



Standing on the Shoulders of Tyrants

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"I have the absolute right to PARDON myself," President Donald Trump announced via Twitter in June 2018. With that, he pitched a can of Sterno into the ongoing media firestorm over the special counsel's Russia investigation.

The last time a president contemplated a self-pardon was during the "final days" of Watergate. Nixon wasn't entirely in his right mind during this period: frequently drunk, possibly suicidal, incoherent, pacing the halls at night "talking to pictures of former presidents," according to his son-in-law. Still, even at his worst moment, Nixon had enough wits about him to know that trying to pardon himself would be crazy.

Trump seems to have arrived at a similar conclusion. His claims about his right to undermine the rule of law are frequent and contemptible. Yet as far as we can tell, they have mostly been rhetorical.

In the run-up to the 2018 midterms, for instance, the president threatened to issue an executive order revoking birthright citizenship—a move that would have flouted the plain language and legislative history of the 14th Amendment while putting more than 4 million Americans at risk of deportation. But this too seems to have been a pump fake designed to thrill the base and rile the media; it was abandoned after Election Day.

It's become a familiar pattern. Trump hits "send tweet" on some crank theory of absolute executive power. Law professors and pundits cancel their weekend plans, scrambling to figure out "Can he do that?"—only to realize, weeks later, that they needn't have taken him literally *or* seriously.

No president in living memory has been nearly as vocal about his contempt for the legal limits on his power; none has threatened half as often to throw them off. But again and again, Trump stares across the Rubicon, shrugs, and then heads back inside to live-tweet Fox News.

In the first hour of this presidency, just after Trump delivered his "American Carnage" inaugural address, George W. Bush supposedly remarked, "That was some weird shit." At this point, we can quibble only with W's use of the past tense: The current president's behavior has been so weird and unsettling that it's hard to get perspective on how bad we've got it. Trump's tweets, his insult-comic pep rallies, his general inability to act like a grown-up in a grown-up's job—everything about the 45th president distracts us from a clear-eyed evaluation of what he's actually *done* with the enormous powers he inherited.

Case in point: In January, *The Atlantic* marked the midpoint of Trump's tenure with "50 Moments That Define an Improbable Presidency," ranked "according to both their

outlandishness and their importance." The former dominate the latter. By my count, 28 of the entries relate to Trump's freakish and often repugnant public conduct: using social media to share the wisdom of Benito Mussolini, referring to "shithole countries," firing his secretary of state via Twitter, and the like. Perhaps 10 of the 50 episodes feature the president misusing the powers of the office. "Trump threatens to press his 'nuclear button'" clocks in at number 17 on the parade of horrors—eight places behind his May 2017 tweet-burp, "covfefe."

But unsettling and repellent as Trump's behavior is, how he wields power has to matter more than what he rants about. It's entirely possible that Donald J. Trump is a terrible human being without a redeeming liberal impulse *and* not nearly as imperial a president as his two immediate predecessors. (Or at least not yet.)

In fact, a close examination of Trump's policies suggests that what we've got so far is the Xtreme Energy Drink version of what's been on tap for a long time. Like Four Loko, it clouds your vision, sours your stomach, and wrecks your head, but it may not be as lethal as the alarmists claim. In his first two years, Trump has aggressively exploited the powers he inherited, but—with very few exceptions—he hasn't really forged new frontiers in the expansion of executive power.

Bloody Business as Usual

Abroad, the executive's powers are at their apex. During President Barack Obama's final year in office, U.S. forces dropped more than 26,000 bombs on seven different countries. Nine months into his tenure, Trump had already blown past that tally. In 2017, he tripled the number of drone strikes Obama had ordered on Yemen the year before. In Somalia, he launched more than Obama had managed over two terms. In his first year, the self-styled "America First" president deepened entanglements on every foreign battlefield his predecessor left him, ramping up deployments, kill-or-capture missions, and civilian casualties.

