

Trump Rewrites the Book on Emergencies

Christopher DeMuth; *The Wall Street Journal*; April 18, 2020

Washington's response to the Covid-19 pandemic is upending one of the most durable patterns of American politics. Throughout our history, national emergencies have led to a more powerful and centralized federal government and to the transfer of federal power from Congress to the executive branch. This time, the federal response rests largely on state and local government and private enterprise, with a wave of deregulation clearing the way. The Trump administration has seized no new powers, and Congress has stayed energetically in the game.

The historical pattern is powerful and might have seemed inevitable. In times of war, natural disaster, and economic upheaval, action is king. The president and his officials and agencies can act with much greater dispatch than Congress can. They may be forgiven for crossing statutory or even constitutional boundaries—in a crisis, the test of legitimacy is perceived effectiveness. But emergency actions often set precedents for normal times.

Moreover, crises generate proposals for preventing their recurrence. These typically take the form of an agency that, with the benefit of hindsight, could have nipped the crisis in the bud. Positing an omnicompetent government authority is political misdirection: It elides the profound problems of uncertainty and conflicting information and interpretation that precede every catastrophe. That is a sure recipe for highly concentrated, discretionary power.

These tendencies were dramatically on display in the first two national emergencies of the 21st century, 9/11 and the 2008 financial collapse. In response to the 9/11 attacks, the Bush administration and Congress created two gigantic agencies with extraordinary powers and insulation from congressional control, the Department of Homeland Security and the Office of the Director of National Intelligence. Intelligence was centralized and bureaucratized; federal police powers were extended down to driver's licenses and much else; the administration established wide-ranging surveillance programs.

In response to the 2008 crisis, the administration arranged corporate mergers and bailouts with only fig leaves of statutory authority. It spent hundreds of billions of dollars without congressional appropriation. These crisis expedients provided the template for the Obama administration's unilateral responses to mere political frustrations—congressional inaction on its climate change, immigration, and other legislative proposals. At the same time, the Dodd-Frank Act of 2010 commissioned an army of new regulatory authorities with unprecedented discretion and autonomy.

It is not only crises that propel the administrative state. Lesser events of the 2000s—accounting scandals and a spike in energy prices—also led to new layers of freewheeling federal power. But major emergencies have unfailingly been major inflection points.

Until now. In responding to the coronavirus, the Trump administration has confined itself to longstanding statutory authorities that have been invoked routinely in responding to lesser emergencies. President Trump has used the Stafford Act of 1988 to provide states with emergency financial assistance—but has deferred to their decisions regarding social confinement, business closures, testing, and treatment. He has employed the Defense Production Act of 1950 to cajole manufactures to prioritize urgently needed medical equipment—but has relied primarily on consultation, coordination, and publicity to coach a private-sector-led mobilization. He has declared a national emergency under the National Emergencies Act of 1976, which can potentially trigger extraordinary regulatory powers—but so far he has used it only for deregulatory purposes, waiving Medicare, Medicaid, Children’s Health Insurance, and Health Insurance Portability and Accountability Act rules that restrict telemedicine and interstate medical practice.

Mr. Trump has received criticism from all sides for these measured responses. It is said, on the one hand, that he should aggressively commandeer state police powers and industrial resources to mount a uniform national response—and, on the other (sometimes by the same critics), that the crisis will sooner or later unleash the authoritarian ambitions Mr. Trump has supposedly been harboring all along.

His replies have been characteristically adamant. He has extolled his administration’s performance on the measures that are unarguably federal jurisdictions—restricting foreign travel, deploying the military’s medical resources, mobilizing production of materials in short supply and allocating them among states and cities, providing information on the spread of the virus and guidance on mitigation measures. He has been jealous of federal prerogatives and sharply critical of governors and business executives he regarded as uncooperative.

But mainly he has given pride of place to federalism and private enterprise—lauding the patriotism and proficiency of our fantastic governors and mayors, our incredible business leaders and genius companies, our heroic doctors and nurses and orderlies, and our tremendous truckers. By shouting out many of them by name and documenting their deeds on a daily basis, he has vivified the American way in action (once reluctantly aroused). When asked why he has not issued orders for nationwide home and business lockdowns, he has emphasized that the intensity of the epidemic varies widely and is best met by calibrated state and local judgments—and added pointedly that such steps would conflict with the Constitution.

As the prospect of reopening the economy approaches, Mr. Trump has asserted that he is the ultimate authority. Governors are making state and regional plans, and mayors are claiming to be the deciders for reopening schools. This jousting is preliminary to a next-phase division of labor that will continue to combine practical and constitutional considerations. The federal government will issue guidelines for phased screening and social-mitigation practices by states, and attend to national priorities such as economic liquidity, air travel, and increased testing capacity. States and localities will take the lead on procedures for reopening schools, churches, restaurants, offices, and parks. There will be a variety of state approaches, and disagreements between the states and the feds. It is shaping up to be another round of creative, knowledge-generating federalism.

Perhaps the historical pattern will reassert itself. The president has floated the idea of restricting interstate travel—which would slow the migration of the virus from hot spots to less-afflicted regions but also raises constitutional questions—but has backed off for now. The Justice Department has suggested that federal judges be authorized to modify or delay criminal trials and procedures—which could also bump into constitutional issues. But these are legislative proposals, not unilateral steps, and congressional leaders have been quick to notice the problems. The Federal Reserve has expanded into corporate bond-buying and loans to state and local governments—supposedly temporary programs, but potentially Fed mission creep into fiscal policy and capital allocation.

