

John Eidsmoe
Lt. Colonel, USAF(Ret.)
Chaplain (Colonel MS), Mississippi State Guard
Pastor, Association of Free Lutheran Congregations
2648 Pine Acres, Pike Road, AL 36064 (334) 324-1812 Eidsmoeja@juno.com

11 April 2020

DON'T QUARANTINE THE CONSTITUTION!

It is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of citizens, and one of the noblest characteristics of the late Revolution.

James Madison, *A Memorial and Remonstrance*, 1785, Works 1:163

The Foundation has received numerous inquiries from pastors and others asking guidance in responding to restrictions placed upon churches because of the coronavirus. It is difficult to respond, because knowledge of the coronavirus is limited and changing daily, and government-imposed restrictions vary from time to place.

Certainly we are sensitive to concerns for public health and safety. Just as churches take the lead in measures for the relief of suffering, they should be careful not to cause or spread suffering by enabling the spread of the coronavirus. But even in times of crisis -- perhaps especially in times of crisis -- we must also vigilantly guard our God-given civil liberties. History shows that the erosion of liberty is usually gradual rather than sudden. This erosion commonly begins when governments claim emergency powers in the face of crisis -- epidemic, war, unrest, or natural disaster. But after the crisis has passed, the emergency powers often remain, and even when the emergency powers are terminated, the precedent for implementing them remains.

And public officials often forget that a health crisis is also a spiritual crisis. As people deal with disease, they have medical needs, and they also have spiritual needs. Meeting those spiritual needs is a foremost duty of the church.

A question that is foremost on the minds of church leaders is,

Should we cancel church services?

This has to be a local decision, and the answer may vary depending on your locality, the extent of the coronavirus in your community, the size of your congregation, the nature of your building, and many other factors. But it is definitely a life-related issue, because we are dealing with a life-threatening virus. And it is also a spiritual issue, because people need spiritual help in a life-threatening crisis.

As we respond, let us first assume there are no legal restrictions on assembling. What should we do then?

Concern for our neighbor may motivate some to suspend assembling. And the same concern for our neighbor may motivate others to continue gathering. The size of our respective churches, the ages of our congregants, and the extent of the coronavirus in our location are relevant factors to consider. If we elect to come together for worship, we can encourage those who may be especially vulnerable and those who are experience symptoms or who have been exposed to the virus to stay home and assure them that no one will think less of them for doing so. If we hold services we will probably see lower-than-normal attendance, so we can encourage those in attendance to sit at a distance from one another, avoid handshakes, etc. Some churches may find it feasible to hold multiple services, thereby reducing the attendance at each of them.

If we decide not to hold services, we can livestream the sermon, liturgy, prayer, and maybe some sacred music. This will be helpful, but it will not meet all of our congregants' spiritual needs. Livestreaming can never be a full substitute for gathering in worship, especially the administration of the sacraments. Hebrews 10:24-25 exhorts us to practice love and good works, "Not forsaking the assembling of ourselves together...."

A large church in the upper midwest devised an innovative solution. The pastor instructed the congregants to drive to the church parking lot at the regular time for services, and he further instructed them not to leave their cars. They then used their technology to broadcast the service into every car. The people assembled (albeit imperfectly), they worshiped, they guarded

their own safety and that of others, and they had no trouble with the authorities.

As we gather to worship, we might emulate the special prayer published by the Church of England during the bubonic plague outbreak in 1665:

A Form of Common Prayer, Together With an Order of Fasting, For The Averting of God's Heavy Visitation Upon Many Places of this Realm, London, 1665.

O Most gracious God, Father of Mercies, and of our Lord Jesus Christ, look down upon us, we beseech thee, in much pity, and compassion, and behold our great misery and trouble.

For there is wrath gone out against us, and the Plague is begun. That dreadful Arrow of thine sticks fast in our flesh; and the Venime thereof fires our blood, and drinks up our spirits; And shouldest thou suffer it to bring us all to the Dust of Death, yet must we still acknowledge, that Righteous art thou, O Lord, and just are thy judgements. For our Transgressions multiplied against thee, as the sand on the sea shore, might justly bring over us a Deluge of thy Wrath. The cry of our sins, that hath pierc't the very Heavens, might well return with showers of Vengeance upon our Heads. While our Earth is defiled under the Inhabitants thereof, what wonder, if thou commandest an evil Angel to pour out his Vial into our Air, to fill it with Infection, and the noisome Pestilence, and so to turn the very breath of our Life into the savour of Death unto us all!

But yet we beseech thee, O our God, forget not thou to be gracious: neither shut thou up thy loving kindness in Displeasure. For his sake, who himself took our Infirmities, and bare our Sickneses, have mercy upon us, and say to the destroying Angel, It is enough. O let that blood of sprinkling, which speaks better things than that of Abel, be upon the Lintel, and the two side-posts in all our Dwellings, that the Destroyer may pass by. Let the sweet Odour of thy Blessed Son's all-sufficient Sacrifice, and Intercession (infinitely more prevalent than the typical Incense of Aaron) interpose between the Living and the Dead, and be our full and present Atonement, ever acceptable with thee, that the Plague may be stayed.

