



# Federal Bar Association

## Transcript of Federal Bar Association Interview with Professor Jonathan Turley on Federal and State Pandemic Authority

*Bruce Moyer and Rachel Rose of the Federal Bar Association Government Relations Committee on April 17, 2020 interviewed Professor Jonathan Turley on the Constitutional and statutory issues arising in the exercise of federal and state power during a pandemic. Professor Turley is the J.B. and Maurice C. Shapiro Professor of Public Interest Law at George Washington University Law School in Washington, D.C. The recorded interview is [here](#).*

### **Bruce Moyer:**

Hi, this is Bruce Moyer and Rachel Rose of the Government Relations Committee of the Federal Bar Association. We're here today to focus on the subject of federalism in this time of pandemic and the push and pull between the federal government and state governments to protect public health and reopen the economy. To discuss that topic with us today, we're delighted to have a leading constitutional scholar and legal analyst, Professor Jonathan Turley of George Washington University Law School in Washington D.C., to join us. Thank you, Professor Turley for spending time with us today.

### **Professor Turley:**

Thank you, Bruce, it is a pleasure to be with you.

### **Rachel Rose:**

Thank you, Professor Turley and our first question relates to the [op-ed article](#) that you wrote in the Washington Post that differed with President Trump's declaration that as the president, he has the ultimate authority to order the resumption of normal economic activity throughout the nation. In your op-ed, you basically indicated, not so Mr. President. You further said that the authority under the Constitution to order the startup of economic activity lies within the states and state governors, not the President. Now, four days later, the President appears to have agreed with your assessment that the Constitution is designed to limit federal authority, and that principal authority to reopen the economy lies with the states.

Can you describe why the Founders created a such system, in which the police powers over public safety lie within the states and federal authority is more limited?

### **Professor Turley:**

Certainly. The fact remains that federalism is a strength, not a weakness, in dealing with the pandemic. First of all, absolutism finds little sanctuary within our constitutional system of limited and shared powers. More importantly, while federalism wasn't designed for a pandemic, it could

have been designed for that purpose. It allows for 50 states to tailor their responses to a pandemic. Fifty states that have intimate knowledge of the conditions on the ground and have the resources and staff to enforce pandemic rules. So, the President was correct for weeks in describing the role of the federal government as secondary. It was odd when he suddenly spoke of absolute power over the states. That simply doesn't exist. Indeed, the Constitution was written to bar that type of claim of total authority. If there's one overriding value in the US Constitution, it is to resist the concentration of power in any one branch or any one individual. What the President was invoking was anathema for the Framers. Indeed, the Framers could not have been more clear in the 10th Amendment. They effectively created the default position as resting with the state. So, when federal push comes to state shove, the states should ideally prevail. The reason they did that was not just to avoid the concentration of power, but they also believed this was necessary to fight tyranny. In a profound way, the Framers decided that individual rights are safest when they're held the closest, and that is with your local and state governments. You have the greatest control and you have the greatest level of observation in a federalism system of these basic rights.

**Bruce Moyer:**

When does federalism and reliance on state sovereignty give way to preemption and the powers of the federal government? Can that sometimes occur?

**Professor Turley:**

Yes, and that has been a daunting question for the Supreme Court throughout its existence. The federal government clearly has authority under the Interstate Commerce Clause to regulate some activities with impacts beyond state borders. Indeed, the creation of the Constitution itself was to move away from the balkanized system that existed under the Articles of Confederation. The federal government does trump state powers in a number of areas, and it can do that expressly through preemption or through the field or implied preemption. That issue was prominent in the Supreme Court's consideration of the immigration cases. However, the Supreme Court has also held the line on state police powers. The majority of the Supreme Court hold a strong fealty toward federalism. The Court has repeatedly struck down federal laws as intrusive for state powers. That includes areas like the disposal of nuclear waste, where the Supreme Court struck down a provision requiring states to take control of nuclear waste that had not been disposed of in their jurisdiction by a certain date. Even that was viewed as too intrusive. There's also a number of cases dealing with the commandeering doctrine, that is, the Supreme Court has held on various occasions that the federal government cannot commandeer the states to force them to carry out federal policies. One of the more notable examples was with the Affordable Care Act, where the Supreme Court nullified one of the provisions because it was a commandeering problem. The commandeering cases are relatively few, and some of the justices have never been enamored with that principle, but the Supreme Court has held the line on state police powers. Where you see the greatest controversy is what constitutes "interstate commerce" and how far the federal government can go in the regulation of the states. What President Trump was referencing was not a close issue. The idea that the President can close or

open the economy of a state would violate a host of constitutional principles, not the least of which would be found in the 10th Amendment.

