

Disclaimer: This is a machine generated PDF of selected content from our databases. This functionality is provided solely for your convenience and is in no way intended to replace original scanned PDF. Neither Cengage Learning nor its licensors make any representations or warranties with respect to the machine generated PDF. The PDF is automatically generated "AS IS" and "AS AVAILABLE" and are not retained in our systems. CENGAGE LEARNING AND ITS LICENSORS SPECIFICALLY DISCLAIM ANY AND ALL EXPRESS OR IMPLIED WARRANTIES, INCLUDING WITHOUT LIMITATION, ANY WARRANTIES FOR AVAILABILITY, ACCURACY, TIMELINESS, COMPLETENESS, NON-INFRINGEMENT, MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. Your use of the machine generated PDF is subject to all use restrictions contained in The Cengage Learning Subscription and License Agreement and/or the Gale In Context: Opposing Viewpoints Terms and Conditions and by using the machine generated PDF functionality you agree to forgo any and all claims against Cengage Learning or its licensors for your use of the machine generated PDF functionality and any output derived therefrom.

Fear Is Not Our Master: The Constitution is clear: even during emergencies, government powers are never unlimited

Author: Clint Bolick

Date: Fall 2020

From: Hoover Digest(Issue 4)

Publisher: Hoover Digest

Document Type: Article

Length: 1,276 words

Content Level: (Level 4)

Lexile Measure: 1270L

Full Text:

Fear is a powerful driver of public policy. Ordinarily that is not greatly troubling. We have speed limits, food sanitation laws, and many other regulations based on rational fear of harm.

Sometimes in extreme circumstances, such as the Covid-19 pandemic, fear is so pronounced that it leads government officials to declare an emergency, which under various enacted laws expands their powers to meet the crisis.

We have probably all been surprised, even before the pandemic, at the number of emergency powers Congress has extended over the years to the president. Likewise, governors and even mayors have exercised sweeping emergency powers in the face of the public health crisis.

But are those powers still bound by the Constitution, or do government's constitutional powers expand in times of emergency? This question has been fiercely debated in presidencies spanning from Abraham Lincoln's to Donald Trump's.

Few questions of constitutional law have categorical answers, but this one does: in our constitutional republic, emergencies do not expand the boundaries of constitutional authority.

The US Constitution bestows enumerated powers upon Congress and the president. By its text, only one power expands in emergency: the writ of habeas corpus may be suspended in time of rebellion or invasion. The remaining powers and limits are firmly set.

Likewise, the individual rights enumerated in the Constitution do not contain emergency exceptions.

For states, the matter is somewhat different. As the organic units of American government, the states alone inherently possess the "police power" to regulate for public health and safety. By virtue of the Tenth Amendment, those powers not expressly delegated to the national government remain with the states or the people. Local governments, in turn, derive their powers from the state.

But state powers are not without limits: not only does the US Constitution protect individual rights against abuses by state and local governments, but state constitutions provide greater protections of individual rights and stricter constraints on government power than do their national counterpart.

Two US Supreme Court cases from the past century illustrate the debate over the expansion of government power in emergencies and its ultimate resolution. The first is one of the most reviled and discredited cases in the history of American jurisprudence: *Korematsu v. United States*. After the attack on Pearl Harbor, President Franklin D. Roosevelt, acting on his powers as commander in chief of the armed forces and later authorized by Congress, issued an order allowing exclusion of people from certain domestic military zones. In turn this led to military orders requiring internment of Japanese-Americans. Twenty-three-year-old Fred Korematsu refused to leave his home and was forcibly removed.

By a [beta]-3 vote, the Supreme Court upheld the internment as a "military imperative" based on reasonable fear: "There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short."

The "compulsory exclusion of large groups of citizens from their homes," the majority recognized, ordinarily "is inconsistent with our basic governmental institutions" But the perceived emergency expanded the government's constitutional powers: when "our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger"

In a dissenting opinion that Justice Antonin Scalia would later say was his favorite ever written, Justice Robert H. Jackson acknowledged the exigencies of war, but rejected the notion that constitutional rights shrink in their shadow. Jackson believed that the order, based on national origin, violated the due process rights of those forced to leave their homes. But he took the longer view: "a judicial construction of the due process clause that will sustain this order," he urged, "is a far more subtle blow to liberty than the order itself."

