



No, Trump doesn't call the shots on reopening states, constitutional scholars say

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After weeks of touting states' rights to decide whether to issue stay-at-home and other mitigation orders, President Trump now says the decision to "open up the states" rests with him, not governors, amid the coronavirus pandemic. But constitutional scholars disagree.

As he forms a council to restart the nation's economy, Mr. Trump claimed "it is the decision of the president" to reopen sectors of states' economies.

"For the purpose of creating conflict and confusion, some in the Fake News Media are saying that it is the Governors decision to open up the states, not that of the President of the United States & the Federal Government. Let it be fully understood that this is incorrect," the president tweeted Monday morning. "...It is the decision of the President, and for many good reasons. With that being said, the Administration and I are working closely with the Governors, and this will continue. A decision by me, in conjunction with the Governors and input from others, will be made shortly!"

Only three days ago, the president insisted he didn't want to direct states to shutter their economies for constitutional reasons.

"... I like to allow governors to make decisions without overruling them, because from a constitutional standpoint, that's the way it should be done," the president said during his Friday Coronavirus Task Force briefing. "If I disagreed, I would overrule a governor, and I have that right to do it. But I'd rather have them -- you can call it 'federalist,' you can call it 'the Constitution,' but I call it 'the Constitution.' I would rather have them make their decisions."

Constitutional scholars, who argued the president lacks the power to implement a nationwide lockdown, said the president also doesn't have the authority to order the states to reopen.

That doesn't mean the president can't be influential in encouraging states to open businesses back up, particularly in states led by Republican governors closely aligned with the president. But it does mean he can't order states or businesses to reopen.

"It's hard to know what the president means with this statement, so perhaps it's an occasion to take him seriously but not literally," said Ilya Shapiro, a constitutional expert with the

libertarian-leaning Cato Institute. "Governors and mayors are the ones with authority to issue shelter-in-place and related orders, and they're the only ones who can rescind them."

"But presidential leadership will be key to the timing of the 'opening up' nationwide, as well as with issuing guidelines for how a presumably phased-in reopening will work," Shapiro continued. "In other words, legally speaking the president doesn't have the power to rescind state orders, but in practical terms, state and local authorities are likely to follow the federal government's lead."

Steve Vladeck, a law professor at the University of Texas School of law, wrote on Twitter that the president's assessment of his own authority is off base.

"This tweet is just false. The president has no formal legal authority to categorically override local or state shelter-in-place orders or to reopen schools and small businesses. No statute delegates to him such power; no constitutional provision invests him with such authority," Vladeck wrote.

"The president can *informally* put pressure on local/state governments. He can mess with emergency funding," Vladeck continued. "And he can even order the federal workforce back to their offices. But largely because he's left so much to local authorities so far, this, too, is ultimately up to them."

Robert Chesney, associate dean for Academic Affairs at the University of Texas School of Law, wrote in Lawfare that such authority lies with the states, not the president, and the president would be unlikely to be able to override a governor's decision.

"The federal government cannot commandeer the machinery of the state governments. ... That is, the federal government cannot coerce the states into taking actions to suit federal policy preference," he writes.

Perhaps the trickier authority debate is between states and municipalities, which is playing out in New York, where Governor Andrew Cuomo and New York City Mayor Bill de Blasio have been at odds over schools.

The New York Times reported that late Friday, de Blasio decided to keep the city's public schools closed through June, a message that did not reach Cuomo effectively until it was made public on Saturday. In his own news conference not long after on Saturday, Cuomo declared that he, not the mayor, controlled the ability to open or close the largest school system in the nation.

Over the past few days and as recently as Monday morning, the president has been calling associates seeking their input on how soon he should reopen the economy and asking what they think of Dr. Anthony Fauci, according to three people familiar with those conversations. The president's top advisers have also been canvassing on these two issues. Fauci, the head of the National Institute of Allergy and Infectious Diseases, has become a prominent face in the Coronavirus Task Force's briefings and media efforts, at times appearing to conflict with the president's messaging.

The president, according to the sources, spoke with industry leaders, conservative organizations and current staffers, and the bulk of these calls have focused on getting America back to work. Some outside associates are pressuring the president to re-open parts of the economy rather than pursue additional stimulus money.

The White House insists the president isn't going to fire Fauci, after the president quote-tweeted a tweet with a "#FireFauci" hashtag on Twitter.

"This media chatter is ridiculous – President Trump is not firing Dr. Fauci," White House deputy press secretary Hogan Gidley said in a statement. "The president's tweet clearly exposed media attempts to maliciously push a falsehood about his China decision in an attempt to rewrite history. It was Democrats and the media who ignored coronavirus choosing to focus on impeachment instead, and when they finally did comment on the virus it was to attack President Trump for taking the bold decisive action to save American lives by cutting off travel from China and from Europe. Dr. Fauci has been and remains a trusted advisor to President Trump."

Determining when and how to encourage the reopening of the economy is something the president says will be the biggest decision of his presidency thus far.

"I'm going to have to make a decision, and I hope to God it's the right decision," the president said Friday. "But I would say without question it's the biggest decision I've ever had to make."