

The Coronavirus Pandemic vs. the Limits of Governmental Power

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With all of the talk about the spread of the Coronavirus, many governmental entities and/or agencies (federal, state, and local) have attempted to persuade the public that “government,” in its many forms and at various levels, has the authority to dictate to citizens how to live their lives, run their businesses, and/or control their activities. These governmental acts typically take many forms, such as Executive Orders, Health and Safety Orders, administrative rules and regulations, etc.

In light of the claims of authority that many in government have assumed, I feel that it is important to set the record straight: **No one in the federal government, state government, or local government has any authority to dictate to the general public that they must stay home or that they must suspend their business, or that they must refrain from traveling, or that they must not gather together in large groups, etc.**

In order to prove my point, we Tennesseans need to have a little history lesson on the rights of man and the formation of governments. Please take 15 minutes or so to review the data and consider my evidence. When you’ve done that, you will then be an informed citizen.

1. **The Declaration of Independence** – Let’s revisit that famous quote from the esteemed document that many view as our country’s birth certificate, the Declaration of Independence:

“We hold these truths to be self-evident, that **all men are created equal**, that they are **endowed by their Creator with certain unalienable Rights**, that among these are **Life, Liberty** and the **pursuit of Happiness**.--That to secure these rights, **Governments are instituted among Men, deriving their just powers from the consent of the governed**, -- That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.” [Emphasis added]

All men are endowed with God-given rights, such as life, liberty, and the pursuit of happiness. Please note that the list is not exhaustive: life, liberty, and the pursuit of happiness are only some of the unalienable Rights. Perhaps you can conceive of some other “self-evident” rights, such as the right to keep the profits of one’s own labors, the right to associate (or for that matter disassociate) with anyone for any reason, or the right to choose one’s own profession.

Please note the next clause, which has two very important principles: (1) The reason that Government was instituted was to secure all of those unalienable rights, and (2) Government has only those powers which are given by the people via the concept of “the consent of the governed.”

2. **The U.S. Constitution** – Building upon the principles of the Declaration of Independence, the people first formed State governments, and later, the State leaders proposed, and the people ratified, the forming of a federal government: the United States of America. Since the U.S. government was created by the people and the States (notice that the original plan was for people to

have their legislative house, the House of Representative, and the State governments to have their legislative house, the Senate). Thus, the federal government has only those powers granted to it by the people and the States through the *U.S. Constitution*.

The powers granted to the federal government were included in a list. That list is contained in **Article I, Section 8**. That list has never been amended. The **Bill of Rights** is the first ten Amendments to the *U.S. Constitution*. These Amendments were ratified by the people and all thirteen states just 4 years after they ratified the *U.S. Constitution*. The Bill of Rights contains a list of topics which were **NOT** given to the federal government. The **Ninth Amendment** says that those **Rights** not listed in the *U.S. Constitution* are retained by the People. The **Tenth Amendment** says that the **Powers** not delegated to the federal government in the *U.S. Constitution* are reserved to the States and to the People.

The *U.S. Constitution* does not give Congress, the President, or the Courts the **Right** to regulate travel, the right to suspend business, the right to mandate health decisions for the people, or the right to issue quarantines. Therefore, those rights are retained by the People.

The *U.S. Constitution* does not grant to Congress, the President, or the Courts the **Power** to deprive citizens of their **unalienable Rights** which were given by their Creator, such as the freedom of assembly, the freedom of commerce, the freedom of self-employment, or the freedom of religious worship. Therefore, those rights are reserved to the people.

While Presidents may issue Executive Orders, those Orders are not law; Executive Orders have effect only within the Executive branch of Government. Said another way, **Executive Orders control only those who work in the Executive branch**. The President cannot make law, just as the Courts cannot make law. Only the U.S. Congress may make laws, and Congress may only make laws related to the Article I, Section 8 activities, such as post offices, coining money, issuing patents, making rules for international waters, entering treaties with foreign governments, raising and supporting the military, governing U.S. territories, making rules for bankruptcies, making rules for U.S. citizenship, issuing declarations of war, controlling U.S.-owned property, and a few other areas. Depending upon how these topics are counted, there will only be about 20 areas.

