

Quarantine Powers

Roman Mars [00:00:00] On the night of March 6th, 1900, a San Francisco health officer reported a mysterious death to the city's Board of Health.

Elizabeth Joh [00:00:07] The body of a Chinese man with badly swollen lymph nodes had been found in the basement of a Chinatown hotel. With the tests they had immediately available, the city Bacteriologist, Dr. Wilfred Kellogg, suspected bubonic plague. That same night, city health authorities took drastic action--a total blockade of the city's Chinatown. The police department stationed 32 officers to seal off Chinatown from the rest of the city. The residents of Chinatown were in an uproar, and the city's newspapers--The San Francisco Chronicle in particular--were skeptical about the need for such a dramatic measure. The city also sent the suspected plague samples to the federal quarantine station on Angel Island. Dr. Joseph Kinyoun was the chief medical officer in charge of testing the sample, but his early results were inconclusive. Faced with all of these circumstances, the city's Board of Health decided to end the lockdown just three days later.

Roman Mars [00:01:12] That wasn't the end, though.

Elizabeth Joh [00:01:15] Kinyoun's samples eventually did confirm that the plague had come to San Francisco. And in the middle of May, four more people died in Chinatown. All signs suggested that these were plague deaths. And on May 29th, 1900, San Francisco's Board of Health passed a resolution. The city would cut off an area bounded by Kearny, Broadway, Stockton and California streets--in other words, Chinatown. The very next day, the San Francisco police sent 53 officers to enforce the decree. Eventually, the police would send 159 officers to have an around the clock enforcement of the ban. By June 4th, the city decided to go further. No streetcar traffic would be allowed through Chinatown. The number of police at the perimeter of the lockdown would double. And barbed wire would be set up to help prevent exit of Chinatown's residents. This kind of measure is sometimes referred to as a "cordon sanitaire," a line drawn around a geographic area where there's been an infectious disease outbreak. No one is allowed in or out. These were common in the medieval period. But if you want to stop the plague, there's a small problem. The plague is spread by rats. But rats weren't being locked down; the Chinese were. And there's another interesting detail about the city's drastic measures. It wasn't exactly true that no one was allowed in or out. In drawing the line around Chinatown, the city made sure that those areas that dipped into the district but were also occupied by white businesses were left out.

Roman Mars [00:03:02] And for white owned businesses that were right on the line, they were allowed to go about their normal lives.

Elizabeth Joh [00:03:08] On June 5th, 1900, a lawsuit was filed in San Francisco federal court against city officials by a man named Jew Ho, a grocer whose business and home was within the city's quarantine area. His lawsuit was brought not just for himself, but for the nearly 10,000 residents of Chinatown who were being blocked from leaving. The essence of the lawsuit was something like this: The city's plague blockade was unconstitutional, it was arbitrary, and it was discriminatory. The quarantine affected every Chinatown home and business, whether or not the city had found evidence of plague cases there. The quarantine affected every Chinese person in Chinatown, but no non-Chinese person in or around Chinatown. And just ten days later, on June 15th, Judge William Morrow called the parties and the public so he could read his opinion in court.

Roman Mars [00:04:04] The city's blockade of Chinatown was indeed unconstitutional--for two reasons.

Elizabeth Joh [00:04:09] First, although Judge Morrow acknowledged that the city's power to make laws to secure the comfort, convenience, peace, and health of the community was an extensive one, that power had limits. And while the authority to quarantine was well established, the way the Chinatown quarantine worked was a problem. This wasn't a narrow targeting of areas where the city had specifically identified cases. It was just a general lockdown of 10,000 people. And that wasn't the only problem with the city's actions. As Judge Morrow said, "Even assuming that the Board of Supervisors had just grounds for quarantining the district, it seems that the Board of Health, in executing the ordinance, left out certain persons--members of races other than Chinese." He said more. "Wherever the courts of the United States see such an administration of law whose purpose is to enforce it with an evil eye and an unequal hand, then it is the duty of the court to interpose and to declare the ordinance discriminating in its character and void under the Constitution of the United States."

