M E M O R A N D U M

To: Governors' Offices
From: National Governors Association
Date: March 30, 2020
Re: Scope of Federal Authority to Alter State Responses to COVID-19

Executive Summary

As the number of COVID-19 positive cases increases, governors are taking action to limit the spread of this disease. Most governors have imposed business closures and restrictions on movement (e.g., stay-at-home/shelter-in-place orders, curfews, etc.) to protect communities from infection while maintaining continuity of essential activities.

As noted in previous NGA memoranda, governors possess significant authority to implement business closures and personal movement restrictions in emergencies.[1] At the request of governors' offices, NGA crafted this memorandum to summarize the scope of federal authority to alter state responses to COVID-19.

This memorandum is not legal advice.[2] This memorandum is a review of legal issues. As such, NGA recommends that governors, their advisors, and other state officials consult the appropriate authorities and attorneys in their state (e.g., legal counsel, local and state public health officials, and attorneys general) to review their interpretation of state powers and laws—alongside local epidemiological data, testing and health system capacity, and other public health factors—when determining whether (and when) to rescind personal movement restrictions.

Background

Over the last two weeks, there have been numerous federal and state actions regarding social distancing. For example, President Donald Trump stated that he wanted the nation "opened up and just raring to go by Easter" (i.e., April 12, 2020) and reiterated that he was eager to see the nation return to normal. On March 26, 2020, the President sent a letter to the nation's governors indicating the federal government would rate counties as low-risk, medium-risk, or high-risk based on public health syndromic surveillance data.[3] Adding complexity, the President also made comments about potential federal quarantines, but seemed to back off that assertion with the issuance of new Centers for Disease Control and Prevention (CDC) domestic travel advisories for

[1] NGA Memorandum on State Isolation and Quarantine Authority and Enforcement Powers; NGA Memorandum on Overview of State Actions on Business Closure and Personal Movement Restrictions in Response to COVID-19.

[2] NGA would like to thank outside constitutional legal experts that have supported the development, considerations, and/or crafting of this document, including, but not limited to: Kent Greenfield of Boston College Law School; Neal E. Devins from William & Mary Law School; and Robert M. Chesney from The University of Texas School of Law. Additional works consulted include: https://www.lawfareblog.com/can-federal-government-override-state-government-rules-social-distancing-promote-economy and https://www.lawfareblog.com/trump-cant-reopen-country-over-state-objections.

[3] Letter from President Trump to governors, March 26, 2020: https://apps.npr.org/documents/document.html?id=6819627-letter1.

certain states.[4] Ultimately, on March 29, 2020, the White House extended social distancing guidelines through the end of April.[5]

Governors have closed businesses and imposed restrictions on movement in their states. At least 50 states, four territories, and D.C. have required or recommended closure or limited services of non-essential businesses.[6] Additionally, at least 34 states, three territories, and D.C. have designated essential businesses.[7] At least 23 states and one territory have already taken or announced imminent state-wide action for stay at home orders, with four states having issued stay-at-home orders for select groups (e.g., high-risk populations, select counties), and two states have issued stay-at-home guidance.[8]

If the federal government and states disagree on when the country can safely return to work, several legal issues may emerge. In consultation with constitutional experts from around the country, the following issues have been highlighted:

1. Federal Supremacy;
2. The Anti-Commandeering Doctrine; and
3. Limitations on Conditional Funding.

As with any sensitive and complex legal situation, state officials should review their state statutes and emergency powers with their legal counsels and, where appropriate, their attorneys general.

In consultation with constitutional law experts, NGA offers the following guidance:

- **The president has no recognized Article II or statutory authority to override state public health orders;**
- **Congress, acting on its authority to regulate interstate commerce, could override state public health orders but any attempt would likely face issues and not automatically pass legal muster; however, in the current political environment, Congress is unlikely to do so; and**
- **The president could exert indirect pressure on states to discontinue or rescind current responses to COVID-19 through conditional federal funding, subject to limitations.**

I. Federal Supremacy

The president possesses an incredible power to persuade and advocate. More concretely, the president possesses powers that are "not fixed but fluctuate, depending on their disjunction or conjunction with those of Congress," derived from Constitutional and federal statute.[9] As such, analysis of potential federal action or directives towards states to rescind personal movement restrictions related to COVID-19 turns on whether the president possesses such powers (e.g., enumerated or implied constitutional powers, federal law) to require states to act. This section

