

Emergency Powers, Real and Imagined: How President Trump Used and Failed to Use Presidential Authority in the COVID-19 Crisis

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INTRODUCTION

President Trump is not shy when it comes to the use of emergency powers. He had declared seven national emergencies before a real one—the COVID-19 pandemic—actually happened. His declaration of a national emergency to secure border-wall funding that Congress had denied was widely perceived as an abuse of power; it came at a time when illegal border crossings were near a 40-year low, and was accompanied by the casual statement, “I didn’t need to do this, but I’d rather do it much faster.”¹ His other declarations, a series of orders imposing sanctions on foreign actors, largely flew under the radar—a strong indicator that no existential crises were afoot.

One might therefore have expected President Trump to deploy emergency powers aggressively when a true emergency finally came his way. His rhetoric has certainly been true to form: he has described himself as a wartime president, and he proclaimed that the powers of the president during an emergency are “total.” He also has threatened to invoke a dizzying range of powers that he does not actually have, sometimes in service of contradictory ends. And with respect to one subset of emergency powers—those relating to immigration—he has indeed taken full advantage of COVID-19 to deliver on longstanding promises to dramatically reduce the flow of lawful immigrants into the United States.

When it comes to deploying emergency powers that would assist in disease mitigation, however, President Trump has been restrained to a fault. His administration declared a public health emergency in late January, but it was slow to exercise the powers this declaration could have unlocked. As the stock markets began to suffer, the president downplayed the crisis and delayed declaring a national emergency or a Stafford Act emergency for several weeks. Eventually he issued both declarations, followed by a series of executive orders purporting to invoke the Defense Production Act. Once again, however, his administration’s actual use of these authorities has been incongruously modest.

What explains the difference between the overweening rhetoric, on the one hand, and the failure to fully exercise applicable emergency powers, on the other? In some cases, the president’s public statements suggest a tension between his penchant for power and a desire to avoid responsibility. In others, news reports point to political calculations or lobbying by corporate interests. In still others, the culprit appears to be administrative incompetence. Whatever the

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¹ Victor Lipman, *Trump Declares National Emergency and Then Adds “I Didn’t Need to Do This,”* FORBES (Feb. 15, 2019, 1:19), <https://perma.cc/P33U-KMZ2>.

reasons, however, one can rule out the explanation that emergency action isn't justified by facts on the ground. The emergency powers that provide additional federal resources in public health crises were designed for precisely the type of circumstance we now face.

The fear that leaders will abuse emergency authorities to consolidate power during real or fictional crises rightly dominates the political and legal literature. President Trump has validated these concerns with his immigration measures and claims of total authority during the COVID-19 crisis. But his passivity on the central public health issues raises a novel question: can a president also abuse emergency powers by not using them?

I. THE LEGAL FRAMEWORK FOR THE PRESIDENT'S EMERGENCY POWERS

It is sometimes said that “necessity knows no law.”² The statement might have some validity as a description of official behavior during crises, but not as a description of our legal system. Like all of his powers, the president's powers during an emergency must come from the Constitution or from laws passed by Congress.

The U.S. Constitution is an outlier among modern constitutions in that it contains no provision for emergency rule.³ It does include a handful of provisions that could be characterized as crisis-response powers, but none of these appears in Article II. Article I, for instance, assigns to Congress the authority to suspend the writ of habeas corpus “when in Cases of Rebellion or Invasion the public Safety may require it,”⁴ and to “provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.”⁵

Although Article II confers no explicit emergency powers, there are implied powers accompanying some of its express provisions. Most notably, the Commander-in-Chief power entails the authority to defend the United States against sudden attack, even without prior congressional authorization,⁶ and to manage the conduct of war. The Supreme Court has also asserted (somewhat controversially) that the president is the “sole organ of the federal government in the field of international relations,”⁷ although the scope of this exclusive power in the international-relations field remains unclear.

Broader claims that the president has inherent constitutional powers to do whatever he or she considers necessary in an emergency have been soundly rejected by the Supreme Court. The government advanced a version of this theory to justify President Truman's seizure of U.S. steel mills during the Korean War. The Supreme Court invalidated the president's action, and Justice Jackson, in his famous concurrence, observed: “[T]he Constitution did not contemplate that the

² See Roger Alford, “*Necessity Knows No Law*,” OPINIO JURIS (May 18, 2009), <https://perma.cc/TWH3-4S6L>.

³ A review of current constitutions reveals that at least 178 countries' constitutions have provisions for emergency rule. See CONSTITUTE: THE WORLD'S CONSTITUTIONS TO READ, SEARCH, AND COMPARE, (June 30, 2020), <https://perma.cc/VK8R-P3C6>.

⁴ U.S. CONST. art. I, § 9, cl. 2.

⁵ U.S. CONST. art. I, § 8, cl. 15.

⁶ See LOUIS FISHER, PRESIDENTIAL WAR POWER 8-10 (2d rev. ed. 2004).

