

## WHAT REALLY DETERMINED AMERICA'S COVID-19 PANDEMIC RESPONSE? WHO IS OVERSEEING THE REACTION TO THE CORONAVIRUS?\*

Mohamed 'Arafa\*\*

### Summary

#### I Introduction

#### II "Beware of the Pandemic Panic": viruses and the COVID-19 Pandemic

#### III A Brand Sitting Still in a Pandemic: is Trump's Response to COVID-19 the Best Brand?

- 1 Coronavirus Preparedness and Response Supplemental Appropriations Act
- 2 Families First Coronavirus Response Act (FFCRA)
- 3 Coronavirus Aid, Relief, and Economic Security (CARES) Act

#### IV The COVID-19 Crisis and the Constitutional Public Rights and Civil Liberties

- (i) The First Amendment (Freedom of Assembly)
- (ii) The Second Amendment
- (iii) The Fourteenth Amendment: Women's Rights (Abortion and Reproductive Health)
- (iv) Institutional Domestic Response: the United States Federal Laws and Regulations for Control of Communicable Diseases

#### V Conclusion and Policy Recommendations: Step-by-Step and the Way Forward

#### Selected Bibliography (References)

Main USA Legislation & Case Law (General statistics from Johns Hopkins University)

---

\* Text received: 15.09.2020.

\*\* Assistant Professor of Law, Alexandria University Faculty of Law (Egypt); Visiting Adjunct Professor of Law, Indiana University, Robert H. McKinney School of Law, Indianapolis and Cornell Law School. The author extends his appreciation to his research assistants, Sydney Kadinger and Dane Foster for their substantial research that made this paper possible. Errors are all mine. For comments or questions, please contact the author at [marafa@iupui.edu](mailto:marafa@iupui.edu).

**Recommended citation:** 'Arafa, Mohamed. (2020). What really determined America's COVID-19 pandemic response? Who is overseeing the reaction to the coronavirus? *Revista Catalana de Dret Públic*, (special issue), 162-174. <https://doi.org/10.2436/rcdp.i0.2020.3551>.

## I Introduction

As the novel coronavirus known as SARS-CoV-2 spread rapidly through the United States in both winter and spring of 2020, causing extensive infection with the disease labeled COVID-19, a fresh and new challenge arose regarding how governments and jurists—specifically the legal ones—have tackled this pandemic, particularly in terms of rights and law. The task is to seek to rely on experience to explore the line between the known and unknown threats this new virus creates within various sectors, by venturing past the open pastures in search of the less obvious “wild facts” prowling in the forest. The “*wild facts*” notion is an abstract concept first expressed by philosopher William James in the early twentieth century. James tells us that “wild facts” are “subtle, unexpected particulars” that lie not in law but in human experience, and that militate against the mechanical and objective application of a society’s rules.<sup>1</sup> The pandemic has raised a host of constitutional inquiries into the interaction between state and federal governments in responding to the COVID outbreak; how government can function while observing social distancing; and how may emergency presidential powers affect democratic norms? Using Richard Posner’s contemporary take on “realism” versus “formalism” as an indicator to define today’s “wild facts”, this paper proposes a rationally inquisitive perspective, which bases decisions on science and facts, including facts that may entail effort to unearth. These hidden facts may be, if not transformative, at least substantial enough to impact decisions immensely.<sup>2</sup>

## II “Beware of the Pandemic Panic”: viruses and the COVID-19 Pandemic

Before discussing the key measures adopted in the USA to respond to the pandemic (rights and freedoms; mobility, intimacy, and economic freedom; and the intended recommendations or mandatory sanctions), along with the legal basis of the decisions taken and the debate generated around the violation of rights by the adopted measures, we need to have a basic understanding of how viruses work and how, in particular, the virus that causes COVID-19 works. Microbes, bacteria, germs, and viruses are all around us. They are part of an invisible world in which microorganisms abound that are so tiny that scientists hardly knew about them before the first half of the twentieth century.<sup>3</sup>

“[I]magine that you have powerful glasses allowing you to perceive any and all microbes. If you were to put on such magical bug-vision specs, you would instantly see a whole new, and very active, world. The floor would seethe, the walls would throb, and everything would swarm with formerly invisible life. Tiny bugs would blanket every surface—your coffee cup, the pages of the book on your lap, your actual lap. The larger bacteria would themselves teem with still smaller bugs. This alien army is everywhere, and some of its most powerful soldiers are its smallest. These smallest of bugs have integrated themselves, quite literally, into every stitch of the fabric of earthly life... They are viruses.”<sup>4</sup>

Viruses’ genetic makeup may recombine to produce totally new viruses and hence create “a rapid and radical way” for viruses “to create novelty”.<sup>5</sup> The word “novel”, when used to describe coronaviruses and human exposure to them, means that the virus is new to humans, whose immune systems do not instantaneously

1 Edmond Cahn, *Jerome Frank’s Fact-Skepticism and Our Future*, 66 Yale L.J. 824, 827 (1957).

2 See Richard A. Posner, *Reflections on Judging* 5–6, 92 (2013).

3 Nathan Wolfe, *The Viral Storm* 19–21 (2011). To complete their life cycle, viruses spread to contaminate the cells of new hosts. As viruses move from host to host, their genomic temperament changes with notable frequency, therefore increasing the odds of avoiding their hosts’ immune systems and anti-viral drugs. *Id.*, at 26–28.

4 *Id.*, at 21–22. These tiny viruses attach themselves to cells, including those of human beings. They infect those cells and “hijack the cellular processes to produce virally encoded protein that will replicate the virus’s genetic material”. See Fredric S. Cohen, “How Viruses Invade Cells”, 110 *Biophysical Journal*, 1028 (2016).