[4] Report on March 28, 2020, from @idreesali114 on Twitter; Trump says quarantine would also be considered on New Jersey and Connecticut, would rather not do it but may need it. Centers for Disease Control and Prevention travel advisory: https://www.cdc.gov/media/releases/2020/s038-travel-advisory.html.
[5] https://www.washingtonpost.com/national/president-trump-extends-social-distancing-guidance-until-end-of-april/2020/03/29/5799f262-71e8-11ea-a9bd-9f8b593300d0_story.html
[6] See NGA COVID-19 website: https://www.nga.org/coronavirus/.
[7] Id.
[8] Id.
[9] Youngstown Sheet & Tube Company v. Sawyer, 343 US 579 (1952).

briefly highlights relevant constitutional powers, enumerated presidential emergency authorities, and other federal statutes.

Among other express or implied constitutional powers, Article Two of the U.S. Constitution outlines powers of the president as commander in chief.[10] In *Youngstown Sheet & Tube Co. v. Sawyer*, however, the Court struck down an executive action ordering the seizure of steel mills during wartime.[11] The Court noted that there was no specific statute empowering the president to conduct such action under his executive authority. Additionally, in his influential concurring opinion, Justice Jackson laid out an "over-simplified grouping of practical situations in which a President may doubt, or others may challenge, his powers" in three categories:[12]

- Presidential action with an express or implied congressional authorization, where such presidential authority is at its maximum;
- Presidential action on an issue where Congress has been silent, where the president can only rely on independent powers and may be in a zone of twilight in which he and Congress have concurrent authority with uncertain distribution; and
- Presidential action incompatible with the expressed or implied will of Congress, where his power is at its lowest ebb.[13]

Congress also affords the President significant emergency powers. On March 13, 2020, President Trump declared a national emergency, invoking the National Emergencies Act (NEA) in response to the ongoing COVID-19 crisis.[14] The NEA has been invoked at least 50 times since its enactment in 1978, including following the September 11, 2001 terrorist attacks and Hurricane Katrina.[15] Notably, it has also been utilized for public health emergencies, including the 2009 H1N1 pandemic.[16] Upon declaration of a national emergency, 136 different statutory powers become available to the President.[17] Of those 136 statutory powers, however, NGA is unaware of any power that authorizes/enables the President to override a gubernatorial business closure or personal movement restriction.

However, depending on a potentially expansive interpretation of other federal statutes, there may be the possibility that the federal government could attempt to exempt additional businesses from closure. For example, the Cybersecurity Information Sharing Act exempts certain classes of critical infrastructure from closures and travel restrictions.[18] Additionally, the Defense Production Act may also grant the president the ability to reverse the closures of certain non-essential businesses that may be ordered to repurpose their manufacturing for the national defense effort.[19]

Moreover, Congress, acting on its Commerce Clause authority, could pass legislation to reopen businesses or lift restrictions on travel. Notwithstanding such a law, any such statute would likely face issues and subject to the restrictions that are raised in the next section. Additionally, as a practical matter, both houses of Congress are unlikely to agree on such a measure.

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[10] U.S. CONST. art. 2, cl. 2.
[11] Youngstown Sheet & Tube Company v. Sawyer, 343 US 579 (1952).
[12] Id. at 634-655 (Jackson, J., concurring).
[13] Id.
[14] 50 U.S.C. 1601 *et seq*. The President invoked sections 201 and 301 on March 13, 2020.
[15] See https://www.brennancenter.org/sites/default/files/analysis/NEA%20Declarations.pdf.
[16] https://obamawhitehouse.archives.gov/realitycheck/the-press-office/declaration-a-national-emergency-with-respect-2009-h1n1-influenza-pandemic-0
[17] See https://www.brennancenter.org/our-work/research-reports/guide-emergency-powers-and-their-use.
[18] 129 Stat. 2936, 6 U.S.C. §§ 1501-1510.
[19] P.L. 81-774, 50 U.S.C. §§4501 et seq.

II. The Anti-Commandeering Doctrine

As legal experts have stated previously: "there is no "federalism clause" in the Constitution, and relevant case law ranges over a number of different provisions, including the Commerce and General Welfare Clauses, and the Eleventh and Fourteenth Amendments.[20] But the two provisions that most directly implicate the anti-commandeering doctrine are the Supremacy Clause and the Tenth Amendment."

