

Make the Presidency Less Imperial

Ramesh Ponnuru

November 17, 2020

(Bloomberg Opinion) -- The last two U.S. presidents repeatedly stretched the powers of their office to set policies that Congress had refused to enact. Instead of following their example, President-elect Joe Biden should work with Congress to bring the branches of the federal government to a better balance.

President Barack Obama's most controversial executive actions were his unilateral decisions to grant work permits to millions of illegal immigrants after Congress had spent years debating amnesty. President Donald Trump declared a national emergency to provide funding for construction of parts of a border wall with Mexico, again after Congress had rebuffed him. Trump also imposed steel tariffs on much of the globe without congressional approval.

Now some Democrats are urging Biden to cancel \$420 billion in student-loan debt without asking Congress. While the merits of that policy are intensely debated, you can see why a Democrat who favors it would want Biden to act unilaterally. A closely divided Congress, probably with a Republican Senate, will not okay that idea and may block Biden from getting other legislative accomplishments, either. Executive government is to some extent the product of political polarization.

But it's worth asking whether it's also a cause of that polarization. Presidents and their parties have less need to bargain with the opposition when they can get their way with a pen stroke. At the same time, the opposition gets to rail against the president's power grab without having to take responsibility for policymaking. Activists shift their focus from getting Congress to take action to getting the president to do it. If each recent president has been more polarizing than the last, it may be in part because more and more rides on who wins presidential elections.

Presidential power has been growing for a long time and for deep-seated reasons. The Founders' view that legislators would guard their powers from presidents didn't take adequate account of partisanship: It turns out legislators think of themselves as members of the president's party more than they think of themselves as members of Congress. We are not going to see a sudden reversal of the trend toward presidential self-aggrandizement and congressional abdication.

But it should nonetheless be resisted, especially when the glimmer of an opportunity to do it appears. This is such a moment. During the primary campaign, Biden was more willing than others in his party — including, sadly, his eventual running mate Senator Kamala Harris — to acknowledge the limits of presidential authority. After going back and forth, he seems to have settled on the correct view that governors and state legislatures have primary authority to issue orders to wear masks to curb the spread of Covid-19. Much of the appeal of his campaign against Trump was that it would be nice to be able to pay less attention to the White House.

Biden has spent more time in Congress than any president in U.S. history. It would be fitting if his time as president moved the country partway toward restoring the proper role of the first branch of the federal government.

There are a few areas where legislators in both parties may have an interest in reclaiming lost powers. A bipartisan majority of Congress voted to disapprove of the emergency declaration Trump used to divert money to his wall, which led to a Trump veto. Congress gave presidents sweeping emergency powers in a 1976 law.

Senator Mike Lee, a Utah Republican, has sponsored a bill to make emergencies expire after 30 days unless Congress votes to extend them. He has also sponsored one to require congressional approval of any tariff increase ordered by the president. That bill, too, would claw back a power Congress gave the president in earlier laws.

A narrower bill put forward by Republican Senator Pat Toomey of Pennsylvania and Democratic Senator Mark Warner of Virginia scales back the power the president got from a 1962 law to impose tariffs for national-security reasons. Trump invoked that power for his steel tariffs (even though the Defense Department had warned that tariffs against allies might actually undermine U.S. security).

But there are already warning signs that no retrenchment will take place. Gene Healy, a longtime critic of the imperial presidency at the libertarian Cato Institute, notes that Democratic efforts to rein in the president have mostly concerned issues specific to Trump rather than larger structural ones. Making presidents disclose their tax returns, even if it were possible without a constitutional amendment, does nothing to tackle the underlying problem. When Biden and Harris answered a survey about presidential powers, they blew right by the question of emergency declarations.

Lee is challenging Democrats who were critics of presidential overreach under Trump. “Now that it is possible the Democrats will control the White House again, I hope that interest in restoring balance between Congress and the president hasn’t waned,” he said. Let’s also hope that Lee’s Republican colleagues find their own interest in it waxing.