Roman Mars [00:05:18] In other words, the Chinatown quarantine was unconstitutionally arbitrary and racially discriminatory. The city couldn't enforce it.

Elizabeth Joh [00:05:26] Within hours, the city passed a resolution lifting the quarantine. They told the police department to dismiss their officers at the boundaries. The city didn't stop its plague response. The Board of Health ordered the disinfection of the area and fumigation of the sewers, but the quarantine was over. Throughout this period, there was a general confusion about the plague. In 1900, The San Francisco Chronicle had what we think of today as a highly partisan point of view against the Democrats in charge of the Board of Health. It also didn't help that California's governor, Henry Gage, initially denied the existence of the plague. The Chronicle reported that, quote, "The governor takes no stock in plague theories. He does not believe it exists." And in January of 1901, Gage told the state legislature that "reports of the plague were false and exaggerated." He was wrong, of course. The truth eventually came out. The plague was very, very real. Now it's 2020, and the entire world is dealing with a coronavirus pandemic. The United States is struggling to coordinate a response to a virus that we didn't know about just months ago. The president has been contradictory about how the public should respond and what exactly the federal government is doing.

Roman Mars [00:06:52] What's the role of the government in an epidemic response, and what does the Constitution have to say about it? It's time to find out. This is What Trump Can Teach Us About Con Law--an ongoing monthly series of indefinite length, more indefinite and uncertain with each passing day, where we take the tweets of the 45th president of the United States and his critics and use them to examine our Constitution like we never have before. Our music is from Doontree Records. Our professor and neighbor is Elizabeth Joh. And I'm your fellow student and host, Roman Mars. Let's start with some vocabulary.

Elizabeth Joh [00:07:51] You hear the word "quarantine" a lot. When we say the word "quarantine" today, that usually refers to separating people who have been exposed to an infection but who are not yet sick and keeping them from everybody else. The term "isolation" refers to separating people who've already been infected and keeping them from everybody else. And while you might know that sometimes governments have to impose quarantines, you might not realize which portion of the government is in charge.

Historically, quarantines and other similar emergency health measures have been the responsibility of the states, not the federal government. And if you think about it, the ability to quarantine is really significant. It's one of the most important restrictions of liberty over a person who has not been accused of a crime. The states--and by extension, local governments--can do this because they possess what's called the "police power." This means a broad power to regulate for the health, welfare, and safety of their citizens. The federal government doesn't have this particular power. And as a part of that police power, each of the 50 states has the ability to declare an emergency. Usually that's done by the state's governor through an executive order. And the powers that states have to address an epidemic within their borders is considerable. It sounds scary, but an emergency declaration is usually pretty practical. A state of emergency can free up funds and permit a state to avoid some regulations that it usually has to comply with. The state can also do things like protect consumers from price gouging that often happens in emergencies. And it doesn't even stop there. States can even take over or commandeer private property to help deal with an emergency. If the state does that, it has a constitutional obligation to pay the private property owner for the loss. But keep in mind, the state isn't asking to buy the property; it's just doing it.

Roman Mars [00:09:51] In order to protect public health, states can do many things to even unwilling people--things like restricting their liberty, taking their property, and requiring vaccinations.

Elizabeth Joh [00:10:02] The United States Supreme Court famously said in a 1905 case that "upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." The federal government has a role in quarantines, but its powers are different. First of all, the Constitution doesn't include any specific power for Congress to protect the public health. Instead, laws that permit the government to impose a quarantine would likely be justified by Congress' powers to regulate interstate and foreign commerce. And, in fact, a federal law called the Public Health Service Act says that the government has quarantine authority in two areas that reflects this understanding--people entering the country, and people crossing state lines. The law gives the executive branch the power, in the form of executive orders, to decide which diseases also qualify for federal quarantine power. The United States Supreme Court has also interpreted the 10th Amendment to mean that while the federal government can encourage the states to act, it can't force them to. So, for example, the federal government--either Congress or the president--couldn't order a state to impose a quarantine.

