



Trump likely has some limited leverage over states in effort to reopen their economies

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President Trump on Tuesday criticized New York Governor Andrew Cuomo for wanting "independence" in determining how and when to reopen his state's economy and warned that states would be held "accountable" as they begin to reopen their economies. The day before, the president insisted he has "total" authority as president to make states reopen their economies.

The president has some leverage — perhaps not extensive — if he wants to influence states to open their economies, scholars of presidential powers under the Constitution say. He doesn't have "total" authority to order states to reopen their economies, a sentiment he's backed off from somewhat after he was challenged by fellow Republicans. But there are avenues he could try in order to leverage federal funding and other resources to states, something he hasn't explicitly suggested and that would almost certainly draw legal challenges.

"There is usually some flexibility on determining how grants are handed out, and the Trump administration could certainly try to leverage that so as to favor some states over others," said Keith Whittington, William Nelson Cromwell Professor of Politics at Princeton University. "It would depend on how the specific statute is written and what kind of restrictions the administration tried to impose. The administration has won some lawsuits, but lost more, on the restrictions it has tried to impose on federal funding to states and localities with sanctuary cities policies. Even if the administration has sufficient legal discretion to withhold medical equipment from states that have adopted policies on the epidemic with which he disagrees, it would certainly be an abuse of power for him to do so."

But, given the urgency of the crisis, Whittington said, "states cannot afford to wait for the courts to resolve any legal questions on how the administration its discretion or for Congress to react to presidential abuses of his authority. So, as a practical matter, the administration has a lot of leverage."

Ilya Shapiro, director of the Robert A. Levy Center for Constitutional Studies at the Cato Institute, said the president has much more leverage over the national stockpile than he does over most pots of funding.

"The national stockpile really is at the discretion of the president," Shapiro said, adding he didn't know if there could be a "viable legal challenge" if the president disproportionately offered equipment such as ventilators to states in line with his policy perspectives.

With other, preexisting federal programs, the president's discretion depends on the nature of the program. If there are certain statutory funding allotments, allocated by population, preferring some states over others might not hold up legally, Shapiro said, or if the president were to give or withhold funding to states strictly based on say, governors' party affiliation. There are questions, too, of the Defense Production Act, "because the president does have allocation authority under the Defense Production Act," Shapiro said. But in any such instance, the offended state or states would likely litigate.

"I think courts would move pretty quickly on this," Shapiro said.

The president "seems to think that any authority in the federal government is vested in him," but much of it lies with Congress, Liza Goiten, co-director of the Brennan Center for Justice's Liberty & National Security Program.

"What Congress cannot do and what the president cannot do is coerce states into doing things that they don't have the authority to require directly, by virtue of withholding funds," Goiten said. "And I think there would be an excellent argument that in the case of a pandemic, you know, threatening to withhold ventilators or just funding for responding to the pandemic, necessary funding, is coercion. ... So I actually think that would be highly problematic from a constitutional perspective."

The president, or at least his lawyers, know he lacks the authority to direct states to reopen, or reopen in a certain manner or timeframe, Goiten said.

"The truth is if he were to try to issue an executive order telling states they all have to lift their bans, it wouldn't stand up in court and he probably knows that. Or at least his lawyers know that. So, yeah, it stands to reason he might try to do this more indirectly."

Mr. Trump on Tuesday said he would be "authorizing" each governor to implement a reopening plan. But he has continued to put the onus on states to provide the bulk of testing and necessary hospital equipment.

"So we'll get it open. Individual states will — and the governors will be held accountable," Mr. Trump said on Tuesday. "If they need things, we'll help them get those things, but we want them to do their testing. We want them — because they're equipped to do testing."