5 Wolfe, *supra* note 3, at 35. See, e.g., *Evolution of Viruses*, Khan Academy (2020), <https://perma.cc/UJM2-3TJV>. Here are some “non-essential” surgery criteria to consider: threat to patient’s life if surgery or procedure is not performed; threat to permanent dysfunction of an extremity or organ system; risk of metastases or progression of station; and time sensitivity (“[...] on a case-by-case basis delaying [sic] that delaying the abortion would push... past the point of ‘viability’ under law... is legally essential woman’s right to constitutionally”).

recognize it as an aggressor.<sup>6</sup> SARS-CoV-2, the novel coronavirus that causes COVID-19, is believed to spread among individuals mostly “through respiratory droplets produced when an infected person coughs, sneezes, or talks”.<sup>7</sup> Not all viruses are deadly, but SARS-CoV-2 is. As of now, COVID-19 has killed more than 224,732 people in the United States, and the total number of positive-infected cases has surpassed 8 million (and expected to upsurge in the upcoming few weeks and months).<sup>8</sup> The World Health Organization (WHO) has described the worldwide COVID-19 outbreak as a “pandemic”, which is a word used by health specialists to define a new infectious agent that has circulated and spread to all continents.<sup>9</sup> Scientists continue to learn more about the virus and its effects (for example, the virus can supposedly cause potentially deadly strokes). The epidemic’s unique nature has influenced nearly all facets of American life, including the legal system.

### III A Brand Sitting Still in a Pandemic: is Trump’s Response to COVID-19 the Best Brand?

According to public health law specialists, quarantines were essentially an everyday occurrence throughout early American history, as communities often practiced isolation to avoid contagious diseases. Ultimately, ordering quarantines and isolation became a *state* power under the Constitution. It was not until the nineteenth century that the federal government first engaged in controlling quarantines. This history is vital because it adds to the federal government’s quarantine power or the ability to impose such policies as are essential to avoid the introduction, transmission or spread of infectious diseases. President Trump said he would not consider a nationwide mandate to wear masks or face coverings and left it up to state governors to decide whether to implement an order requiring people to wear them in public, as he wanted people to have individual freedom.

#### 1 Coronavirus Preparedness and Response Supplemental Appropriations Act

On March 6, 2020, President Donald Trump signed the Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020 into law (which was passed with near unanimous support in both the House and Senate). It provided \$8.3 billion in emergency funding for federal agencies to respond to the coronavirus epidemic.<sup>10</sup>

The majority of the bill’s funding allocation went to the Department of Health and Human Services (HHS), including the Office of the Secretary – Public Health and Social Services Emergency Fund (PHSSEF). The funding allows for the Biomedical Advanced Research and Development Authority to research and develop vaccines, therapeutics, and diagnostics, funding for the purchase of vaccines, therapeutics, and diagnostics to be used if deemed necessary by the Secretary of HHS, and some grants under the Health Center Program, which are intended to improve healthcare for individuals who are geographically isolated and economically or medically vulnerable. Additionally, the government has directed some funds from the Centers for Disease Control and Prevention (CDC) to aid state and local response efforts, and replace the Infectious Diseases Rapid Response Reserve Fund, supporting U.S. efforts to respond to an infectious disease emergency. Other funds have been dedicated to the National Institute of Allergy and Infectious Diseases (NIAID), together with the Food and Drug Administration (FDA), to conduct research on therapies, vaccines, diagnostics, and other health technologies, at the National Institutes of Health (NIH). This support helps expand and review

6 Katie Kerwin McCrimmon, “[Viruses 101: Why the New Coronavirus Is So Contagious and How We Can Fight It](#)”, *UC Health Today* (Mar. 17, 2020).

7 These globules can then enter neighboring individuals through contact with their mouths or noses; if the droplets are not inhaled, they can land on nearby surfaces. See generally “[How COVID-19 Spreads](#)”, *Centers for Disease Control and Prevention: Coronavirus Disease 2019 (COVID-19)*.

8 In other words, out of the total number of over 8 million cases of infection, 224,732 have been fatal. For further details, see generally “[COVID-19 Dashboard](#)”, *Johns Hopkins University & Medicine*.

9 Bill Chappell, “[Coronavirus: COVID-19 Is Now Officially A Pandemic, WHO Says](#)”, *NPR* (Mar. 11, 2020); Wolfe, *supra* note 3, at 97.

10 From the \$8.3 billion aid package, the bill designates \$6.7 billion (81%) for the domestic response and \$1.6 billion (19%) for the global response.

vaccines, therapeutics, medical devices, and countermeasures, address potential supply chain disruptions, and support enforcement against counterfeit products.<sup>11</sup>

Regarding international efforts, funding provided to the United States Agency for International Development (USAID) includes funding provided through:

- the Global Health Programs (GHP) account to promote health systems responding to the coronavirus outbreak abroad;
- the International Disaster Assistance (IDA) account to sustain humanitarian assistance needs resulting from the pandemic;
- the Economic Support Fund (ESF) account to assist economic, security and stabilization efforts resulting from the coronavirus occurrence; and
- the Office of the Inspector General (OIG) for oversight of COVID-19 response actions.<sup>12</sup>

## 2 Families First Coronavirus Response Act (FFCRA)

Generally, this Act applies to “covered employers”: certain public employers and private employers with fewer than 500 employees. However, the expanded family and medical leave provisions of this Act do not cover most federal employees. The main provisions of this Act stipulate significant matters concerning labor and employment legal issues, as follows:

- Paid sick leave;
- Covered employers must provide two weeks of paid sick leave for all employees who (1) are quarantined, or (2) are exhibiting COVID-19 symptoms while seeking a medical diagnosis;
- Employers must provide two weeks of paid sick leave at two-thirds ( $\frac{2}{3}$ ) of the regular rate to all employees who are unable to work because of a *bona fide* need to (1) care for someone subject to quarantine, or (2) care for a child whose school or child care provider is closed or unavailable for reasons related to COVID-19;
- Expanded family and medical leave [provision] “*Family and Medical Leave Act*”;
- Covered employers must provide, to employees that have been employed for at least 30 days, an additional 10 weeks of expanded family and medical leave at two-thirds ( $\frac{2}{3}$ ) of the employees’ regular rate of pay where an employee is unable to work due to a *bona fide* need for leave to care for a child whose school or child care provider is closed or unavailable for reasons related to COVID-19; and

11 Other funds dedicated to the Small Business Administration (SBA) disaster loans program to support SBA’s administration of loan subsidies are to be made accessible to entities fiscally impacted by COVID-19. See [Coronavirus Preparedness and Response Supplemental Appropriations Act](#), [116<sup>th</sup> Congress Public Law 123]. Furthermore, the bill includes a waiver eliminating limitations on Medicare providers, permitting them to offer telehealth services to beneficiaries irrespective of whether the beneficiary is in a rural community, at an estimated cost of \$500 million. Some of the national funding could likely be used for international responses.