Roman Mars [00:11:17] But the federal government can help the states in disasters and emergencies by sending them money.

Elizabeth Joh [00:11:23] The president can declare an emergency under what's called the Stafford Act to allow FEMA--that's the Federal Emergency Management Agency--to coordinate an emergency response with the states. And there is one important area where the federal government has a central role, even if that's not quarantine authority--and that's being the organizing center for a national response to a pandemic. Federal agencies like the Food and Drug Administration and the Centers for Disease Control develop the tests when there's an infectious disease outbreak. And these agencies make sure that the laboratories at the state and local level are all using uniform standards. And they are supposed to collect data so that the whole nation knows what's going on. And in this important role, it's the federal government that is primary. The states aren't supposed to be involved in developing 50 different sorts of tests or having all kinds of unregulated

laboratories being involved in the process. So, the basic idea is that for historical and constitutional reasons, the states are primarily responsible for quarantine authority within their borders, but the federal government has other important roles to play here in coordination, providing for money, and also having a kind of general organizational response. That's federalism. Even if both the federal and state governments possess enormous power to protect people, these are not unlimited powers.

Roman Mars [00:12:49] There are also limits on how the government can impose a quarantine. Even if a state were to impose a quarantine, it's possible that someone could argue, "Well, hey, wait. The way you imposed it is unfair and violates my constitutional rights."

Elizabeth Joh [00:13:04] We can see that example in the San Francisco plague case. The government might be discriminatory by taking actions against a particular group that might have only race or ethnicity in common, let's say. Another kind of constitutional problem might arise if the government is arbitrary or unreasonable about the procedures they use to determine who should be quarantined. In this kind of situation, a person or group of people might claim that their constitutionally protected due process rights are being violated. In 2014, an American nurse named Kaci Hickox flew back to Newark, New Jersey, after having worked with Ebola patients in West Africa. Even though she tested negative for the Ebola virus, New Jersey forced her into quarantine and even initially refused to let her see anyone.

Newscaster #1 [00:13:54] And we know that the state of Maine would like you to abide by a voluntary quarantine until the 21 days have passed. But you say you're not going to do it.

Kaci Hickox [00:14:02] You know, I remain really concerned by these mandatory quarantine policies from aid workers. I think we're just only adding to a stigmatization that, again, is not based on science or evidence.

Elizabeth Joh [00:14:16] Kaci Hickox sued. She argued that the state violated her due process rights by forcibly and unreasonably detaining her. She eventually settled the case with New Jersey. And the settlement agreement established clear procedures that New Jersey agreed to follow in future quarantine cases. These are things like providing notice for why she's being detained and giving her an ability to consult with a lawyer if necessary. The Hickox lawsuit shows that while a state's quarantine powers are considerable, they're not unlimited. So, in plain English, the government has to be reasonable about how it determines why you're going to be quarantined and have good reason to believe that you're either infected or have been exposed to an infectious disease. So, if we can summarize the American legal response to epidemics, it's kind of complicated. It assumes that both the states and the federal governments have different and important rules. But it assumes that there is going to be at least two things happening on the part of the federal government--smooth coordination on the part of the federal government to make sure all the parts of the country are working together, and symbolically, a president who can guide the federal response and provide clear, reassuring messages to the public. So now let's get to Trump. As we know by now, late last year, a new mysterious and highly infectious respiratory illness was identified in Wuhan, which is a major city in central China. This was a new or novel coronavirus that had not been previously identified. The World Health Organization gave the disease caused by the new virus a name--COVID-19. That's short for coronavirus disease 2019. There is currently no vaccine or established medical treatment for the coronavirus. And because it's new, people haven't yet developed an immunity to it. It also appears that it's highly infectious and deadly, particularly for older

people and for people who have certain chronic medical conditions. In January of 2020, the Chinese government basically cut off Wuhan--a city of 11 million people--from the rest of the country, in hopes of keeping the disease from spreading further. The Chinese government also took other drastic measures, including extending restrictions to other cities. And eventually about 60 million people in China were subjected to total or partial lockdowns.

