal government in their fight against the coronavirus. While the Guard officials insist they have not been tasked with martial law, they are coordinating with the Pentagon, FEMA and the states/territories on COVID-19 response missions.

A quick civics lesson: **Martial law is a raw exercise of executive power that can override the other branches of government and assume control over the functioning of a nation**, state, or smaller area within a state. The power has been exercised by the president, as President Lincoln did soon after the start of the Civil War, and by governors, as was done in Idaho to quell a miner's strike that broke out there in 1892.

In areas under martial law, all power rests with the military authority in charge. As British General Wellington wrote, "martial law" is not law at all, but martial rule; it abolishes all law and substitutes for it the will of the military commander. Military personnel are not bound by constitutional restrictions requiring a warrant, and may enter and search homes at without judicial authorization or oversight. Indeed, civil courts would no longer be functioning to

hear citizen complaints or to enforce their constitutional rights.

Thus far, we have not breached the Constitution's crisis point: martial law has yet to be overtly imposed (although an argument could be made to the contrary given the militarized nature of the American police state).

It's just a matter of time before all hell breaks loose.

If this is not the defining point at which we cross over into all-out totalitarianism, then it is at a minimum a test to see how easily we will surrender.

Curiously enough, although Americans have been generally compliant with the government's suggestions and orders with a few notable exceptions, there's been a small groundswell of resistance within parts of the religious community over [whether churches, synagogues and other religious institutions that hold worship services should be exempt](#) from state-wide bans on mass gatherings. While many churches have resorted to drive-in services and live-streamed services for its congregants, others have refused to close their doors. One pastor of a 4,000-member church who stood his ground, claiming that the government's orders violate his right to religious freedom, was [arrested after holding multiple church services](#) during which attendees were reportedly given hand sanitizer and made to keep a six-foot distance between family groups.

Police arrest Florida pastor for holding church services despite stay-at-home order



By **Daniel Burke**, CNN Religion Editor

Updated 0054 GMT (0854 HKT) March 31, 2020

Screenshot from CNN

It's an interesting test of the First Amendment's freedom of assembly and religious freedom clauses versus the government's compelling state interest in prohibiting mass gatherings in order to prevent the spread of the virus.

Generally, the government has to show a compelling state interest before it can override certain critical rights such as free speech, assembly, press, search and seizure, etc. Most of the time, it lacks that compelling state interest, but it still manages to violate those rights, setting itself up for legal battles further down the road.

These lockdown measures—on the right of the people to peaceably assemble, to travel, to engage in commerce, etc.—unquestionably restrict fundamental constitutional rights, which might pass muster for a short period of time, but can it be sustained for longer stretches legally?

That's the challenge before us, of course, if these days and weeks potentially stretch into months-long quarantines.

For example, the First Amendment guarantees "the right of the people peaceably to assemble." While the freedom to travel has been specifically recognized only as in the context of interstate or international travel, the freedom of movement is implicit liberty given that government agents may not stop and question or search persons unless they have some legal justification.

As Supreme Court **Justice William Douglas** once wrote:

The right to travel is a part of the “liberty” of which the citizen cannot be deprived without the due process of law under the Fifth Amendment. . . . Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values.

As a rule, people are free to roam and loiter in public places and are not required to provide police with their identity or give an account of their purpose for exercising their freedom.

However, as with all constitutional rights, these freedoms, as the Courts have ruled, are not unqualified. Even content-based restrictions on speech are allowed under the First Amendment if the restriction is needed to serve a compelling government interest.

The Supreme Court long ago “distinctly recognized the authority of a state to enact quarantine laws and health laws of every description[.]” Such laws are an exercise of the state’s police power, and if there is a rational basis for believing they are needed to protect the public health, they will be [deemed to serve a compelling government interest](#).