12 Also, the State Department has received funding to support consular operations, emergency evacuations, and other needs at U.S. embassies/consulates and to support global disease detection and emergency response efforts. See, e.g., *Ohio Rev. Code Ann.* § 3701.13 – “The department of health shall have supervision of all matters relating to the preservation of the life and health of the people and have ultimate authority in matters of quarantine and isolation, which it may declare and enforce, when neither exists, and modify, relax, or abolish, when either has been established”.

- Employers may not discharge, discipline, or otherwise discriminate against any employee who takes paid sick leave under the FFCRA and files a complaint or institutes a proceeding under or related to the FFCRA.<sup>13</sup>

This Act is enforced through the Department of Labor, which administers and enforces both Sections 16 and 17 (paid sick leave provisions) of the Fair Labor Standards Act (29 U.S.C. §§216-217). The violation of these sections will result in various severe punishments to be implemented such as fines, imprisonment, damages, equitable relief (§216) and injunctions (§217).

### 3 Coronavirus Aid, Relief, and Economic Security (CARES) Act

The CARES Act is a \$2 trillion coronavirus stimulus bill. The bill was launched on an unrelated matter, but on March 25, 2020, the Senate replaced its text in whole with the incentive bill which: (a) sent \$1,200 to each American making \$75,000 a year or less; (b) added \$600/week to unemployment benefits for four months; (c) gave \$100 billion to hospitals and health providers and increased Medicare reimbursements for treating coronavirus; (d) gave \$750 million to food banks, to Puerto Rico and the other territories for food assistance, and to programs for food distribution on American Indian reservations; (e) made \$500 billion in loans or investments to businesses, states and municipalities, and \$32 billion in grants to the airline industry; (f) relief for those with federally-backed mortgages; and (g) delayed student loan payments.<sup>14</sup>

## IV The COVID-19 Crisis and the Constitutional Public Rights and Civil Liberties

Generally, in times of crisis, Americans always experience some restriction of fundamental constitutional rights. Such transgressions fall into three categories. The first category constitutes the most egregious rights violations which create near-uniform contempt, but usually, only after a crisis is past, and with the benefit of retrospection (for example, President Franklin Roosevelt's relocation and internment of Japanese Americans during World War II). The second category involves slighter losses of rights during a crisis, and if these losses are overlooked, the risk is that rights lost are never truly reinstated (consider the USA PATRIOT Act after September 11). In the third category are frankly provisional measures that were suitable and manifestly needed; temporary quarantines during past pandemics fall under this category.<sup>15</sup> In this respect, extraordinary policies are required to address COVID-19, and some might not be constitutional during normal periods, but in which category will history place the existing rights restrictions? To answer this query, one should consider

13 Under the FFCRA, "an employee qualifies for paid sick time if the employee is unable to work (or unable to telework) due to a need for leave because the employee:

- is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
- has been advised by a health care provider to self-quarantine related to COVID-19;
- is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
- is caring for an individual subject to an order described in (1) or self-quarantine as described in (2); is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19; or
- is experiencing any other substantially-similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury".

See generally H.R.6201-[Families First Coronavirus Response Act](#) [116<sup>th</sup> Congress (2019-2020)] [FFCRA: Employee Paid Leave Rights].

14 The 2010 Affordable Care Act (Obamacare) included a planned 40% tax provision on any employer-sponsored health insurance plan above \$10,200 for a person or \$27,500 for a family. This became known as "the Cadillac tax", after the Obama Administration sold it as a tax on only the most high-priced companies' health insurance plans. Nevertheless, some studies indicated that as many as 82% of plans could face the tax, covering middle-class workers and schoolteachers. See S.3548-[CARES Act](#) [116<sup>th</sup> Congress (2019-2020)].

15 Joshua Matz, "[The Coronavirus Is Testing America's Commitment to People's Constitutional Rights](#)", *The Atlantic*, Apr. 20, 2020 ("The government's reaction to COVID-19 in jails and ICE detention facilities must follow settled legal precedent on acceptable conditions of confinement. The pandemic does not change that obligation").

the balance between the *ālmāslāh āl'māh* (public interest) in saving lives with the gravity of the constitutional breach. Measures must be overwhelmingly in the public interest, rooted in reason, *not* in pretext, and achieved by the least invasive methods.<sup>16</sup> For instance, the governor of Rhode Island directed the National Guard—armed and masked—to search and evict visiting New Yorkers due to their purportedly intensified coronavirus risk. This violated Article IV of the US Constitution, prohibiting states from discriminating against non-citizens (non-residents) or impeding their movement.<sup>17</sup> Moreover, the arrests of clerics (pastors) seeking to hold services are debatable, as these arrests are vulnerable to First Amendment challenge. If a place of worship applies the same precautions as a retail establishment, why should a hardware store remain open while a church, synagogue or a mosque is closed?<sup>18</sup>

In the same vein, reasonable restrictions involve restricting the right to protest and petition the government in person. Typically, these would be obvious First Amendment infringements, but as Justice Robert Jackson noted, “the Constitution is not a suicide pact”.<sup>19</sup> Further, to avert crisis, preventative measures must be taken to slow spread of disease in official government buildings and massive infection of key personnel. Thus, if these measures and policies are temporary and proportional, they seem to be wise and constitutional.<sup>20</sup> During *Force Majeure* (unexpected circumstances) or crises, panic can make every extreme appear reasonable, but governments must avoid enormous abuses that history will consider disproportionate. The general public must ensure that temporary actions do not become permanent, and better planning can reduce the need to violate future rights.<sup>21</sup>