**Rachel Rose:**

Professor Turley, building on that from your perspective, can it be said that the President's power to reopen the economy lies more in his informal authority, the power of his bully pulpit and the power of suggestion – underscored by CDC guidance – to suggest actions that states taken in allowing commercial and other human activity to resume?

**Professor Turley:**

Yes, the President's plan for reopening the economy got the balance right. It is the exercise of persuasive, rather than command, authority. It leaves the ultimate decision to the governors. The President still claimed extraconstitutional authority this week in saying that he has decided to grant the governor's this authority. But, putting that rhetoric aside, the plan itself is measured and fully constitutional. The President has a great deal of persuasive authority by suggesting when the economy can re-open. He not only offers federal expertise in such recommendations, but he offers some political cover to governors in following the federal lead.

There is more pressure that the federal government can use, just not quite as much as the President suggested earlier.

The federal government can restrict discretionary federal funds and cooperation for those states that are opposing the national plan for recovery, but the federal government needs to be careful. Coercion can become commandeering. The Supreme Court has clearly indicated that a line can be crossed when the pressure is so great that the federal government is making the states a mere agent of its policies. Thus, it is certainly true that the federal government can exercise pressure on the states, but even that authority is not unlimited.

The key is that what the President was suggesting earlier, is as unnecessary as it is unsupportable. The President doesn't have to exercise command authority to nudge the country back into a reopening. The federal government has a great deal of resources. The governors want to stay in close cooperation with the federal government. There is going to be a great deal of stimulus money that has yet to be approved by Congress. There are ample apples for the federal government, so that there's really not much need for a stick. But, the President grabbed the wrong stick when he threatened to use total authority over the states.

**Rachel Rose:**

And how would your answer vary, and maybe it won't, in relation to the Defense Production Act?

**Professor Turley:**

The Defense Production Act (DPA) has been discussed in wildly different ways. The DPA has been used in this case correctly. In a few cases, it has been used as a cudgel for some companies that were not sufficiently motivated. However, it is primarily used as a threat. Companies know that

if they don't meet the expectations of the federal government, they can be the subject of the DPA. While there's room for criticism of the President over some of his statements and actions, there's also room to praise his administration for some aspects of the response. FEMA has done a phenomenal job. The level of production and delivery of material is very impressive. And that's a curious thing about the President's comments, is that they stepped on his administration's best line. There is justification for the administration to take credit for a successful rollout, including the use of the DPA. The DPA gives added control over these companies primarily in prioritizing production. It can also negate certain contractual agreements. However, it is not licensed to take over control of the states. Nothing in the Act suggests that it has that authority.

Indeed, there's a conflict here on both sides. For weeks, the media was chastising President Trump for not ordering an effective National Quarantine. I find no authority in federal law or the Constitution for the president to order a National Quarantine. There are regulations where the CDC can quarantine individuals. There's also an ambiguous provision where the CDC can take action if it finds that local governments are not acting in a sufficiently protective manner. But none of these provisions suggests the President can shut down a state or order a National Quarantine. Yet, when the President claimed the authority to command states, the press correctly objected and said that it was unconstitutional. Of course, that's true. But before he made that statement, it seemed like many people were criticizing him for not using such authority.

**Rachel Rose:**

It's a delicate balance for sure. So, my final question is, is it possible from your perspective to use the DPA to provide adequate testing on a state level, or would that be deferred to the states?

**Professor Turley:**

Well, what the DPA can do is to force the production of tests and their delivery to the states. The CDC does have a provision where it could conceivably conduct large scale tests within a state. It has that federal authority. There is no question that there is robust federal authority in terms of forcing the production of tests.

**Bruce Moyer:**

Professor Turley, our time is coming to an end for this conversation today, but we hope we can pick up with you at a future time. Thank you very much for explaining these Constitutional and statutory issues to us today. They certainly represent important guideposts in our collective civic education. We recommend that everyone read Professor Turley's Op Ed in the April 14 issue of the *Washington Post*, which we have linked on the [FBA website](#). Professor Turley, thank you for joining us today.

**Professor Turley:**

Thank you all. It's been my great pleasure.