O let us live, and we will praise thy Name; and these thy Judgements shall teach us to look every Man into the plague of his own Heart: that being cleansed from all our sins, we may serve thee with pure hearts all our days, perfecting holiness in thy Fear, till we come at last, where there is no more Sickness, nor Death, through thy tender Mercies in him alone, who is our Life, and our Health, and our Salvation, Jesus Christ, our ever blessed Saviour, and Redeemer, Amen.

God is real, and He really does answer prayer. Assembling together to pray for the health and safety of our community, our state, our nation, and our world, is a vital public service and part of our duty as Christians. We must not neglect that duty.

But what happens when government officials restrict our gathering? Then the situation changes. What is our duty then?

As we now know, the question is not "if" or "when" government will restrict our gathering. In many parts of the nation, state and local governments have already imposed restrictions, and these restrictions vary greatly from one state or community to another:

- Texas Governor Gregg Abbott issued an executive order closing schools, restaurants, and gyms, and limiting people at gatherings that did not include churches. Asked at a town meeting why churches were not included, he wisely responded, "There was nothing specific in the executive order about churches because there is freedom of religion here in the United States of America."
- However, Dallas County (Texas) Judge Clay Jenkins, in conjunction with the Dallas County Commissioners, issued an amended order requiring all persons living within Dallas County to "shelter at their place of residence" and may leave their residences "only for Essential Activities, or to provide or perform Essential Governmental Functions or to operate Essential Businesses...." Essential Activities are defined as those which are "essential to their health and safety," to "obtain necessary services or supplies," to "engage in outdoor activity"

including "walking, biking, hiking, or running," to perform work for an "Essential Business," or to "care for a family member or pet." "Essential Retail" includes "grocery stores, warehouse stores, big-box stores, bodegas, liquor stores, gas stations and convenience stores...." Church services do not qualify; "Religious and worship services may only be provided by video and teleconference." But how does one livestream the sacraments? Apparently Judge Jenkins thinks the right to buy liquor is more essential than the right to worship.

- The Governor of Alabama has issued an executive order prohibiting all public gatherings of more than 10 persons. Churches are neither singled out nor exempted; they are treated the same as all other gatherings.
- The Governor of Pennsylvania has ordered businesses to close but has exempted "life-saving" businesses and has provided a detailed list of which businesses must close and which may remain open. As of March 21, religious organizations may remain open.
- The Governor of New Mexico has effectively imposed a quarantine, requiring anyone traveling into the state to "self-isolate" for 14 days and self-monitor for symptoms including fever, cough, or shortness of breath.
- And the list goes on and on.

These restrictions raise serious constitutional issues. People's health and safety are important, but so are people's liberties. As guardians of the most basic liberty of all -- the right to worship God -- church leaders have a special duty to warn against all infringements, even in a public health crisis, perhaps especially in a public health crisis because at such times civil liberties often seem unimportant. Quarantines are of special concern because they severely restrict individual liberties in many ways and because they often, as in New Mexico, are applied to persons who show no evidence whatsoever of carrying the coronavirus. Depending on how a quarantine is conducted, healthy persons could be placed in close proximity to infected persons for lengthy periods of time.

Romans 13:1-7 imposes a strong obligation to obey civil government, but please note these qualifications:

- Romans 13 is addressed to individuals, including Christians who are under civil government; but it is not necessarily addressed to the Church which as an institution is outside the jurisdiction of civil

government. Arguably, when civil authorities give commands to those outside their authority, those outside their authority have no duty to obey, any more than the people of South Korea are obligated to obey the commands of North Korea's Kim Jong Un.

- Romans 13 says we obey the authorities because they command what is right and forbid what is wrong. But Paul does not contemplate (in this passage) a situation in which the king commands what is wrong or forbids what is right. In this case, “we ought to obey God rather than men” (Acts 5:29; cf Daniel 3, Daniel 6, Exodus 1). Many Christians believe Hebrews 10:25 (“not forsaking the assembling of ourselves together”) is a command of God that we worship together as a church.

Courts commonly say the state has authority to infringe fundamental rights when it has a compelling interest that cannot be achieved by less restrictive means. A court might well conclude that the state has a compelling interest in stopping the spread of the coronavirus. But are the means being employed the “least restrictive means” of achieving that compelling interest? A policy of limiting church gatherings to 10 or fewer persons is not “narrowly tailored” to be the least restrictive means. Should the same 10-person limit apply both to a small church building and to a building ten times that size that could easily provide social distancing for 100 persons?

