



White Paper: COVID-19 Emergency Measures and Press Freedom

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The Reporters Committee for Freedom of the Press has been comprehensively monitoring the federal, state, territorial, tribal, and local emergency responses to the outbreak of the novel coronavirus named COVID-19. See our landing page [here](#) for information on public records, court access, and emergency measures, as well as an intake form to track COVID-19 related access issues. For any questions not addressed below or for emergency assistance, please contact the Reporters Committee’s hotline at hotline@rcfp.org.

At the time of writing, the steps other countries have taken to blunt the spread of the disease, particularly the country-wide lockdown in Italy and the geographic quarantine in cities in China’s Hubei province, are the [most sweeping](#) since the influenza pandemic in 1918.

In the United States, states, territories, tribal authorities, counties, and cities have issued “stay-at-home” and “social distancing” orders but have not yet imposed the most invasive public health interventions. Experts believe extraordinary steps like a mandatory regionwide quarantine [are unlikely](#) but not [impossible](#). (Notably, on March 28, the president [floated](#) the idea of a regional quarantine for parts of New York, New Jersey, and Connecticut, but, after internal discussions, issued a non-binding travel advisory instead.)

Even if they are not invoked, federal, state, territorial, tribal, and local governments have expansive powers in a public health emergency. These include the apprehension and detention of exposed individuals (quarantine), the apprehension and detention of the sick (isolation), the ability to commandeer private property, and even the ability to limit interstate travel, which has been recognized as a fundamental right under the Constitution.

The president also possesses expanded powers triggered by an emergency declaration such as the one issued in response to COVID-19, some of which could have implications for the First Amendment.

The following white paper looks at the scope of these emergency powers and explains how they could theoretically implicate newsgathering and press freedoms.¹

The bottom line is that, while the government’s authority to take extraordinary measures to limit personal autonomy is significant when combating the spread of infectious disease, perhaps justifiably so, these powers are not unbounded and may not be misused. That said, courts are likely to be deferential to the government in these cases. So far, the best strategy for a news organization concerned about a particular public health intervention has been dialogue with the relevant government agency.

To the extent public health interventions impact the exercise of First Amendment rights, including newsgathering and reporting, the existing law suggests that they must not be arbitrary, unreasonable, discriminatory, or retaliatory, and they must be driven by science.² This careful balancing is crucial for the press, which, as the Centers for Disease Control and Prevention (and other government bodies [have recognized](#)), plays an essential role in communicating accurate information about public health emergencies to the public.³

Who’s in charge in a public health emergency?

Federalism in the U.S. means that officials at all levels of government – federal, state, territorial, tribal, and local – share emergency powers. States, localities, and territorial and tribal governments have the primary authority to implement emergency public health interventions and are usually the lead decision-makers and enforcers during outbreaks of infectious disease.

The states derive their legal authority to impose public health interventions from a general “police power,” which includes an obligation to protect public health. That power was reserved to the states under the 10th Amendment to the U.S. Constitution and is often described as “plenary” – that is, restrained only by the federal or state constitutions, or if the federal government has “pre-empted” a state power by passing legislation. In practice, this means that states and localities have expansive powers in public health emergencies.

Because states, territories, tribes, and localities all share this emergency authority, it is often important to check multiple sources of law when faced with a question about non-federal public health authority. And states, territories, and tribal authorities may have all transferred emergency powers to counties or cities in different ways.

Fortunately, states, territories, tribal authorities, and localities have all been diligent in pushing information about the emergency to their constituents. For instance, most states and large cities have emergency management agencies (see this [list](#) from the Federal Emergency Management Agency) collecting the relevant executive orders or other guidance on the COVID-19 pandemic from the state governor's office. State governors also have their own websites and will post executive orders and other guidance.

As sovereign entities, tribal authorities have their own public health powers, including the power to quarantine and isolate infected individuals, or to exclude individuals from tribal territory. For guidance on tribal public health powers, the CDC website has a significant amount of information, including [this bulletin](#). For an example of a tribal stay-at-home order, see [this order](#) from the Navajo Department of Health.

Individual counties or cities will also often have ordinances or other laws relevant to public health emergencies. See, for instance, the [site](#) hosted by the Cook County Board of Commissioners in Illinois, which lists recent county ordinances related to COVID-19.

Again, in identifying the operative rules in your jurisdiction, it is important to check multiple sources of authority, at the state, tribal, territorial, and local levels.

What about federal power?

