

Rein In Trump's Emergency Powers

Congress has granted vast authority to the presidency, risking dictatorial abuses.

By William A. Galston

“Our great American companies are hereby ordered to immediately start looking for an alternative to China,” President Trump declared last week in an instantly famous tweet. When skeptics questioned his authority to issue such an order, **he cited the International Emergency Economic Powers Act of 1977, or IEEPA.**

People who followed the ensuing debate among international-trade lawyers were likely surprised; I know I was. The president may well have the legal power to enforce much, if not quite all, of his tweet. Although he cannot literally compel U.S. companies to repatriate their enterprises from China, he can make it all but impossible for them to continue doing business there.

The language of the IEEPA is amazingly broad. In brief, once the president declares a specific emergency, he may block economic transactions of all kinds between the foreign countries or entities named in the emergency declaration and any party subject to U.S. law. The president is required to consult with Congress before instituting the block, but congressional consent is not required.

As originally enacted, the law allowed Congress to block the president's action with a resolution not subject to presidential veto (a “legislative veto”). Five years later, in the case of *Immigration and Naturalization Service v. Chadha*, **the Supreme Court held legislative vetoes unconstitutional.** So to block an emergency declaration, Congress now has to muster a two-thirds majority of each house to override a president's veto.

For Congress and critics of sweeping emergency powers, the bad news doesn't stop here. Because the IEEPA doesn't include a sunset clause, any amendments the president opposes will also require support from two-thirds of both the House and Senate.

The authority Congress has surrendered will be difficult to reclaim—unless the political parties unite to take it back or Americans elect a president who questions the wisdom of his expanded powers.

Those powers should be questioned. As legal scholars point out, neither the IEEPA nor the broader National Emergency Act defines the meaning of “national emergency” beyond characterizing it in general terms as an “unusual and extraordinary threat.” Moreover, the interconnectedness of the global economy means that the president's power under this legislation could extend to domestic transactions. With sufficient congressional support and a complaisant judiciary, a president whose ambitions transcended constitutional norms could use these laws to wield near-dictatorial powers.

These dangers have a long history. As a recent report from the Congressional Research Service points out, the issue of executive discretion has been at the center of constitutional debates in liberal democracies for much of the past century. (Historically minded readers will also recall its presence in the theory of John Locke and the practice of the Roman republic.) Unlike many others, the U.S. Constitution makes no mention of emergency powers, leaving the matter to be worked out between the executive and legislative branches, subject to review by the judiciary.

Only in the 20th century did Congress grant explicit statutory authority for presidential emergency power. Intended to rein in the president, this strategy had the opposite effect. Presidents of both parties exploited statutory generalities and ambiguities to exercise sweeping powers that began in wartime but carried over into peacetime. Conceived in the wake of Vietnam-era concern about the rise of the “imperial presidency,” the current statutory regime of which the IEEPA is a pillar was designed to shore up the constitutional structure against the hyperexpansion of presidential power. As recent events demonstrate, it has not succeeded.

The men who drafted the Constitution feared tyranny above all else. They knew, as James Madison observed, that “enlightened statesmen will not always be at the helm” and that laws must always be crafted with due awareness of the worst-case scenario. The current structure of U.S. emergency legislation ignores these cautions. We are playing with fire.

The legislative branch will have to lead efforts to remedy this situation. Members of Congress should join across party lines to consider a package of reforms. Current legislation should be amended to require congressional approval of any emergency declaration and to terminate any national emergency after a fixed period. Moreover, all legislation providing for emergency powers should contain a sunset clause requiring its reauthorization after, say, five years.

These steps would be part of a broader effort by Congress to reclaim the legislative powers it has surrendered to the executive branch over the past several decades. They presuppose what may be contrary to fact—that members of Congress want to accept responsibility for discharging their duties under the Constitution.