And how does prohibiting drive-in services (in which churches have worship services in the church parking lot during which those in attendance do not leave their cars) further the state interest of preventing the spread of the virus? This seems very difficult to justify, especially when there is no limit on the cars parked at Wal Mart or on the number of people shopping in the store.

Some argue that none of this matters so long as the church attendance is treated the same as other gatherings. However, by guaranteeing “free exercise of religion,” the First Amendment gives special protection to religion. And like others, religious persons also have the right to free speech, freedom of assembly, and freedom of association.

Others say the Hebrews 10:25 command to assemble together can be satisfied by livestreaming church services to people at home. Some may

believe that, but others do not. Others note that the assembling is not just to hear music and a message but to be together in close proximity. Livestreaming may satisfy your interpretation of Hebrews 10:25, but it may not satisfy another person's interpretation; and you do not have a right to force your interpretation on that person. By way of analogy, in *Thomas v Review Board*, 450 U.S. 701, 715-16 (1981), Thomas argued that as a Jehovah's Witness he could not work on tank turrets in a foundry because of his religious convictions. The State called another Jehovah's Witness to testify that he was a Jehovah's Witness in good standing, worked on tank turrets, and saw no conflict with his religious beliefs, so Thomas shouldn't have a problem either. But the U.S. Supreme Court noted,

The Indiana court also appears to have given significant weight to the fact that another Jehovah's Witness had no scruples about working on tank turrets; for that other Witness, at least, such work was "scripturally" acceptable. Intrafaith differences of that kind are not uncommon among followers of a particular creed, and the judicial process is singularly ill-equipped to resolve such differences in relation to the Religion Clauses. One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause; but that is not the case here, and the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.

We understand officials' desire to limit public gatherings. But we are concerned when church services are closed along with other gatherings, and we are especially concerned when a governor orders that gatherings specifically including religious services are prohibited but businesses and industries may continue to function as usual, thus prohibiting people from corporate worship but permitting them to shop for liquor or potato chips. This suggests, contrary to Matthew 4:4, that man does live by bread alone, and that religious needs are less important than economic needs. In fact, during a crisis like this, people's spiritual needs are at least as compelling as their material needs.

So what should we do?

If churches are ordered to close during this crisis, some may follow the Hebrews 10:26 directive to not forsake "the assembling together of the saints," and decide, as did the apostles in Acts 5:29, that "we must obey God rather than man." They may view this action as necessary in order to join in prayer for the health of the community, and they may also view it as necessary in order to make clear to the authorities that they may not trample God-given constitutional rights. Without endorsing or opposing this course of action, I commend such churches for their courage and faithfulness to the Word of God.

Other churches may choose to comply with the restrictions, partly for public health reasons and partly because resistance might appear insensitive to our neighbors' health and safety and might therefore be a bad testimony. Again, I neither endorse nor oppose this course of action. However, if churches choose this course of action, I suggest that they issue a public statement to the effect that they are voluntarily complying with the order in the interest of public safety, but that infringements upon our God-given rights under the Constitution must not be taken lightly and that restrictive orders must be lifted as soon as the emergency abates. History shows that governments are quick to impose restrictions during emergencies but often slow to remove the restrictions when the emergency has passed, and that even when restrictions are lifted, the precedent for imposing restrictions remains. In the words of President Reagan,

Freedom is a fragile thing and is never more than one generation away from extinction. It is not ours by inheritance; it must be fought for and defended constantly by each generation, for it comes only once to a people. Those who have known freedom and then lost it have never known it again.

As Luther wrote in "Secular Authority: To What Extent It Should Be Obeyed" (1523), "...these two kingdoms [church and state] must be sharply distinguished, and both be permitted to remain; the one to produce piety, the other to bring about external peace and prevent evil deeds; neither is sufficient in the world without the other." The functions of church and state are different but not incompatible. In a crisis like this, each kingdom should work for the glory of God, the edification of man, and the preservation of

sacred human life. Unfortunately, we seem to be moving away from Luther's and Calvin's understanding that church and state are two kingdoms ordained of God (a view which is close to that of the Founders of our constitutional republic) and moving toward a view like that of Rousseau, who taught that the state is an evolving organism that stands above all other societal organizations (labor unions, clubs, schools, societies, of which the church is merely another of the same), and therefore the state has authority to regulate all other societal organizations including the church. If so, the State is becoming our god.

Above all, let us remember that God is in control, and all things move and breathe by His command. Let us pray to Him for deliverance, and trust that in His power we will triumph.

May God grant you His wisdom and strength in this time of crisis.

Godspeed,

John Eidsmoe

P.S. For an excellent opinion of a federal judge issuing a restraining order prohibiting the Mayor of Louisville, KY from prohibiting drive-in Easter services, see:

<https://firstliberty.org/wp-content/uploads/2020/04/OFCC-v-Fischer-Order-Granting-TRO.pdf>