As is generally well-known, the coronavirus pandemic sweeping the world has significantly changed American life. Still, much of the nation is at home under shelter-in-place (*mandates versus guidance*) orders; businesses and schools are closed or have shifted to virtual settings, and more than 30 million individuals have lost their jobs. Social gatherings in public spaces are still not a vital activity—and not considered ‘*essential*’—and regional jurisdictions have been instructed to ensure that groups of people greater than ten are not allowed to gather in any public area. Along with the new, practical questions redefining lives—When is it safe to see family? How can we get our stimulus check? What cleaning goods work best to keep our house safe?—the virus’ influence also presents complicated constitutional questions underlining the country’s entrenched ideological and philosophical divisions during the crisis.<sup>22</sup>

While the federal and state governments have worked to secure large swathes of the economy to slow the spread of the COVID, their citizens, in turn, have claimed a violation of Constitutional rights—fights for the right to bear arms or to practice religious freedom during this pandemic, entangle courtrooms around the nation. Several lawsuits have been filed on questions ranging from social distancing limitations singling out religious meetings, to whether closing abortion clinics as supplementary medical providers infringes women’s right to the procedure. All the while, President Trump argues that it is essential to “liberate” some states from

16 See generally Mike Gatto, “[The coronavirus crises and our constitutional rights](#)”, *The Los Angeles Daily News*, Apr. 12, 2020.

17 *Id.* These actions will fall in the first category, as the seriousness (door-to-door searches by the military) and illogicality (what about Rhode Islanders who traveled to New York?) made it irrational.

18 Recently, Texas has used coronavirus as a justification to forbid abortions. Since policymakers have expressed bigotry toward this right in the past, this could be considered a *pretext* to attain illegal ends.

19 *Terminiello v. City of Chicago*, 337 U.S. 1 (1949).

20 Gatto, *supra* note 16. Also, some scholars argued that shutting down courts seems problematic during a crisis, as it is exactly during these times that the judicial branch is most crucial.

21 Likewise, arguments based on constitutional liberties are raised not only when states change the *status quo*, but also when they do not. Legal complaints have been filed on behalf of prisoners and migrant detainees who face intensified health risks under normal crowded conditions. An additional potential problem arising from the pandemic’s invasion of civil liberties is the situation of the country’s federal and state courts, as a large portion are still physically closed and managing cases remotely. See Daniel Aaron, “[COVID-19 Policies and Constitutional Violations](#)”, *Harvard Law Bill of Health*, May 20, 2020.

22 See generally Tessa Berenson, “[3 Key Constitutional Questions We Have to Answer in Our Fight Against the Coronavirus](#)”, *Time*, Apr. 24, 2020 (“As federal and state governments have had to shutter large swathes of the economy to slow the spread of the virus, some Americans feel they have gone too far, infringing on rights enshrined in the Constitution, such as the right to bear arms or to practice freedom of religion”).

strict public health measures as Michigan, creating a nationwide schism on how the United States should respond to the growing threat. Here are the three most significant evolving constitutional disputes in the war to defeat the novel coronavirus.

### (i) *The First Amendment (Freedom of Assembly)*

Limits on religious gatherings—involving restricting the number of individuals permitted to attend religious/mass services—have become a key issue in several states. Recently, numerous complaints have been filed all over the nation, claiming that the restraints infringe the First Amendment's guarantee to freely exercise religion (establishment and exercise clauses).<sup>23</sup> Attorney General William Barr said the religious freedom inquiries are an overall top priority for the Justice Department during the pandemic: “Whatever measures are placed against religion have to be placed against all comparable commercial and other activities”, and, “You can't single out religion for special burdens”.<sup>24</sup> It has been ruled that “[t]he free exercise of religion cannot be taken lightly and should not be sacrificed at the altar of political expediency” and “[o]ur state and federal constitutions embody a fundamental commitment to religious liberty and guarantee the freedom to express diverse thoughts without governmental interference”.<sup>25</sup> The ruling precedent here is the 1990 Supreme Court case *Employment Division v. Smith*, which held that impartial laws of general applicability curbing religious freedom are lawful and acceptable.<sup>26</sup>

### (ii) *The Second Amendment*

Second Amendment issues cropped up in states that mandated “non-essential” businesses to close and deemed gun dealers “non-essential”. For example, New York, New Jersey, Massachusetts, and Pennsylvania ordered the closure of arms stores as part of the states' attempts to slow down the virus' spread. In response, gun groups, factories and owners filed numerous lawsuits challenging the closures. In one case, the National Rifle Association (NRA) claims that Governor Andrew Cuomo of New York “effectively and indefinitely suspended a key component of the Second Amendment to the United States Constitution” by categorizing gun stores as non-essential and compelling them to shut down. It should be noted that the Department of Homeland Security (DHS) issued guidance assigning “workers supporting the operation of firearm or ammunition product manufacturers, retailers, importers, distributors, and shooting ranges” as part of the “essential critical

23 *Id.* Churches and advocacy organizations have already filed lawsuits against governments in numerous states, such as Kansas, Florida, New Mexico, Mississippi, Texas, and California. For example, in Kansas, the state stipulated a maximum limit of 10 people at religious meetings; the governor's office says six deaths and 80 coronavirus cases in the state were associated with religious gatherings. However, a judge's order impeded enforcement of the governor's order at two churches, arguing that “churches and religious activities appear to have been singled out among essential functions for stricter treatment”.

24 *Id.* For example, the Texas State guidelines read “If religious services cannot be conducted from home or through remote services, they should be conducted consistent with the guidelines from the president and the (Centers for Disease Control) by practicing good hygiene, environmental cleanliness, and sanitation, and by implementing social distancing to prevent the spread of COVID-19”.

