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# LIBERTY COUNSEL

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Official Legal Bulletin

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## KNOW YOUR RIGHTS IN A STATE OF EMERGENCY

### THE PRESUMPTION OF LIBERTY

In any discussion of a potential limitation of constitutional freedom and unalienable rights, we begin with the presumption of liberty. Liberties such as the right to life, freedom of speech, and freedom of religion are not *privileges* granted to the people. They are *unalienable* to the person. Our God-given rights pre-exist government. As the Declaration of Independence states, governments “are instituted” in order to “secure these rights.” Government must *safeguard* liberties you already possess. The U.S. Constitution also protects many additional rights.

### GUIDELINES FOR EXPANDED GOVERNMENT AUTHORITY DURING AN EMERGENCY

In general, government can restrict certain rights by demonstrating a legitimate or compelling interest. The government must also have to use what is called the “least restrictive means” to accomplish its goal. In other words, if the government can accomplish its “compelling interest” in a less restrictive way, then it must do so. The restriction should be “narrowly tailored” to meet the stated objective. Any restriction must not discriminate against religion.

Although the word “emergency” is not in the Constitution, the Constitution does mention situations of “invasion,” “domestic violence,” and “war.” Supreme Court martial law cases arose during times of war. The Supreme Court has never been faced with martial law questions outside of war or rebellion.

At the federal, state and local level, the declaration of an emergency triggers certain laws to take effect. A federal emergency puts many laws into effect. Interestingly, state and local officials also can enact “states of emergency” that may grant them even broader powers, in large part because state and local officials have direct access to police power. The challenge comes in upholding the high standards of the “least restrictive means” and “narrowly tailored” requirements when the alleged emergency demands restrictions on constitutional rights.

### Q&A REGARDING COVID-19 EMERGENCY RESTRICTIONS

*What follows are answers to commonly asked questions we are receiving that surround the COVID-19 crisis. Please note that many of the emergency powers we now see operating have not yet been tested in court. The key question for the courts may be whether the government could have accomplished its emergency goals using less restrictive means. This bulletin is not meant to provide legal advice. The below responses to common questions are broad guidelines and principles that may or may not apply to your particular situation.*

#### ▶ Can the government restrict meeting sizes and gatherings?

State and local laws grant the ability to temporarily restrict gatherings during emergencies. These orders should be temporary, “least restrictive” and “narrowly tailored” to accomplish a compelling need. A constitutional problem arises when a size limitation is placed over different locations and types of meetings without any flexibility.

#### ▶ Can the government restrict church meetings?

Any emergency powers must be content-neutral and cannot target religion. Orders that allow certain secular meetings while restricting churches can be discriminatory.

#### ▶ Can the government close businesses during a health emergency?

State and local laws grant the government the ability to temporarily close businesses during a health emergency, but this is such an extreme restriction on the rights and liberties of individuals that at best it should be a last resort. Outside of war or rebellion, these cases have not been fully tested in court.

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## ▶ Can the government make “emergency” orders “effective immediately”?

Technically, yes, but only if the “emergency” requires it. However, the courts generally recognize the right to “due process.” Even in an emergency, governments should provide fair notice that is clearly stated and sets forth sufficient detail for compliance. Some orders that are quickly created and released to the public are constitutionally suspect. Most have never been fully vetted by expert lawyers or debated.

## ▶ Can the government limit how many people you can have in your home during an emergency?

Apart from building codes, zoning and other generally applicable ordinances, the government cannot limit the number of people in your home. Under some of these restrictions, Jesus could not have met with the Apostles!

## ▶ Can the government limit or stop firearm sales during an emergency?

Although some of the emergency ordinances being issued seem to create such restrictions, the government would have to demonstrate its need to do so. In relation to controlling a virus, there is no apparent constitutional connection.

## ▶ Can the government QUARANTINE people by neighborhood, city or other regional areas during a health emergency as a general measure that covers many citizens?

Some state laws grant government the authority to quarantine citizens. In the context of this virus, quarantining healthy people has not been tested in court. For a list of state quarantine laws, see <https://www.ncsl.org/research/health/state-quarantine-and-isolation-statutes.aspx>.

## ▶ Can a person be required to be tested for COVID-19 or another infectious disease?

This depends on the state law. See above.

## ▶ How long can restrictions be kept in place?

Based on the “least restrictive means” and “narrowly tailored” standards for certain constitutional rights, all such restrictions should be temporary.

## ▶ Can the government use the GPS and other data on digital devices to monitor or even control people’s movements during a health emergency?

This drastic measure appears to violate constitutional rights.

## ▶ Can the government require persons to show a “negative” disease test, or a work permit or otherwise limit the ability to travel because of a health emergency?

The courts have upheld restrictions on freedom of movement in certain cases. But the bar is very high for government to limit your right to move freely within our country.

## Words of encouragement from the Bible.

“For God has not given us a spirit of fear, but of power and of love and of a sound mind.” 2 Tim 1:7

“Be anxious for nothing, but in everything by prayer and supplication, with thanksgiving, let your requests be made known to God; and the peace of God, which surpasses all understanding, will guard your hearts and minds through Christ Jesus.” Philippians 4:6-7

“Do not be anxious about your life, what you will eat, nor about your body, what you will put on.” Luke 12:22

“Fear not, little flock!” Luke 12:32

“Fear not, for I am with you.” Isaiah 41:10

## Our pledge to bring hope and light to the world...

- 1. We do not** fear because we serve the Creator and our Redeemer. “Fear not, little flock.”
- 2. We will not** add to the panic.
- 3. We will** speak peace to all we encounter.
- 4. We will** minister to the world the Light of the world.
- 5. We will** be the church that Jesus called us to be and run to, not from, danger to save souls.
- 6. We will** remember that the Gates of Hell shall not prevail against the church.
- 7. We will** pray that this virus is crushed.
- 8. We will** pray for wisdom for our elected leaders.
- 9. We will** spend more time in the Word of God than we spend chasing media stories.