⁷ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936).

title Commander in Chief *of the Army and Navy* will constitute him also Commander in Chief of the country, its industries and its inhabitants.”⁸

While the emergency powers available to the president under the Constitution are thus quite limited, Congress has been generous in its delegation of emergency powers to the president. Several laws give the president or other executive branch officials the power to issue emergency declarations in specified situations, which in turn unlock resources and authorities as provided in the law. Notable examples include the Public Health Service Act and the Stafford Act, discussed below.

In addition to these statutes, each of which constitutes a self-contained grant of emergency authority, there are more than 120 statutory authorities that become available to the president when he declares a “national emergency.” The procedures for declaring a national emergency are set forth in the National Emergencies Act, but the law includes no definition of the term, leaving it to the president to decide when national emergency exists. The authorities that can be triggered by such a declaration span almost every conceivable area of governance, from agriculture to military deployment to domestic transportation.⁹

Finally, many laws that are available without an emergency declaration are properly viewed as emergency powers, because they confer extraordinary authorities that are clearly intended for use in extraordinary situations. A prime example of this type of “pseudo-emergency power” is the Insurrection Act, one portion of which allows the president to deploy military forces domestically to suppress insurrections, domestic violence, and any “unlawful combination” or “conspiracy” that “opposes or obstructs” the execution of the law.¹⁰ Similarly, multiple statutes allow the president to take certain actions—or set aside otherwise applicable limits on presidential action—when necessary for “national security.”¹¹

II. COVID-19 AND THE PRESIDENT’S RESPONSE

From the beginning, the president’s response to COVID-19 has been predominantly focused on keeping the virus out of the country—an approach he has continued to follow long after the virus was widespread within U.S. borders. In connection with this strategy, he has barred certain foreign nationals from entering the country; closed the borders with Mexico and Canada; and made far more extensive use of the federal quarantine power than any previous president. Most recently, he has moved to an even broader ban on immigration, ostensibly for the purpose of mitigating the damage that the crisis has inflicted on the economy.

⁸ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 643-44 (1952) (Jackson, J., concurring) (emphasis added).

⁹ See BRENNAN CTR. FOR JUSTICE, A GUIDE TO EMERGENCY POWERS AND THEIR USE 3 (rev. ed. 2019), <https://perma.cc/9EMU-LB58>.

¹⁰ 10 U.S.C. § 253 (2018).

¹¹ Section 232 of the Trade Expansion Act of 1962, for instance, allows the President to impose restrictions on certain imports when the Department of Commerce determines that the product “is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security.” 19 U.S.C. § 1862 (2018).

There is ample evidence that at least some of these measures were driven by xenophobia and the prospect of political gain, rather than considerations of how best to address emergency conditions. In that sense, they should be viewed as an abuse of emergency powers. On the other hand, the laws the president relied on give him enormous discretion and provide little recourse for anyone adversely affected.

Outside the realm of immigration, the most salient feature of the president's use of emergency powers has been the discrepancy between word and deed. The president threatens on a regular basis to take actions that Congress has not authorized and that go far beyond any inherent authority he has. At the same time, he hesitated for weeks before declaring Stafford Act and national emergencies and invoking the Defense Production Act. And he has yet to wield the full powers those laws would afford him to increase the availability of scarce public health resources.

A. Immigration Measures Under Emergency and Pseudo-Emergency Powers

1. Travel Bans

On January 31, 2020—the same day that Secretary of Health and Human Services (HHS) Alex Azar declared a public health emergency—President Trump issued a proclamation restricting travel into the United States. The proclamation barred the entry of aliens who had been present in China (excluding Hong Kong and Macau) within the 14-day period before seeking entry. Many categories of aliens were excluded from the ban, including lawful permanent residents (LPRs) of the United States; spouses and certain family members of U.S. citizens or LPRs; aliens traveling at the invitation of the U.S. government for a purpose related to containment or mitigation of the virus; United Nations personnel, foreign government officials, and their immediate families; and crewmembers on vessels or aircraft traveling to the United States. Aliens also may enter if the Director of the Centers for Disease Control and Prevention (CDC) determines that they pose a low risk of carrying the virus, or if officials determine that their entry would further “important law enforcement objectives” or would serve “the national interest.”¹²

A month later, on February 29, President Trump issued a second travel ban, this one affecting aliens who had been present in Iran during the 14-day period before seeking entry to the United States.¹³ Another proclamation followed on March 11, encompassing the Schengen Area, a group consisting of just over half of the countries in Europe.¹⁴ This proclamation sparked sharp controversy, as the Schengen Area excludes some of the European nations hit hardest by COVID-19—most notably, the United Kingdom, whose prime minister, Boris Johnson, is closely allied with President Trump. After three days of intense political blowback, the president issued another proclamation extending the travel ban (and its exceptions) to the United Kingdom and Ireland.¹⁵

¹² Proclamation No. 9984, 85 Fed. Reg. 6709 (Jan. 31, 2020).

¹³ See Proclamation No. 9992, 85 Fed. Reg. 12,855 (Feb. 29, 2020).

¹⁴ See Proclamation No. 9993, 85 Fed. Reg. 15,045 (Mar. 11, 2020).

