

Federal Authority to Lift or Modify State and Local COVID-19 “Stay-at-Home” Orders: Frequently Asked Questions

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Legal Sidebar

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To contain the spread of the Coronavirus Disease 2019 (COVID-19), roughly 20 states and the District of Columbia continue to operate (<https://www.nytimes.com/interactive/2020/us/states-reopen-map-coronavirus.html>) under so-called “stay-at-home” orders closing nonessential businesses and limiting the circumstances in which individuals can leave their residences. In other states, some counties and cities remain subject to similar orders. These directives fall within the traditional police powers (<https://www.oyez.org/cases/2011/11-393>) of state and local governments to protect the health and safety of their citizens. But stay-at-home orders also implicate federal interests, raising questions about the balance between federal and state power if federal authorities disagree with the content or duration of specific state or local mandates. Besides these federalism issues, disputes over the proper response to COVID-19 raise separation-of-powers questions about the President’s authority to override stay-at-home orders. This Legal Sidebar responds to certain frequently asked questions concerning the federal government’s power to lift or modify such orders.

Does the President have statutory or constitutional authority to lift state or local stay-at-home orders?

The Supreme Court has explained (<https://www.law.cornell.edu/supct/pdf/06-984P.ZO#page=28>) that the President’s authority “must stem either from an act of Congress or from the Constitution itself.” Applying this principle, the Court has identified three “zones” of executive authority.

□ In Zone 1, (<https://www.law.cornell.edu/supct/pdf/06-984P.ZO#page=29>), “the President acts pursuant to an express or implied authorization of

Congress.” In this circumstance, the President’s authority is “at its maximum, for it includes all that he possesses in his own right”—i.e., the President’s Article II powers—“plus all that Congress can delegate.”

□ In Zone 2, (<https://www.law.cornell.edu/supct/pdf/06-984P.ZO#page=29>) “the President acts in absence of either a congressional grant or denial of authority,” and thus “can only rely upon his own independent powers.” In some of these cases, “there is a zone of twilight in which [the President] and Congress may have concurrent authority, or in which its distribution is uncertain.”

□ In Zone 3, (<https://www.law.cornell.edu/supct/pdf/06-984P.ZO#page=29>) “the President takes measures incompatible with the expressed or implied will of Congress.” As a result, executive power “is at its lowest ebb.”

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The President does not appear to have the express or implied authorization of Congress (Zone 1 authority) to unilaterally terminate state or local stay-at-home orders. To be sure, the President *does* have broad statutory authority to respond to public-health emergencies. For example, the Public Health Service Act (<https://legcounsel.house.gov/Comps/PHSA-merged.pdf>) authorizes the executive branch to impose certain federal quarantines to contain the spread of communicable diseases, waive specified regulatory requirements, and provide support to state and local governments in response to a “public health emergency.” Similarly, the Robert T. Stafford Disaster Relief and Emergency Assistance Act (https://www.fema.gov/media-library-data/1582133514823-be4368438bd042e3b60f5cec6b377d17/Stafford_June_2019_508.pdf) allows the President to provide various forms of assistance to individuals and state and local governments upon declaring an “emergency” or “major disaster.” The Defense Production Act (https://www.fema.gov/media-library-data/20130726-1650-20490-5258/final_defense_production_act_091030.pdf) empowers the President to require private companies to prioritize and execute government contracts related to national defense. And the President has a wide range of additional authorities that he can invoke after declaring a “national emergency” under the National Emergencies Act. (<https://uscode.house.gov/view.xhtml?path=/prelim@title50/chapter34&edition=prelim>) However, these statutes do not appear to expressly or impliedly authorize the President to categorically terminate stay-at-home orders. Because the President seems to lack this *statutory* authority, executive action to that effect would fall within either Zone 2 or Zone 3 of the Supreme Court’s framework for analyzing presidential power.

Executive action lifting stay-at-home orders could plausibly fall within either of these zones. There are good—but not necessarily decisive—reasons to conclude that Congress *disapproves* of such action, which would place it within Zone 3. Congress has provided the executive branch with robust public-health and emergency authorities, including the powers to impose certain federal quarantines

(<https://www.law.cornell.edu/uscode/text/42/264>) and reopen *specific* industries. (https://www.fema.gov/media-library-data/20130726-1650-20490-5258/final_defense_production_act_091030.pdf) Congress's provision of these powers arguably *evinces an implicit refusal* (https://www.law.cornell.edu/supremecourt/text/343/579#writing-USSC_CR_0343_0579_ZC2) to allow the President to *categorically* override state and local quarantines. This conclusion is buttressed by an “anti-preemption” provision (<https://www.law.cornell.edu/uscode/text/42/264>) attached to the executive branch's quarantine power, which makes clear that states and localities retain the authority to institute public-health measures that do not conflict with federal quarantines. Finally, Congress has passed *several pieces of legislation* (<https://www.wyden.senate.gov/download/summary-of-covid-19-relief-bill>) responding specifically to the COVID-19 pandemic, none of which authorizes the President to lift stay-at-home orders. Taken together, these measures could be construed as reflecting Congress's disapproval of such action by negative implication, placing it within Zone 3.