Jackson reasoned that the military order, noxious though it was, would expire with the perceived emergency. "But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution," Jackson warned, "the principle then lies about like a loaded weapon, ready for the hand of any authority that can bring forward a claim of an urgent need."

The appeal of a strong response to crisis can be so alluring that both Justice Hugo Black, a fervent constitutionalist, and Justice William O. Douglas, a renowned civil libertarian, joined the Korematsu majority. But both justices may have experienced buyer's remorse, because only eight years later they joined another 6-3 majority, this time expressly repudiating the notion of boundless executive power in time of crisis.

In the midst of the Korean War, President Harry S. Truman feared that a threatened national strike would shut down the vital steel industry. Rather than use authority provided by Congress to avert the strike, Truman issued an order seizing the steel companies and requiring company managers to operate them to supply the war effort.

Truman defended his orders as commander in chief and under the president's inherent powers. In *Youngstown Sheet & Tube Co. v. Sawyer*, the court rejected those arguments. "In the framework of our Constitution," the court declared, "the president's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."

This time Justice Jackson was in the majority. He noted that when the president acts pursuant to congressional authority, his power is at its apex--but even then it is bound by the Constitution. As commander in chief, he controls its military forces, Jackson wrote, but is not thereby "also commander in chief of the country, its industries, and its inhabitants," and must exercise his powers "consistent with a constitutional republic."

As to inherent presidential authority, Jackson observed, this was "something the forefathers omitted" from the Constitution. They "knew what an emergency was, knew the pressures they engender, knew, too, how they afford a ready pretext for usurpation," Jackson argued. "We may also suspect that they suspected that emergency powers would tend to kindle emergencies."

The president's order, Jackson concluded, "represents an exercise of authority without law." Truman promptly returned control of the steel companies to their owners.

The *Youngstown* steel case and others like it illustrate the principle that emergency powers, though broad and often justified by law, are always limited by the Constitution. Whether a constitution for a free people will endure is measured by its vitality in times of crisis; and so far, thankfully, ours has withstood many challenges. Still, the debate over whether constitutional powers expand in emergency persists.

But those seeking to invoke the expansive presidential power articulated in *Korematsu* are out of luck. In 2018, when the Supreme Court divided bitterly over presidential authority in a case called *Trump v. Hawaii*, all nine justices agreed on one thing: after nearly seventy-five years, *Korematsu* should be relegated to the jurisprudential dustbin. As Chief Justice John Roberts aptly put it, (u) *Korematsu* was gravely wrong the day it was decided." And so was its notion of unbounded executive power.

Available from the Hoover Institution Press is *Two-Fer: Electing a President and a Supreme Court*, by Clint Bolick. To order, call (800) 888-4741 or visit www.hooverpress.org.

By Clint Bolick

Clint Bolick is a justice on the Arizona Supreme Court and a research fellow (on leave) at the Hoover Institution. He teaches constitutional law at the Arizona State University Sandra Day O'Connor College of Law.

Key points

>> The states alone inherently possess the "police power" to regulate for public health and safety. But the Constitution still protects individual rights.

>> The Japanese-American internment, at first justified as a wartime emergency step, later served to build a barrier against boundless executive power.

>> The Supreme Court checked President Truman's attempt to seize the steel industry, saying he had exceeded his powers.

Copyright: COPYRIGHT 2020 Hoover Digest
<http://www.hoover.org/publications/hoover-digest>

Source Citation (MLA 8th Edition)

Bolick, Clint. "Fear Is Not Our Master: The Constitution is clear: even during emergencies, government powers are never unlimited." *Hoover Digest*, no. 4, 2020, p. 117+. *Gale In Context: Opposing Viewpoints*, link.gale.com/apps/doc/A641011994/OVIC?u=monr95008&sid=OVIC&xid=c2a48f44. Accessed 2 Jan. 2021.

Gale Document Number: GALE|A641011994