Newscaster #2 [00:16:50] Airports around the region stepping up screening. Workers in hazmat suits checking arrivals. These are drastic measures by authorities here in central China to contain a virus that's fueling fears of a pandemic. Also on hold, Lunar New Year festivities. During China's busiest travel season, authorities here are taking few chances, canceling events across the country.

Elizabeth Joh [00:17:12] These were dramatic measures, like roadblocks, restrictions on travel, and even keeping people from leaving their homes. The Chinese government's efforts appear to have led to an eventual decrease in the number of deaths and new cases. But in the meantime, the coronavirus began to circulate around the world. On January 31st, the Trump administration imposed a travel ban on foreign nationals who had been in China. The administration also flew hundreds of Americans who had been in Hubei province, one of the centers of the coronavirus outbreak in China. But they weren't allowed to go home. These Americans were put in federal quarantine in military bases for two weeks. That 14-day period represents our understanding of the maximum amount of time believed to pass before a person exposed to the coronavirus gets sick. These actions can be explained by the public health strategy of containment. This involves tracking the spread of the disease and trying to separate the infected and the exposed from the general public to make sure that they don't spread the virus. This is usually what happens at the beginning of an infectious disease outbreak. But if the containment doesn't work, then the next strategy is mitigation. These are broader efforts like thinking about closing schools and public events, preparing hospitals for large numbers of patients, and encouraging social distancing--literally increasing the physical distance among people. Widespread testing is another kind of mitigation effort. If that fails, then another theoretical option would be a lockdown. That's what we saw in parts of China and more recently in Italy. Italy has been particularly hard hit, and the government has closed its schools and universities. And on March 11th, the Italian government closed all businesses except pharmacies and grocery stores. As for the legal power behind a federal quarantine, the Trump administration's travel ban and its federal quarantine powers were the kind of epidemic containment strategies the federal government is empowered to do.

Roman Mars [00:19:19] Remember, federal law allows for travel restrictions on foreign citizens in an epidemic situation. And while the federal government can't turn away its own citizens, it can certainly require them to be in a federal quarantine.

Elizabeth Joh [00:19:32] And the states? Remember, the states historically have had a primary role in responding to epidemics. And we've already seen maybe the most dramatic containment strategy so far in the state of New York. In the city of New Rochelle, the state of New York imposed a one-mile containment zone because of a particularly bad outbreak. It's not quite the same kind of lockdown that we've seen in other countries. The state of New York has closed down gathering places in New Rochelle, but businesses like grocery stores can stay open and people can move about. But the National Guard has been sent out there to help clean and to bring food to people who are in self-quarantine. California was one of the first states to declare a state of emergency. And on March 4th, Governor Gavin Newsom issued the state's proclamation of a state of emergency. And pursuant to

that proclamation, he's done things like issue an executive order that will allow the state to commandeer or take over hotels and medical facilities to treat coronavirus patients.

Gavin Newsom [00:20:34] We are directing that all bars, nightclubs, wineries, brewpubs, and the like be closed in the state of California. We believe that this is a non-essential function in our state, and we believe that it's appropriate under the circumstances to move in that direction.

Elizabeth Joh [00:20:56] So far, the states have been taking the primary role in local matters. So just this week, we've been seeing ever more increasing numbers of state governors doing things like declaring states of emergencies and imposing bans on large public gatherings--things like that. But remember the important and primary role the federal government has here--coordinating a national response, approving the testing necessary, collecting data. Unlike many other countries, the United States has been and continues to be very slow to test for the coronavirus. And that means the states and the federal government have lost time to act quickly.

Roman Mars [00:21:33] And President Trump's early responses have not exactly helped.

