

## Trump Likely Doesn't Have Power To Reopen Businesses

By Mylan Denerstein, Lauren Elliot, Lee Crain and Victoria Weatherford

(April 15, 2020, 4:55 PM EDT) -- Businesses across the country face a patchwork of shutdown, shelter-in-place and stay-at-home orders, directing that only essential businesses remain open. Making things more complicated, the definition of essential business changes across state, county and often municipal lines — resulting in a difficult climate for businesses which often must make judgments about whether they can, and should, remain open or face potentially steep fines for violating unclear orders.

That climate is about to get more complex. As has been widely reported, President Donald Trump has expressed his desire to reopen and restart the economy by overriding state and local shutdown orders, if necessary.

Just days ago, the president stated that he believed he “ha[d] the right to” “overrule a governor,” on school closures[1] although education is an area that the U.S. Supreme Court has long recognized as “truly local” and governed by the states.[2]

On the morning of April 13, the president tweeted that the “President of the United States & the Federal Government” gets the ultimate decision whether “to open up the states.”[3]



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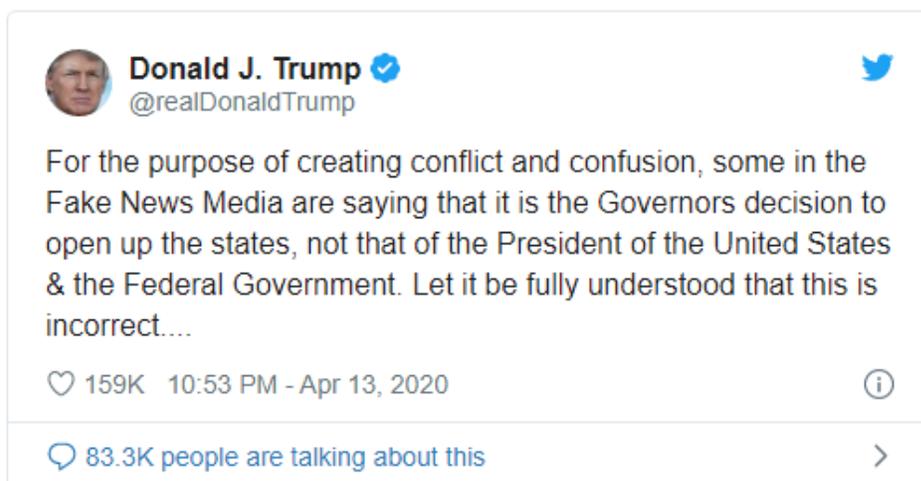
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And later that day, during the April 13 daily COVID-19 task force briefing, the president reaffirmed his position: “The authority of the President of the United States having to do with the subject we are talking about” — rescinding stay-at-home orders — “is total.”[4]

It seems likely that, as time passes and state and local efforts to contain the virus begin to show progress, businesses will be faced with competing and contradictory directives from governmental officials at various levels, some who seek to push forward America’s grand reopening and others who believe it more prudent to postpone it.

Consequently, businesses may have to grapple with which orders are effective, which are superseded or overridden, and which are invalid exercises of governmental power. In particular, there is a reasonable possibility that businesses will have to decide whether to continue to abide by state-level shutdown orders, or instead reopen in reliance on a presidential directive rescinding those orders. That decision can carry significant legal liability.[5]

We conclude that an executive order issued by the president at this point in time would likely be found to be legally ineffective to unilaterally override state and local shutdown orders. Congress has not acted by passing legislation that would authorize the exercise of executive powers in this way — nor would any such bill appear likely to pass in the currently composed U.S. House of Representatives and U.S. Senate.

Furthermore, the president likely does not possess independent emergency Article 2 powers that would support such an order. Consequently, we believe that state and local shutdown orders are likely to be adjudged enforceable even in the face of a presidential executive order to the contrary.