But none of that required new claims of presidential power. Well before Trump took office, permanent war had become America's default setting, thanks in large part to the 2001 Authorization for the Use of Military Force (AUMF) that Congress passed three days after September 11.

Initially aimed at the perpetrators of the attacks and those who "harbored" or "aided" them, the AUMF by 2016 had been stretched by creative lawyering far enough to cover everything from boots on the ground in Tongo Tongo to drones over Timbuktu. Trump took that expanded authority and used it as legal justification for "bomb[ing] the shit out of" ISIS and other jihadist groups. But the real inflection point, quantitatively and qualitatively, happened under his predecessor. Trump's escalation of the war on terror may rest on shaky legal ground, but it's not territory the 45th president seized.

There's one area where Trump has ventured further than Obama: his annual spring bombing of the Bashar al-Assad regime in Syria. In April 2017 and again in April 2018, Trump ordered airstrikes on Syrian government assets in response to chemical weapons attacks attributed to the Assad regime.

The Trump administration couldn't credibly rely on the 2001 AUMF as legal justification for its drive-by missile strikes. Having already been used, tenuously, to cover ISIS, a group

excommunicated by and at war with Al Qaeda, the AUMF couldn't also serve to underwrite military action against Assad, who's at war with both.

Instead, the president invoked his Article II powers as commander in chief and chief executive. A May 2018 memorandum from the Office of Legal Counsel (OLC)—"the president's law firm" and an ever-reliable font of constitutional rationalizations—lays out the theory: "the President could lawfully direct [the airstrikes] because he had reasonably determined that the use of force would be in the national interest and that the anticipated hostilities would not rise to the level of a war in the constitutional sense."

In other words, if the president thinks it's a good idea—and assures himself we won't get bogged down in a wider conflict—he can order up a light dusting of cruise missiles. "Not every military operation," OLC insists, "rises to the level of a war." Bombing raids are a *microaggression*, constitutionally speaking.

That is, of course, an extraordinarily broad interpretation of the president's war powers, which the Framers understood to cover repelling sudden attacks, not launching them. But it's nothing new. The Trump OLC opinion relies heavily on two Obama-era opinions, one written to support the war in Libya and another drafted when his administration was contemplating "humanitarian" intervention in Syria. And broad as the Trump/Obama theory is, it falls well short of the absolutist notions that prevailed in the George W. Bush OLC, which held categorically that decisions about the use of military force "are for the President alone to make."

Powers There for the Taking

Indeed, very few of Trump's most controversial initiatives have smashed the Overton window on executive discretion. His administration's cruelest policies—separating children from their parents at the border, aiding Saudi Arabia's murderous war in Yemen—didn't require a novel gloss on presidential authority. The powers were already in the White House's arsenal. "Zero tolerance" at the border was a (brutal) exercise of prosecutorial discretion, and it was Obama who first ordered aerial refueling and other assistance to a Saudi bombing campaign that has hit weddings, school buses, and hospitals, causing massive civilian casualties.

The administration's various attempts to impose a travel ban ran into stiff judicial resistance, thanks in large part to Trump's repeatedly calling it a "Muslim ban" and practically daring the courts to strike it down. (As was said of gangster matriarch Livia Soprano, "Between brain and mouth, there is no interlocutor.") Even so, the Supreme Court upheld a revised version of the order last summer, with Chief Justice John Roberts noting that the relevant statute "exudes deference to the President in every clause."

There's ample ground for disputing the Court's decision, but the case law supporting that deference long predated the Trump presidency. As the Cato Institute immigration scholar David Bier puts it, "It's difficult to do a genuine executive power grab in an area where SCOTUS and Congress have ceded this much power to the president."

When it comes to *trade* wars, Trump is demonstrably more bellicose than his immediate predecessors: Such face-offs are "good and easy to win," he tweeted last spring. Three days after his inauguration, he announced his decision to withdraw from the Trans-Pacific Partnership (TPP), a trade agreement with 11 Asia-Pacific nations that hadn't yet been submitted to Congress. In March 2018, he invoked his statutory powers under Section 301 of the Trade Act of

1974 to hike tariffs on a host of Chinese products, sparking a series of tit-for-tat countermeasures that now affects some \$360 billion in U.S.-China trade.

