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## Trump claims ‘total’ authority during pandemic but even states don’t have that

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WASHINGTON — Does President Donald Trump really have “total” authority to reopen the economy by lifting stay-home orders issued by states? Hardly anyone outside the White House believes that.

Could Texas — which already has troopers at the Louisiana border demanding details on where arrivals will self-quarantine — seal its borders entirely? Maybe.

Like no crisis in the last century, the COVID-19 pandemic is testing the emergency powers of government at all levels, and spotlighting some of the least litigated aspects of the state-federal relationship.

Vacation spots in Colorado and North Carolina have banned out-of-state property owners from hunkering down in their own mountain and beachfront getaways.

Drivers entering Texas, Florida and other states face checkpoints unfamiliar to generations for Americans who have always taken freedom of movement for granted.

And at the White House, Trump has claimed broad emergency authority to overrule state-level business closures and other restrictions imposed to slow the outbreak.

“The president of the United States calls the shots,” he said Monday evening at his daily coronavirus task force briefing. “When somebody is the president of the United States, the authority is total, and that’s the way it’s got to be. It’s total. It’s total. And the governors know that.”

Legal scholars — and governors across the country, for that matter — scoff.

“Unless the president is ready to nationalize parts of the economy like the manicure industry, there’s really not a lot of opening he can do,” said Polly Price, a professor of law and global health at Emory University School of Law in Atlanta who has written extensively about epidemics and related legal issues. “Congress could conceivably legislate to override state control of commerce, but not the president by himself.”



Like other legal experts, Price finds Trump’s stance puzzling and contradictory.

Only a few weeks ago, the president was swatting aside pressure to order a nationwide stay-home order, insisting that even if he wanted to, that was up to governors. If such decisions are out of his hands, it’s hard to see how the power to nullify those orders isn’t.

On Tuesday night, he offered a face-saving declaration that, while he was certain he had complete control over business closures around the country, he’d leave the timing to governors.

“I’m not putting any pressure on the governors,” he said.

In fact, there’s “precious little” the president can do about local and state public health orders, said David Coale, a Dallas appellate lawyer whose work often focuses on separation of powers, because “there is no federal law telling everyone to stay home right now for him to go back on.”

“I’m sitting in my house because of Dallas County’s shelter-at-home order,” which flows from authority delegated by the state, he said, “and none of that has anything to do with the federal government.”

### **‘Shotgun quarantines’**

Nearly every governmental authority during a public health emergency rests with the states under the 10th Amendment to the Constitution, which reads: “The 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.”

Such emergency powers are vast.

In Texas, Gov. Greg Abbott resisted issuing a statewide shelter-at-home order until March 31, leaving such decisions to counties. Florida's Gov. Ron DeSantis followed suit the next day, after taking the hint from Trump's decision to extend national stay-home "guidance" for 30 days.

Checkpoints are extraordinary — but not unprecedented.

When Memphis had a yellow fever outbreak in 1879, the sheriff across the river in Arkansas lined up armed deputies to arrest anyone who tried to come across.

During the Spanish flu pandemic of 1918 and 1919, cities from coast to coast set up barricades manned by armed police, deputies and volunteers to keep out travelers.

In 1899, Texas actually did shut its border to Louisiana amid reports of yellow fever in New Orleans.

The state of Louisiana fought the move before the U.S. Supreme Court, accusing Texas of using the outbreak as a pretext, to lure business away from New Orleans for the benefit of Galveston and other Texas ports. Texas denied that, and the high court declined to hear the case.

Price recounted that and other incidents in an academic paper on epidemics, federalism and "the era of the shotgun quarantine" between the Civil War and World War I. "Local governments throughout the South defended their towns against epidemic disease by imposing a form of quarantine by martial law," she wrote.

Texas probably can't stop and turn someone away at the state line. But what Texas and other states are doing now falls short of that, and their actions are within their powers.

