

VIEWPOINT

Presidential Powers and Response to COVID-19

Lawrence O. Gostin, JD
O'Neill Institute for
National and Global
Health Law,
Georgetown University
Law Center,
Washington, DC.

**James G. Hodge Jr, JD,
LLM**
Sandra Day O'Connor
College of Law, Arizona
State University,
Phoenix.

**Lindsay F. Wiley, JD,
MPH**
Washington College of
Law, American
University,
Washington, DC.

The Centers for Disease Control and Prevention (CDC) modeling suggests that, without mitigation, severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2), the virus that causes novel coronavirus disease 2019 (COVID-19), could infect more than 60% of the US population.¹ President Trump has declared a national emergency along with 50 governors declaring state emergencies (Figure), which are unprecedented actions. Social distancing aims to flatten the epidemic curve to moderate demand on the health system. Consequently, whether through voluntary actions or state mandates, individuals are increasingly sheltering at home, schools and universities are closing, businesses are altering operations, and mass gatherings are being canceled. On March 16, the health officers of 6 local governments in the San Francisco Bay Area issued mandatory orders to shelter in place, making it a misdemeanor offense to leave home for any nonessential purpose.

Some countries have resorted to more aggressive measures, including *cordons sanitaire* (guarded areas in which individuals may not enter or leave) or large-scale ordering of individuals to remain in their homes at all times. What powers do the president and governors have in the United States? How should individual rights be balanced with public health at a critical point in safeguarding the nation's health?

Federal Emergency Powers

The federal government has declared 3 national emergencies in response to COVID-19. On January 31, US Secretary of Health and Human Services (HHS) Alex Azar issued a public health emergency under the Public Health Service Act (PHSA), authorizing funds and facilitating rapid development of diagnostic tests, antiviral drugs, and vaccines. On March 13, the president declared a national emergency under the National Emergencies Act, waiving federal rules to facilitate telemedicine and increase hospital capacity. He also declared an emergency under the Stafford Disaster Relief and Emergency Assistance Act, asserting "the preeminent responsibility of the Federal Government to take action to stem a nationwide pandemic,"² coordinated through the Federal Emergency Management Agency.

The PHSA authorizes the HHS secretary to prevent international and interstate spread of communicable diseases, regardless of emergency declarations.³ The CDC has used this authority to isolate and quarantine repatriated US citizens from Hubei Province, China, and 2 cruise ships. This extensive use of federal quarantine powers has no modern precedent. The CDC has not exercised its quarantine authority in the last 50 years ago other than to address single, suspected cases. The PHSA⁴ and CDC regulations permit the federal government to take additional actions deemed reasonably necessary to prevent interstate spread of communicable diseases if

state and local responses are inadequate, but the extent of this authority has not been tested.⁵

Travel Restrictions

Recently, the president banned most non-US citizens from entry into the United States traveling from the Schengen area (an area comprising 26 European states that have officially abolished all passport and other types of border control), the United Kingdom, and Ireland, on top of existing bans from China and Iran. The CDC rarely issues advisories against travel to particular locations within the US and has not done so to date for COVID-19. The CDC last advised against domestic travel during the 2017 Zika outbreak, recommending pregnant women avoid travel to southern Florida. While the White House has policies for military and government personnel traveling to places experiencing high levels of COVID-19 cases, it has not, as of yet, restricted domestic travel for the US public.

The US Constitution prohibits deprivations of life, liberty, or property without due process and guarantees equal protection of law. Judicial precedents also suggest that the freedom to travel domestically is constitutionally protected.⁶ These fundamental rights are not absolute, but rather are balanced against compelling state interests in safeguarding the nation against a novel, highly transmissible virus.

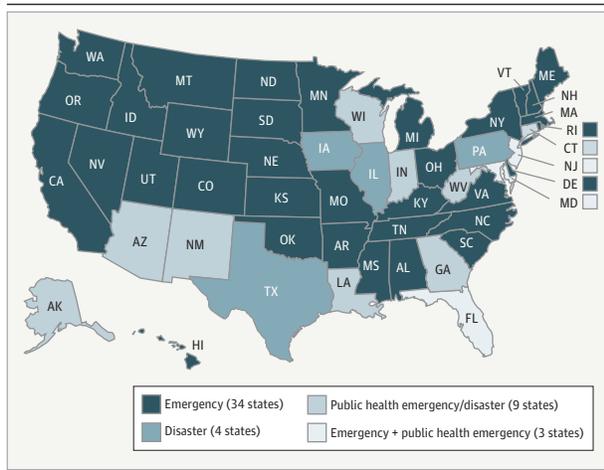
State and local health agencies have historically exercised powers to isolate or quarantine individuals infected with, or exposed to, dangerous infectious diseases. Courts typically uphold these powers if supported by clear scientific evidence. Large-scale domestic travel bans, however, would be extraordinary and constitutionally problematic. Authorities' attempts to confine infected and uninfected individuals together within a *cordon sanitaire* would be subjected to the highest level of judicial scrutiny. More than 120 years ago, a federal district court banned a *cordon sanitaire* in San Francisco during a plague outbreak because it operated almost exclusively against the Chinese community.⁷

If a state or locality experiencing a major COVID-19 outbreak ordered a *cordon sanitaire*, it would have to be implemented with extreme care, including strong justifications regarding timing and geographic scope. Decision-making would need to be fair and transparent, demonstrating that no less restrictive interventions could safeguard the public's health. Arguably, rigorous social distancing, such as comprehensive closures, assembly limits, and targeted quarantines, would be as, or more, effective and less restrictive of liberty.