Elizabeth Joh [00:21:37] On February 24th, Trump tweeted, "The coronavirus is very much under control in the USA. We are in contact with everyone and all relevant countries. CDC and World Health have been working hard and very smart. Stock market's starting to look very good to me." On February 26, the president stated, "Because of all we've done, the risk to the American people remains very low. When you have 15 people and the 15 within a couple of days is going to be down to close to zero. That's a pretty good job we've done." Two days later, he said, "It's going to disappear one day. It's like a miracle. It will disappear." As news of serious outbreaks emerged in places like Seattle, Washington State, and Santa Clara, California, the president continued in this vein. "Some people will have this at a very light level and won't even go to a doctor or hospital, and they'll get better. There are many people like that." On March 6th, Trump said, "We did an interview on Fox last night, a town hall. I think it was very good. And I said, 'Calm. You have to be calm. It'll go away.'" The next day, he tweeted, "The fake news media and their partner, the Democrat Party, is doing everything within its semi considerable power--it used to be greater--to inflame the coronavirus situation far beyond what the facts would warrant." On March 10th, Trump said of the epidemic, "And it hit the world. And we're prepared. And we're doing a great job with it. And it will go away. Just stay calm. It will go away." And on March 12th, he addressed the nation from the Oval Office. While he said that "testing and testing capabilities are expanding rapidly day by day," the president didn't explain how the federal government--or his administration in particular--would address widespread complaints about tests not being available. He also announced some immediate steps, some of which not only took the entire world by surprise, but also weren't factually correct. For example, he announced, "To keep new cases from entering our shores, we will be suspending all travel from Europe to the United States for the next 30 days. The new rules will go into effect Friday at midnight."

Roman Mars [00:23:56] That wasn't accurate. The ban won't apply to U.S. citizens or permanent residents, which Trump didn't mention.

Elizabeth Joh [00:24:03] He said that health insurance companies agreed to waive all coronavirus treatments. No, that's not true either. Insurers have agreed to waive testing co-payments, and that's it. And finally, he said that "the travel restrictions applied to the tremendous amounts of trade and cargo, but various other things as we get approval." But

that, too, wasn't right. The ban is for people, not goods. And as ever, Trump's concern about the economy was clear. He said, "This is not a financial crisis. This is just a temporary moment of time that we will overcome together as a nation and as a world." The world was not assured. And the next morning, financial markets around the world panicked.

Newscaster #3 [00:24:46] Goodness, look at those numbers. They're down 7% again, 1,600--almost 1,700--points. Stocks just plummeting. This after the president announced a travel ban.

Newscaster #4 [00:24:57] Look, the president wanted to calm the country and markets last night, and that didn't happen.

Newscaster #5 [00:25:01] He did not calm the country and markets...

Elizabeth Joh [00:25:02] And on March 13th, Trump sent out a tweet that echoes our experiences with the way fear and politics can shape the handling of epidemics. "To this point, and because we have had a very strong border policy, we have had 40 deaths related to coronavirus. If we had weak or open borders, that number would be many times higher."

Roman Mars [00:25:24] In the meantime, more states have since declared states of emergency as they discover more coronavirus cases among the public.

Elizabeth Joh [00:25:31] The state of Washington, which so far has been hardest hit by the epidemic, has a 13-step plan to address a disease outbreak. It's currently on Step 10--canceling major public and large private gatherings. It is considering Step 11--recommending or ordering the closing of schools, workplaces, and public buildings. The 13th step is establishing a cordon sanitaire.

Roman Mars [00:25:57] So what happened in San Francisco in 1900?

Elizabeth Joh [00:25:59] Well, the plague wasn't fake of course. It was very real. A guy named Joseph Kinyoun--the federal official who tested those samples--he was right. The first white San Franciscan died of the plague on August 11th, 1900. And the plague continued to kill people for months. The city continued unsuccessfully to fumigate and disinfect. And then in November of 1902, they got a bright idea. Why don't we focus on the rats that carry the plague? So, by February 29th, 1904, the city saw the last death related to the plague. But by then, San Francisco had had 121 cases, and 113 people had died. Nearly all of them were Chinese. A couple of years later, there was one more wave of plague that hit San Francisco. It lasted about a year and a half. And there were 160 cases and 78 deaths. They didn't rely on a cordon sanitaire, and very few of the victims were Chinese. Now, of course, the Jew Ho case doesn't mean that cordon sanitaires are all unconstitutional or unlawful. You can have one presumably if a city decides to impose an order and it's narrowly targeted, not discriminatory, and not racist. And it's pretty clear that there's evidence that a certain area has really got to be, you know, cut off from the rest of the public. It probably is going to be okay. But it was just so obvious in this case because if you were a white person and you were kind of within the border, you were allowed to do whatever you wanted. And so that was pretty clear to the judge that this was not the way to do it. And that's one of the things about this case. It kind of shows you these extreme instances or situations that give rise to these cases. But a lot of times we think, "Well, what can the government do?" There often isn't a challenge because people in a plague