### **President Likely Lacks Independent Authority to Override State and Local Orders Mandating Closure of All Nonessential Businesses**

The effect of what we will call a presidential open-for-business order would likely be analyzed under the tripartite *Youngstown* test.[6]

This examination, applying the analytical framework of U.S. Supreme Court Justice Robert Jackson’s concurrence in the seminal case of *Youngstown Sheet & Tube Co. v. Sawyer*, has been regularly applied in the decades since to determine the validity of exercises of presidential power.[7] And *Youngstown* itself addressed whether President Harry S. Truman’s decision to nationalize parts of America’s steel industry during the Korean War was a proper exercise of executive power. The court ultimately rejected Truman’s order, holding he lacked power to issue it.

In holding the president had overstepped, the *Youngstown* court explained that “[t]he president’s power, if any, to issue the order must stem from either an act of Congress or from the Constitution itself.”[8]

Justice Jackson’s concurrence subdivided that statement of presidential power into three categories of analysis — (1) an executive order issued pursuant to statute, which reflects presidential power at its zenith or, as Justice Jackson said, an order that “personif[ies] the federal sovereign;”[9] (2) a presidential executive order issued “in absence of either a congressional grant or denial of authority” that relies only “upon his own independent powers;”[10] and (3) when the president acts contrary to “the expressed or implied will of Congress,” rendering his power “at its lowest ebb” and reliant “only upon his constitutional powers minus any constitutional powers of Congress over the matter.”[11]

We address each category in turn.

### ***Category One***

In the event the president could rely on an act of Congress authorizing him to direct businesses to reopen, such an executive order likely would be found to be operative and supreme over contrary state and local law.[12]

The Constitution provides Congress with the enumerated power to control interstate and foreign commerce.[13] A statute (even if implemented by executive order) that directs the reopening of businesses nationwide to respond to a national economic crisis is very likely a lawful exercise of Congress' commerce powers.

Congress has the power to regulate even “purely local activities that are part of an economic ‘class of activities’ that have a substantial effect on interstate commerce.”[14]

We expect that state and local orders compelling the mass closure of businesses in states across the country — including businesses that plainly fall within the stream of interstate commerce — and the nationwide recession and double-digit unemployment that has since occurred, would qualify as a “substantial effect on interstate commerce.”

However, we have identified no existing statute pursuant to which the president could issue an executive order requiring businesses to reopen notwithstanding state and local laws to the contrary.

Although there are a variety of federal emergency statutes, those statutes generally authorize specific powers to the executive branch — including, for example, providing “military assistance,”[15] and “supporting investigations into the cause, treatment, or prevention of a disease”[16] — that cannot reasonably be read as allowing the president to direct unilaterally that industries and businesses must reopen, thereby overriding and invalidating state or local shutdown orders.[17]

Other statutes also specify that the president has the authority to declare forms of emergency, such as public health and emergencies necessitating foreign military intervention,[18] that do not necessarily align with the type of economic emergency he would have to argue exists here. Other statutes simply authorize the president to supplement — rather than override — ongoing state disaster relief.[19]

Although it is possible that certain courts could expand the reach of these statutes, none seems a likely candidate to serve as a statutory hook for an emergency open-for-business order. Consequently, we conclude that a presidential executive order would not likely be found to be entitled to Youngstown category one treatment.

### ***Category Two***

Category two addresses circumstances in which the president acts with no congressional statute clearly authorizing or disapproving his orders.

In such cases, courts assess whether the president can rely “upon his own independent powers” in taking a given action.[20] As there does not appear to be a statute directly addressing the president's exercise of power over opening the economy, category two is the likely category in which any executive order would be analyzed.

Courts assessing a presidential executive order under this category will examine whether Article 2 empowers the president with the inherent authority to validly issue an open-for-business executive order.[21] Our view: Article 2 likely will not be adjudged to convey such power.

As an initial matter, an invocation of the president's Article 2 "take care" and "commander in chief" powers is likely insufficient — in fact, the Supreme Court in *Youngstown* rejected generalized reliance on these powers as a means of justifying Truman's executive order seizing steel plants to facilitate the Korean War.[22]

Similarly, the president's invocation of generalized emergency powers in this context is likely unavailing.

