

NATIONAL REVIEW

An Exit Survey of Trump’s Constitutional Misdeeds

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With Donald Trump out of the White House, pundits are trying to find coherent ways of summarizing what was, to say the least, an unconventional presidency. I had long planned to do an exit survey of the Trump administration’s constitutional record, as I did four years ago in cataloguing President Obama’s top ten constitutional violations. But there are two problems with applying that approach to Trump.

First, in many cases, when people claim that Trump’s actions violated the Constitution, they’re really pointing to a move with which they disagree, or a move that broke norms but not laws, or even just outrageous rhetoric. For example, Trump’s “travel ban,” which placed restrictions on nationals of half a dozen predominantly Muslim nations seeking to enter the U.S. — or at least the properly conceived and drafted third version of it — was correctly upheld by the Supreme Court even if it didn’t do anything to protect national security. And Trump’s claim that Article II gave him “the right to do whatever I want as president,” while accompanied by regular attacks on officials and institutions, rarely resulted in executive action that broke the law. As Bob Bauer and Jack Goldsmith write in *After Trump: Reconstructing the Presidency*, “the argument for reform of the presidency does not rest primarily on Trump’s defiance of the law. Trump’s law-breaking bark . . . has often been worse than his bite.”

Second, Trump’s post-election behavior, culminating in the January 6 sacking of the Capitol, has largely overshadowed everything that came before. Who cares about expansive regulatory policy when the president spent two months inflaming his supporters with conspiracy theories that undermine our electoral legitimacy? Indeed, it’s unclear that anything he did in this period, save perhaps the infamous call to Georgia secretary of state Brad Raffensperger, violated any laws. That is, whatever you think of the actions for which he was impeached — I think he committed impeachable offenses but the Democrats made a politicized hash of it — he can’t be *criminally* convicted for incitement of violence. I guess we can all just be glad that the judges Trump appointed were better than the election lawyers he hired.

With all that said, and trying to take a step back even as the ink on the first draft of history has yet to dry, here are eight of Trump’s worst constitutional violations, plus a couple of other worrying developments from his term.

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1. Acting Officials

The Constitution's appointments clause gives the president power to appoint federal officers, with the Senate's advice and consent. There are often delays in the confirmation process, however, so Congress enacted the Federal Vacancies Reform Act (FVRA) to allow the president to appoint "acting" officers, people already holding certain positions within the federal government who can serve in a vacant office for a maximum of 210 days after it becomes vacant. Keeping an officer in such an "acting" position past the statutory limit violates the appointments clause. Although past presidents have employed a handful of unlawfully serving officers, Trump made the creative use of "actings" into an art.

Take the Department of Homeland Security, where until his recent resignation, Chad Wolf had served as acting secretary since November 2019 — well more than 210 days since the last permanent secretary, Kirstjen Nielsen, resigned. Several courts have ruled that Wolf's actions as acting secretary are void because he wasn't eligible for the role, without even broaching the timing issue. The authority of the man serving as acting deputy secretary, Ken Cuccinelli, was even more clouded. With little chance of confirmation as director of U.S. Citizenship and Immigration Services, Cuccinelli was instead appointed by Trump to the newly created position of principal deputy director, which would supposedly allow him to then be named acting director, which in turn would allow him eventually to be named acting deputy secretary. Cuccinelli's directives have likewise run into legal trouble.

2. Steel Tariffs

The Trump administration also violated the separation of powers in March 2018, when it issued a 25 percent steel tariff under Section 232 of the Trade Expansion Act (TEA). The purpose of the TEA is to grow foreign commerce by opening trade up, but it effectively allows the president to unilaterally restrict imports in the name of national security. The president's security justification was undermined by the fact that military requirements for steel represent only 3 percent of the commodity's domestic production. It's also unclear how the round 25 percent figure was calculated or how it relates to national security. Courts were unwilling to question executive discretion, or congressional delegation of the power to regulate international commerce, though one judge asked and failed to receive an answer to the question of whether the president's authority would extend to tariffs on peanut butter.

3. Border-Wall Funding

Trump once again violated the separation of powers when in February 2019 he repurposed funds from the military budget to build his border wall without congressional approval. The Constitution's appropriations clause states that no money may be drawn from the treasury unless appropriated by law, which means that the executive can't spend money that Congress hasn't authorized it to spend. When Congress appropriated some but not all of the money Trump wanted for his border wall, the president found what he thought was a workaround: he declared a national emergency, which in part gave him the power to shift Defense Department funds appropriated for drug-war activities and military-construction projects. The Supreme Court is hearing a challenge to this executive reappropriation next month (Full Disclosure: I filed a brief supporting the challenge), and even if the justices rule in Trump's favor, there's a serious constitutional problem with Congress's delegation of such plainly legislative authority.

4. Anti-Sanctuary City Orders

In early 2017, Attorney General Jeff Sessions announced that he would be punishing states and local governments for refusing to help the federal government enforce its immigration laws. This denial of a slew of federal law-enforcement grants to so-called sanctuary cities violated the “anti-commandeering doctrine,” among other principles of federalism. That is, states are independent sovereigns that can’t be forced to assist the federal government, and although they can be enticed to help willingly with the promise of federal funds, the federal government can’t place additional strings on those enticements without congressional approval. Numerous courts around the country have blocked Sessions’s plan, which has gone unenforced.

