

To Democratic Subscribers

Setting the Record Straight Concerning President Trump's Authority to Override State Health and Safety Restrictions

Dear Democratic Colleague:

As you know, two days ago, President Trump asserted in his daily briefing that he has “total” authority to “reopen the economy” and to order States to relax social distancing measures. Yesterday he made additional threats to retaliate against States that were forming alliances to set standards for reopening – accusing them of “mutiny.” Last night he acknowledged that it would be up to individual governors to decide on reopening their economies, but also added that it will be up to him to “be authorizing each individual governor of each individual state to implement a reopening.” Given the President’s conflicting statements, we thought it would be helpful if we explained President Trump’s actual legal and constitutional authority in this area.

As the Founders explained—and the Supreme Court has stated time and again—“the Constitution created a Federal Government of limited powers.” The President’s authority is limited to the enumerated powers given to him by the Constitution and to those delegated to him by acts of Congress. Even within those spheres, he cannot exercise his authorities in ways that violate Americans’ civil rights and civil liberties.

President Trump was doubly wrong to claim “total” authority to dictate States’ public health policies. Unsurprisingly, he cannot point to any specific law that supposedly gives him that power. Nor does it rest hidden somewhere in the Constitution. On the contrary, the Tenth Amendment makes clear that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

Regulation of public health is precisely the type of authority traditionally reserved to the States. Congress, of course, may also enact laws to protect public health and safety, including through its authority to regulate interstate commerce. Using that authority, Congress would have the power, under the Supremacy Clause, to preempt state laws that might otherwise restrict economic activity. But Congress has never given the President the kind of open-ended authority he claimed in his Monday evening briefing. And although federal laws such as the Public Health Service Act give the federal government authority to prevent the spread of diseases, they in no way suggest that the President can force States to lift their *own* measures designed to protect public health and safety. In fact, given President Trump’s insistence that the States are on their own to battle this pandemic—and that the federal government will serve only as a “back-up,” if at all—it is astonishing to suggest that his Administration would have even considered intervening to *stop* the States from protecting their citizens’ health.

This is not a matter of partisan disagreement. Lawmakers including Senator Marco Rubio (R-FL) and Representative Liz Cheney (R-WY) agreed that President Trump does not have the kind of dictatorial power he has threatened to assert.

Although the President has no power to order States to “reopen,” he has also repeatedly threatened to use the federal government’s resources as leverage to coerce the States to do his bidding. Such actions could also be unlawful for a number of reasons. Generally speaking, federal laws providing for assistance to State and local governments constrain the President’s spending discretion and do not allow

him to withhold aid for whatever reason he chooses. For example, the Stafford Act—under which the Federal Emergency Management Agency provides emergency assistance to State and local governments—specifically describes the purposes for which funding must be used. Those purposes include saving lives, protecting public health and safety, and distributing food and medicine. They do not include rewarding political loyalty or fulfilling political vendettas. Likewise, nothing in the CARES Act gives the President authority to dispense funds in order to reward his friends and punish his perceived enemies.

It is not new for a President to stretch the limits of his power during a time of emergency. But for perhaps the first time in our history, a President dangled emergency powers as a way to *hinder*, rather than help, our response. Whatever his purpose or ultimate plans, President Trump cannot ignore the structure of our Constitution and the basic checks and balances put in place by our Founders.

Please feel free to contact us or the Judiciary Committee staff if you have any questions regarding these matters.

Sincerely,

Jerrold Nadler

Chairman, Committee on the Judiciary

Steve Cohen

Chairman, Subcommittee on the Constitution, Civil Rights, and Civil Liberties, Committee on the Judiciary