

## ***Legal Dubiousness of En Masse State Lock-Downs and “Shelter-in-Place” Orders as a Response to COVID-19***

The constitutionality of the authoritarian lock-down and "shelter-in-place" orders occurrent in the United States, as local responses to COVID-19, will be an issue for some time to come. Many aspects of the situation must be considered as we grapple with the legal questions. I have enumerated some of them below, using the State of Illinois as an example.

### ***A. Established Quarantine and Isolation Laws Ignored by State Governors in the COVID-19 Situation***

In Illinois (and probably many other states), there is a well-established quarantine and isolation law and corresponding set of administrative rules for epidemic situations. Governor Pritzker's emergency executive orders contravene this well-established body of law (20 ILCS 2305/2; Illinois Administrative Code 77.690.1330). These rules and laws build in due process protections for the People of Illinois and rule out summary mass quarantines of the entire state population, or of whole communities, and the wholesale closures of businesses, by executive fiat, in an epidemic. The State needs court orders to quarantine people and close businesses without their consent; and those opposed have a right to counsel which the State must appoint, if necessary. The Governor can neither change Illinois law nor ignore due process guarantees, even in an emergency. He is charged with upholding the Illinois Constitution (and the United States Constitution, which by its Article VI, is the Supreme Law of the Land) and properly executing Illinois law.

The Illinois Department of Public Health (“IDPH”) actually has exclusive authority over quarantine and isolation—not the Governor; it, too, must follow Illinois law. The Governor has misapplied the Illinois Pandemic Preparedness and Response Plan (March 2020) (“IPPRP”) of that agency, indicating that, in emergencies, the State is to facilitate *local* responses, not dictate from the top. While the Governor controls and directs emergency response in the state, he is supposed to aid *localities* by directing resources to them, as needed. The plan emphasizes that epidemic response be *targeted* and mindful *to minimize economic damage*; it expressly states that *quarantine is ineffective against novel diseases spreading in a flu-like way*. Medical experts made the latter judgment.

The Governor's disregard of Illinois law is especially troubling absent any accurate public accounting and proof of COVID-19 numbers and any context of equally careful comparative statistics providing a basis to evaluate the level of threat. The Governor of Illinois and the Illinois Department of Public Health owe the People of Illinois a detailed report specifying (1) who is doing the reporting; (2) how it is being done; (3) the criteria for assessing anything as a COVID-19 case; (4) the criteria for assessing anything as a COVID-19 death; (5) the exact locations (addresses) of each COVID-19 case; (6) the exact locations (addresses) of COVID-19 proliferation since the beginning of the reporting; (7) the exact conditions of proliferation; (8) the exact locations (addresses) of case and death concentrations throughout the State of Illinois; and (9) a context of equally careful comparative statistics, such as the cold and flu statistics for the State of Illinois for the last five years, to provide the public with some basis for evaluating the level of the COVID-19 threat.

Certainly, if cases are concentrated in specific localities, then a general restriction of movement and assembly is especially baseless, particularly without proof that assembly respecting social distancing presents a danger. Further, the Governor's requirement, as of May 1, that people

wear masks is problematic and arbitrary, since he has presented no proof that masks help to prevent COVID-19.

The Governor should have enforced the Illinois law of quarantine and isolation under IDPH's direction. This situation's novelty is no excuse for his failure; every epidemic is unique. He must explain the authority for his executive orders. They appear to have none.

If the Illinois Governor has ignored quarantine and isolation laws, then one might ask about governors elsewhere. If many have behaved similarly, then we should seek the reasons and also question the coordinated character of their lock-down and "shelter-in-place" activity. The resulting mass immobilization of the nation is both historically unprecedented and politically dangerous. Surely, local leaders had better approaches to this virus available than deliberate actions foreseeably crashing our local and national economies and destabilizing the lives of millions of people. Our laws and regulations, in Illinois, and locally focused IPPRP certainly anticipated a better way.

### *B. Unique Aspects of the Current Situation*

We have seen rash, hastily implemented, authoritarian style lock-downs or "shelters-in-place" of whole states in serial fashion, with no more targeted, moderate, measured response even considered. This reckless conduct has trashed our economy and put at least thirty million people out of work. It raises a number of issues, including the following:

- (a) the constitutionality of state laws creating gubernatorial emergency powers neither contemplated by state constitutions, as interpreted by judicial decisions, nor delegated properly by legislatures for administrative purposes;
- (b) the legitimacy of an executive's *de facto* immobilization of a whole state population, particularly in an undefined situation with no determinate end, operating to deprive that population of critical First, Fifth, and Fourteenth Amendment rights under the United States Constitution and corresponding rights under the state constitution;
- (c) the legitimacy, as well, of a coordinated use of local executive authority, across many states, effectively immobilizing vast segments of the United States population and operating to deprive that population of their First, Fifth, and Fourteenth Amendment rights under the United States Constitution and corresponding rights under state constitutions, particularly in an undefined situation with no determinate end;
- (d) the legitimacy of government takings of property without due process and just compensation, in relation to the Fifth and Fourteenth Amendments to the United States Constitution and corresponding provisions of state constitutions, where government action, urged to be in the public interest, drives people out of business, deprives them of their livelihoods, and subjects them to involuntary bankruptcy and mortgage foreclosure;
- (e) the danger for the stability of our nation's political and economic system created by a coordinated use of local emergency powers immobilizing vast segments of the nation's population and crashing the whole national economy;
- (f) the possible conflict between such coordinated uses of power and the Commerce Clause of the United States Constitution; and

(g) the danger to the people of each state posed by a partial or total government shut-down in an emergency situation, e.g., such that legislatures do not meet to provide any necessary checks on executive action, and courts meet on altered schedules, creating accessibility problems.

(h) The constitutional limits on exercises of local executive power crashing a local economy and coordinated usages of such powers, across many states, crashing a whole national economy, bear particular study. Executives are elected to preserve the total welfare of the political units that they serve; acts with such serious destructive effect run contrary to that total welfare and, so, to the executive mandate.

The people of the fifty states have an interest in (a) making legislative changes to emergency powers acts, particularly sections defining executive power and designating a broad range of triggering events at the executive's discretion without legislative involvement; (b) suggesting well-considered standards for defining emergency situations; (c) suggesting careful guidelines assuring the measure and proportion of government responses to emergencies, particularly in the face of media and political pressure; (d) studying and suggesting means of protecting citizens from emergency government action causing them devastating economic damage and doing significant violence to their constitutional freedoms; and (e) producing a civil defense plan for each state and the nation, as a whole, to avoid future scenarios in which executives and governing bodies, themselves, create a threat to the stability of the political and economic system of the United States.

Measure and proportion should be the rule for all "emergency" action. We are a free people. The continued preservation of our freedom is critical to each of us and to our nation as we meet the challenges of today's world.

Donna M. Adler, J.D., Ph.D.  
Glen Ellyn, Illinois

**Biographical Statement:** Donna Adler is an Illinois attorney working to analyze the full range of constitutional issues raised by local governmental COVID-19 responses. This article does not constitute the provision of legal advice. It raises questions that all concerned citizens should want to see resolved and presents her stand, as an informed citizen, on the issues.