5. Bump-Stock Ban

I’ll let my Cato colleagues Trevor Burrus and James Knight explain this one:

A bump stock is firearm accessory that allows the user to fire a semi-automatic gun more quickly by harnessing its recoil. After the tragic 2017 mass killing in Las Vegas, it was reported that the shooter used guns equipped with bump stocks to carry out his crime, leading to a backlash against the devices. Despite considerable bipartisan support in Congress for passing a bill banning bump stocks, President Trump told members of Congress not to address the issue. Instead, the president directed his administration to ban bump stocks by reinterpreting existing laws that ban fully automatic guns. Thus, the Bureau of Alcohol, Tobacco, and Firearms reinterpreted the word “machinegun” to include bump-stock devices, despite a longstanding determination under both the Bush and Obama administrations that bump stocks did not fit within the legal meaning of “machinegun.”

As a result, possession of a bump stock is now a crime, even though Congress has never passed a law criminalizing the devices. Before the ban was enacted, members of the president’s own administration had expressed concerns about this approach, saying that only Congress has the power to ban bump stocks.

Litigation in the matter is ongoing.

6. Bombing Syria

Another instance of Trump’s ignoring the separation-of-powers doctrine to do what he pleases is his air strikes in Syria. In April 2017, the Trump administration ordered the bombing of a Syrian military base to “save” Syrians from the Assad regime. Regardless of the humanitarian justification, Trump did not inform Congress of this bombing mission, much less ask for authorization. He then ordered another air strike in Syria without congressional approval in 2018. A bipartisan group of members of Congress questioned its constitutionality.

7. Blocking Twitter Users

Although Twitter’s ban of @realDonaldTrump is currently in the news, the legal and policy issues raised by that decision are different than those raised by the president’s blocking of users who criticized him. While I was initially skeptical of the lawsuit filed in the first year of his presidency challenging such blockings, it subsequently became apparent that Trump had turned his Twitter feed into a public forum by announcing executive actions and policies there, from the withdrawal of U.S. troops from Syria to the selection of Christopher Waller for the Federal Reserve Board to the goal of returning a citizenship question to the 2020 census to West Wing personnel decisions and so on and so forth. The White House also designated Trump’s tweets as

official statements to be maintained by the National Archives, making his account far from a personal one. The U.S. Court of Appeals for the Second Circuit held that Trump's blocking of unfriendly followers thus constituted viewpoint discrimination, in violation of the First Amendment, but the Supreme Court had since October been postponing a decision on whether to take the case, which now it won't have to.

8. COVID-19 Executive Orders

Trump built on Obama's pen-and-phone governance to bypass the constitutional structure when he short-circuited congressional negotiations over COVID relief in August 2020 by issuing four pandemic-related executive orders. These orders extended unemployment benefits and placed the onus on states to top them up, suspended the payroll tax for many workers, facilitated an eviction moratorium later declared by the Centers for Disease Control (the extension of which President Biden is now pursuing), and suspended student-loan repayments. While these may or may not be sensible policies to provide relief to low-income people economically hurt by the global pandemic, even leading progressive legal scholar Erwin Chemerinsky found them unconstitutional.

Dishonorable Mentions

There are two other types of constitutional dubiousness indulged by Trump that merit a dishonorable mention: corruption and unethical behavior, and the abuses that would've been perpetrated had his aides not disregarded his instructions.

The first category encompasses both official actions such as undermining and pushing out federal inspectors general to unofficial actions such as calling his political opponents "human scum" and journalists "the enemy of the people" (even if it's true that the mainstream media is biased against Republicans and conservatives). The two actions for which he was impeached — pressuring a foreign leader to investigate a political rival and fomenting an assault on the Capitol — can also be included here. And although neither the foreign-emoluments clause nor the domestic-emoluments clause quite covers the benefits Trump got from owning a hotel in central Washington or China's fast-tracking his daughter's trademark applications, the Constitution's framers did mean to preclude that sort of personal corruption and influence-peddling.

As to the would-be violations, although it was fun to read about Gary Cohn's snatching away an executive order that would've started a trade war with South Korea or Don McGahn's acting like a "real lawyer" and refusing to fire Bob Mueller, it was also unsettling. Nobody elected Cohn or McGahn, but it turns out we all depended on them to avoid disasters, including constitutional crises, many of which we won't ever know about.

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The Trump Administration is not unique in having violated the Constitution. Presidents of both parties have betrayed the document they swore to protect, from Barack Obama's unilateral rewriting of immigration law to George W. Bush's expansive interpretation of antiterrorism powers. Trump's norm-breaking and his coarsening of American political culture have been extreme, but from a constitutional standpoint, the bulk of his abuses involved phone-and-pen policymaking of a sort we've come to expect from the imperial presidency. And we shouldn't forget that his administration did certain things to help rebalance our constitutional order, such as putting greater constraints on regulatory actions — including one this week — adding due-

process protections to campus-disciplinary investigations, and, of course, appointing three superb Supreme Court justices and 231 other federal judges committed to interpreting constitutional text according to its original public meaning. Those positives will get overshadowed by the chaos he's created, but they are substantial.

Trump could've been truly dangerous if he'd had a greater understanding of the law and the powers of his office. It's frightening to think of a world in which he'd enforced half the notions behind his tweets and used the levers of government rather than just lashing out. But he didn't, and now he's been succeeded by a president whose constitutional violations and policy errors both will likely fall within more "normal" parameters. That's not exactly a cause for celebration — but then, those are few and far between for we who seek to preserve the Constitution and hold government officials responsible for adhering to it.

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