

## Donald Trump and the expanding power of the presidency

By Marc Fisher (*This article first appeared in the Washington Post on the web.*)

Donald Trump has promised not only to be the voice of the American people but also to take decisive, immediate action. As president, he has said he would move fast to destroy the Islamic State, scrap bad trade deals, build that wall, “stop the gangs and the violence,” and “stop the drugs from pouring into our communities.” He would “immediately suspend immigration” from countries where terrorism is rampant. He might even defy treaty obligations and decline to aid NATO allies.

The Republican nominee has led some to conclude that he intends a sweeping expansion of presidential authority. His rhetoric implies a muscular, almost unitary, presidency that would be at least as expansive as what historian Arthur Schlesinger Jr. famously dubbed the “imperial presidency” — his critique of Richard Nixon’s abuse of power in the era of Watergate and Vietnam.

But scholars of the presidency say that Barack Obama, George W. Bush and their predecessors have added so many powers to the White House toolbox that a President Trump could fulfill many of his promises legally — and virtually unchecked by a Congress that has proven incapable of mustering much pushback for decades.

“Every president expands the power of the presidency,” said Neal Devins, a law professor at the College of William & Mary. “This is a constant pattern. They never shrink the presidency. A President Trump could say, ‘I’m going to use the Obama playbook’ and go pretty far. The difference between Hillary Clinton and Donald Trump is not going to be one of lawlessness but of the policies they pursue.”

Plenty of politicians have pledged wholesale, game-changing shifts in policy, but Trump’s hot rhetoric stands out because his promises are rarely accompanied by details on how he might implement his initiatives. He doesn’t say how he might punish companies that ship jobs overseas, or how he would get Mexico to pay for a border wall, or how he would impose a ban on Muslims entering the country. He says he will make it happen — “believe me.”

Trump’s critics hear his sweeping promises as the words of a classic strongman, a ruler who seems prepared to push aside the cobwebs of bureaucracy and the checks and balances of American federalism to produce instant, decisive action. Critics have compared him to Mussolini, Hitler, Vladimir Putin, Saddam Hussein and Argentina’s Juan Perón. Trump has praised Putin and Hussein for being tough on terrorism. In the past, Trump has singled out China’s crackdown against pro-democracy activists in Tiananmen Square in 1989 as a demonstration of “the power of strength.”

“Certainly rhetorically, Trump’s idea that ‘I alone can fix this’ does go beyond the template that President Obama and President Bush before him came in with, the idea that you try to fix things together,” said Andrew Rudalevige, a professor of government at Bowdoin College.

Trump’s defenders argue that his statements, whether off the cuff at rallies or in his scripted acceptance address at last week’s Republican convention, are not policy prescriptions but rather reflections of popular frustration. When Trump says he’s going to fix a problem immediately, some supporters say, he’s throwing down his marker, taking a stand rather than spelling out a plan.

Some Trump initiatives, such as repealing the Affordable Care Act, cutting taxes or expanding Social Security, would require extensive, close work with Congress. But presidents already have the power to do much of what Trump has proposed. Congress has given the president the authority to negotiate trade deals, for example, and Trump could try to renegotiate the nuclear deal with Iran.

Other promises put him in disputed terrain, such as his vow to bomb the Islamic State, “circle” their territory and “take the oil.” Some argue that such actions must be authorized by Congress under the War Powers Resolution, which was passed over President Nixon’s veto in 1973. But presidents since then have routinely ordered military action without seeking a congressional green light.

Trump could justify an all-out assault on the Islamic State by pointing to the same kinds of authority that allowed the Bush administration to use torture against alleged terrorists and allowed the Obama administration to expand the use of drones to kill terrorist suspects. Recent presidents have used their constitutional authority as commander in chief even to take actions that are specifically restricted by law. Donald Trump painted a dark picture of America during his acceptance speech at the Republican National Convention, but some of his doomsday stats are rather dubious. The Post’s Fact Checker examined 25 of his key claims. (Jenny Starrs/The Washington Post)

In 2014, Obama announced a prisoner swap in which Army Sgt. Bowe Bergdahl was brought home from Afghanistan in exchange for five Taliban commanders who had been held at the U.S. facility at Guantanamo Bay, Cuba. Congress had passed a law requiring the president to notify it 30 days before the release of any Guantanamo detainee, but Obama insisted he had a higher duty to protect American lives and U.S. troops.

“The presidential toolbox of unilateralism is quite deep,” Rudalevige said, “but you can’t have an imperial presidency without an invisible Congress that is willing to take a back seat because it doesn’t want to be blamed for a war or some other unpopular policy.”

There’s only one effective way to push back against presidential power grabs, he concluded in a recent study: “Congress has to do its job.”

That hasn’t been happening, however. The country is so politically polarized that many members of Congress are now elected on promises to resist the kind of compromise that is necessary to build majorities and be an effective check on executive power.

“The constitutional order set up by our founders is breaking down,” Sen. Mike Lee (R-Utah) wrote this month in *National Review*. “What Congress wants today is to be weak . . . for fear of the political consequences of hard choices.”