The Supremacy Clause of the Constitution notes that…"[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land."[21] Under the doctrine of preemption, federal law will preempt state law when in conflict. Specifically, federal law preempts state laws that are in conflict, but only if federal law occupies the field. In this case, state executive action would prevent federal law from occupying the field.

However, there are additional considerations when determining potential conflicts between state and federal law, beginning with the Tenth Amendment and the doctrine of commandeering. The Tenth Amendment specifically reserves powers not delegated to the federal government to the states.[22] Included in that reservation is the unenumerated "police power" that states hold. The court has sought to outline police power as "the authority to provide for the public health, safety, and morals."[23] In fact, states' authority is at its strongest when they are acting within their police powers to preserve public health, safety, and the general welfare.

Both states' police power and their respective emergency management statutory frameworks give governors broad authority to promulgate executive orders, rules, or regulations for the benefit of health and safety.[24] [25] For example, the Court in 1905 in *Jacobson v Commonwealth of Massachusetts* noted that states have the "authority to enact statutes to be referred to what is commonly called the police power—a power which the state did not surrender when becoming a member of the Union under the Constitution."[26] Further, the Court went on to recognize the "authority of a state to enact quarantine laws using such powers…for the protection of public health and the public safety, confessedly endangered by the presence of a dangerous disease."[27] For a more robust legal analysis, see the National Governors Association's March 24th memorandum, "Overview of State Actions on Business Closure and Personal Movement Restrictions in Response to COVID-19."[28]

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[20] 51 U. Kan. L. Rev. 141-153 (2002)
[21] U.S. CONST. art. 6, cl.2.
[22] U.S. CONST. amend. X
[23] Barnes v. Glen Theatre Inc., 501 US 560 (1991).
[24] U.S. CONST. amend. X; See also, Elizabeth Joh, Yes, States and Local Governments Can Close Private Businesses and Restrict Your Movement, POLITICO, (Mar. 18, 2020), available at https://www.politico.com/news/magazine/2020/03/18/states-police-power-coronavirus-135826.
[25] See, e.g., https://www.ag.state.mn.us/Office/Communications/2020/03/25_StayAtHomeOrder.asp (arguing that Minnesota law provides the power to "protect the public peace, health and safety, and preserve the lives and property of the people of the state" under § 12.02 and the ability to control "direct and control "the conduct of persons in the state," "entrance or exit from any stricken or threatened public place, occupancy of facilities, and the movement and cessation of movement of pedestrians, vehicular traffic," and "the evacuation, reception, and sheltering of persons" under § 12.21).
[26] Jacobson v Commonwealth of Massachusetts.
[27] Id.
[28] https://www.nga.org/wp-content/uploads/2020/03/Memorandum-on-Overview-of-State-Actions-on-Business-Closure-and-Personal-Movement-Restrictions-in-Response-to-COVID-19_3.25.pdf

In other words, states likely have a serious Tenth Amendment argument that police powers are an area of traditional state concern, in which state prerogatives are usually controlling either in fact or in law.[29] However, if the president and Congress acted in concert to restrict state efforts in this area, additional doctrines may come into play.

Legal experts have underscored the development of the anti-commandeering doctrine, which says that the federal government cannot require states or state officials to adopt or enforce federal law.[30] Such doctrine emanates from decisions in two key cases: *New York v. United States* in 1992, and *Printz v. United States* in 1997. As such, while federal law general supersedes state law,[31] the federal government cannot force a state to enact a law under the Tenth Amendment.[32]

In *New York v. United States*, the Court held that portions of the Low-Level Radioactive Waste Policy Amendments Act of 1985, which required states to "take title" of nuclear waste sites, exceeded congressional power under the Commerce Clause.[33] Specifically, the federal statute stipulated that should states fail to provide for the disposal of internally generated waste by a particular date, then states must take legal ownership and liability for it. The Court found the "take title" provision unconstitutional because they "commandeered" the state legislative process by directly compelling them to enact and enforce a federal regulatory program.[34] In contrast, the monetary incentives and access incentives within the Act were permissible under the Commerce Clause as a lawful exercise of their regulation of the interstate market in the disposal of low-level radioactive waste.[35]

Similarly, in *Printz v. United States*, the Court again held that state legislatures are not subject to federal direction.[36] In *Printz*, plaintiffs were local law enforcement officials challenging requirements under the Brady Act that compelled them to perform temporary background checks on prospective handgun owners until the Attorney General was able to establish a federal system for background checks. Despite congressional power to regulate commerce and make laws that are necessary and proper for regulating interstate commerce, the Court held that this provision of the Brady Act was unconstitutional because the provision forced the states to participate "in the actual administration of a federal program."[37] The Court reaffirmed case law around commandeering in 2018 in *Murphy v. National Collegiate Athletic Association*.[38] In that case, the Court found that the Professional and Amateur Sports Protection Act of 1992 (PASPA)'s prohibition of any states' further legalization of sports betting was an unconstitutional attempt to commandeer state legislative processes.