Although states, territories, tribes, and localities are usually the first to order and enforce a public health intervention, the federal government also has broad emergency authorities in a pandemic. These are derived from constitutional provisions giving it the power to levy taxes and spend public funds, regulate commerce among the states, and enact laws that are “necessary and proper” for the exercise of the powers granted to the federal government in the U.S. Constitution. The Commerce and Necessary and Proper Clauses are the most relevant grants of authority vis-à-vis federal power in an outbreak of an infectious disease.

Again, in practice, those clauses have been read to grant broad authorities to the federal government in public health emergencies, and the Commerce Clause provides the basis for foreign and interstate isolation and quarantine authority.

There are several federal laws relevant to an infectious disease outbreak. The most important for the purposes of scoping federal power during an infectious disease outbreak are: (1) the [Robert T. Stafford Disaster Relief and Emergency Assistance Act](#), codified at 42 U.S.C. §§ 5121-5207; (2) the [Public Health Service](#)

[Act](#), codified at chapter 6 of Title 42 of the U.S. code; and (3) the [National Emergencies Act](#), codified at chapter 34 of Title 50.

The Stafford Act permits the president to declare either a “major disaster,” the definition of which does not include an outbreak, or an “emergency,” the definition of which is broad enough to cover public health threats. President Trump [declared](#) a nationwide emergency on March 13, which allows him to direct federal agencies to use existing resources to aid state, territorial, tribal, and local responders. In a major disaster, like a hurricane, FEMA, part of the Department of Homeland Security, coordinates the federal response. With the COVID-19 nationwide emergency, the Department of Health and Human Services remains the agency in charge of the response.

Interestingly, President Trump has declared “major disasters” in many states in response to requests from the governors of those states, becoming the first president ever to do so. Those declarations unlock a wider range of federal assistance. See this [explainer](#) by Liza Goitein of the Brennan Center for Justice for the possible civil liberties implications of the move.

The PHSA permits an emergency declaration by the HHS secretary, which is also in effect. Under a PHSA emergency, the secretary is empowered to make grants, enter into contracts, waive certain federal regulations, and take other emergency action to address a public health threat. The PHSA is also the law governing the federal government’s quarantine and isolation powers, and implementing regulations were finalized in 2012. Those can be found at 42 C.F.R. part 70 (interstate quarantine and isolation) and part 71 (foreign quarantine and isolation).

Finally, and most importantly, the NEA is a law passed in 1976 to formalize the emergency powers of the president. The law itself does not grant emergency authority, but its invocation triggers more than 130 emergency powers, some of which are of direct relevance to the news media.

For instance, as the Reporters Committee will explain in a separate special analysis, section 706 of the Communications Act of 1934 (codified at 42 U.S.C. § 606) permits the president to shut down or take over radio stations during a time of “public peril,” and [some](#) have expressed concerns that it could theoretically be invoked to interfere with other forms of media or as an internet “kill switch” to enforce a communications blackout. Section 706 is complex and, if applied broadly, could present serious threats to press freedom. We will update this white paper with a link to that analysis when it’s published.

Note that the president has invoked all three emergency laws noted above – the Stafford Act, the PHS Act, and the NEA – in the ongoing nationwide COVID-19 emergency.

What kinds of emergency public health powers could be exercised during a pandemic?

Federal, state, tribal, territorial, and local officials have already exercised some of these powers. States and localities across the country have imposed “social distancing” measures such as banning large gatherings, closing schools and non-essential businesses, and requiring residents to “shelter in place” or “stay at home” except for solitary exercise, medical visits, and to purchase essentials.

Importantly, all of the emergency authorities that the Reporters Committee is aware of (collected [here](#)) exempt the news media from any mobility restrictions, though they do strongly encourage news organizations to practice social distancing measures, such as keeping employees at least six feet apart while working.

The federal government has also instituted [travel bans](#) for foreign nationals who have visited China, Iran, the Schengen Area of Europe, the United Kingdom, and the Republic of Ireland within the past 14 days. U.S. persons returning from high-risk countries have been asked to stay home for 14 days.

The most invasive and controversial public health interventions involve the deprivation of personal liberty, such as forced testing, vaccinations, and perhaps most notably for the news media, the power to apprehend and detain individuals or groups in quarantine (meaning the detention of an individual who has been exposed to an infectious agent) or isolation (the detention of an individual who has been infected).

All levels of government have the authority to impose quarantine or isolation. The federal government’s authority is under the PHS Act, while state, territorial, tribal, and local officials have inherent authority, usually governed by a particular statute. (Many states have adopted the [Model State Health Emergency Act](#), commissioned by the CDC in the 2000s.)

