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Preventing Liberty from Becoming a Coronavirus Fatality

Ted Galen Carpenter

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Public attitudes about the coronavirus outbreak increasingly exhibit features of a collective panic. That development creates the danger that government measures designed to deal with a very real public health problem may lead to enormous collateral damage both to the economy and the freedoms that Americans take for granted.

Governments at all levels have taken ever more extreme (even outrageous) actions in an effort to stem the outbreak. The governors of New York, California, and other states have issued orders closing most private businesses and requiring residents not engaged in “essential” activities to remain in their homes. Nevada’s governor greatly restricted doctors from prescribing an anti-malaria drug that Trump administration experts suggested held promise for treating coronavirus, because in the governor’s opinion, such prescriptions might lead to hoarding. U.S. Justice Department officials secretly asked Congress to give the executive branch the authority to seek orders from federal judges to detain indefinitely any individual during the current emergency or any future one.

Although appalling, such attempted eviscerations of constitutional liberties should not be surprising. Governments invariably exploit crises to expand their powers—often to a dangerous degree. That certainly has been the track record in the United States throughout our history. Worse, a significant residue of expanded powers always persists after the crisis recedes and life supposedly returns to normal.

Most, but not all, of the abuses and unhealthy expansions of power have occurred during wartime. World War I led to statutes and executive orders that still haunt us more than a century later. For example, various administrations have used the Espionage Act of 1917 to punish whistleblowers and intimidate investigative journalists. Barack Obama’s administration even waged a campaign to harass and intimidate journalists who published leaked material. Officials conducted electronic surveillance of both New York Times reporter James Risen and Fox News correspondent James Rosen in an effort to identify their sources. The government named Rosen as an “unindicted co-conspirator” in an espionage case brought against his source. The administration asserted that it had the right to prosecute Risen, even though it chose not to take that step.

Later presidents used other laws passed during World War I in ways the legislators who enacted them never contemplated. For example, in August 1971 Richard Nixon declared a national

emergency under the Trading with the Enemy Act of 1917 to impose import tariffs, close the gold window for international payments, and establish domestic wage and price controls.

World War II produced additional abuses and dangerous precedents. The most alarming example was President Franklin D. Roosevelt's executive order putting Japanese Americans in "relocation centers" (concentration camps). In an especially shameful ruling, the U.S. Supreme Court upheld the legality of his action. That decision is not just a matter of academic or historical interest. Later administrations developed contingency plans along the lines of FDR's infamous executive order. In the aftermath of the 9-11 terrorist attacks, suggestions surfaced that Muslim aliens (and even Muslim-American citizens) should be subjected to internment measures as part of the war on terror.

During the Korean War, President Harry Truman expanded the number and scope of executive orders, further enlarging the power of the presidency—a power surge that already had reached troubling levels under Woodrow Wilson and FDR. Truman's most flagrant initiative was his attempt to seize control of the nation's steel mills as a wartime measure. Fortunately, on that occasion the Supreme Court fulfilled its constitutional duty and struck down his dangerous executive power grab.

More recently, the policy responses to the 9-11 terrorist attacks included that 2001 Authorization for the Use of Military Force (AUMF), ostensibly to wage war against Al Qaida and its allies. However, the AUMF became a veritable blank check for presidents to wage wars anytime, anywhere, for any reasons those presidents deemed appropriate. Domestically, the response to 9-11 included the so-called Patriot Act and its legendary erosions of the 4th Amendment's protections against unreasonable searches and seizures, as well as the weakening of other substantive and due process rights guaranteed in the Constitution. That measure was a crucial building block in the growth of the current pervasive surveillance state.

Wars and other "national emergencies" produced an array of lesser, but still undesirable, expansions of governmental power and the narrowing of individual rights. For example, the federal government's response to the economic and financial dislocations of the Great Depression included Roosevelt's executive order banning the private ownership of gold. That annoying limitation continued until the mid-1970s.

The historical record also demonstrates that "temporary" measures enacted to deal with a specific crisis frequently prove to be anything but temporary. One insidiously corrosive "temporary" change was the establishment of the withholding provision to the federal income tax during World War II. That temporary measure is still with us, and the effect has been revolutionary. Paying the tax in installments that show up as nothing more than an entry on an employee's paycheck stub disguises the extent of the actual tax burden on that individual and reduces the emotional impact.