Therefore, we can easily see that neither the U.S. Congress, the U.S. President, nor any U.S. Court has any authority to affect the general activities of the American public. They may issue opinions, they may give warnings, and they may give advice, but they cannot make law or give orders outside of the listed areas. Now, we all know that federal officials often do things that are not authorized. Quite honestly, it is done all of the time, right under the noses of an ignorant citizenry. But if they do it, it is an unauthorized invasion of the rights of the citizen. When someone exceeds his proper authority, it is called "**usurpation.**" **Usurpative acts are illegal. Usurpative laws are void.**

But what about State government? Perhaps you've been told that Tennessee's Governor has issued an Executive Order shutting down dining areas, theaters, sporting events, and other such public gatherings. Surely he has the power to do that, right?

Again, sorry, but he does not have that right or the power to do so. He may SAY that he has that power, but he can't prove it.

So, let's do a little review of Tennessee government and the *Tennessee Constitution*.

3. **Tennessee Constitution - Declaration of Rights. Article I, Section 1.** Just as the federal government is premised on the unalienable rights of the people, so is the *Tennessee Constitution*. The very first substantive portion of the *Tennessee Constitution* says:

That all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, and happiness; for the advancement of those ends they have at all times, an unalienable and indefeasible right to alter, reform, or abolish the government in such manner as they may think proper. [Emphasis added.]

So the *Constitution* declares that the people have the authority to establish a State government. And when they decide to create a State government, how do Tennesseans delegate power to that government? By and through the *Tennessee Constitution*. Therefore, if we want to evaluate whether the State government has the power to do this, that, or the other, we need to examine the *Tennessee Constitution*. Fortunately, just like the *U.S. Constitution*, it is a rather short document.

Let's examine the *Tennessee Constitution* to see what powers and rights the citizens of Tennessee have delegated to the Tennessee government. Perhaps the Governor has the power to deal with things like the Coronavirus pandemic.

4. **Tennessee Constitution – Executive Department.** What provision of the *Tennessee Constitution* describes the powers that are given to the Governor? Well, that's "Article III – Executive Department."

And what provision in Article III gives the Governor the power to issue Executive Orders which are binding upon the citizens? **NONE. In fact, Executive Orders are not mentioned anywhere in the entire Tennessee Constitution.** Arguably, the Governor, much like the President, may choose to issue Executive Orders, but if he does so, those Executive Orders will be binding **only** on those who work in the **Executive Department**. No Executive Order can apply to any general citizen of the State. [Note: The same principle holds true for a county executive, or mayor, as well as a city or town mayor --- they are not lawmakers, but only executives, who are charged only with carrying out the law, not making the law.]

Curiously, however, the Governor **claims** to have legislative authority to issue such Executive Orders of general application pursuant to T.C.A. § 58-2-107. What does this section say?

§58-2-107(a)(2). Pursuant to the authority vested in the governor under subdivision (a) (1), the governor may issue **executive orders, proclamations, and rules** and may amend or rescind them. **Such executive orders, proclamations, and rules have the force and effect of law.** [Emphasis added.]

So apparently, the Governor has Legislative authority to issue orders and rules that are to be treated and considered as law, right?

No. When the Tennessee **General Assembly** passed this law in 2000, **they exceeded their Constitutional authority by purporting to give the Governor legislative power.** And when, just a few weeks ago, the **Governor** accepted the power to issue orders, rules, and other such authorities that would be treated as laws, **he violated the Tennessee Constitution.**

5. **Tennessee Constitution – Article II. Distribution of Powers.** You see, the *Tennessee Constitution* is very clear: **No department of the Tennessee government may delegate any of its authority to another department of government:**

Section 1. The powers of the government shall be divided into **three distinct departments:** legislative, executive, and judicial.

Section 2. No person or persons belonging to **one of these departments shall exercise any of the powers properly belonging to either of the others**, except in the cases herein directed or permitted. [Emphasis added.] [**Note:** There is nothing else in the *Tennessee Constitution* which allows for emergency powers. In fact, the words *emergency*, *sudden*, *exigency*, or other similar words are not to be found in the *Tennessee Constitution*.]