As a result, a federal court may find that a potential mandate from the federal government to rescind stay-at-home or business closure orders may be an unconstitutional commandeering of the state's ability to exercise its police powers to protect the health and safety of its communities.

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[29] Consultation with U.S. constitutional legal expert
[30] https://www.scotusblog.com/2017/08/symposium-time-abandon-anti-commandeering-dont-count-supreme-court/
[31] U.S. CONST. art. 6, cl.2.
[32] New York v. United States, 505 U.S. 444 (1992).
[33] Id.
[34] N.Y. v. U.S., 505 U.S. 444 (1992).
[35] Id.
[36] 521 US 898 (1997).
[37] Id.
[38] 584 US _ (2018).

III. Limitations on Conditional Funding

The federal government may encourage states to voluntarily adopt a legislative program consistent with federal interests, such as the conditional provision of federal grant funds.[39]

Courts have identified four limitations on the federal conditional funding:

- Federal government restriction on grants funds must be in pursuit of the "general welfare;"[40]
- Congress must exercise the spending power "unambiguously…enabling the states to exercise their choice knowingly, cognizant of the consequences of their participation;"[41]
- Grant requirements must be reasonably related to the purpose of the expenditure;[42] and
- There cannot be a separate constitutional prohibition.[43]

Restrictions on a federal grant program may not be "unduly coercive" such that they constitute a commandeering-in-effect. In *South Dakota v. Dole*, the Court held that Congress did not exceed its spending powers in withholding five percent of federal highway funds from states that did not raise the legal drinking age to 21.[44] The withholding of highway funds was to enhance traffic safety, expressed transparently, and reasonably related to the purposes of the grant funding. Furthermore, the loss of five percent was not an undue burden upon the states.

However, in *National Federation of Independent Business v. Sebelius*, the Court held that Congress exceeded its spending power when it threatened a complete loss of federal Medicaid funding to states that refused to enact the Medicaid expansion provisions of the Patient Protection and Affordable Care Act (ACA).[45] In that instance, the threat of a total loss of Medicaid funding was so extreme as to constitute a coercive mandate.

Conditional funding remains a prominent issue. There is a current circuit split related to the federal government's restriction of the Edward Byrne Memorial Justice Assistance Grant (JAG) Program for jurisdictions that do not cooperate with federal immigration enforcement, including the refusal to share immigration status information under 8 U.S.C. §1373. The Second Circuit recently upheld the federal government's ability to withhold grant funding, reasoning that it was not an unduly burdensome requirement that violated the Tenth Amendment.[46] In doing so, it marked a departure from decisions in the Third and Seventh Circuits.

Conclusion

Governors possess significant authority to implement personal movement restrictions. Governors' offices consult appropriate authorities and attorneys to review interpretation of state powers and laws—alongside local epidemiological data, testing and health system capacity, and other public health factors—when determining whether (and when) to rescind personal movement restrictions.

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[39] See, e. g., South Dakota v. Dole, 483 U. S. 203, 206-208, and n. 3.
[40] *See* Helvering v. Davis, 301 U. S. 619, 301 U. S. 640-641 (1937); United States v. Butler, supra, at 297 U. S. 65.
[41] Pennhurst State School and Hospital v. Halderman, supra, at 451 U. S. 17.
[42] Massachusetts v. United States, 435 U. S. 444, 435 U. S. 461.
[43] Lawrence County v. Lead-Deadwood School Dist., 469 U. S. 256, 469 U. S. 269-270 (1985); Buckley v. Valeo, 424 U. S. 1, 424 U. S. 91 (1976) (per curiam); King v. Smith, 392 U. S. 309, 392 U. S. 333, n. 34 (1968).
[44] 483 US 203 (1987).
[45] National Federation of Independent Business v. Sebelius, 567 US _ (2012).
[46] New York et al. v. United States Dep't of Justice et al., Nos. 19-267(L); 19-275(con), (2nd. Cir. 2020).