Trump's authority to make these moves was hardly disputed. The modern U.S. trade regime delegates enormous power to the chief executive on the theory that, as the representative of a national constituency, he's more insulated from parochial interests than members of Congress and therefore a better steward of open markets. That theory met the ultimate test starting in January 2017.

The president didn't need to push the envelope on executive authority to penalize China or cancel the TPP. There is one front of the trade war, however, where Trump managed a significant executive power grab: his March 2018 imposition of steel and aluminum tariffs on national security grounds.

Trump is far from the first chief executive to jack up tariffs for naked political purposes. In 2002, George W. Bush imposed duties of up to 30 percent on imported steel, a move that his trade representative admitted was made to "manage political support for free trade at home." But the legal authority Bush invoked wasn't novel: The "safeguard" provision of the '74 Trade Act had been used some 28 times before to protect domestic producers from import surges—of motorcycles and steel under Ronald Reagan, for example, and of wheat gluten and lamb meat under Bill Clinton.

Trump's steel and aluminum tariffs mined a different, and potentially much vaster, delegation of congressional power. Section 232 of the Trade Expansion Act of 1962 allows the president to "adjust imports" upon a finding by the commerce secretary that current levels threaten "national security."

Prior uses of the national security clause—embargoes on crude oil from Iran in 1979 and Libya in 1982—had at least some plausible relationship to defense policy. In Trump's case, the national security rationale was a transparent pretext. A memo then-Secretary of Defense James Mattis released after Trump's announcement notes that military demand for the two metals represents just 3 percent of U.S. production and that foreign competition would not "impact the ability of [Defense Department] programs to acquire the steel or aluminum necessary to meet national defense requirements."

In a challenge to the law brought by steel importers, a Justice Department attorney wouldn't give a clear "no" to the question of whether, under the statute, a president "worried about jobs in the peanut butter industry" could "make a national security connection" and order an embargo on imports of the sandwich ingredient. That may sound absurd, but it's probably a mistake to give this president any new ideas. He was apoplectic when Nabisco moved Oreo production to Mexico in 2015. Could Double Stuf imports be the next national security threat?

A Bogus National Emergency

Trump's use of the national security clause to impose steel and aluminum tariffs was the first time he added a new weapon to the executive arsenal. The second time involved his single-minded desire to build a wall along the border with Mexico.

In late 2018, the president forced a partial government shutdown by refusing to sign any spending bill that didn't include \$5.7 billion for the barrier. At the same time, he began

threatening to use emergency powers to fund it anyway. On February 15, he made good on that threat with a formal proclamation "Declaring a National Emergency Concerning the Southern Border of the United States."

The first paragraph of that proclamation concedes that "the problem of large-scale unlawful migration through the southern border is long-standing." Just before he signed the paperwork, Trump further undercut the "crisis" claim by admitting, "I didn't need to do this. But I'd rather do it much faster."

A president triggering emergency authorities isn't unusual, unfortunately. There are more than 30 national emergency declarations in effect right now, dating as far back as the 1979 Iranian hostage crisis. What's new here is the bogus invocation of an "emergency" to fund a pet project Congress had repeatedly refused to support. It's a militarized version of the "trillion-dollar coin" gimmick that Obama apparently contemplated, but never used, when the GOP in 2011 resisted raising the federal debt limit—an extralegal tactic better suited to a banana republic than a government of laws.

And it could set a damaging precedent. In 1952, Justice Robert Jackson wrote that the Framers feared that "emergency powers would tend to kindle emergencies," which was why they rejected any general grant of such power to the executive. But what the Framers withheld Congress has fecklessly ceded, via myriad laws passed over decades. A Brennan Center report released last December identifies 123 statutory powers the president can invoke in a self-declared national emergency, including the power to test chemical or biological weapons on human subjects or to take over "any facility or station for wire communications" if he proclaims that a threat of war exists.