So the General Assembly cannot delegate rule-making authority or law-making authority to the governor. **T.C.A. 58-2-107(a) is blatantly and obviously unconstitutional.** Both the General Assembly and the Governor swore an oath to **support** the *Tennessee Constitution*.

Under the *Tennessee Constitution*, the only action which the Governor may take is to convene the legislature:

Article III, Section 9. He (the Governor) may, **on extraordinary occasions, convene the General Assembly by proclamation**, in which he shall state specifically the purposes for which they are to convene; **but they shall enter on no legislative business except that for which they were specifically called together.**

6. **Tennessee Constitution – Article X. Oaths, Bribery of Electors, New Counties.** Every officer of Tennessee must take an oath before entering into office. The Governor takes the oath listed in Section 1:

Section 1. Every person who shall be chosen or appointed to **any office of trust or profit** under this Constitution, or any law made in pursuance thereof, **shall, before entering on the duties thereof, take an oath to support the Constitution of this state**, and of the United States, and an oath of office. [Emphasis added.]

The members of the General Assembly, however, take a different oath:

Section 2. Each member of the Senate and House of Representatives, shall before they proceed to business take an oath or affirmation to support the Constitution of this state, and of the United States and also **the following oath: I _____ do solemnly swear (or affirm) that as a member of this General Assembly, I will, in all appointments, vote without favor, affection, partiality, or prejudice; and that I will not propose or assent to any bill, vote or resolution, which shall appear to me injurious to the people, or consent to any act or thing, whatever, that shall have a tendency to lessen or abridge their rights and privileges, as declared by the Constitution of this state.** [Emphasis added.]

So, when the General Assembly passed the “Emergency Management Powers” of the Governor, they violated their oath **twice**: first, by delegating law-making power when the *Tennessee Constitution*

prohibited them from doing so, and second, by assenting to a bill which has a “tendency to lessen or abridge [the people’s] rights and privileges, as declared by the Constitution of this state.”

7. **Tennessee Constitution – Legislative Department.** So, if the Governor cannot issue Executive Orders or make any other such rules that deal with emergencies, then can the General Assembly make laws that deal with emergencies or suspend laws in the event of emergencies? If so, it will be found in that part of the *Tennessee Constitution* that deals with the law-making powers that are given to the General Assembly: “Article II – Legislative Department.”

As previously stated, there is nothing in the *Tennessee Constitution* that deals with emergencies in the healthcare field, in the financial field, in commerce or trade, or the like. In fact, the General Assembly is not given any power to deal with business, trade, or commerce other than to levy a tax upon real estate and a tax upon gross revenue.

Remember our main premise: Tennessee officials have no power other than the power delegated to them by the “people” in the *Tennessee Constitution*, because all power is inherent in the **people**, and the government is founded on the **authority** of the people.

8. **Tennessee Constitution – Declaration of Rights. Section 8.** The *Tennessee Constitution* specifically describes the importance of protecting the rights, liberties, and privileges of citizens:

That no man shall be taken or imprisoned, or **disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property,** but by the judgment of his peers, or the law of the land. [Emphasis added]

Thus, Tennessee’s Declaration of Rights specifies that no man shall have ANY of his rights, liberties or privileges taken without a court judgment or the law of the land. The “law of the land” has historically been understood to mean that the law must be of general application and must be applied with due, or fair, process.

9. **Tennessee Constitution – Declaration of Rights. Section 25.** Following along in the same theme as the aforementioned “Declaration of Rights, Section 8” is this VERY important declaration:

Section 25. That no citizen of this state, except such as are employed in the army of the United States, or militia in actual service, shall be subjected to punishment under the martial or military law. **That martial law, in the sense of the unrestricted power of military officers, or others, to dispose of the persons, liberties or property of the citizen, is inconsistent with the principles of free government, and is not confided to any department of the government of this state.** [Emphasis added.]

Is the right to travel freely, to associate freely, and to be about one’s own business a “liberty” that is protected from the power of “any department of the government of this state”? Is one’s commercial business activity a “property” which is contemplated in Section 25? Well, I certainly think so. What else would it be intended to protect, if not that?