On the other hand, there are also reasons to characterize Congress's posture toward this type of executive action as silent, which would place it within Zone 2. Congress has not *explicitly* disapproved of executive action terminating stay-at-home orders, nor *has it rejected legislation* (https://www.law.cornell.edu/supremecourt/text/343/579#writing-USSC_CR_0343_0579_ZC2) that would give the President that power. Accordingly, it is unclear whether a presidential directive to that effect would fall within Zone 2 or Zone 3.

But the President likely lacks the authority to lift stay-at-home orders in either zone. In both zones, the President must rely upon his explicit or *inherent Article II authorities* (<https://constitutioncenter.org/interactive-constitution/article/article-ii>) to defend a challenged action. And neither set of authorities appears to support a general power to override state and local quarantines. The President's *explicit* Article II authorities—like his powers under the Vesting Clause, the Commander-in-Chief Clause, and the Take Care Clause—do not appear to provide a plausible basis to lift stay-at-home orders. Nor do the Supreme Court's executive-power cases support this type of *inherent* authority. In these cases, the Court has heavily *emphasized* (<https://www.law.cornell.edu/supct/pdf/06-984P.ZO#page=36>) the importance of historical practice. The Court has *explained* (<https://supreme.justia.com/cases/federal/us/453/654/>) that a “systematic” and “unbroken” presidential practice in which Congress has acquiesced can create a presumption that executive action is constitutional. And conversely, the Court *has reasoned* (<https://www.law.cornell.edu/supct/pdf/06-984P.ZO#page=36>) that an absence of historical precedent cuts against a claim of inherent authority.

These principles suggest that the President likely lacks an inherent power to categorically override stay-at-home orders. There does not appear to be a “systematic” and “unbroken” historical practice of executive action countermanning state and local police-power regulations without congressional authorization. To the contrary, state and local police-power regulations—including “quarantine laws” and “health laws of every description”—(<https://supreme.justia.com/cases/federal/us/22/1/#tab-opinion-1923815>) have a strong *historical pedigree*, *r* (<https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1250&context=jcl>) representing “that immense mass of

Even if the President cannot lift stay-at-home orders in their entirety, can he limit their effect?

The President may have the power to roll back specific elements of state and local stay-at-home orders.

For example, when the President invokes (<https://www.cbsnews.com/news/meat-plants-open-defense-production-act-trump-executive-order-coronavirus/>) the Defense Production Act to open critical industries, such actions likely preempt state and local regulations closing those industries under the Constitution's Supremacy Clause. Other (<https://www.law.cornell.edu/constitution/articlevi>) federal statutes may provide the President with similar powers to preempt certain elements of state and local stay-at-home orders.

Separately, the Department of Justice (DOJ) has announced (<https://www.justice.gov/opa/page/file/1271456/download>) its intention to file Statements of Interest (<https://www.justice.gov/opa/pr/department-justice-files-statement-interest-support-church-ministers-underserved-communities>) in support of lawsuits alleging that certain stay-at-home orders violate (<https://crsreports.congress.gov/product/pdf/LSB/LSB10451>) individuals' constitutional rights. (<https://crsreports.congress.gov/product/pdf/LSB/LSB10450>) The DOJ could also potentially bring its own lawsuits challenging certain applications of stay-at-home orders under 18 U.S.C. § 242, which (<https://www.law.cornell.edu/uscode/text/18/242>) prohibits government officials from willfully depriving individuals of their constitutional rights under color of law.

Could the federal government condition federal funding for states and localities on their compliance with federal directives concerning stay-at-home orders?

The “anti-commandeering” doctrine prohibits (https://crsreports.congress.gov/product/pdf/R/R45323#_Toc525881701) the federal government from ordering states and localities

to adopt or enforce federal policies. However, it is well-settled that Congress can use its Spending (https://www.law.cornell.edu/wex/spending_power) Power

to attach conditions to federal funds and delegate that authority to the executive branch. Accordingly, if a federal statute authorizes the executive branch to condition certain funding for states and localities on their compliance with federal directives concerning stay-at-home orders, the executive branch could potentially impose that condition. But the Spending Power is subject to several constitutional limits.

□ *First*, the legislation authorizing such a condition would need to provide states and localities with “clear notice” (<https://supreme.justia.com/cases/federal/us/451/1/#tab-opinion-1954019>) of the condition. Specifically, statutes authorizing the executive branch to place conditions on federal funds must do so “unambiguously,” so that states and localities can knowingly decide whether to accept the funds in the first instance.

□ *Second*, conditions on federal funds must be “related to” (<https://supreme.justia.com/cases/federal/us/483/203/>) the purpose of the funds. The executive branch would therefore need to identify some connection between federal directives concerning stay-at-home orders and the funds that states and localities would lose if they did not comply with those directives. However, this “relatedness” limitation on the Spending Power has not been rigorously enforced, and the Supreme Court has never invalidated federal legislation on relatedness grounds.