The fundamental lesson from these historical episodes is that Americans need to resist the casual expansion of arbitrary governmental power in response to the current coronavirus crisis. New local and state governmental assaults on civil liberties came early and already are disturbingly plentiful. In early March, authorities around the United States ordered schools to close and either prohibited large-scale public events or pressured the sponsors to take such action. A growing number of jurisdictions soon went further. San Francisco ordered residents to "shelter in place," barring them from engaging in any "nonessential" activity outside their own homes. All of this

occurred before California Governor Gavin Newsom and New York Governor Andrew Cuomo set a new, even more intrusive pattern by ordering statewide lockdowns.

Beyond the trampling of property rights and other crucial liberties, the coronavirus episode has led to worrisome erosions of the democratic political process. Louisiana and Georgia were the first states to cancel primary elections, citing the danger of contagion among polling place crowds. Other states, including Ohio and Maryland, soon followed

Both the nature and scope of the expanding restrictions should alarm all defenders of liberty. In mid-March, North Carolina went beyond shutting down individual enterprises or even types of businesses; authorities there placed most of the Outer Banks off limits to tourists and other outsiders. Police established checkpoints to examine identifications and required special permits for access. There is more than a small echo in that measure of the ubiquitous police or military checkpoints and “show your papers” demands that countries in the old Soviet bloc implemented, and various dictatorships around the world require today. It’s an ominous policy and image.

Sentiments in favor of comprehensive lockdowns to halt the spread of the virus reflect understandable emotions, but panic is always a poor basis for policy decisions. The economic costs of such radical responses to the coronavirus outbreak are enormous, and the damage to basic liberties ultimately may prove even worse. Ugly, potentially dangerous precedents are being set left and right. In virtually every case, officials imposed restrictions without any provisions for appeal—or even public comment. Worse, they did not seem to recognize any limits to their power with respect to a health crisis. The steps taken to date go far beyond the longstanding authority of local governments to impose quarantines on individuals or families diagnosed with certain highly contagious diseases. Entire cities and states are now being put on similar lockdowns, even though the overwhelming majority of residents show no signs of coronavirus

Worries about expansive government diktats and precedents are especially warranted if the coronavirus outbreak is neither unique nor a crisis of short duration. Originally, there was a pervasive assumption that the emergency would last only a few weeks, and then life in America (as well as other countries) would return to normal. But in Trump’s March 16 press conference, both the president and his health policy advisers indicated that the outbreak might last until July or August. Some experts in Britain fear that it could last until spring 2021.

That possibility creates some very serious concerns. There is no realistic way that a complex, inter-connected market economy can operate effectively for an extended period of time with a country—or even major portions of it—on lockdown. A similar problem arises if the coronavirus does not prove to be a one-time visitor, but resembles influenza outbreaks that ebb and flow each year. In addition to the adverse economic consequences, forcibly cocooned populations will have every justification to become furious if arbitrary bureaucratic edicts repeatedly uproot their lives.

There is an imperative reason to monitor and curb some of policy precedents being set. Future overcautious or egotistical public officials will be tempted to impose drastic measures even in response to lesser health or other emergencies. Government orders closing private businesses fundamentally alter the relationship between individuals and the state in a dangerous fashion. Travel restrictions that confine people to their homes or bar them from specific areas are further cause for alarm. Such restrictions always have been a hallmark of authoritarian political systems. Likewise, the postponement of elections is unsettling. Giving incumbent officials such

authority creates an obvious potential for abuse—especially if the incumbents face the prospect of electoral defeat. Perhaps worst of all is the possibility of the federal government being able to seek the indefinite detention of people based on nothing more than a Justice Department request and a compliant judge’s order.

Given the historical record of how previous emergencies spawned corrosive policies that continue to menace basic freedoms years or decades later, it is urgent to seek effective curbs on the growing abuses of power in the current crisis. We must resist being stampeded into endorsing whatever policies self-interested officials insist are necessary. Benjamin Franklin observed that “those who would give up essential liberty, to purchase a little temporary safety, deserve neither liberty nor safety.” Americans must keep that wise admonition in mind during and after the coronavirus crisis.

Ted Galen Carpenter is vice president for defense and foreign policy studies at the Cato Institute. Dr. Carpenter is the author of seven books and the editor of ten books on international affairs.