25 *See, e.g., S. Bay United Pentecostal Church v. Newsom*, (9<sup>th</sup> Cir. May 22, 2020); *Roberts v. Neace*, 2020 WL 2115358 (E.D. Ky. May 4, 2020); *Legacy Church v. Kunkel*, 2020 WL 1905586 (D.N.M. April 17, 2020); *Gish v. Newsom*, 2020 WL 1979970 (C.D. Cal. April 23, 2020); *Tolle v. Northam*, 2020 WL 1955281 (E.D. Va. April 8, 2020), *Maryville Baptist Church v. Beshear*, 957 F.3d 610 (6<sup>th</sup> Cir. 2020).

26 Former Cornell Law School Professor David French argued, “These closure orders do not specifically target churches and leave other large gatherings alone. They are in general blanket bans on large gatherings of all types, and so they are a classic neutral law of general applicability under which a free exercise claim is going to fail”. Also, he says that the New Hampshire law has a “sunset clause”, which reads:

“That is best practice, [...], for this kind of emergency order because of course, the concern that people have when it comes to civil liberties in a time of crisis is that these emergency powers that enable governments to take actions that they would not be able to do otherwise – that they might sustain long past the time when the crisis is over, that they can have a permanent effect on people's civil liberties. So, having a time when it is going to end, and... requiring it to be justified and renewed when it does end, if it is still necessary, [...] that is very important”.

infrastructure workforce". The guidelines are "advisory in nature", according to the document, and should "not... be considered, a federal directive or standard".<sup>27</sup>

### (iii) *The Fourteenth Amendment: Women's Rights (Abortion and Reproductive Health)*

Several states have temporarily barred "non-essential" medical practices to help maintain medical supplies in the face of countrywide shortages. Some states such as Ohio, Texas, Alabama, Iowa, Arkansas, and Oklahoma have put abortion—excluding some surgical abortions—in the non-essential category, leading to abortion rights groups and advocacy organizations bringing legal action. They argue that stopping the service is unethical and unconstitutional and that these orders infringe the cornerstone abortion precedent set in the *Roe v. Wade* case, which protects women's right to abortions and how women controls their bodies.<sup>28</sup> Further they claim that using and politicizing this pandemic to prohibit abortion access is unconstitutional, as "[a]bortion care is time-sensitive and essential health care that has a profound impact on a person's health and life, which is why it is protected as a constitutional right".<sup>29</sup> A three-judge panel of the U.S. Court of Appeals for the 5<sup>th</sup> Circuit ruled, while citing a Supreme Court ruling in a Massachusetts case in 1905:

"The bottom line is this: when faced with a society-threatening epidemic, a state may implement emergency measures that curtail constitutional rights so long as the measures have at least some 'real or substantial relation' to the public health crisis", "That settled rule allows the state to restrict, for example, one's right to peaceably assemble, to publicly worship, to travel, and even to leave one's home. The right to abortion is no exception".<sup>30</sup>

27 *Id.* Nonetheless, New Jersey and Pennsylvania, which were both facing separate lawsuits over the closures, consequently overturned their decisions and permitted gun shops to reopen. A New Jersey Governor Phil Murphy said, declaring the reopening of arms stores, "[arms stores defined as essential businesses] would not have been my definition, but that is the definition at the federal level". See, e.g., *Brandy v. Villanueva*, 20-CV-2874-AB (C.D. Cal. April 6, 2020) (denying the plaintiffs' TRO motion to enjoin enforcement of local orders requiring closure of gun stores); *McDougall v. County of Ventura*, California, 20-CV-2927-CBM-AS (C.D. Cal. March 31, 2020); *Pennsylvania Civil Rights Defense Firm v. Wolf*, (Pa. Sup. Ct. March 23, 2020) (ruling 4-3 against an emergency challenge to state-mandated closure of gun stores); *McCarthy v. Baker*, 20-cv-10701-DPW (D. Mass. May 7, 2020) (preliminarily enjoining closure of gun stores), *Lynchburg Range & Training v. Northam* (Cir. Ct., City of Lynchburg April 27, 2020) (temporarily enjoining closure of gun ranges pursuant to a statute prohibiting the Governor from "in any way limit[ing] or prohibit[ing] the rights of the people to keep and bear arms"). So non-customer facing offices may operate with minimal social distancing and sanitation mandates. Considerations include reduced occupancy rules if activity beyond minimum basic operations is permitted.

28 These orders applied to any sort of abortion procedure unless it was vital to protect a woman's health. *Id.* Robin Marty, the Communication Director for Yellowhammer Fund (an abortion fund in Alabama) said that "[t]he novel coronavirus managed exactly what anti-abortion activists struggled for nearly five decades to accomplish: it is the biggest threat to legal abortion in America ever imagined". See, e.g., *Roe v. Wade*, 410 U.S. 113 (more) 93 S. Ct. 705; 35 L. Ed. 2d 147; 1973 U.S. LEXIS 159. ("[It was a] landmark decision of the U.S. Supreme Court in which the Court ruled that the Constitution of the United States protects a pregnant woman's liberty to choose to have an abortion without excessive government restriction").

29 Berenson, *supra* note 22. It should be noted that violators of the stay-at-home orders face some of the severest punishments – fines of up to \$5,000 and a year in jail are among them. Police have issued many citations, arrests, suspension notices, and revocations of business—even criminal charges. These penalties are—mostly—aimed at persons gathering in public places such as parks or violating the general coronavirus regulations. See generally John Curran, Jake Gardener and Jeffery Ding, "[COVID-19 and the Constitution: How the Bill of Rights Is Being Tested by the Coronavirus](#)", *The New York Law J.*, May 29, 2020 (The coronavirus is set to test our Bill of Rights more broadly than any other event in recent memory).

30 It has been argued that Texas was within its rights to consider abortion nonessential during the epidemic. The policy has forced some women to travel long distances out of state for medication or risk carrying unwanted pregnancies. French argued that:

"The best argument that [gun rights advocates] would have is going to be similar to the best argument that say abortion clinics have to stay open... And that argument is essentially that unlike a restriction on First Amendment Free Exercise, where you can attend church virtually, rather than this being a mere burden on the right, it is essentially an extinction of the right to keep and bear arms by barring people from any access to firearms at all. Now, that is imperfect because there are private sales and other kinds of measures perhaps where a person could obtain a firearm lawfully, but that would be their strongest argument".