Shortly after Trump's emergency announcement, Democratic presidential contender Sen. Elizabeth Warren (D–Mass.) weighed in on Twitter: "Gun violence is an emergency. Climate change is an emergency.... Donald Trump's ridiculous wall is not an emergency." She's right about the last bit, but it sure sounds as if Trump's gambit has inspired her to start envisioning emergency proclamations yet to come.

What About *Whataboutism*?

Trump's exploitation of national security and national emergency authorities in trade and immigration is cynical, lawless, and potentially dangerous. But the current president is standing on the shoulders of tyrants. Next to the executive power grabs of his two immediate predecessors, those innovations look like pretty small beer.

Declaring a national emergency might let Trump get away with shifting several billion dollars toward a Potemkin barrier on the southern border. But in 2011, Barack Obama managed to find enough loose change in the Pentagon budget to bomb Libya for seven months without any specific appropriations, let alone authorization, from Congress. As dubious as Trump's legal claim is, it doesn't require torturing the relevant statute nearly as much as Obama tortured the 2001 AUMF to wage war against ISIS—or as much as George W. Bush tortured U.S. law to justify *actual torture*.

Among other enormities, Bush implemented a host of secret dragnet surveillance programs and, in his last month in office, unilaterally ordered a multibillion-dollar auto bailout just days after Congress voted the move down.

Obama, who had pledged to "turn the page on the imperial presidency," launched two undeclared wars—in Libya and against ISIS—and defied the limits imposed by the 1973 War Powers Resolution on the novel theory that you're not engaged in "hostilities" if the foreigners you're bombing can't hit you back. At home, he used the powers of "the pen and the phone" to unilaterally rewrite federal immigration law and his own Affordable Care Act.

It's true: Trump talks like a caricature of a homicidal despot. At various times he's threatened to order the military to commit war crimes, bring back torture, "take out" terrorists' families, and "take the oil" from countries where we're at war. President Bush actually seized an American citizen on American soil and claimed the power to hold him as an "enemy combatant" in a military prison for the duration of the war on terror. And President Obama claimed, and exercised, the power to order drone strikes on Americans abroad. But because you could take Bush and Obama out in polite company and they'd sound the right notes about democracy and human rights, they were able to get away with far greater abuses than Trump has yet attempted.

It's at this point that such comparisons usually draw a charge of "whataboutism," a scurrilous debater's dodge that's become increasingly common in the Trump era. The *Oxford English Dictionary*, which added the word to the lexicon in 2018 on the strength of "a spike in use in relation to US politics in the past year," defines *whataboutism* as the "practice of responding to an accusation or difficult question by making a counter-accusation or raising a different issue." That's a tactic Trump himself has perfected, as when he rails against the special counsel investigation by demanding to know why no one's "looking into Crooked Hillarys crimes & Russia relations?"

Still, whether a given comparison constitutes *whataboutism* depends on what you're on about. If the aim is to defend your side by pointing to the other team's sins, it's a logical fallacy. But what's at issue here is how much Trump has pushed the envelope on executive power, a question that cannot be answered without reference to those who pushed before. Lately, all too often, the "whataboutism" charge has itself become a diversionary tactic—an excuse for pretending that the history of presidential transgressions began on January 20, 2017.

The Abuses That Haven't Happened (Yet)

"So far, Trump has used his powers less aggressively than most modern presidents," University of Chicago law professor Eric Posner observed last year in *The Washington Post*. Indeed, what's striking is how many of Trump's truly awful, imperial notions turn out to be crazy-uncle-shouting-at-the-TV bluster that never gets a tangible follow-through.

