



Written by [Joe Wolverton, II, J.D.](#) on May 26, 2023

## The Danger of Rule by Emergency Decree

On March 15, 2020, Cornell University law professor Michael C. Dorf urged Congress to order the complete lockdown of the United States and to suspend the writ of habeas corpus. Dorf warned Congress that such drastic measures must be taken if we were to “save the nation.”

Two days earlier, then-President Donald Trump issued the [following declaration](#):

Now, therefore, I, Donald J. Trump, by the authority vested in me by the Constitution and the laws of the United States of America, including sections 201 and 301 of the National Emergencies Act (50 U.S.C. 1601 et seq.) and consistent with section 1135 of the Social Security Act (SSA), as amended (42 U.S.C. 1320b-5), do hereby find and proclaim that the COVID-19 outbreak in the United States constitutes a national emergency, beginning March 1, 2020.



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He then goes on to outline his responses to the emergency he declared with this document.

Both of these responses — both a law professor’s preposterous call for the suspension of habeas corpus, as well as a sitting president’s declaration of an emergency, claiming such authority was granted to him in the Constitution — are irresponsible, unconstitutional, and very likely to be repeated as soon as the next “national emergency” occurs.

As the acts of a president are certainly weightier and thus much more worthy of discussion than those of a law professor, I’ll first dismiss the habeas corpus issue.

Article I, Section 9 of the U.S. Constitution reads, in relevant part:

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

Now, as many readers of *The New American* are aware, the use of commas in the Constitution can be a nuisance. In this case, using contemporary rules of punctuation, a comma should be placed after the words “unless” and “invasion.” The addition of those two commas would reveal the intended meaning of this very critical clause, that being: that the writ of habeas corpus should not be suspended unless the public safety is threatened by a rebellion or an invasion.



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Even if one were to take everything “scientists” were saying about the Covid-19 outbreak at face value (and you certainly should not!), there is no way the spread of that disease could be reasonably classified as a rebellion or an invasion.

The writ of habeas corpus is a civil right so fundamental to Anglo-American common-law history that it predates the Magna Carta.

In his profoundly influential *Commentaries on the Laws of England*, William Blackstone described the writ of habeas corpus as “the most celebrated in English law,” adding that it is “a writ of right, which may not be denied, but ought to be granted to every man that is committed, or detained in prison, or otherwise restrained, though it be by the command of the king, the privy council, or any other.”

On August 28, 1787, several delegates at the Constitutional Convention in Philadelphia argued in favor of “declaring the Habeas Corpus inviolable” and asking “whether in any case a suspension could be necessary.” That is how fundamental the writ of habeas corpus is to the principle of justice in the United States.

In a letter to James Madison, Thomas Jefferson made the following observation regarding the history of the suspension of habeas corpus:

Examine the history of England: see how few of the cases of the suspension of the Habeas corpus law have been worthy of that suspension. They have been either real treasons wherein the parties might as well have been charged at once, or sham-plots where it was shameful they should ever have been suspected.

Lastly, in his seminal *Notes on Blackstone’s Commentaries*, forgotten Founding Father St. George Tucker put a fine point on the issue of suspending the writ of habeas corpus:

In the United States, it [the writ of habeas corpus] can be suspended, only, by the authority of congress; but not whenever congress may think proper; for it cannot be suspended, unless in cases of actual rebellion, or invasion. A suspension under any other circumstances, whatever might be the pretext, would be unconstitutional, and consequently must be disregarded by those whose duty it is to grant the writ.

That should suffice to dismiss the ridiculous ramblings of the law professor. Now, on to the presidential decree of emergency and its legality and longevity.

Speaking of the rule by emergency decree that took place at what he called a “breathtaking scale,” on May 23, 2023, Justice Neil Gorsuch wrote the following in his [statement on the case of \*Arizona v. Alejandro Mayorkas\*, U.S. Secretary of Homeland Security](#):

Since March 2020, we may have experienced the greatest intrusions on civil liberties in the peacetime history of this country. Executive officials across the country issued emergency decrees on a breathtaking scale. Governors and local leaders imposed lockdown orders forcing people to remain in their homes. They shuttered businesses and schools, public and private. They closed churches even as they allowed casinos and other favored businesses to carry on. They threatened violators not just with civil penalties but with criminal sanctions too. They surveilled church parking lots, recorded license plates, and issued notices warning



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that attendance at even outdoor services satisfying all state social-distancing and hygiene requirements could amount to criminal conduct. They divided cities and neighborhoods into color-coded zones, forced individuals to fight for their freedoms in court on emergency timetables, and then changed their color-coded schemes when defeat in court seemed imminent.

Then, speaking of the federal government’s usurpation of unconstitutional and burdensome powers following the Covid-19 outbreak, Gorsuch wrote:

They deployed a public-health agency to regulate landlord-tenant relations nationwide. They used a workplace-safety agency to issue a vaccination mandate for most working Americans. They threatened to fire noncompliant employees, and warned that service members who refused to vaccinate might face dishonorable discharge and confinement. Along the way, it seems federal officials may have pressured social-media companies to suppress information about pandemic policies with which they disagreed.

While executive officials issued new emergency decrees at a furious pace, state legislatures and Congress — the bodies normally responsible for adopting our laws — too often fell silent. Courts bound to protect our liberties addressed a few — but hardly all — of the intrusions upon them. In some cases, like this one, courts even allowed themselves to be used to perpetuate emergency public-health decrees for collateral purposes, itself a form of emergency-lawmaking-by-litigation.

Perhaps the lesson we learn from Justice Gorsuch’s rehearsal of recent violations of civil and natural rights by emergency decree is that we complied. The majority of the American people not only believed the government’s account of the disease and its fatal effects, but they clamored for safety from that same government. We were not forced to abandon our jobs, our churches, our shops by armed troops enforcing the president’s decree. No, we obeyed, sometimes reluctantly, but we always obeyed.

Historically, when emergencies don’t exist, tyrants create them, knowing that denials of liberty to save us from a virus won’t be resisted as much as armed federal agents with the same mission: deny the people of their liberty.

Aristotle, Plato, Thucydides, Herodotus, Sallust, Tacitus, Demosthenes, and scores of other ancient thinkers and historians have warned how men in power accumulate greater — even absolute — power by creating “emergencies” from which the people will beg him for relief, even at the expense of their freedom.

It’s time we learn from the history of the distant past, as well as from our own very recent history to regard our liberty as our greatest gift from God and guard it from those offering safety in exchange for it.

And, when it comes to safety, I’ll leave you with these words of Algernon Sidney from his book *Discourses Concerning Government*, a book Thomas Jefferson described as the best book ever written on the subject of politics, wherein he identifies the true meaning of “safety” in a free society:

Besides, if the safety of the people be the supreme law, and this safety consists in the preservation of their liberties, goods, lands and lives, that law must necessarily be the root



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and beginning, as well as the end and limit of all magistratical power, and all laws must be subservient and subordinate to it.



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