He referenced to the rule laid out by *Planned Parenthood v. Casey* because a good claim could be made that closing clinics due to coronavirus establishes an excessive duty/burden and an elimination of that right.



(iv) *Institutional Domestic Response: the United States Federal Laws and Regulations for Control of Communicable Diseases*

Based on pre-existing laws and regulations, State law has designated certain institutional and administrative agencies to handle the outbreak of the pandemic.<sup>31</sup> On the federal level, the Secretary of HHS has legislative responsibility for avoiding the introduction, transmission, and spread of contagious diseases in the United States. Under its designated authority, the Division of Global Migration and Quarantine works to fulfill this obligation through many activities, comprising: the operation of Quarantine Stations at entry ports; creation of standards for medical examination of individuals attempting to enter the United States; and administration of regional and foreign quarantine rules, which govern the global and interstate movement of people, animals, and cargo.<sup>32</sup> In the same vein, it is known that the American Code is a consolidation and codification by subject matter of the general and permanent laws of the United States. The Federal Government derives its legal authority for isolation and quarantine from “Dormant” Commerce Clause of the American Constitution.<sup>33</sup>

31 For example,

(a) *Health and Safety:*

- Administration for Children and Families: provides program information for children, families, and communities; Administration for Community Living: provides information for elderly and people with disabilities; Army Public Health Center: provides guidance for army members and their families; Centers for Disease Control and Prevention: provides virus and infectious disease studies; Centers for Medicare and Medicaid: provides guidance for Medicare/Medicaid recipients and providers; Consumer Product Safety Commission: deals with home safety advice; Corporation for National and Community Service: provides guidance for volunteers and programs; Department of Defense (DoD): deals with enforcement of governmental measures, military health; Department of Energy: deals with virus study; and Department of Health and Human Services: provides news and updates (releases) on the health situation.

(b) *Department of HHS Office of the Assistant Secretary for Preparedness and Response (ASPR):* focus on developing new medical treatments, publishing medical counter-means portfolio.

- Department of Homeland Security: facilitating government response, and ensuring contact tracing; Department of Labor: deals with workplace guidance; Department of the Interior: provides guidance for firefighters and managers; Department of Veterans Affairs: deals with veteran care; Drug Enforcement Administration (DEA): provides information and guidance for handling and reporting controlled substances and listed chemicals; Environmental Protection Agency (EPA): provides information about killer disinfectants and water safety; Federal Bureau of Investigation (FBI): provides guidance on reporting child abuse and protecting children; Federal Emergency Management Agency (FEMA): deals with protecting the health and safety of Americans; Food and Drug Administration: deals with vaccines, drugs, diagnostic tests, etc...; Indian Health Service: focus on public health response for American Indians and Alaska Natives; Military Health System: provides health advice and travel restrictions for military members; National Aeronautics and Space Administration (NASA): provides tips for isolation and educational activities; National Cancer Institute: provides guidance for cancer patients and researchers; National Institute of Environmental Health Sciences: deals with virtual safety training for frontline responders; National Institutes of Health: focus on COVID treatment and vaccine research; National Institute on Drug Abuse: provides advice for people with substance use disorders; Navy and Marine Corps Public Health Center: provides guidance for healthcare providers; Occupational Health and Safety Administration (OSHA): provides guidance for workers and employers; U.S. Census Bureau: deals with population demographics and economic indicators; U.S. Department of Agriculture (USDA): provides information on SNAP program, food and pet safety; U.S. Fire Administration: deals with infection control guidance for first responders; Travel, Immigration, Transportation (Customs and Border Patrol (CBP)); DHS; Department of State (DS); Federal Aviation Administration (FAA); Federal Transit Administration (FTA); Transportation Security Administration (TSA); and U.S. Citizenship and Immigration Service (USCIS).

See, e.g., Richard Wolf, “[Government intrusions on civil liberties during pandemic raise risks, rewards](#)”, *USA Today*, Apr. 9, 2020.

32 The legal basis for these actions is found in Titles 8 and 42 of the U.S. Code and related endorsing policy regulations. See generally Kevin Johnson and Richard Wolf, “[Enforcing the Shutdown: Law Enforcement Grapples with Policing Stay-at-home Orders, Social Distancing, Quarantines](#)”, *USA Today*, Apr. 2, 2020. In *South Bay United Pentecostal Church v. Newsom*, 590 US \_\_ (2020), affirmed [...] *Jacobson v. Massachusetts*: our Constitution principally entrusts “[t]he safety and the health of the people” to the politically accountable officials of the States “to guard and protect”. When those officials “undertake to act in areas fraught with medical and scientific uncertainties”, their latitude “must be especially broad”. Where those broad limits are not exceeded, they should not be subject to second-guessing by an “unelected federal judiciary”, which lacks the background, competence, and expertise to assess public health and is not accountable to the people. See, e.g., *Marshall v. United States*, 414 U. S. 417, 427 (1974) (“[...] upon the principle of self-defense, of paramount necessity [...]”).

33 For further details, See Sections 264-272--Title 42 – The Public Health and Welfare, Chapter 6A – Public Health Service, Subchapter II – General Powers and Duties, Part G – Quarantine and Inspection.

In this regard, the U.S. Supreme Court explained Congress' capability to act under the Commerce Clause in *Morgan's Steamship Co. v. Louisiana Board of Health* (1886), a case that said quarantine laws belong to a class of laws which normally only the states may create until Congress acts in the matter to prevent state action by covering the same ground or prohibiting state laws. In *Jacobson v. Massachusetts* (1904), the Court ruled that "a Massachusetts law requiring smallpox vaccination was a legitimate exercise of the state's police power to protect the public health and safety of its citizens". This precedent affirmed the state's right to infringe upon personal autonomy for the benefit of society (the common good).<sup>34</sup> Presidential executive orders identify the list of diseases for which federal quarantine is approved, which is required by the Public Health Service Act and based on a recommendation of the HHS Secretary. The President may amend this list when necessary to add new and evolving infectious diseases that are a threat to public health.<sup>35</sup>

## V Conclusion and Policy Recommendations: Step-by-Step and the Way Forward

Of course, the challenges facing the United States are similarly challenging countries all over the world experiencing the pandemic. From Europe to Africa, to Asia, to Latin and North Americas, numerous leaders' responses to the coronavirus have emphasized vulnerabilities in their democratic or autocratic regimes that may endure after the public health crisis subsides. Broader fights over public rights and civil liberties could come into play if public officials do not alleviate limits, such as travel bans, when the health risk eases. One could argue that shutting down national travel will prevent the virus' spread, but that does not necessarily make it right. After the September 11 terrorist attacks, the Federal Government rounded up thousands of Muslims as potential terrorists, exposing them to protracted and harsh confinement before most were freed; that type of discrimination must be avoided. The "hope" is that the virus and the government's reactions to it will assist, expose, and underline the challenges that democracies globally are currently facing.

