

VIEWPOINT

US Emergency Legal Responses to Novel Coronavirus

Balancing Public Health and Civil Liberties

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Viewpoint



Audio

With increasing numbers of cases of coronavirus disease 2019 (COVID-19) globally and in the United States, Health and Human Services (HHS) Secretary Alex Azar declared a national public health emergency on January 31.¹ The emergency declaration of the HHS authorizes additional resources, enhanced federal powers, interjurisdictional coordination, and waivers of specific regulations. State and local public health emergency declarations are also likely. During crises, government has a special responsibility to thoughtfully balance public health protections and civil liberties.

Public Health Risk Assessment

While epidemiological data are evolving, human-to-human transmission of COVID-19 has been documented over an incubation period of 2 to 14 days.² Based on available data, the case fatality rate appears lower than that associated with other novel coronaviruses (severe acute respiratory syndrome [SARS] and Middle East respiratory syndrome [MERS]), likely no more than 2%. China has reported the majority of cases and deaths, especially in Wuhan and surrounding Hubei Province. The US population currently is at low risk,

eral powers in response to COVID-19 beyond those used for previous health emergencies such as SARS, H1N1 influenza, and Ebola. The administration premised the exercise of federal powers on the need to avert "cascading public health, economic, national security, and societal consequences."⁴

Travel Warnings and Recall of Nonessential Personnel

Immediately following the emergency declaration of the HHS, federal agencies implemented travel warnings, entry bans, and border protections. On January 31, the State Department issued its strongest warning ("do not travel") applying to mainland China.⁵ Additional warnings may take effect with "little or no advance notice."⁵ Nonessential diplomatic, military, and other personnel in affected regions are being called back. Customs and Border Protection agents are actively screening persons for signs of illness at ports of entry, separating those exposed to, or infected with, COVID-19.

Flights Suspended or Rerouted

Direct flights from China have been rerouted to select US airports for enhanced screening and self-quarantine up to 14 days. Major airlines have temporarily suspended flights to and from China. Even after declaring a public health emergency of international concern, the World Health Organization urged air carriers to resume flights given potential adverse effects on international travel and commerce.

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but infections could escalate if sustained transmission occurs. Absent rapid diagnostic tests, effective vaccines, or antiviral medications, health officials are focused on identifying cases and separating persons exposed or infected.

Emergency Health Powers

Emergency declarations enhance national or regional response capabilities through limited liability protections for first responders and volunteers; reciprocal licensure requirements; and real-time development and acquisition of countermeasures (eg, vaccines, antivirals, medical equipment). Hospitals that have staffing or supply shortages can shift to crisis standards of care.³ Declarations also expedite public health powers to test, screen, or isolate individuals and restrict travel.

The US Constitution grants primary public health powers to the states, which they may delegate to localities. Narrower federal health powers historically center on preventing spread of infectious diseases into the US or across states. However, the HHS has exercised fed-

Ban on Non-US Nationals

Federal authorities have banned non-US nationals visiting mainland China in the prior 2 weeks from US entry.³ Exceptions include lawful residents, noncitizen spouses, and persons determined not to pose a significant risk. Yet, the Centers for Disease Control and Prevention (CDC) has not stated a discernable standard for conducting risk assessments. The Department of Homeland Security plans to remove noncitizens circumventing entry rules through "fraud, willful misrepresentation of a material fact, or illegal entry."⁴ Customs and Border Protection officers are checking passengers' travel histories to identify those who have recently visited China.

Evacuations and Quarantines

The CDC ordered a 14-day quarantine of nearly 200 US citizens evacuated from Wuhan at a military base in California on January 31. The Department of Defense has approved additional quarantine facilities at military bases for other evacuees.⁶ Federal authorities also

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announced mandatory quarantines for any person entering the US who has recently visited Hubei province.

Lawfulness of Quarantine Powers

The federal Public Health Services Act authorizes the CDC to detain, medically examine, and quarantine persons traveling into the US or between states suspected of carrying specific communicable diseases.⁷ For decades, the CDC's direct use of its powers lied dormant. In 2017, however, the CDC expanded its powers coupled with modest due process safeguards.⁸ Its rule stressed interjurisdictional coordination, recognizing the primary public health powers of states and the availability of medical isolation facilities.

Under the rule, CDC agents can initially apprehend persons suspected or known to be infected with specified communicable diseases for up to 72 hours. Medical testing, consensual treatment, modes of communication, and other accommodations must be offered at the government's expense (unless health insurers are obligated to pay).⁸

Following initial apprehension, the CDC can quarantine suspected cases or isolate infected persons pursuant to due process protections, including access to independent medical experts, legal counsel, and outside witnesses. CDC agents must also determine whether less-restrictive alternatives to separation and confinement are available. Although meaningful, these due process measures are constitutionally insufficient. The Supreme Court requires "clear and convincing" evidence (not reasonable beliefs) for civil confinements, with the right to appeal to independent tribunals.⁸ Under the CDC's rule, individual appeals are handled through internal agency reviews although anyone deprived of liberty has the right to petition courts for *habeas corpus*.

Evaluating Compulsory Powers

Compulsory public health powers should be evaluated and justified under a common legal and ethical standard, including (1) individuals must pose a significant risk of spreading a dangerous, infectious disease; (2) interventions must be likely to ameliorate risks; (3) least-restrictive means necessary to achieve public health objectives are required; (4) use of coercion should be proportionate to the risk; and (5) assessments must be based on the best available scientific evidence. In emerging crises when the science is

uncertain, adoption of the "precautionary principle" is reasonable to ensure public safety. Yet, health emergencies do not warrant coercion that is indiscriminate, overbroad, excessive, or without evidentiary support.

Entry bans of non-US nationals are overbroad because there is no individualized risk assessment. Enhanced screening, monitoring, and social distancing are less-restrictive means to achieve the public health objective. The World Health Organization officially recommends against widespread travel restrictions under the International Health Regulations, including the US entry ban.

Quarantines of evacuees or other passengers arriving from Hubei province may be justified under the precautionary principle. Hubei is currently a "hot zone" of contagion where individuals have significant risks of exposure. The quarantine period also is justified by epidemiologic data placing the outer limit of asymptomatic transmission at 14 days.

Quarantines of passengers arriving from mainland China appear excessive and are inconsistent with available epidemiologic data. While there are mounting cases outside Hubei, most passengers from mainland China have not been exposed to infection, suggesting that quarantines are overinclusive. Less-restrictive alternatives, such as enhanced screening and active monitoring, could ameliorate risks to the US population.

Self-monitoring and home quarantines are effective public health tools. During prior infectious disease emergencies, states have ordered exposed individuals to remain in their personal residences and self-monitor for early signs of infection. Thousands of US residents who have returned from China are already sheltering at home. When rigorously implemented (including regular check-ins, health care worker visits, and social support), home quarantine orders are lawful, effective, and more respectful of individual rights to liberty and privacy than restrictive, off-site measures.

This is a critical juncture in the COVID-19 epidemic, when community transmission can be prevented. Affording public health departments with the resources needed to implement evidence-based strategies is essential. A sound response starts with science, voluntarism, and civic responsibility. Coercive measures could be counterproductive and erode public trust and cooperation. Effective public health interventions that delay the spread of COVID-19 would allow time to develop key biomedical technologies, possibly including vaccines.

ARTICLE INFORMATION

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