There are several different types of quarantine and isolation, which Lawrence O. Gostin and Lindsay F. Wiley, authors of “Public Health Law: Power, Duty, Restraint,” list as:

- Medical Isolation: Where an infectious individual is isolated, usually in a hospital setting.

- Travelers' Quarantine: Where individuals coming from a “hotspot” are quarantined for the incubation period of the infectious agent (from exposure to the development of symptoms). The federal government has instituted mandatory federal quarantines for individuals evacuated from foreign nations in response to COVID-19.
- Home Quarantine: Where individuals are required to “shelter in place,” which is the approach taken in several European countries and in many U.S. jurisdictions.
- Work Quarantine: Where individuals are limited to home and the workplace.
- Institutional Quarantine: Where individuals in a particular place are quarantined together. Institutional quarantine is controversial because it can cause an infection to spread.
- Geographic Quarantine: Where a region is quarantined and entry and exit are barred, often called a “cordon sanitaire.” China has imposed mandatory lockdowns on entire cities in the Hubei province, and Italy has declared the entire country a “red zone,” barring travel throughout the country, save for essential services.

The geographic quarantine is the most controversial public health intervention, and, to date, experts say it is unlikely to happen in the U.S. It is also of questionable effectiveness, depending on the scope and nature of the quarantine, because the disease could more easily spread within the “cordon” (because sick individuals intermingle with the healthy).

Were a geographic quarantine imposed, the news media should be declared an essential service with the ability to move about (subject to social distancing and safety requirements). Importantly, Italy considers the news media an [essential service](#) and has not limited its mobility through the country.

Finally, public health authorities have a wide variety of “surveillance” authorities to track and control the spread of infectious diseases. (This does not mean “surveillance” in the sense of criminal or national security electronic surveillance.) These laws are complex and involve both proactive information gathering and sharing, and restrictions on the dissemination of information to protect personal privacy. The Reporters Committee is in the process of preparing resources on pandemic surveillance issues.

Are there limits on federal, state, or local emergency authorities?

Yes, though the scope of these limits is both unclear and potentially complicated. News organizations facing questions about the propriety of mobility restrictions or other public health interventions should be aware of three types of limits, and should contact the Reporters Committee's hotline at hotline@rcfp.org with specific questions.

First, some states have statutes in place that provide express protections for the news media in emergencies. For instance, [California Government Code § 8572](#) gives the governor the power to commandeer or utilize any private property or personnel in a state of emergency (with reasonable compensation), but expressly exempts any "newspaper, newspaper wire service, or radio or television station" from such action. The governor may, however, use any news wire service to communicate information to the public, if no other means of communication are available, but is obligated to minimize interference with the transmission of the news.

Similarly, [California Penal Code § 409.5\(d\)](#) permits law enforcement to cordon off areas of "calamity" and to punish those who violate the cordon, but exempts "duly authorized representative[s] of any news service, newspaper, or radio or television station or network."

News organizations concerned about the effect of an emergency public health intervention on news gathering or reporting should consult state and local laws to determine if such protections exist.

With respect to federal law, there are laws and guidance that should provide some protections for the news media with respect to mobility restrictions and affirmative protections.

The 2018 appropriations act extended "first informer" status to broadcasters in the Stafford Act. Under [42 U.S.C. § 5189e\(a\)](#), "wireline or mobile telephone service, Internet access service, radio or television broadcasting, cable service, or direct broadcast satellite service" are defined as "essential service providers." As such, federal officials may not impede access to a disaster site for these services if access is needed to restore and repair service (and may not impede that restoration or repair).

Further, the Cybersecurity and Infrastructure Security Agency at DHS has issued [guidance](#) identifying the "essential critical infrastructure" workforce, which specifically includes workers "who support radio, television, and media service, including, but not limited to front line news reporters, studio [sic], and technicians

for newsgathering and reporting.” The guidance is advisory, and meant to direct state, local, tribal, and territorial governments. But it should be persuasive when cited to state, territorial, tribal, or local public health authorities in the event an intervention impedes media operations.

Second, particularly with quarantine and isolation, there may be procedural requirements and protections depending on the jurisdiction. State laws vary widely, but some require a court order and others provide for some form of judicial review. See this [state-by-state survey](#) prepared by the National Conference of State Legislatures.

With respect to federal quarantine authority, the PHSA permits foreign and interstate quarantine and isolation for specific diseases identified by executive order, which includes coronaviruses like COVID-19. As noted, the PHSA authority has been implemented in regulations finalized in 2012. Interstate quarantine is governed by 42 C.F.R. part 70 and foreign quarantine by part 71. Under the terms of the regulations, federal quarantine or isolation authority is broad and does not expressly provide for judicial review.