Now, lastly, what about the assertion that county officials are authorized to declare a state of emergency, and in doing so, that they may issue orders requiring one to stop work, to disassociate with others, to stay at home, to stand 6 feet away from others, or the like? How would we evaluate the county official's claim to have such authority?

10. City and County officers & their laws and orders. First, we must take notice of the fact that city and county officials must also, before entering into office, take an oath to support the *Tennessee Constitution*. (See #6, above.) Therefore, county officials are also bound by the Declaration of Rights as set forth under the *Tennessee Constitution* (See Items 3, 8, & 9, above)

I admit that County mayors have the authority to declare a state of emergency, but the sole purpose and extent of that declaration is to call in FEMA, TEMA, or other such emergency providers. The declaration of a state of emergency might also trigger the release of state or federal funds. When a county mayor declares a state of emergency for this purpose, he is well within his right.

However, when a county mayor claims authority under the *Tennessee Constitution* to do what the General Assembly and the Governor cannot do, he is mistaken. The General Assembly cannot empower a county official to disregard the citizen's **unalienable rights** to life, liberty, and property. I have made a thoughtful search (although done quickly), and I can find no statutory authority for a county mayor to issue any such executive order of general application in his county. [If there were to be such a statute, it would also be unconstitutional.] Admitted, as with the Governor and the President, the Mayor has authority to control the conduct of those in the executive branch of county government. But the Mayor has no authority to direct the **Sheriff** (he is a **co-equal constitutional** officer) or any other non-executive branch officer to implement or enforce any executive order that affects the general public. And we must also remember that the Sheriff is also bound to support the *Tennessee Constitution*, so he must also be prohibited from any attempt to carry out an unlawful order. **In fact, the Sheriff has a duty to stop other officials whose illegal acts harm the people.**

It has been brought to my attention that perhaps a county health officer can issue such an Order. Specific reference has been made to T.C.A. § 68-2-608 & § 68-2-609, which read as follows:

§ 68-2-608. Administrative orders and judicial remedies of county health director.

(a) (1) Whenever it appears to the county health director that a condition or activity exists or is threatened that may **violate the laws, regulations, resolutions, ordinances, permits or licenses** that are **within the enforcement responsibility of the county health director**, the county health director may, **after notice and opportunity for a hearing**, issue an order for any of the following:

- (A) Cessation of the activity;
- (B) Correction of the condition or activity;
- (C) Removal of the condition in whole or in part;
- (D) Revocation, suspension or imposition of conditions on a license or permit; or
- (E) Abatement of a nuisance that involves a violation of the health laws of the state and that can be reasonably expected to adversely affect the health of the public.

(2) Any person served with an order pursuant to subdivision (a)(1) shall immediately comply with the order at the person's own expense.

(b) Whenever a condition or activity exists or is threatened that, in the opinion of the county health director, causes or threatens an **imminent or immediate danger to the public health under circumstances in which an opportunity for prior hearing might further seriously endanger the health of the public**, the county health director may issue an order requiring the actions listed in subdivision (a)(1). **The person to whom the order is addressed shall immediately comply with the order. However, such person shall be provided an opportunity for a hearing as promptly as is reasonable under the circumstances.**

(c) The county health director may petition the appropriate chancery court for injunctive relief and any other remedy available at law or equity as necessary to enforce an order issued pursuant to this section, or to otherwise require compliance with the laws, regulations, resolutions, ordinances, permits or licenses that are within the enforcement responsibility of the county health director. It shall not be necessary that an order be issued prior to seeking relief in chancery court. The court shall have the power to assess the cost of corrective measures against any & all persons failing to comply with the order.

§ 68-2-609. Orders of county health officer. The county health officer is empowered to order:

- (1) The **quarantine of any place or person**, if the county health officer finds that quarantine is necessary to protect the public health from an epidemic;
- (2) The **closure of any public establishment**, facility or building if the county health officer finds **unsanitary conditions** of such a nature and extent to significantly threaten the public health; or
- (3) The **closure of any public establishment**, facility or building, if the county health officer is **otherwise authorized by law to take that action**.