The point was made over 100 years ago in circumstances similar to today’s COVID-19 outbreak when a smallpox outbreak occurred in Cambridge, Mass., invoking a state law allowing localities to make vaccinations mandatory and enforceable by criminal penalties. In upholding the law and local order against a claim that it violated the constitutional liberty to control one’s own body and health, the Supreme Court declared:

The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one’s own will.

The Court went on to write that “[u]pon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.”

Most states have enacted laws that recognize the need for prompt action in times of emergency, including epidemics, and have delegated the authority to an executive officer to take action to address that emergency. For example, Tennessee law provides that the governor is given the power to issue orders that have the force and effect of law to address emergencies, which include disease outbreaks and epidemics. That state’s law similarly grants mayors or other local chief executive officers the power to issue orders and directives deemed necessary, including closing public facilities, in order to address civil emergencies.

Courts have ruled that they will defer to the decisions of an executive authority on the decision as to whether an emergency exists and whether the means employed to address the emergency are reasonable and legal, although there could be situations where a court would declare that the executive decision is arbitrary and unreasonable.

When governments act under their police power to control plagues and epidemics, those laws are valid even though they may restrict individuals in the exercise of constitutional rights. As one legal scholar recently noted, the balance between individual rights and protection of the public “assumes that [there will be times when there are truly compelling emergencies justifying severe measures](#). A global pandemic that spreads even among those who are asymptomatic and could exceed the capacity of the American health care system would appear to be just such a compelling situation.”

At the moment, the government believes it has a compelling interest—albeit a temporary one—in restricting gatherings, assemblies and movement in public in order to minimize the spread of this virus.

The key point is this: while we may tolerate these restrictions on our liberties in the short term, we should never fail to be on guard lest these one-time constraints become a slippery slope to a total lockdown mindset.

What we must guard against, more than ever before, is the tendency to become so accustomed to our prison walls—these lockdowns, authoritarian dictates, and police state tactics justified as necessary for national security—that we allow the government to keep having its way in all things, without any civic resistance or objections being raised.

Martin Niemoller learned that particular lesson the hard way.

A German military officer turned theologian, Niemoller was an early supporter of Hitler’s rise to power, having believed his promises to protect the church and not allow pogroms against the Jewish people. It didn’t take long for Hitler to break those promises, but by the time the German people realized they had been double-crossed, it was too late.

As Niemoller warned:

“First they came for the Socialists, and I did not speak out—Because I was not a Socialist. Then they came for the Trade Unionists, and I did not speak out—Because I was not a Trade Unionist. Then they came for the Jews, and I did not speak out—Because I was not a Jew. Then they came for me—and there was no one left to speak for me.”

The lesson for those of us housebound and watching from a distance as the Fourth Reich emerges from the shadows is this: all freedoms hang together.

Niemoller’s warning for our modern age would probably go something like this: First the government went after the right to be free from unreasonable searches and seizures, and I did not object, because I had nothing to hide. Then they went after the right to not be spied upon, and I did not object, because I had done nothing wrong. Then they went after the right to criticize the government, and I still did not object, because I had nothing to criticize them for. Then they went after the right to speak—worship—and assemble freely, and I did not object, because I had nothing to say, no one to worship, and nowhere to congregate. By the time the government came to lock me up, there was no one left to set me free.

In other words, don’t be naïve: the government *will* use this crisis to expand its powers far beyond the reach of the Constitution. The Justice Department has already signaled its desire to [suspend parts of the Constitution indefinitely](#).

That's how it starts.

Travel too far down that slippery slope, and there will be no turning back.

Curiously enough, although Americans have not been inclined to agree on anything much lately, given the extreme polarization of the country politically, a recent survey indicates that "[people of both parties seem rather okay with undermining core civil liberties in order to fight the pandemic.](#)"

This way lies madness.

As I make clear in my book [Battlefield America: The War on the American People](#), if you wait to speak out—stand up—and resist until the government's lockdowns impact *your* freedoms personally, it could be too late.

What would be far worse, however, is handing over your freedoms voluntarily—without even a semblance of protest—to a government that cares little to nothing about your freedoms or your lives.

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