There are lessons that can be learned from countries' reactions to the COVID outbreak. One can argue that governments can either threaten democracy with overreaction or jeopardize the health and safety of a country through under-reaction (lack of care). Trying to force a chief executive—the U.S. president—to act presents its own constitutional queries. This virus is not the sort of threat that permits the government (administration) to condemn any specific minority or subdivide the community. Successful policies and measures must be broad-based and must establish some type of political check on the government. The potential privacy incursions, abuse, and stigmatization are massive, and any uses of private data should be temporary, constrained to public health agencies and objectives, and should make the most effective use of accessible techniques—exposed of

34 Professor Polly Price of Emory University School of Law mentioned: "The Supreme Court, the federal courts are not really involved in this because it is such a state and local matter" [...] "there was no attempt by the Federal Government to impose nationwide social distancing measures... They left those up to the state and local governments, and for better or worse, they are probably the best decision makers. They know the local circumstances".

35 See [Federal Register Archives](#) (signed April 4, 2003, amended by 13375 on April 1, 2005 and by 13674 on July 31, 2014). Additionally, the Code of Federal Regulations (CFR) is the official and complete text of the general and permanent guidelines issued in the Federal Register. These regulations are instituted by the executive departments and the Federal Government's agencies. The CDC's regulations fall under Title 42: Public Health, Chapter 1 – Public Health Service, Department of Health and Human Services. See generally, [Specific Laws and Regulations Governing the Control of Communicable Diseases](#), Center for Disease and Control Prevention. It should be noted that advanced medical technology provides both possibilities and pitfalls for public health workers during a disaster (pandemic). For further details on the Fifth, Sixth, and Eighth amendments, See, e.g., *Valentine v. Collier*, 2020 WL 1934431 (5<sup>th</sup> Cir. 2020) (Eighth Amendment); *Marlowe v. LeBlanc*, 2020 WL 2043425 (5<sup>th</sup> Cir. 2020) (Eighth Amendment); *Swain v. Junior*, 2020 WL 2161317 (11<sup>th</sup> Cir. May 5, 2020) (staying injunction) (Eighth Amendment); *United States v. Credidio*, 2020 WL 1644010 (S.D.N.Y. April 2, 2020) (Eighth Amendment); *Wilson v. Williams*, 2020 WL 1940882 (N.D. Ohio April 22, 2020) (ordering release or transfer of especially vulnerable inmates from one Ohio federal prison) (Eighth Amendment); *Williams v. Wilson* (U.S. May 26, 2020) (denying request for emergency stay of district court injunction); *Thakker v. Doll*, 2020 WL 1671563 (M.D. Pa. March 31, 2020) (5<sup>th</sup> Amendment); *Bent v. Barr*, 2020 WL 1812850 (N.D. Cal. Apr. 9, 2020) (5<sup>th</sup> Amendment); *Coronel v. Decker*, 2020 (S.D.N.Y. Mar. 27, 2020) (5<sup>th</sup> Amendment); *People ex rel. Stoughton v. Brann*, 2020 N.Y. Slip Op. 20081 (N.Y. Sup. Ct. Apr. 6, 2020) (5<sup>th</sup> Amendment); *United States v. Jarquin Rico*, 2020 (S.D.N.Y. April 21, 2020) (6<sup>th</sup> Amendment); *United States v. Flores-Lopez*, 2020 (W.D. Wash. Apr. 14, 2020) (6<sup>th</sup> Amendment), *United States v. Robinson*, 2020 WL 1820089 (D. Md. Apr. 11, 2020) (6<sup>th</sup> Amendment). *KOA v. Hogan*, (D. Md. May 20, 2020) "requiring necessary protective equipment be worn to engage in certain public activities is [...] not the equivalent of mandating expressive conduct".

detecting information by the Disease Centers for Control to track the spread of the virus—that safeguard privacy and secrecy (Fourth amendment). Everybody on earth—including civil libertarians—wishes that government officials' decisions to fight the coronavirus are authorized to expire when the threat shrinks. There is a clear and logical concern for public rights and civil liberties, as crises (emergencies) are exceptions to the rule of law, and depending on how long an emergency lasts, the exception can become normal/typical routine. To conclude, Professor Deborah Pearlstein of Cardozo Law School in New York argues:

“What we are seeing is that the virus is infecting not only people and spreading but the virus has been infecting democracies that have weak or damaged constitutions. So if you have a system already in place that is not robust, that has not been maintained, that has weaknesses or that has the possibility of political gaming, then the kind of extraordinary powers that somebody needs to control a pandemic are precisely the kind of powers that you see undisciplined presidents grabbing, or, weirdly, in some cases, undisciplined presidents simply letting go because they just do not seem to care about the health of the general public. The virus actually shows which constitutions are sick, and the question is, how it is that we fix those constitutions? [And to maintain...], it seems... that one of the things we start needing to talk about is what looks like a constitutional vaccine so that this does not happen the next time”.

