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The Government Has A Lot More Emergency Powers Than Libertarians Like, But It Still Can't Control Everything

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In the last month, I've found myself in the awkward position of defending all sorts of outlandish government actions. Yes, the president really can requisition ventilators and masks from manufacturers that can produce them, under the Defense Production Act, but he has to pay for them. This is a rewrite of government-contracting law, not Harry Truman's seizure of steel mills during the Korean War.

Yes, governors really can require travelers from coronavirus hotspots to self-quarantine, provided this also applies to returning residents, not just visitors. And yes, mayors can force businesses to close and stop people from congregating, assuming they don't contradict what their governors are doing and otherwise follow applicable state law.

But how can I say that? Isn't the Cato Institute a libertarian think tank dedicated to individual liberty, free markets, and limited government? And don't I run Cato's constitutional studies shop, which rails against government excess of all kinds?

Don't these orders go beyond the Commerce Clause, infringe the Privileges or Immunities Clause, or violate one of the other constitutional provisions I'm constantly banging on about? Surely I can't approve such extreme impositions on economic liberty, the right to travel, and just the basic freedom to go about your daily life as you choose so long as you don't get in the way of others' freedom to do the same?

Well, that's the rub. As I explained during Cato's online forum on "[Coronavirus and the Constitution](#)," in a pandemic when we don't know who's infected and infections are often asymptomatic, these sorts of restrictions end up maximizing freedom. The traditional libertarian principle that one has a right to swing one's fists, but that right ends at the tip of someone else's nose, means government can restrict our movements and activities, because we're all fist-swingers now.

This isn't like seatbelt mandates or soda restrictions, where the government regulates your behavior for our own good, because—setting aside the issue of publicly borne health care costs—the only person you hurt by not wearing a seatbelt or drinking too much sugar is yourself. With communicable diseases, you violate others' rights just by being around them.

The federal government is one of enumerated and thus limited powers—at least in theory, if observed largely in the breach since the New Deal—but states have "police powers" to govern

for the public health, safety, welfare, and morals (the last one having fallen away in recent decades). Accordingly, in light of the best epidemiological data we have, state and local executives ordered “shut downs” to prevent people from being around too many other people and thus spreading the disease.

Interestingly, despite the infamous pictures of spring-breakers and St. Patrick’s Day revelers, these government actions were lagging indicators. Restaurant traffic and airline travel fell off a cliff before any official action. Airports are still open, even though the president has “total authority” to shut them down, as George W. Bush did on 9/11.

People began social-distancing and wearing masks without any edicts. Sports leagues canceled their seasons without so much as a “don’t play ball” from state umpires.

Not being satisfied with this large-scale recognition of the threat we face and compliance with common-sense rules for the “new normal,” however, governors and mayors have begun to overreach. Although I had been telling reporters that nobody was going to get arrested for reading in the park or enjoying wildlife with her family, police were indeed telling people to “move along” if they were in a public space, even if they were nowhere near anybody else.

When we got questions at that Cato forum about restrictions on the sale of “non-essential” products or prohibitions on fishing—a right going back to Magna Carta!—I thought these were far-fetched hypotheticals, but it turns out they were all too real.

Then came the bans on parking at a church and staying in your car to hear a sermon, ahead of Easter Sunday, no less, which led to one of the best district court opinions I’ve read in a long time, reversing such an order in Louisville. (Full disclosure: Judge Justin Walker is a friend, and I’m advising the Mississippi Justice Institute on one these cases in Greenville, Miss.)

Look, this isn’t about religious liberty, or any other constitutional right in particular. Assuming that social-distancing is required to “flatten the curve” and fight COVID-19, such rules are fine so long as they’re applied equally everywhere, whether to yoga studios or churches, hackathons or street protests.

But they’re not fine when they’re arbitrarily targeted at some businesses and not others, as if coronavirus spreads more in gun shops than liquor stores. They’re also not fine when they have nothing to do with social-distancing, as with the fatwas against drive-in liturgy or closing only aisles three and five of a big-box store. Or when tennis courts are closed even if the players wear all-white masks and promise not to both go to the net at the same time. Or that video of the cop chasing that poor guy going for a run on the beach by his lonesome.

These ridiculous examples of petty tyranny led to my most viral tweet ever: “Angered by citations for being in park with nuclear family, or in car at church, or running on the beach. Or ‘non-essential’ goods roped off in stores. These things have nothing to do with fighting the virus and everything to do with power-hungry politicians and law enforcement.”

Just because significant restrictions on our day-to-day lives are warranted doesn’t mean it’s a free-for-all for government coercion. To borrow a legal standard from a different context, the rules have to be “congruent and proportional” to the harm being addressed. As a matter of law, judges will give executives a wide berth to deal with a crisis, but their enforcement measures still have to pass the constitutional smell test.

More fundamentally, any regulations that don't make common sense, that aren't seen as reasonable by most people, are simply not going to be taken as legitimate, and they won't be followed. The American people will decide what restrictions are reasonable, and for how long. Just like they decided when to shut down, they have "total authority" to decide when to reopen.

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