□ *Third*, conditions on federal funds cannot be unduly “coercive.” The Supreme Court announced this limitation on the Spending Power in *South Dakota v. Dole*, which (<https://supreme.justia.com/cases/federal/us/483/203/>) where it explained that the federal government cannot offer states financial inducements that are “so coercive as to pass the point at which pressure turns into compulsion.” In *Dole*, the Court rejected the argument that withholding five percent of federal highway funds from

states that refused to adopt the federal drinking age was unduly coercive. In contrast, the Court invalidated a federal statute on coerciveness grounds in *NFIB v. Sebelius*. I

(<https://www.oyez.org/cases/2011/11-393>)n

Sebelius, the Court struck down a provision allowing the Secretary of Health and Human Services to withhold all Medicaid grants from states that refused to accept expanded Medicaid funding and abide by other conditions. Because the challenged provision in *Sebelius* threatened states with the loss of over ten percent of their budgets—as opposed to less than half of one percent in *Dole*—the Court held that it impermissibly left states “with no real option but to acquiesce in the Medicaid expansion.”

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In summary, then, the executive branch could withhold federal funds from states and localities that refuse to abide by federal directives concerning stay-at-home orders if (1) a statute authorizes such a condition, and (2) the condition comports with the constitutional limits on the Spending Power discussed above.

Can Congress pass legislation lifting state and local stay-at-home orders or delegate that power to the President?

Under the Supreme Court’s Commerce Clause jurisprudence, Congress can regulate (https://constitution.congress.gov/browse/essay/artI_S8_C3_1_2/commerce%20clause/) intrastate economic activity that in the aggregate has a “substantial effect” on interstate commerce. And when Congress acts pursuant to an enumerated power, it can preempt contrary state and local laws under the Constitution’s Supremacy Clause. (<https://www.law.cornell.edu/constitution/articlevi>). Congress can also delegate this authority to the President. Because conducting intrastate business is an economic activity that in the aggregate has a “substantial effect” on the national economy, a federal statute granting businesses the right to reopen would likely fall within Congress’s Commerce Clause powers. (Unlike a law directing states and localities to lift their stay-at-home orders—which would violate the anti-commandeering doctrine—this type of statute would “confer[] rights on private actors” (https://www.supremecourt.gov/opinions/17pdf/16-476_dbfi.pdf#page=26), and therefore not run afoul of that doctrine.) Similarly, a federal statute granting individuals the right to engage in nonessential economic activity also would likely pass muster under existing precedent. It is less clear whether a broader statute giving individuals the right to leave their homes or gather for noneconomic purposes would fall within Congress’s Commerce Clause powers. However, Congress’s authority to enforce certain constitutional rights, su (https://crsreports.congress.gov/product/pdf/R/R45323#_Toc525881696)ch as the right to due process under the Fourteenth Amendment, might provide an alternative avenue for legislation addressing the effects of stay-at-home orders.

Could a private litigant challenge state or local stay-at-home orders on the grounds that they violate the Dormant Commerce Clause?

In the absence of executive or congressional action lifting stay-at-home orders, private litigants might challenge such orders on the grounds that they violate the Dormant Commerce Clause. But such claims do not seem likely to succeed. Under the Supreme Court’s Dormant Commerce Clause jurisprudence, states cannot discriminate (<https://www.law.cornell.edu/constitution-conan/article-1/section-8/clause-3/the-commerce-clause-as-a-restraint-on-state-powers>) against out-of-state commerce or enact laws whose burdens on interstate

commerce are “clearly excessive in relation to the[ir] putative local benefits.”

(<https://supreme.justia.com/cases/federal/us/397/137/>) Stay-at-home orders do not

seem to fall within either prohibition. As long as such orders apply equally to in-state and out-of-state

businesses, they do not facially discriminate against out-of-state commerce. And the burdens of stay-at-home orders on interstate commerce do not seem to be “clearly excessive” in relation to their goal of containing the spread of a deadly and highly contagious pandemic. The Supreme Court has explained (<https://supreme.justia.com/cases/federal/us/447/27/>) that states “retain authority under their general police powers to regulate matters of ‘legitimate local concern,’ even though interstate commerce may be affected.” And when it comes to public-health measures like quarantines, the Court has concluded (<https://supreme.justia.com/cases/federal/us/306/439/>) that “[t]he mere power of the Federal Government to regulate interstate commerce does not disable the States from adopting reasonable measures designed to secure the health and comfort of their people.” Thus, (<https://supreme.justia.com/cases/federal/us/270/87/>). [i]n the absence of any action taken by Congress on the subject-matter, it is well settled that a state, in the exercise of its police power, may establish quarantines against human beings, or animals, or plants, the coming in of which may expose the inhabitants, or the stock, or the trees, plants, or growing crops, to disease, injury, or destruction thereby, and this in spite of the fact that such quarantines necessarily affect interstate commerce. State and local stay-at-home orders designed to mitigate the spread of COVID-19 seem to fall within these bounds absent significant changes in the virus’s contagiousness or lethality.

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Author Information

Jay B. Sykes

Legislative Attorney

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