Granted, some of those outbursts are genuinely terrifying. During his first year in office, Trump seemed determined to confirm the worst fears about his presidency, casually threatening to rain thermonuclear "fire and fury" on North Korea and tweeting playground insults at the hermit kingdom's paranoid dictator. But by mid-2018, the mercurial Trump and "Little Rocket Man" had embarked on a bizarre bromance as odd as—if less frightening than—their first-year Twitter war. Lately, Trump's hawkish would-be handlers mainly worry the president "will be overly enthusiastic about engagement with wily adversaries," as *The New York Times* put it. Last December, when Trump announced a withdrawal of U.S. troops from Syria, anonymous Defense Department officials and Rep. Nancy Pelosi (D-Calif.) accused him of playing "wag the dog" by trying to *wind down* a war. Apparently, the major risk with an unstable president is that we might pratfall into peace.

Trump's attitude toward federal law enforcement is nearly as unsettling as his sporadic saber rattling. The president has made it all too clear that he'd like to run the Department of Justice like a closely held business. He thinks his attorney general should have his back the way Bobby had JFK's, and he insists he has "an absolute right to do what I want with the Justice Department."

Unlike past presidents who seized new substantive powers in the midst of economic or foreign policy crises, *The Atlantic's* David Graham argues, "Trump seems to be pushing against the limits of his presidential power almost entirely to protect himself." Yet the material attempts the president has made toward that end have mainly been within his constitutional authority.

They've also tended to be comically self-defeating. Former Trump adviser Steve Bannon rightly called the May 2017 firing of FBI director James Comey one of the biggest mistakes in modern political history. That own goal may have weighed on Trump's mind in June 2017, when he very nearly removed Special Counsel Robert Mueller but then backed off when his White House counsel threatened to quit.

What's stopping Trump from going further to blow up executive constraints? Posner's *Post* piece offers three hypotheses. First, that the president is "a blowhard" who talks tough but shrinks from fights he might not win. Second, that it's all part of a sinister plan in which he steadily undermines the legitimacy of the courts and the media until he's ready to strike. Or third, that he has concluded his base is credulous enough to back him so long as he *looks* like he's fighting, whether or not he actually gets anything done.

Of these, the second explanation, which has Trump laying the "groundwork for an attack on our institutions at a politically opportune moment," is the least plausible. Such a scheme would require a healthy attention span and a modicum of self-restraint, neither of which this president has demonstrated so far. Being an effective autocrat is hard work.

The national emergency declaration that generated so much outcry fits perfectly into the staged-drama, reality-TV theory of the Trump presidency. It may be years, if ever, before a single "artistically designed steel slat" is implanted under its authority. But the president may not care. The "emergency" gambit gave him a way out of the corner he'd painted himself into. And when the courts get in his way, he can rant about "so-called judges" making us less safe.

Trump's lack of impulse control and self-discipline—his tendency to say the quiet parts out loud—have helped generate significant pushback, even #Resistance, within the courts and the federal bureaucracy. Our political system remains surprisingly resistant to one-man rule. There's a lot of ruin in a republic, it seems.

Past Performance and Future Results

Most presidents strive to leave the presidency stronger than they found it. Most of them succeed. A year ago, I thought it was a safe bet Trump would continue that trend. Yet so far, he looks poised to be the first commander in chief since Jimmy Carter who won't.

It would be foolish to conclude that we needn't worry about Trump's authoritarian temperament. He already holds the most powerful office in the world, and he regularly fantasizes about abusing that power to an audience of 58 million followers on a Twitter feed that sounds like a live broadcast of the Watergate Tapes. In government, as in investing, past performance is no guarantee of future results. The chances that Trump will be able to successfully act on one of his

lawless impulses are far higher than the prospect that he'll suddenly turn "so presidential" we'll be bored, as he promised on *The Today Show* before his election. And nothing in the law or history of constitutional impeachment requires Congress to wait until after the damage has already been done before it opens an inquiry.

When we consider how many of this president's abuses, attempted or accomplished, were based on powers his predecessors had already seized, we should consider ourselves lucky things haven't gone worse. And we should set about reimposing limits on the office's powers before a *competent* authoritarian comes along.

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