The main procedural limits on both federal and interstate quarantine authority are a requirement that the CDC director reassess the need for a quarantine order within 72 hours from the issuance of a federal order, and that an individual can request a medical review. The person must request the review, and it can be completed by a CDC employee and based exclusively on written submissions. Both sets of regulations state that nothing therein “shall affect the constitutional or statutory rights of individuals” to judicial review (§ [70.14](#) and § [71.37](#)), but this is not a grant of an affirmative right to court review.

Third, and relatedly, there may be limits under federal or state constitutions, depending on the circumstances. As discussed below, there are older cases involving mandatory vaccination and quarantine that suggest that emergency powers are not unbounded and must be exercised consistent with certain first principles.

Additionally, certain invasive measures — particularly something like the quarantine of a city — have not been tested in the courts. With respect to limits on interstate travel, for instance, the U.S. Supreme Court has recognized interstate travel as a fundamental right under the Constitution, and under modern constitutional doctrine, a restriction on interstate travel would be subject to strict scrutiny. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 630 (1969).

The foundational case on the scope of public health authority is [Jacobson v. Massachusetts, 197 U.S. 11 \(1905\)](#), in which the Supreme Court upheld

the authority of states to mandate vaccinations (in that case smallpox). The decision simultaneously recognizes broad public health authorities for states or localities as well as limits on that authority: “[T]he police power of a state, whether exercised directly by the legislature, or by a local body acting under its authority, may be exerted under circumstances, or by regulations so arbitrary and oppressive in particular cases” as to warrant courts to act to “prevent wrong and oppression.” *Id.* at 38.

With respect to quarantine, courts have set down three general rules: (1) health authorities have to show that the person had been exposed to an infectious disease and posed a risk to society; (2) they have to ensure the safety of the individual while in isolation or quarantine; and (3) health authorities may not discriminate. The most important case on the latter point is *Jew Ho v. Williamson*, 103 F. 10 (N.D. Cal. 1900), in which a federal district court struck down a quarantine order by the city and county of San Francisco that was directed exclusively at the Chinese community. The court found that authorities had acted with an “evil eye and an unequal hand” by targeting a particular group of people. *Id.* at 23.

The most recent case on state quarantine powers affirms that quarantine orders must be based on necessity and may not be overbroad or arbitrary. In that case, [Hickox v. Christie, 205 F. Supp. 3d. 579 \(D.N.J. 2016\)](#), a Doctors Without Borders nurse returning from Sierra Leone, where she had cared for Ebola patients, was quarantined for about 80 hours after arriving at Newark International Airport. She sued under the Fourth and 14th Amendments and state tort law for false imprisonment and false light. The district court dismissed the constitutional claims but permitted the state claims to proceed. See *id.* at 584-85. The parties ultimately settled.

Based on *Jacobson* and *Jew Ho*, the district court in *Hickox* found that the quarantine did “not suggest arbitrariness or unreasonableness as recognized in the prior cases – i.e., application of the quarantine laws to a person (or, more commonly, vast numbers of persons) who had no exposure to the disease at all.” *Id.* at 593. Although the court found the quarantine in that case constitutional, the decision leaves open the possibility of a challenge where health officials cannot show need, or where the quarantine is arbitrary or unreasonable.

In sum, with respect to invasive health interventions like mandatory vaccination or quarantine, the law recognizes significant federal and state power to interfere with civil liberties, including physical detention, but that power is not unbounded.

Is there any precedent for a public health intervention being challenged under the First Amendment?

Our research thus far says no. There are no cases involving the worst-case scenario of a reporter being apprehended and detained in quarantine or isolation to stop a story or to retaliate for coverage perceived as negative. Indeed, as noted above, in public health emergencies, the news media is often considered by authorities as an essential service and an important means by which information is disseminated to the public.

What should I do if I'm subjected to a public health intervention that appears unnecessary, unreasonable or retaliatory, and/or that interferes with newsgathering or news reporting?

First, as noted above, please contact the Reporters Committee through the hotline (hotline@rcfp.org). If more invasive public health interventions do occur, particularly something like a regional quarantine where reporters are limited in their movements, we would both like to track these developments and may be able to offer pro bono help from Reporters Committee lawyers or guidance on whom to contact and where to secure local counsel, if warranted.

With respect to mobility restrictions, based on past experience with state stay-at-home orders and the fact that public health authorities often rely on the media to communicate information to the public, we do not see it as likely that journalists will be impeded even in the extreme case of a mandatory region-wide quarantine. If they were to be, there would likely be the possibility of a constitutional challenge, which would be a matter of first impression.