### Selected Bibliography (References)

- Aaron, Daniel. (May 20, 2020). [COVID-19 Policies and Constitutional Violations](#). *Bill of Health*. Harvard Law School.
- Berenson, Tessa. (April 24, 2020). [3 Key Constitutional Questions We Have to Answer in Our Fight Against the Coronavirus](#). *Time*.
- Cahn, Edmond. (1957). [Jerome Frank's Fact-Skepticism and Our Future](#). *The Yale Law School Journal*, 66.
- Chappell, Bill. (March 11, 2020). [Coronavirus: COVID-19 Is Now Officially a Pandemic, WHO Says](#). *NPR*.
- Cohen, Fredric S. (2016). [How Viruses Invade Cells](#). *Biophysical Journal*, Vol. 110, 5.
- Curran, John, Gardener, Jake, & Ding, Jeffery. (May 29, 2020). [COVID-19 and the Constitution: How the Bill of Rights Is Being Tested by the Coronavirus](#). *The New York Law Journal*.
- Fuentes, Gabriel A. (2020). [Federal Detention and “Wild Facts” During the Covid-19 Pandemic](#). *The Journal of Criminal Law and Criminology*, Vol. 110, 3.
- Gatto, Mike. (April 12, 2020). [The coronavirus crisis and our constitutional rights](#). *Los Angeles Daily News*.
- Johnson, Kevin, & Wolf, Richard. (April 2, 2020). [Enforcing the shutdown: Law enforcement grapples with policing stay-at-home orders, social distancing, quarantines](#). *USA Today*.
- Kerwin McCrimmon, Katie. (March 17, 2020). [Viruses 101: Why the new coronavirus is so contagious and how we can fight it](#). *UCHealth Today*.
- Matz, Joshua. (April 20, 2020). [The Coronavirus Is Testing America's Commitment to People's Constitutional Rights](#). *The Atlantic*.
- Posner, Richard A. (2013). *Reflections on Judging*. Harvard University Press.
- Wolf, Richard. (April 9, 2020). [Government intrusions on civil liberties during pandemic raise risks, rewards](#). *USA Today*.
- Wolfe, Nathan. (2011). *The Viral Storm: The Dawn of a New Pandemic Age*. Times Books

---

Main USA Legislation & Case Law (General statistics from [Johns Hopkins University](#))

*Bent v. Barr*, 2020 WL 1812850 (N.D. Cal. April 9, 2020) (Fifth Amendment).

*Brandy v. Villanueva*, 20-CV-2874-AB (C.D. Cal. April 6, 2020).

[\*Coronavirus Aid, Relief, and Economic Security Act\*](#) (2020).

[\*Coronavirus Preparedness and Response Supplemental Appropriations Act\*](#) (2020).

*Coronel v. Decker*, 2020 WL 1487274 (S.D.N.Y. March 27, 2020) (Fifth Amendment).

[\*Families First Coronavirus Response Act\*](#) (2020).

*First Baptist Church v. Kelly*, 2020 WL 1910021 (D. Kan. April 18, 2020).

*Friends of Danny DeVito v. Wolf*, 2020 WL 1847100 (Pa. April 13, 2020).

*Gish v. Newsom*, 2020 WL 1979970 (C.D. Cal. April 23, 2020).

*Hartman v. Acton*, 2020 WL 1932896 (S.D. Ohio April 21, 2020).

<https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html>.

<https://www.cdc.gov/quarantine/specificlawsregulations.html>.

<https://www.federalregister.gov/documents/2014/08/06/2014-18682/revised-list-of-quarantinable-communicable-diseases>.

*Legacy Church v. Kunkel*, 2020 WL 1905586 (D.N.M. April 17, 2020).

*Lynchburg Range & Training v. Northam*, No. CL20-333 (Cir. Ct., City of Lynchburg April 27, 2020).

*Marlowe v. LeBlanc*, 2020 WL 2043425 (5th Cir. 2020) (Eighth Amendment).

*Maryville Baptist Church v. Beshear*, 957 F.3d 610 (6th Cir. 2020).

*McCarthy v. Baker*, 20-cv-10701-DPW (D. Mass. May 7, 2020).

*McDougall v. County of Ventura, California*, 20-CV-2927-CBM-AS (C.D. Cal. March 31, 2020).

*Mich. United Conservation Clubs v. Whitmer*, No. 20-cv-00335 (W.D. Mich.) & *Mich. Nursery & Landscape Ass'n v. Whitmer*, No. 20-cv-331 (W.D. Mich.) & *Wilson v. Williams*, 2020 WL 1940882 (N.D. Ohio April 22, 2020) (8th Amendment).

*Pennsylvania Civil Rights Defense Firm v. Wolf*, No. 63 MM 2020 (Pa. Sup. Ct. March 23, 2020).

*People ex rel. Stoughton v. Brann*, 2020 N.Y. Slip Op. 20081 (N.Y. Sup. Ct. April 6, 2020) (Fifth Amendment).

*Roberts v. Neace*, 2020 WL 2115358 (E.D. Ky. May 4, 2020).

*S. Bay United Pentecostal Church v. Newsom*, No. 20-55533 (9th Cir. May 22, 2020).

*SH3 Health Consulting v. Page*, 2020 WL 2308444 (E.D. Mo. May 8, 2020).

*Swain v. Junior*, 2020 WL 2161317 (11th Cir. May 5, 2020) (Eighth Amendment).

*Thakker v. Doll*, 2020 WL 1671563 (M.D. Pa. March. 31, 2020) (Fifth Amendment).

*Tolle v. Northam*, 2020 WL 1955281 (E.D. Va. April 8, 2020).

*United States v. Credidio*, 2020 WL 1644010 (S.D.N.Y. April 2, 2020) (Eighth Amendment).

*United States v. Flores-Lopez*, 2020 WL 1862599 (W.D. Wash. April 14, 2020) (Sixth Amendment).

*United States v. Jarquin Rico*, 2020 WL 1934989 (S.D.N.Y. April 21, 2020) (Sixth Amendment).

*United States v. Robinson*, 2020 WL 1820089 (D. Md. April 11, 2020) (Sixth Amendment).

*Valentine v. Collier*, 2020 WL 1934431 (5th Cir. 2020) (Eighth Amendment).

*Williams v. Wilson*, No. 19A1041 (U.S. May 26, 2020).