



BY DAVID BOAZ

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EDITORIAL

Reining in Presidential Power

In the past three years, the president of the United States has unilaterally banned foreign nationals from seven predominantly Muslim countries from entering the United States; imposed tariffs on goods coming from Canada, China, Europe, Mexico, and other countries; declared a national emergency in order to shift military funding from congressionally authorized purposes to building a wall on the southern border; bombed the Assad regime in Syria twice; and much more.

President Trump is not the first modern president or presidential hopeful to look for opportunities to rule without the hassle of getting Congress to pass legislation. When President Clinton found a Republican Congress uncooperative, his aide Paul Begala boasted: “Stroke of the pen, law of the land. Kind of cool.” President Obama declared: “We’re not just going to be waiting for legislation. . . . I’ve got a pen, and I’ve got a phone.” Both President George W. Bush and President Obama used executive orders to grant themselves extraordinary powers to deal with terrorism. Running for president in 2016, Hillary Clinton promised executive action on gun control, immigration, corporate political spending, and corporate taxes.

Trump, true to form, has been blunter in claiming extra-constitutional powers. Some have observed that he tends to “say the quiet part out loud.” He says, “When somebody is the president of the United States, the authority is total.” He says that Article II of the Constitution gives him the right “to do whatever I want as president.” He says, “The president of the United States calls the shots [on ending state lockdown orders. Governors] can’t do anything without the approval of the president of the United States.” Vice President Pence echoed him: “Make no mistake about it, in the long history of this country, the authority of the president of United States during national emergencies is unquestionably plenary.” “Plenary,” of course, means “absolute, unqualified, complete in every respect.”

The president also said, in declaring a coronavirus emergency, “I have the right to do a lot of things that people don’t even know about.” He doesn’t in fact have the right to do whatever he wants. But alarmingly, he does—in one sense—have hidden powers we don’t know about. According to Elizabeth Goettein and Andrew Boyle in the *New York Times*, these powers are contained in classified documents known as “presidential emergency action documents.” There may be 50 or 60

of these documents, and as far as we know even Congress doesn’t know what’s in them. Some older such documents “purported to authorize . . . suspension of habeas corpus by the president (not by Congress, as assigned in the Constitution), detention of United States citizens who are suspected of being ‘subversives,’ warrantless searches and seizures and the imposition of martial law.” The word “purported” is right.

Some people don’t think these constitutional niceties matter. When there’s an emergency—war, pandemic, Congress’s refusal to appropriate the money the president wants—you can’t stand on ceremony. You’ve got to get things done, the way they do it in China. As New York leaders argued about school closings, Brooklyn Borough President Eric Adams tweeted: “Who has legal authority to close down @NYCSchools? That’s a conversation for people with time for largely academic conversations. I don’t have the time. I don’t have patience for petty back-and-forths in the middle of a deadly pandemic.”

But public officials should care whether their actions are legal. That’s why both state and federal officeholders are all required to take an oath to support the Constitution.

In his 1973 book *The Imperial Presidency*, Arthur Schlesinger Jr. wrote that the shift of war powers to the president was “as much a matter of congressional abdication as of presidential usurpation.” I wouldn’t want to downplay presidential will to power, but it’s true that Congress has sat by while presidents have acted without authorization.

Consider Senate Minority Leader Chuck Schumer. He pressed President Trump to declare a national emergency to deal with the coronavirus. Then when Trump did that, Schumer urged him not to “indulge his autocratic tendencies.”

Power tends to corrupt. Power is subject to abuse. James Madison observed that we are not governed by angels nor even by “enlightened statesmen,” and Hayek feared that “the unscrupulous and uninhibited” are likely to seek power. So maybe we shouldn’t give any one man as much power as the president now has.

Congress, Article I gives you the power to restrain presidents.