Notably, Justice Jackson in *Youngstown* expressed doubt that the president had such powers in the first instance.

In reflecting on other failed constitutional systems that vested emergency powers in the executive such as Weimar Germany (the precursor to Hitler's Third Reich), Justice Jackson explained that Congress "can grant and has granted large emergency powers" to the president already, rendering him "quite unimpressed with the argument we should affirm" the president's possession of such powers without statute.[23]

Justice Tom Clark, however, suggested that "the president's independent power to act depends upon the gravity of the situation confronting the nation,"[24] and multiple scholars have opined that the president does have vast emergency powers.[25]

In the end, however, it strikes us as unlikely that a court would find that the president has independent, emergency economic powers to override state and local shelter-in-place orders and permit businesses to open up, absent an affirmative act of Congress.

Importantly, a presidential open-for-business order could not likely be justified on the grounds that a national public health emergency exists, as the very premise of any open-for-business order assumes the COVID-19 pandemic has diminished or that the country's economic emergency trumps any public health emergency.

Consequently, any order would likely have to be predicated on the president's having inherent economic emergency powers — a prospect that seems unlikely given Congress' well-established interstate and foreign commerce powers.

In our view, consistent with the court's holding in *Youngstown*, a court would likely hold that directing the reopening of businesses nationwide is not within the president's independent Article 2 powers.

### ***Category Three***

The final category is where the president acts contrary to the express or implied will of Congress. In that instance, his power is at its "lowest ebb." [26] We have identified no specific statute that is irreconcilable with — or otherwise prevents the president from issuing — an open-for-business order.[27]

The recent congressional COVID-19 emergency bills each seek to remedy the economic emergency our country faces through an influx of funds to businesses and individuals, not through an override of state and local shutdown orders.[28]

Such congressional enactments could lead courts to conclude that Congress had rejected legislation authorizing the exercise of emergency presidential powers as the preferred remedy for our current economic crisis, although this too seems unlikely.[29]

In any event, because we conclude that a court would likely find that the president lacks independent authority to issue an open-up order, he likely could not justify such an order under a Youngstown category three analysis in which congressional enactments expressly or impliedly opposed such executive action.

### ***10th Amendment Gloss***

As discussed, we believe a presidential executive order of the kind discussed herein would likely be adjudged to fall under a Youngstown category two analysis.

To the extent debate remains as to whether the president possesses independent authority to override state and local shutdown orders, the Supreme Court's recent 10th Amendment jurisprudence suggests that those doubts would be resolved in favor of preserving state authority.

The Founding Fathers' generation understood that quarantine laws and "health laws of every description ... form[ed] a portion of that immense mass of legislation ... not surrendered to the general government" and therefore reserved to the states.[30]

In more recent terms, the Supreme Court has counseled that federal law is to be construed based on the "background assumption that Congress normally preserves 'the constitutional balance between the national government and the states,'" an "assumption [that] is grounded in the very structure of the Constitution." [31]

That balance likely includes the long-standing recognition that the states possess authority over public health.

If there is any ambiguity in federal emergency statutes, courts will likely construe that ambiguity so as to not "intrude upon the police power of the states." [32] Absent a clear statutory grant or some clear emergency power enumerated in Article 2, then, courts will likely conclude that the president lacks independent power to override the states' actions to protect public health. [33]

### **Conclusion**

In sum, we have found no existing federal statutory authority authorizing the president to direct our nation's businesses to reopen, and we find it unlikely that a court will determine that the president has inherent Article 2 authority to do so without congressional approval.

The Youngstown court previously rejected presidential invocation of generalized, independent emergency powers as a justification for seizing needed steel plants in the context of warfare. It is hard to see a court authorizing presidential action justified by such emergency powers here unsupported by any federal statutory authority.

