Underreaction in a Time of Emergency: America as a Nearly Failed State

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09.04.2020 doi: 10.17176/20200409-153039-0

The emergencies that keep constitutionalists awake at night are the ones in which political leaders control both cause and effect. The Reichstag Fire. The self-generated terrorist attack. The sudden discovery of a trumped-up conspiracy to kill the leader that results in the convenient roundup of the political opposition. The state unleashes its fury on those who attacked it, but it turns out that those who plotted the attack are none other than those who benefit from the fury. These emergencies kill constitutions.

And then we worry about the overreaction to a real problem that could have been addressed with fewer threats to constitutional government. After 9/11, the US and many of its allies used real or apparent emergency powers to employ preventive detention, military tribunals, widespread surveillance, ramped up government secrecy, and even (in the case of the US) torture in the name of self-defense. And, of course, war. Many of these "temporary" solutions eventually became permanent, undermining human rights protections and separation of powers over a long horizon, well beyond the "emergency" that brought those measures about. These emergencies damage constitutions.

But constitutionalists have generally *not* been so concerned about the emergencies that are caused by nature. Earthquakes, hurricanes, volcanos, blizzards, floods. Even outbreaks of illness. Because the cause of these emergencies is so evidently not political, the timing is out of the control of leaders who might benefit from them and the measures that are needed to address the problems are so visible and evident, these have been considered the emergencies least dangerous to constitutional government. Small emergencies, I've called them. The emergency is declared, the problems are fixed (or managed), and then the emergency is clearly over so everything goes back to normal.

Not surprisingly, those of us who write about emergencies have been far more concerned about overreaction than underreaction and we have been far more concerned about politically caused emergencies rather than natural disasters. History is littered with the cautionary tales of overreaction to politically caused emergencies. But the dangers of state failure evident in underreaction are underestimated.

In the United States today – in the middle of the coronavirus pandemic – we are witnessing an appalling *lack* of emergency measures deployed at federal level. Donald Trump, the American president who has undermined constitutionalism at every opportunity throughout his presidency and who has already aggressively deployed a trumped-up state of emergency where one did not exist, now does not want to use the emergency powers available to him to limit the devastating effects of the pandemic among us.

The United States is therefore in the middle of an emergency with virtually no federal emergency powers anywhere in sight. True, the Health and Human Services Secretary Alex Azar declared a national state of emergency on 31 January, but took few of the powers on offer with that declaration. The president also declared a state of emergency, but not until 13 March, and his declaration only waived some rules about health insurance coverage under federal programs. Both declarations appeared to be doing something but in fact did very little. The powers that would have allowed the United States to meet the threat with an aggressive and concerted nationwide response have not yet been invoked. In fact, the federal government has largely been missing in action.

For example, the president can order the Centers for Disease Control (CDC), the national center for public health, to prioritize fighting the pandemic. But Trump refused for months to recognize the coronavirus was a problem, and in the meantime, the CDC monopolized the creation and deployment of test kits (that didn't work), failed to track the spread of the disease (because there were no test kits), refused the international offers of help that would have allowed the US to begin testing faster (America First!) and stood in the way of other actors – states and private businesses – who wanted to develop adequate testing regimens but who needed federal approval to do so. By the time Trump finally gave permission for states and private businesses to develop their own tests, the epidemic had already been declared a global pandemic and most US states were already registering "community transmission," in which the virus was loose in the community with no way to track its course. The number of people being tested in the US is still woefully small and therefore no one knows the shape of the outbreak to design adequate measures to prevent its spread. The development of testing capacity is clearly still not a priority, even now.

The president has the power through a 1950s law called the Defense Production Act (DPA) to order from private companies the production of scarce supplies that are needed for national security. Face masks and ventilators could have been ordered up in January when the dimensions of the coming pandemic were becoming clearer. But Trump did not invoke the act to order the production of critical pandemic supplies until late March, only a week or two away from the anticipated peak of their demand in large parts of the country. By the time the ventilators arrive, produced by companies that never made them before but that have been ordered to do so on short notice, it will be summer – at which point we hope that the worst will be over. What's especially shocking about this non-use of DPA powers is the absolutely normal use of these powers to clear ordinary roadblocks throughout the defense supply chain on a daily – even hourly – basis. As the New York Times reported, "[t]he Defense Department estimates that it has used the law's powers 300,000 times a year" during the Trump administration. But Trump would not invoke it for ventilators or masks.

Under authorization of the Pandemic and All-Hazards Preparedness Act (PAHPA), the US federal government maintains a Strategic National Stockpile to store pharmaceuticals and other medical supplies for use in a national health emergency. But the Trump administration has refused to authorize distribution of the stock of ventilators and masks to the states. Instead Trump told the governors that it was their responsibility to fend for themselves, even though the US was maintaining these stockpiles precisely for a national health emergency like this. Trump's son-in-law Jared Kushner even incorrectly said that the national stockpile was not supposed to be used by the states except as a last resort and, after governors protested, the website of the program was changed to correspond to Kushner's legally inaccurate statements. When the reserve of medical supplies was finally dribbled out to the states in late March, states with Republican governors got what they asked for and Democratic governors came up short. Trump seems to be using a public health emergency to benefit his political allies and require citizens in states with Democratic governors to risk their lives. He's treating health supplies as gifts of grace, and not as the weapons for fighting an actual emergency.

