



COVID-19, Bill Barr and the American authoritarian tradition

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National crises—real or manufactured—often bring out the worst in government officials. It was reported on Saturday that the Justice Department requested from Congress the ability to ask chief judges to indefinitely detain people without trial during the COVID-19 pandemic.

This penchant of federal officials to attempt or actually suspend the Bill of Rights dates from the first decade of the American republic to the present day. Now, Attorney General Bill Barr is seeking to revive the use of at least some of those past tools of political repression in the name of combatting a microscopic, and all-to-frequently lethal virus.

It was the authoritarian Federalists who pushed the Alien and Sedition Acts through the Congress in 1798. President Lincoln suspended habeas corpus at the outbreak of the Civil War. President Wilson and a pliant Congress gave the country the Espionage Act, Trading with the Enemy Act, a revived Sedition Act and the Food and Fuel Control Act (which allowed federal agents to enter people's homes to see if they were "hoarding" flour, sugar or other daily staples). President Franklin Delano Roosevelt ordered the internment of over 100,000 innocent Japanese Americans after the Pearl Harbor attacks—a scurrilous unconstitutional act upheld by the Supreme Court at the time and only repudiated by the current Supreme Court less than two years ago. During the Cold War, the House Committee on Un-American Activities and its Senate counterpart, the Internal Security Subcommittee, spent decades and taxpayer dollars in public anti-communist witch hunts that destroyed the reputations and lives of thousands of Americans.

Exactly how would suspending court proceedings prevent the spread of the virus? Given where we are in this pandemic, eliminating in-person court proceedings might be prudent from a public health standpoint, but much of the American justice system can operate utilizing existing telecommunications technology.

My ongoing Freedom of Information Act (FOIA) lawsuit against the Defense Department and the National Security Agency is a case in point. Since the beginning of March, the magistrate judge presiding in our mediation proceedings has held two judicial teleconferences with the parties. From a procedural and technological standpoint, those conferences have gone off without a hitch. Given the availability of video teleconferencing capabilities, there's simply no justification for suspending criminal proceedings either, as Barr is pushing.

Barr's power play for essentially open-ended suspensions of criminal proceedings and related matters has nothing to do with stopping the spread of COVID-19. Barr's proposals, at least so far as we know from public reporting thus far, involve giving judges the power to suspend court proceedings "whenever the district court is fully or partially closed by virtue of any natural disaster, civil disobedience, or other emergency situation." The only reason to suspend court proceedings would be if no judges, court recorders, or other court personnel were available to deal with cases. That's not the case now and is highly unlikely ever to be the case. Our legal system can absolutely continue to operate in the digital age, as my own experience and that of many others demonstrates.

The condemnation of Barr's proposals has been swift and bipartisan. Sen. Chuck Schumer (D-N.Y.), representing one of the states hardest hit by COVID-19, had a terse response to Barr's gambit: "Hell no." Rep. Justin Amash (I-Mich.) tweeted "Congress must loudly reply NO." Sen. Rand Paul (R-Ky.) went further in his tweet:

"We absolutely must, must, resist government run amok taking advantage of a crisis. This is how your liberty dies. Stand up America and resist."

Resist indeed.

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