Hawaii was the first. Since March 21, Hawaii has required a two-week quarantine for anyone arriving from out of state — visitors and Hawaii residents alike. Alaska issued a similar order on March 25.

Florida since March 23 has required two weeks of self-isolation for air travelers arriving from New York, New Jersey or Connecticut. Days later, Gov. Ron DeSantis added checkpoints at highway crossings from Georgia and Alabama.

Anyone coming from the three Northeastern states or Louisiana, another hot spot, must provide contact information and travel details. And they're required to stay isolated for their first 14 days in the Sunshine State — or for the entire time, if their visit isn't that long.

## **Golfing as a criminal act**

Rhode Island likewise has set up checkpoints and is requiring a two-week quarantine when people arrive from out of state — an order that led to the arrest earlier this month of three golfers from Massachusetts. They'd driven into the state, parked at a McDonald's, switched to a car with local plates and hit the links.

Tipped off by a restaurant worker, police were waiting when they returned to retrieve their car.

That could be discriminatory, legal experts said.

“States can't treat their own citizens differently,” said Ilya Shapiro, director of the Center for Constitutional Studies at the Cato Institute, a libertarian think tank.

Similarly, Abbott can't order state troopers to wave any car with Texas tags through the checkpoints. “But inspecting everyone who's trying to get into your state — that's within their police powers in the context of a viral spread like this,” Shapiro said.

Judges are usually deferential during emergencies, as long as the restriction “isn't completely arbitrary and crazy,” he added.

Could Texas seal its border?

Maybe, in the right circumstances — not to prevent the common cold, Shapiro said, but probably to block the spread of an incurable, highly contagious and deadly pathogen.

The 14th Amendment makes it problematic to restrict movement across state lines: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

The layman's version is that Americans are guaranteed freedom of movement within and between states, and the right to equal treatment in any state, no matter which one they call home.

Texas Attorney General Ken Paxton cited that Privileges and Immunities Clause in a stern letter last Thursday to Gunnison County, Colo., home of Crested Butte and other ski resorts.

The county had ordered anyone without Colorado residency to leave, even if they owned property there, contending that during the emergency, the county had a responsibility to conserve access to groceries, medical care and other services for bona fide residents.

“The Order ... discriminates against nonresident homeowners by entirely prohibiting their ingress to the county and enjoyment of their real and personal property in the county,” Paxton wrote.

“He's dead right. You can't do that,” said Coale. “I realize you have a public health issue, but really.”

On Friday, the county dug in, telling Paxton that “Gunnison County was forced to take dramatic measures to save lives ... [and] will welcome the return of non-residents once this crisis is over, including the citizens of Texas.”

The county has since softened its ban. An amended public emergency order issued on Saturday now lets nonresidents stay, if they'd been in the county for two weeks already.

Paxton is satisfied. Equal treatment is what makes the Texas border checkpoints legitimate, said spokesman Marc Rylander: Anyone driving into Texas from Louisiana — including residents of Texas — is required to self-quarantine for 14 days.

“That's the difference between our policy with Louisiana and Colorado's policy that said, ‘Hey, if you don't have a Colorado driver's license and this isn't your permanent residence, you have

to leave,” Rylander said. “What Colorado did and what we are doing with Louisiana is night-and-day different.”

Gunnison County isn’t the only vacation playground trying to keep out visitors during the outbreak.

In North Carolina’s Outer Banks — the narrow barrier island that includes Kitty Hawk, where the Wright brothers made aviation history — Dare County declared a state of emergency and banned nonresidents.

At least a half-dozen property owners from Virginia and elsewhere have gone to court to challenge the ban. But with deputies posted at the only two bridges on and off the island, it’s a ban that’s hard to skirt.

Even if he wanted to send the National Guard, the president probably couldn’t open those bridges.

He does have the bully pulpit, though. A federal pronouncement that it’s safe to return to work, hit the malls and fill restaurants and ballparks would carry enormous weight.

“That has enormous persuasive power,” Coale said. “A lot of state agencies follow that guidance.”