So does the county health officer have the authority to issue an order shutting down all businesses of a specific nature, or prohibiting citizens from visiting the business establishment of their choice? Well, according to the aforementioned statute, “No.”

Look closely at the wording of T.C.A. § 68-2-608(a). There are at least 3 elements of that statute that are not satisfied. **First**, there is no violation of the law, regulation, etc., as previously demonstrated in this article. **Second**, even if there was a law, regulation, etc., the health official must find that law to be within his enforcement responsibility. **Third**, he must give notice and an opportunity for hearing to **EVERY** person who is affected **BEFORE** he can issue an order. To the best of my knowledge, this approach has not been taken anywhere in Tennessee.

But what about **68-2-608(b)**? Look back at the wording. It also doesn’t apply, for 3 reasons. **First**, the Coronavirus contagion does not constitute an **imminent or immediate danger to the public health**. *Imminent* means “likely to occur at any moment.” *Immediate*, in this context, means “about to occur without a time interval.” As we know, many people are not affected at all, and simply because it is a serious danger to 5% of those exposed does not mean that this rises to the level of a public health crisis. Of course, it can be, and is, a healthcare crisis for those who acquire the virus, but that does not mean that it is a healthcare crisis for the public. **Second**, the statute contemplates that the order will be directed to a “**person**,” not to a group or to the general public. **Third**, the affected “person” must be afforded a **public hearing** as soon as practicable.

Now, lastly, let's look at T.C.A. § 68-2-609. Many county health officials argue that they are operating under this statute. But a careful reading of this statute causes their argument to fall apart. **First**, the county health official is authorized to issue an order of "quarantine." It is well-known that a quarantine is for the purpose of segregating those who have been **exposed**, not those who have not been exposed. **Second**, an establishment may be closed only when "unsanitary conditions" are found that significantly threaten public health. **Third**, an establishment may be closed if some other law permits the closure. Obviously, then, no county health official has statutory authority to issue any such order under this statute. **And if any such statute were found to exist, that statute would be patently unconstitutional.**

So let it again be stated: **No public officer** (including a county health officer) serving under the authority of the *Tennessee Constitution* may disregard the very plain statements of the Declaration of Rights. Neither the mayor nor the county health officer has greater powers than the Tennessee General Assembly or the Governor. And let it be plainly stated: the **PEOPLE** have **NOT** authorized **ANY** official, including the **Sheriff**, to disregard or violate their unalienable rights. That is why the rights are called "unalienable," because they cannot be transferred away or alienated.

CONCLUSION – Without question, many thousands of Tennesseans will acquire the Coronavirus. Of those who acquire it, between one and five percent will die. Therefore, the Coronavirus should not be disregarded or taken lightly. It is unquestionably fatal to some. But over 35 Americans per **day** die from **falling**, and the government has not seen fit to outlaw stairs.

Citizens have the right to determine their own level of risk, whether personal, financial, medical, or otherwise. And citizens have the responsibility or duty to make their **own** healthcare decisions. Government has no role in deciding any of these things for its citizens.

Government steps outside of its proper role when it favors one citizen over another or one business over another. Upon what basis in "justice" is one lawful business required to be closed, while another is permitted to be open? Some that are closed will undoubtedly be unable to reopen. Some employees who are laid off will undoubtedly be lost for good. **Government should not be in the business of choosing winners and losers;** its only role is to make a level playing field for everyone.

"**Liberty**" and "**Justice**" are the objects of **good** government, and each must be preserved at all costs. Therefore, I support the right of businesses to close if they are concerned, and I also support the right of businesses to stay open if they choose. Patrons may choose to shop, or they may choose to stay home. Either way, it is the choice of the citizen, not the decision of a government official.

If the government is permitted to order law-abiding citizens to **stay home** due to public health emergencies, it can also order law-abiding citizens to **leave home** for public health emergencies. If we come to accept it as fact that government can require some private businesses to **close**, will we not also accept it when some government official orders some private businesses to **operate**?

Government was not instituted to protect our health; it was instituted to protect our liberties.

"Government is not reason; it is not eloquent; **it is force**.
Like fire, it is a dangerous servant and a fearful master." -- George Washington