In the event the president issues such an order, businesses should pay close attention to the authority — statutory or constitutional — the president attempts to invoke and should seek legal counsel regarding the effectiveness of any such order.

Our view, however, is that any such invocation will likely be found to be ineffective, meaning, most importantly for businesses, that they will likely remain subject to penalties imposed for violating state and local shutdown orders even where the president has issued a national open-for-business directive.

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[1] Remarks by President Trump, Vice President Pence, and Members of the Coronavirus Task Force in Press Briefing (Apr. 10, 2020), [https://www.whitehouse.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-briefing-24/?utm\\_source=link&utm\\_medium=header](https://www.whitehouse.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-briefing-24/?utm_source=link&utm_medium=header) (last accessed April 13, 2020).

[2] See *United States v. Lopez*, 514 U.S. 549, 567-68 (1995) (holding Gun-Free Zones School Act not a proper exercise of Congress's commerce clause power).

[3] @realDonaldTrump, Twitter (Apr. 13, 2020 10:53 AM), available at <https://twitter.com/realDonaldTrump/status/1249712404260421633?s=20> (last accessed April 13, 2020).

[4] White House Coronavirus Task Force Briefing, C-Span (April 13, 2020) at 1:09:31, <https://www.c-span.org/video/?471160-1/white-house-coronavirus-task-force-briefing> (last accessed April 13, 2020).

[5] See, e.g., Wash. R.W.C. 43.06.210; R.C.W. 9.92.020 (providing that willful violations of Washington state governor emergency proclamation are gross misdemeanors, punishable by a fine not to exceed \$5,000, and imprisonment for a period not to exceed 364 days); N.Y. Exec. Order 202.8 (2020) (providing that violations of shutdown orders subject to enforcement pursuant to New York Public Health Law §12, which sets monetary penalties for violations).

[6] *Youngstown Sheet & Tube Company v. Sawyer*, 343 U.S. 579 (1952) (Jackson, J. concurring).

[7] See, e.g., *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2084 (2015) (applying Youngstown tripartite framework to question of whether President has the "exclusive power of recognition" of foreign countries); *Medellin v. Texas*, 552 U.S. 491, 524-25 (2008) (applying Youngstown framework in assessing whether Presidential "Memorandum" on the domestic effect of an International Court of Justice decision was binding); *Dames & Moore v. Regan*, 453 U.S. 654, 669 (1981) (noting that Justice Jackson's framing is "analytically useful," though noting that the categories likely constitute a

“spectrum” rather than a neat “pidgeonhol[ing]”).

[8] *Youngstown*, 343 U.S. at 585.

[9] *Id.* at 636 (Jackson, J., concurring).

[10] *Id.* at 637 (Jackson, J., concurring).

[11] *Id.*

[12] See *Dames & Moore*, 453 U.S. at 674 (“Because the President’s action . . . was taken pursuant to specific congressional authorization, it is ‘supported by the strongest of presumptions and the widest latitude of judicial interpretation . . . .’”) (quoting *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)).

[13] U.S. Const. Art. I, § 8, cl. 3.

[14] *Gonzales v. Raich*, 545 U.S. 1, 17 (2005) (holding that the Controlled Substance Act is a valid exercise of the Commerce Clause power, even where marijuana growth and sales are exclusively intrastate in a state that has legalized medical marijuana).

[15] 22 U.S.C. §2318(a)(1).

[16] 42 U.S.C. §247d(a).