Yet the administration seems intent on keeping the crisis from generating a permanent expansion of federal and executive powers. President Trump's calling himself a "wartime president" has sounded authoritarian to some of his detractors. It is better viewed in conjunction with his constant assurances that the "invisible enemy" will soon be subdued and national life returned to normal—as a vow that his use of emergency authority will be as transitory as public-health conditions permit.

The most striking aspect of the administration's response has been its waiving or liberalizing of hundreds of regulatory requirements that would otherwise impede efforts to cope with the epidemic and ensuing shutdowns. The Food and Drug Administration has relaxed its extreme restrictions on the development and deployment of medical tests, equipment, drugs, and vaccines. The Medicare and HIPPA waivers, along with the suspension by many states of their restrictions on out-of-state medical professionals, are allowing doctors and nurses to go where they are needed and to practice telemedicine. The Education Department is easing its micromanagement of school districts to facilitate online teaching and other initiatives. Teachers I know are enthusiastic about the cancellation of this year's federal testing requirements—now they can actually teach their students instead of merely preparing them for tests.

Some of these measures have been introduced under established emergency statutes. Some have been newly authorized by the CARES Act (Coronavirus Aid, Relief and Economic Security), and some have been matters of sheer bureaucratic leniency under pressure from the president and other officials. While some of them, such as extension of paperwork filing deadlines, are one-off crisis expedients, others, such as those I have mentioned, hold promise for permanent liberalization.

FDA reform should be at the top of the list. The agency has been widely condemned for denying permission to begin Covid-19 testing to dozens of front-line epidemiologists, from the Mayo Clinic to the University of Washington, in February when the virus had recently entered the country and was spreading undetected in the Seattle region and elsewhere. These incidents have become part of the media narrative of government bungling in the critical early days of the U.S. infection.

But the FDA wasn't bungling at all: Saying no to new tests and therapies, and delaying them with endless demands for additional data and forms, is standard FDA practice. The agency is required by statute to certify the safety and efficacy of medical tests, drugs, and devices, but it has built its own edifice of overbearing command and control far beyond the statutory requirements. The public-health consequences of putting its bureaucratic self-interest first might have been unusually large, perhaps momentous, in the case of Covid-19 testing. But if it should have done better in this one infamous instance, then why not in thousands of others as well?

Under pressure, the FDA is now reviewing a range of Covid-19 treatments and vaccines with extraordinary dispatch, dispensing with time-consuming procedures and show-stopping veto points it has previously insisted are essential to public health. One or several of them will no doubt prove useful, probably even game-changing, in controlling the virulence and lethality of coronavirus infection.

When the epidemic has subsided, the FDA will say that it was merely reallocating resources from other reviews, and that its lenient procedures had involved health risks that only a dire health crisis could justify. But overregulation is costly to the agency, too. If some of the expedited therapies turn out to be reasonably safe and effective, and none positively harmful, that will be strong evidence for extending the agency's newfound liberality to other areas of medical innovation.

The coronavirus pandemic is generating valuable policy evidence in many other areas. If new ventures in telemedicine and online teaching prove satisfactory during the crisis, it is hard to see why they should be shut down afterward by regulatory irredentism. If nurses licensed in Idaho can perform at New York standards during the crisis, they can do so in normal times as well. State reforms to occupational licensing of medical professionals might even be vouchsafed to gardeners and hairdressers. The purpose of uniform annual student testing is to rank school performance within

states—if skipping a year, as we are now doing perforce, turns out to have little systematic effect on rankings, that will argue for moving to biennial tests.

These suggestions will seem marginal to many who are familiar with the regulatory regimes in question. But the regimes are deeply entrenched, and their machinations obscure to outsiders. The epidemic, and the highly disruptive measures that have been taken to control its spread, have publicized many examples of official suppression of everyday initiative as well as crisis response. These are rare openings for creative political disruption. Seizing them will vindicate the uses Americans are making of the temporary liberties that are being given to them under duress.

The coronavirus crisis and government response will yield other important lessons and policy improvements, such as stockpiling essential equipment and repatriating the manufacture of pharmaceuticals and other critical goods. They will also, however, generate proposals for centralized agencies of surveillance and control, for further nationalization of state police powers and finance, for further socialization of private medical care, pharmaceuticals, and health insurance, and for maintaining the CARES Act's temporary restrictions on corporate finance and labor markets.

When that time comes, it will be a great blessing that as soon as the magnitude of the epidemic was grasped, it was managed and subdued through vigorous localism, private enterprise, and professional dedication, with the federal government providing essential national leadership but staying within its constitutional rails. The crises of 2001, 2008, and 2020 all came by surprise, with singular causes and demands. The next one will almost certainly be another unique surprise. “Plans are worthless but planning is everything,” Dwight Eisenhower observed, because “the very definition of ‘emergency’ is that . . . it is not going to happen the way you are planning.” Diversified centers of authority and initiative aren't luxuries. They are the keys to resilience in the face of emergencies large and small.