Grounded in the White House, along with much of the rest of the population, in emergency lockdowns declared by governors and mayors, Trump has taken to holding daily press conferences in which he often gives information contradicting experts in the field, and frequently confuses the messages that people need to protect themselves. On the day when the CDC formally recommended that Americans begin wearing masks (despite the fact that none are available), Trump announced that he would not be doing so.

The American response to the pandemic could have been massively more effective if the president had actually treated it like an emergency and used the powers that the law gives him to challenge the virus. But he balked every step of the way. As the pandemic started to take off exponentially in the US while the

president held the US back from a program of aggressive early detection, Trump tweeted a picture of himself, fiddling while the coronavirus flamed.

The national response to the pandemic has been a disaster, but state governors have tried to fill the leadership vacuum. Washington State, where the first cases of COVID-19 were discovered, was the first to declare an emergency on 29 February, followed closely by California. By late March, fully 48 out of America's 50 states had emergencies in place. Every state law is different and each governor is using different powers given to him or her under state-level emergency law. Therefore, the emergencies are not fully parallel or coordinated. Some states put lockdown orders in place quickly; other states used the emergency merely to apply for federal aid, appropriated by Congress under the first coronavirus mitigation law that brought new money into the public health system. Still others used emergency powers to waive state licensing requirements for medical personnel who are coming in from different states to treat victims in virus hot-spots. Others have postponed presidential primaries in an election year to prevent people from congregating at the polls. While a national lockdown is what experts say is the surest way to prevent the spread, however, nine governors (all Republicans) are holding out as I write. Without a national response, the piecemeal strategies of reluctant governors risk lives across the country.

But it has not been easy for the states. Once Trump told states that they had to fend for themselves, governors and state health commissioners entered a world-wide scrum for Personal Protective Equipment (PPE) for health care workers and ventilators for patients. News organizations have documented how states have tried to outbid each other, raising the prices of scarce medical supplies as if at an art auction. While private companies profit, states sink deeper into debt. Rumors that the Trump family had a financial interest in one of the companies benefiting from administration policy were determined by Politifact to be "half true," which is to say, not fully false. More crucially, governors have to compete with each other for scarce supplies, and such a competition may or may not result in these supplies getting to where they are needed the most.

The United States is a sprawling, decentralized, complex political space. And the legal authorities for health-related emergencies tend to be local. But the US response to the coronavirus has been too little, too late, incoherent and ineffective. If it weren't for state governors, the virus would have already overwhelmed America's for-profit, just-in-time-supplied hospital system.

Oh yes, and since health insurance is tied in the US to having a job while millions upon millions of people have lost their jobs in the last few weeks due to the "stay at home" orders, we are facing the country's most serious health crisis in a century with a growing number of people uninsured. This, too, could have had an easy federal fix under the "Obamacare" program that allows people to buy subsidized health insurance. But President Trump refused to open the program to the newly uninsured.

So what do we make of the uses of emergency powers in this health emergency? Strangely, despite the fact that Trump has never seen a presidential competency he hasn't wanted to enlarge, he has refused to play much of a role in the pandemic. Instead, he has sat on his hands and not invoked the powers at his disposal to create even a minimally effective response to the threat.

Usually constitutionalists worry about power grabs and executive aggrandizement at times of emergency. But in the US response to the pandemic, we see the flip side of that problem, no less dangerous. We are witnessing the abuse of presidential power through the president's willful refusal to act in ways that the emergency demands. And when the president does decide to act, he acts to benefit his partisan allies, and not for the health of the country.

A government that refuses to protect its own citizenry damages the constitutional order just as does a government that preys on them. With ineffective government, people become cynical about politics. Ineffective government becomes yet another reason to resist paying taxes, and it pushes people resort to self-defense instead of collective security. In most states

under lockdown in which only "essential businesses" like grocery stores and pharmacies remain open, gun shops have been deemed essential. In March alone, since the pandemic has started to spread in earnest across the United States, nearly 2 million guns were sold. The most robust constitutional response to the pandemic relies on the US Constitution's Second Amendment, which protects the right to own guns.

A strand of American conservatism detests government as such and harbors dreams of doing away with it so that people can experience the freedom of not being told what to do. Influential Republican strategist Grover Norquist once famously declared, "I don't want to abolish government. I simply want to reduce it to the size where I can drag it into the bathroom and drown it in the bathtub." Trump has often indicated his sympathies with this view.

As the pandemic grips the US and the death toll rises, Trump refuses to treat the situation as an emergency and leaves everyone to their own devices. People must now trust that their governors and mayors are resourceful enough to deal with a global and national problem at the local level. Many local politicians have risen to the challenge. But at national level, the pandemic shows that the US is perilously close to being a failed state. Underreaction also corrodes constitutional resilience.

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SUGGESTED CITATION

Scheppele, Kim Lane: Underreaction in a Time of Emergency: America as a Nearly Failed State, Verfassungsblog, 09.04.2020, doi: 10.17176/20200409-153039-0.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20200409-153039-0.