[17] See, e.g., 42 U.S.C. § 247d(a) (allowing the Secretary of Health and Human Services to declare a “public health emergency” and “take such action as may be appropriate to respond to the public health emergency, including making grants, providing awards for expenses, and entering into contracts and conducting and supporting investigations into the cause, treatment, or prevention of a disease or disorder.”); 22 U.S.C. § 2318(a)(1) (allowing the President to intervene in an emergency by providing “military assistance to a foreign country or international organization”); 42 U.S.C. § 5122(1) (allowing the President to declare an emergency when “Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States.” (emphasis added)); 50 U.S.C. § 1701(a) (“Any authority granted to the President by section 1702 of this title may be exercised to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat.” (emphasis added)); 50 U.S.C. § 4533(a)(1), (a)(7) (waiving, in emergency, limits on President’s authority to “create, maintain, protect, expand, or restore domestic industrial base capabilities essential for the national defense” (emphasis added)). See also 50 U.S.C.A. § 1631 (disallowing emergency powers for a “national emergency . . . unless and until the President specifies the provisions of law under which he proposes that he, or other officers will act.”).

[18] See 42 U.S.C. § 247d(a) (allowing the Secretary of Health and Human Services to declare a “public health emergency” and “take such action as may be appropriate to respond to the public health emergency, including making grants, providing awards for expenses, and entering into contracts and conducting and supporting investigations into the cause, treatment, or prevention of a disease or disorder.”); 22 U.S.C. § 2318(a)(1) (allowing the President to intervene in an emergency by providing “military assistance to a foreign country or international organization”).

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[20] *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring); see *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 414 (2003) (holding that even in absence of congressional authorization or disapproval, executive agreement with foreign nations preempted state law because “in foreign affairs the President has a degree of independent authority to act” without Congressional authority) (citing *Youngstown*, 343 U.S. at 635–36 n.2 (Jackson, J., concurring)).

[21] *Youngstown*, 343 U.S. at 637.

[22] *Id.* at 587.

[23] *Id.* at 651-53 (Jackson, J., concurring).

[24] *Id.* at 662 (Clark, J., concurring).

[25] See, e.g., Candidus Dougherty, “Necessity Hath No Law”: Executive Power and the Posse Comitatus Act, 31 *Campbell L. Rev.* 1, 23 (2008) (“The emergency powers doctrine is supported by a close textual reading of Article II”); Captain Richard K. Sala, *The Illusory Unitary Executive: A Presidential Penchant for Jackson’s Youngstown Concurrence*, 38 *Vt. L. Rev.* 155, 156 (2013) (“Recently, legal scholars working in the Bush Administration expanded the scope of the Unitary Executive Theory to include emergency powers that stem from the President’s inherent and implied Article II powers in foreign affairs and national security.”); Robert J. Delahunty & John C. Yoo, *Dream on: The Obama Administration’s Nonenforcement of Immigration Laws, the Dream Act, and the Take Care Clause*, 91 *Tex. L. Rev.* 781, 812 (2013) (“Ever since Abraham Lincoln’s presidency, the nation’s emergency powers have rested within the President’s Article II powers, not outside it.”).

[26] 343 U.S. at 637 (Jackson, J., concurring); accord *Zivotofsky*, 135 S. Ct. at 2084 (applying third category and affirming presidential exercise of power where Court determined President’s independent power of recognition overrode congressional statute to the contrary).

[27] See *City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1234-35 (9th Cir. 2018) (invalidating executive order depriving “sanctuary cities” of certain funding where Congress had “frequently considered and thus far rejected legislation accomplishing the goals of the Executive Order”).

[28] *Coronavirus Aid, Relief, and Economic Security Act*, Pub. L. No. 116-136, 134 Stat. 281 (2020); *Families First Coronavirus Response Act*, Pub. L. No. 116-127, 134 Stat. 178 (2020); *Coronavirus Preparedness and Response Supplemental Appropriations Act*, Pub. L. No. 116-123, 134 Stat. 146 (2020).

[29] See *id.*

[30] *Gibbons v. Ogden*, 22 U.S. 1, 203 (1824) (Marshall, C.J.); accord *Stone v. State of Miss.*, 101 U.S. 814, 818 (1879) (“No one denies” that State police power “extends to all matters affecting the public health . . .”); see also *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991) (“The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and we have upheld such a basis for legislation.”).

[31] *Bond v. United States*, 572 U.S. 844, 862 (2014).

[32] *Id.*

[33] See *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).