Somewhat more probable would be mandatory quarantine or isolation orders affecting the press. In terms of how to respond, particularly if you believe the quarantine order is improper or, worse, an attempt to impede reporting, our top-level guidance would include:

- If this is a state, territorial, tribal, or local order, consult the relevant law. Again, the NCSL state-by-state survey is [here](#). The relevant jurisdiction may have procedural requirements that were not followed or some avenue of redress, like judicial review or right to counsel.
- Similarly, persons detained in quarantine or isolation may file a petition for a [writ of habeas corpus](#), challenging their detention as improper. Habeas law is complicated, particularly with respect to federal quarantine or isolation orders, and we encourage anyone with questions to contact our hotline.

- Although modern case law on quarantine or isolation is sparse, there is a developed body of law on civil confinement, which requires certain procedural safeguards. Again, we encourage anyone with questions on these issues to contact our hotline.
- With respect to both federal and non-federal quarantine orders, if there is some indication of retaliation or a desire to suppress reporting, there could be other constitutional challenges available. Again, please reach out to the Reporters Committee hotline with any questions if such situations arise.

Finally, the two other emergency authorities that could theoretically affect the news media are the power of authorities at all levels of government to commandeer private property for public use, and to limit access to private property to prevent the spread of an infectious agent.

Top-level guidance for a news organization or journalist affected by a commandeering order would include:

- Check the relevant law in the jurisdiction, which is likely to be the state or territorial emergency management statutes. As noted, California has specific rules that prevent the governor from commandeering media facilities. [Section 252.33 of the Florida Emergency Management Law](#) (chapter 252 of Title 27) also includes an express carve-out for the news media, stating that nothing in the general emergency provisions can be used to “[i]nterfere with the dissemination of news or comment on public affairs,” but that communications facilities and news organizations can be required to transmit public service messages in connection with the emergency. The Reporters Committee is currently surveying similar statutes and will update its resources shortly.
- The general rule when private property is commandeered is that the owner receives some compensation, but there are exceptions. The federal constitutional power to commandeer private property is subject to due process and compensation limits, which apply both in times of emergency and non-emergency.
- Under basic First Amendment principles, emergency authorities could not be used to control the actual content of a news broadcast – though the rules for federally licensed broadcasters may be more complicated. Any request or demand for a news organization to modify the content of its reporting (not including requirements that outlets carry public service announcements) should be immediately reported to the Reporters Committee hotline.

- As noted, the Reporters Committee will release additional resources on Section 706 of the Communications Act of 1934, which grants special presidential authority over electronic transmissions in emergencies.

Finally, top-level guidance for news organizations who may have their facilities closed on public health grounds would include:

- Again, consult the relevant law to see if there are any limitations on emergency action that impact the press
- Generally, a public health closure would not entitle the owner to compensation, though there may be exceptions. Again, consult the relevant law.
- Last, as with all of these emergency authorities, if there is any indication that they are being taken to retaliate against a news organization for the content of its coverage, please contact the Reporters Committee's hotline immediately. There may be emergency legal responses available, and we may be able to assist with securing counsel in such a case.

Endnotes

1 This paper relies significantly on Lawrence O. Gostin and Lindsay F. Wiley, *Public Health Law: Power, Duty, Restraint* (3d ed. 2016). It was written by Gabe Rottman, director of the Technology and Press Freedom Project at the Reporters Committee, with Linda Moon, Stanton National Security/Free Speech Fellow, and Legal Fellows Lyndsey Wajert and Jordan Murov-Goodman. Some of the questions addressed here would be matters of first impression in the court and our conclusions are therefore our best application of the law as we know it to scenarios, like the mandatory quarantine of a reporter, that have heretofore been hypothetical. Again, for specific questions, please contact the Reporters Committee's hotline at hotline@rcfp.org.

2 As discussed below, this is our distillation of the existing case law on compulsory public health interventions, including vaccination and quarantine, as it would likely apply in a case where an intervention impacted the press (the mandatory quarantine of a reporter, for instance). These are not terms of art currently in the law. With respect to mandatory quarantines, for instance, the courts require that the person be exposed to an infectious agent, and that the quarantines not be arbitrary, unreasonable, overbroad, or discriminatory. See *Hickox v. Christie*, 205 F. Supp. 3d 579, 593-94 (D.N.J. 2016).

3 This balancing is also important to ensure that public health interventions actually mitigate the threat from COVID-19, as dramatic steps like an institutional quarantine that keeps the sick in proximity to healthy individuals could be counter-productive and increase infections in a population.