Lee argued that presidents will continue to assume broader powers unless Congress fulfills its constitutional duty to “protect the American people from exactly the kind of arbitrary, unaccountable government-without-consent that Congress now for its own selfish reasons enables the executive branch to practice.”

In recent decades, presidents have stretched their ability to act unilaterally, bypassing Congress through executive orders, executive memos, national security orders, findings, signing statements and prosecutorial discretion. After the Vietnam War and the Watergate scandal, Congress pushed back with a series of laws designed to rein in the president.

But the War Powers Resolution, the Intelligence Oversight Act, the Congressional Budget Act and the independent counsel act — all designed to limit presidential unilateralism — have proved toothless, and Congress since has ceded even more authority.

After Sept. 11, 2001, the rush to expand the president's ability to respond quickly to attacks and to ferret out terrorists shifted the balance of power ever more decisively toward the White House. Then-Vice President Dick Cheney, a proponent of a stronger presidency going back to his days in Congress three decades earlier, argued that the fragility of a world with nuclear weapons mandated an expansive presidency: The fact that the president is accompanied at all times by a military aide carrying the nuclear codes, he said, means that "he doesn't have to check with anybody. He doesn't have to call the Congress. He doesn't have to check with the courts. He has that authority because of the nature of the world we live in."

A president who might act unilaterally was one of the chief fears expressed in the original debates about the Constitution. Writing in what became known as the Anti-Federalist Papers in 1787, the pseudonymous Cato warned against the presidency becoming "a Caesar, Caligula, Nero, and Domitian in America." The system of checks and balances — giving Congress the authority to make laws and decide how money is spent, and giving the Supreme Court the last word on what laws comport with the Constitution — was supposed to rein in the president.

But as the size and scope of government ballooned, the president became the de facto manager of a sprawling, vital sector of the economy, and presidential authority expanded almost continuously. A century ago, Theodore Roosevelt argued that presidents were allowed to do anything not specifically prohibited by law or the Constitution. And Nixon famously asserted, after he had resigned from office over the Watergate scandal, that "when the president does it, that means that it is not illegal."

By 2004, George W. Bush could state that when "Congress wouldn't act," he had no choice but to issue an executive order expanding access to federal grants for faith-based charities. Obama similarly said in 2014 that "when Congress doesn't move on things they should move on ... I've got a pen and I've got a phone, and I can use that pen to sign executive orders and take executive actions and administrative actions that move the ball forward."

In today's hyperpartisan politics, accusations of overly expansive presidencies fly across the aisle as a matter of course. "A strong presidency is one who is of your own party, and an imperial presidency is one from the other side," Rudalevige said.

Potentially dangerous clashes could develop: If Trump were to ask the military to target terrorists' families — an idea he has at various times proposed and disavowed — some military and intelligence officials have said that commanders might refuse to follow such orders. "The American armed forces would refuse to act," former CIA director Michael Hayden said earlier this year. "You are required not to follow an unlawful order."

That scenario could lead to "a constitutional crisis," Rudalevige said, "especially if we still have an eight-member Supreme Court," assuming that the late Justice Antonin Scalia's seat remained unfilled.

If a president does overstep his authority, Congress could cut off his funding or impeach him, but a President Trump could counter with the power of the bully pulpit.

“Any new president comes in with a certain degree of goodwill and political capital,” said Joe Hagin, who spent 14 years as a White House aide in Republican administrations, culminating in eight years as deputy chief of staff to George W. Bush. “What’s happening in the nation and the world at any given time affects your ability to move quickly. And if you look at what we were able to do post-9/11, it’s almost unprecedented.”

Congress acted within weeks to authorize war, pass the USA Patriot Act and establish the Department of Homeland Security — a sharp contrast to the administration’s failure to move on domestic initiatives such as overhauling Social Security and reforming immigration. What made the difference, Hagin said, was public opinion, and Trump’s knack for blunt communication could be an effective defense against efforts by Congress to rein him in.

“He’s thrown the rulebook out the window, and that could be a very good thing,” Hagin said. “He certainly understands how to communicate with a certain segment of the population, and the question is, can he expand that to a majority of the population?”

Public opinion also would likely have a big impact on Congress’s willingness to push back.

“No one knows what Trump would really do, which is why people are so freaked out,” said Devins, the law professor. “If he did push the boundaries dangerously, it really would depend on Congress, and it would take an awful lot for Republicans to join with the Democrats to assert themselves and slap him down.

“It took Watergate for the parties to stand up to Nixon and attempt to constrain the presidency. The question really is, what unilateral action against ISIS would be so extreme that Congress would pass a funding ban?”

Asked about Trump’s proposals to ban Muslims or build a border wall without congressional approval, House Speaker Paul D. Ryan (R-Wis.) said last month that he “would sue any president that exceeds his or her powers.”

But Devins has concluded that the record of the past two decades shows that Congress “lacks both the will and the way to check the presidency. Today’s system of checks and balances,” he said, “is an abject failure.”