

The United States Law Week

Officials Have Vast Power on Covid-19 Measures—Except for Worship

By Hermes Fernandez

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The New York Legislature granted vast emergency powers to the governor during the pandemic, limited mainly by public acceptance and statutory and constitutional limits. The U.S. Supreme Court just decided the right to worship imposes a significant limit on those powers, says Hermes Fernandez, immediate past chair of the Health Law Section of the New York State Bar Association.

On March 1, New York identified its first positive case of Covid-19, in a traveler returning from Iran. The next evening, Gov. Andrew Cuomo (D) asked state lawmakers to grant him emergency powers.

They obliged, passing a bill in a matter of hours. With that, Cuomo became arguably the nation's most powerful governor—possibly the most powerful governor the nation has ever seen.

The powers the Legislature granted to the governor are vast. Ruling by decree, up to constitutional limits, he may suspend any law or regulation, or issue any directive, necessary to cope with the Covid-19 emergency.

The governor has acted to those limits, and possibly beyond, yet he has also been cautious and deliberate. Four days after the legislative grant of emergency powers, he issued the first of his now 78 emergency orders, largely marshaling resources and galvanizing state government to meet the expected pandemic.

He did not though, act as quickly to impose restrictions. Instead, he acted incrementally. On March 12, in response to the first known major outbreak in the state the governor imposed limits within the city of New Rochelle. That same day, the governor also implemented his first state-wide restriction, a 500-person cap on mass gatherings. After New York's first death on March 14, Cuomo slashed that cap to 50, and, on March 23, banned mass gatherings all together.

On March 16, Cuomo ordered restaurants, bars, gyms, movie theaters and casinos closed. He ordered schools to close as of March 18, along with public amusements, the next day. Meanwhile, in three separate orders he mandated workforce reductions culminating in a March 22 ban on all but essential workers. Since then, some of these restrictions have been modified, some have been lifted, some remain in place and some have been reimposed.

First Limit: Public Acceptance

Cuomo's incremental approach showed he recognized the need for public buy-in. The governor imposed and increased public restrictions as the threat had become real and immediate. As experience across the nation has shown, compliance with stringent restrictions will not occur without public acceptance of the need.

And that, as Cuomo recognized, is the first limitation on a governor's exercise of power. If employers won't keep workers home, if crowds gather—to worship, protest, bury their dead, celebrate new families, or merely socialize—emergency powers are hollow. In this, Cuomo was masterful. His daily press conferences became must-see TV. As New York was besieged by a deadly virus, the governor displayed thoughtfulness and strength, garnering public trust.

More Limits: Statute and Constitution

The second limit to the governor's emergency authority is in the statutory grant of authority itself— the governor's orders must be necessary to cope with a disaster. The governor could not order all New Yorkers to wear Yankee jerseys, for example, but his order that masks be worn in public when social distancing cannot be maintained falls comfortably within that statutory authority.

There are two further statutory limits: First, the Legislature can override a gubernatorial emergency decree. This legislative veto turns the usual constitutional process on its head, since governors and presidents approve or veto legislative enactments, not the reverse. That issue may never arise. The New York Legislature has barely convened since March and has shown little interest in reviewing the governor's emergency decrees.

The second statutory limit is that each decree expires after 30 days. It, too, is barely a check, as the governor alone decides whether to extend an order or allow it to wither.

Beyond the statutory limits, there are state and federal constitutional limits. In this regard, Cuomo is in a much stronger position than some other governors, such as Gretchen Whitmer of Michigan or Laura Kelly of Kansas. Without expansive legislatively conferred emergency powers, those governors saw their emergency actions clipped.

Because of that state and federal legislative empowerment, courts have rejected repeated efforts to overturn Cuomo's various closure orders. Gyms, bars, restaurants all have failed.

Another Limit: The Right to Worship

There is one domain, though, in which courts can be expected to be and are especially solicitous—the right to worship. Here, courts will take an especially hard look.

Churches are subject to laws of general applicability, but those laws must be neutral with respect to religion. A congregation is free to worship, but church occupancy cannot violate fire codes.

Yet, as we learned on Nov. 25, when it comes to the right to worship, even occupancy restrictions have their limits. Concerned that recently imposed restrictions may prevent the right to worship itself, a split Supreme Court decided in *Roman Catholic Diocese of Brooklyn v. Cuomo* (20A87) and *Agudath Israel v. Cuomo* (20A90) that the governor had gone too far in limiting church services to 10 or 25 attendees depending on the severity of the outbreak in that neighborhood.

The decision may represent epidemic fatigue at the judicial level, but it may also reflect a new heightened protection to the right to worship. Indeed, in a concurrence worthy of Roger Taney, fifth chief justice of the U.S., Justice Neil Gorsuch suggested that almost no limit exists when the right to worship is at issue.

Does the Supreme Court's decision portend an end to judicial deference? Will freedom to worship, the first right in the words of Gorsuch, stand apart, or will the Bill of Rights prevent measures to check the virus' spread?

Until now, courts have balanced those rights with the need for measures to meet a deadly pandemic. This decision may presage a harder judicial look, but beyond the right to worship, we should continue to expect a deference to the public health decisions of elected officials.

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