Presidential action to restrict domestic travel would be even more constitutionally problematic under the US federalist system, by which states possess primary public health powers. The high potential for a local COVID-19 outbreak to result in interstate transmission could justify

**Corresponding
Author:** Lawrence O.
Gostin, JD,
Georgetown University
Law Center, 600
New Jersey Ave NW,
McDonough 568,
Washington, DC 20001
([gostin@law.
georgetown.edu](mailto:gostin@law.georgetown.edu)).

Figure. State Declarations of Emergency in Response to Novel Coronavirus Disease 2019 (as of March 15, 2020)



Descriptions of the emergency, disaster, and public health emergency categories can be found at <https://www.networkforphl.org/resources/emergency-legal-preparedness-covid19/>.

some intrusion on states' rights, but national health powers are limited. Federal law, even during an emergency, does not expressly authorize a large-scale domestic travel ban, which could require more specific legislative authority.

Sheltering in Place

While the CDC has issued voluntary guidance urging people to stay home as much as possible, county health authorities in the San Francisco Bay Area have broadly ordered people to shelter in place for a 3-week period beginning March 17. Permissible exceptions include activities to care for vulnerable persons; seek medical and other essential service providers; and pick up food, medical, home maintenance, and office supplies, as well as employees performing essential work and walking outdoors other than in groups. Violators are subject to criminal penalties. Legal challenges related to significant infringements of individual liberties and business interests are likely.

Social Distancing

Many cities and states have ordered social distancing, including closing schools, altering business operations, instituting curfews, and prohibiting large gatherings. Studies suggest that banning all large gatherings would significantly diminish the spread of SARS-CoV-2, yet many

have not done so.⁸ To promote uniformity, the federal government has recommended social distancing, with federal agencies offering technical assistance. The CDC has issued guidance to limit gatherings to no greater than 50 persons for the next 8 weeks. On March 16, President Trump advised that gatherings of more than 10 persons should be avoided. Congress could also condition certain health funding on states' conformity with national recommendations. Yet, the president could not directly order states to implement federal standards.

Mandated or voluntary self-isolation imposes hardship particularly for those at high risk, such as the elderly or individuals with chronic disease. Federal agencies should provide critical support for individuals separated from their communities, including emergency authorizations to provide food, medical services, and other essentials. Congress' proposed Families First Coronavirus Response Act would significantly expand services, including paid sick leave, nutrition assistance, and coverage for SARS-CoV-2 testing.⁹

Balancing Rights and Public Health in a National Emergency

COVID-19 poses a threat to US health and security, justifying rigorous interventions at levels US residents have rarely experienced. Yet, it is important to carefully balance public health with rights to privacy and liberty. Exercising public health powers unmoored from constitutional rights is unwarranted.

Achieving a careful balance between public health and individual rights requires adherence to 6 key principles: (1) interventions should be *evidence-based* and grounded in scientific knowledge, not political considerations; (2) health officials should make *individualized risk assessments* demonstrating a significant risk to the public; (3) coercive measures should be *proportionate* to the threat faced; (4) there should be no *less restrictive alternatives* to accomplish public health objectives; (5) individuals subject to deprivation of liberty should be afforded *due process*, including impartial hearings; and (6) government should ensure *fair and equal treatment*, avoiding stigma or discrimination against individuals or groups.

Vulnerable or disadvantaged populations (eg, the elderly, poor or uninsured, persons with disabilities, undocumented immigrants, and racial/ethnic minorities) face major and unique hardships. While taking aggressive action to respond to an historic health crisis, it is also vital to ensure the health, safety, and well-being of communities often left behind or discriminated against. Government must guarantee a robust social safety net, while individuals exercise civic responsibility toward family and neighbors, as well as those in greatest need.

ARTICLE INFORMATION

Published Online: March 18, 2020.
doi:10.1001/jama.2020.4335

Conflict of Interest Disclosures: None reported.

REFERENCES

- Fink S. Worst-case estimates for US coronavirus deaths. *New York Times*. Published March 13, 2020. Accessed March 15, 2020. <https://www.nytimes.com/2020/03/13/us/coronavirus-deaths-estimate.html>
- Robert T. Stafford Disaster Relief and Emergency Assistance Act. 42 USC §5191(b) (2018).
- Control of Communicable Diseases: Interstate Quarantine. 42 USC §70.2 (2017).
- Public Health Service Act. 42 USC §264(a) (2018).
- Communicable Disease Control: Interstate. 42 CFR §70.2 (2017).
- Saenz v Roe*, 526 US 489 (1999).
- Jew Ho v Williamson*, 103 F.10 (ND Cal 1900).
- Emanuel Z, Spiro T, Calsyn M, Waldrop T, Rapfogel N, Parshall J. State and local governments must take much more aggressive action immediately to slow spread of the coronavirus.
- Center for American Progress. Published March 14, 2020. Accessed March 15, 2020. <https://www.americanprogress.org/issues/healthcare/news/2020/03/14/481763/state-local-governments-must-take-much-aggressive-action-immediately-slow-spread-coronavirus/>
- Families First Coronavirus Response Act, HR 6201, 116th Cong (2020).