situation or an epidemic situation--they comply because they're scared. But I think that as an epidemic spreads throughout a country, there are always going to be some people who are unwilling to comply. And that's where you occasionally see legal cases arise.

Roman Mars [00:28:01] When one of these situations arises, is there something to be said that we're putting a lot of the pressure on Trump, and we should be putting an equal amount of scrutiny on Gavin Newsom?

Elizabeth Joh [00:28:14] Well, we'll see how the California response unfolds. It seems that, you know, at least in some dramatic ways already, we can see some differences. Newsom has been having pretty regular conferences--public conferences--with the press, answering questions, being direct about data, saying, "Here's what we're going to do." I won't be surprised if there are critics already saying, "You know, Newsom could have done more." And as time goes on, maybe there'll be increasing calls for, you know, wrong decisions were made. I think one of the biggest issues that people have had with President Trump has been not only has there been not enough information and the Trump administration has been slow to act, but there have been literally contradictory messages from both the president, the vice president--who's in charge of the coronavirus task force--some of the president's economic and public health advisers. It's very hard for the public to feel reassured at the federal government level when all of these different people are saying things that are just completely at odds with each other. It's either a thing not to worry about, or it's a real public health emergency that people have to pay attention to. It can't be both.

Roman Mars [00:29:19] Right. Right. Have there been other things that you've seen on Twitter that related to coronavirus and federal power that you've felt that you want to dispel the myth of right now?

Elizabeth Joh [00:29:34] I suppose one of the things that is confusing for people is they really want to blame somebody or something right now. And while it's true that it's very hard to just blame a single person or a single entity--and it's true that the states do have a lot of responsibility--it's very important to understand that any presidential administration has a key role in just being the public face of "This is what the government is going to do." And when there is no clear set of facts and there's no clear plan, I think that is something that certainly is a source of blameworthiness. Even if states stumble, and even if other parts of the federal government aren't working well--and these are parts that we've always had--there's a real role for the United States, both in a very symbolic sense... Even if the president came on every night on TV and said, "We're doing everything we can, but this is serious. And you have to listen to everything that the CDC and your local state is telling you"--that would make people feel better. And even if the states could turn to the federal government and say, "Can you tell us what the information is as a national level--that would be helpful, too." So, the power sharing is real--that we expect public health to be kind of this shared burden. But certainly, the Trump administration has been kind of falling flat in this way. And I think the real problem out there is that, you know, you've seen a lot of stuff on social media like, "Well, what can you do? It was a surprise." It wasn't really a surprise because, you know, if you've been paying attention, people have been yelling about this for months.

Roman Mars [00:31:20] Right. It's really the principle of what the executive branch is. You act in war, you act in these decisions as a unitary executive because, you know, the legislature takes time and deliberation and things to do and, like, you need action. And this is kind of the only job. If you were to boil it down, this is the only job.

Elizabeth Joh [00:31:43] The leadership role. Yeah. So, we'll see--as things hopefully don't get too much worse, but may get much, much worse--whether President Trump proves himself up to the task.

Roman Mars [00:32:06] This show is produced by Elizabeth Joh, Chris Berube, and me, Roman Mars. You can find us online at trumpconlaw.com. All the music in Trump Con Law is provided by Doomtree Records, the Midwest Hip Hop Collective. You can find out more about Doomtree Records, get merch, and learn about current tours at doomtree.net. We are a proud member of Radiotopia from PRX, supported by listeners just like you.