¹⁵ See Proclamation No. 9996, 85 Fed. Reg. 15,341 (Mar. 14, 2020).

On April 22, President Trump implemented what he described as a “temporary suspension of immigration into the United States.”¹⁶ That description was a significant exaggeration; nonetheless, his proclamation dramatically cut back on legal immigration. For a period of 60 days, which was subsequently extended to the end of 2020, the proclamation prohibited the entry into the United States of foreign nationals seeking permanent legal residence. The ban does not apply to existing green card holders; health care workers and their spouses and minor children; certain visa types, including visas for foreign nationals who invest at least \$900,000 in a business that will hire ten or more American workers; spouses and unmarried minor children of U.S. citizens (but not parents, siblings, or grown children); and any alien whose entry would be in the national interest, as determined by the Secretary of State or HHS.¹⁷

Advocates of strict immigration restrictions criticized the president for not going far enough.¹⁸ On June 22, President Trump issued another order barring foreign nationals from entering the United States on certain temporary worker visas through the end of 2020.¹⁹ Once again, the order contains many exceptions—for instance, it does not apply to workers in the agricultural, health-care, and food-supply sectors.

All of these proclamations cite Section 212(f) of the Immigration and Nationality Act (INA) as the legal authority for the president’s actions. That provision, in place since the INA’s enactment in 1952, states as follows:

Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.²⁰

This law can be viewed as a pseudo-emergency power. The president need not declare an emergency to invoke it. However, it creates an obvious exception to “business as usual,” given that the entry of aliens into the United States is otherwise closely regulated by the statute. Moreover, although the provision gives the president discretion to determine whether an alien’s entry would be “detrimental to the interests of the United States,” the standard itself suggests something much more than a minor concern. It should take a highly unusual set of circumstances for the entry of an alien or class of aliens to harm the interests of the nation as a whole. And that harm should presumably be an immediate and urgent one, as Congress would otherwise be able to address it through a change in the law itself.

Consistent with this interpretation, past presidents generally have invoked Section 212(f) to create relatively narrow exclusions. The vast majority of these exclusions have been directed at

¹⁶ Nick Miroff et al., *Trump to Suspend Immigration to U.S. for 60 Days, Citing Coronavirus Crisis and Jobs Shortage, but Will Allow Some Workers*, WASH. POST (Apr. 21, 2020, 5:01 PM), <https://perma.cc/74SR-WTFA>.

¹⁷ See Proclamation No. 10,014, 85 Fed. Reg. 23,441 (Apr. 22, 2020).

¹⁸ See Brett Samuels, *Hard-Line Immigration Groups Blast Trump Order for Not Going Further*, THE HILL (Apr. 23, 2020, 4:30 PM), <https://perma.cc/9K7L-HFU8>.

¹⁹ See Proclamation No. 10,052, 85 Fed. Reg. 38,263 (June 22, 2020).

²⁰ 8 U.S.C. § 1182(f) (2018).

the targets of sanctions under the International Emergency Economic Powers Act (IEEPA),²¹ such as foreign officials suspected of human rights violations or corruption. These targeted people or entities were individually determined to have contributed to an “unusual and extraordinary threat” to national security, the economy, or foreign policy. Outside of the IEEPA context, the broadest use of 212(f) before the COVID-19 outbreak was to suspend the entry of undocumented aliens from “the high seas,” and to direct the interdiction of certain vessels carrying such aliens.²²

President Trump’s use of Section 212(f) is different in kind. His orders are not limited to people who have been individually determined to pose a threat to the United States, nor are they limited to undocumented immigrants. They do not create *exceptions* to the statutory framework Congress established for lawful immigration. Instead, they *override* that framework and fundamentally reshape its contours. Through Section 212(f), the president has transferred from Congress to himself the constitutional authority to “establish a uniform Rule of Naturalization”²³ and to control the flow of immigration into the United States.

Moreover, there is good reason to conclude that President Trump’s orders were driven by prejudice and politics, rather than a good faith assessment of the United States’ interests. For a full month, as COVID-19 spread across the world, the president imposed a travel ban only on China, our main economic rival and a frequent target of the president’s wrath. He then extended it to another political enemy—Iran—even though it had fewer reported cases than hot spots like Italy.²⁴ His next order, two weeks later, swept in some countries in Europe that had fewer than a dozen reported cases, while exempting close European allies (most notably the United Kingdom) where the virus was more prevalent by orders of magnitude.²⁵ All of these bans remain in place today—and the president persists in referring to COVID-19 as “the foreign virus,” “the Chinese virus,” and, most offensively, “Kung Flu”²⁶—despite statistics showing that the virus is now under much better control in those countries than inside the United States.²⁷

The proclamations issued on April 22 and June 22 are even less defensible. The stated goal of these orders is to stem foreign competition for jobs at a time when U.S. unemployment has reached its highest level since the Great Depression. Yet the first order applies, on its face, to minor children

²¹ 50 U.S.C. §§ 1701-08 (2018).

²² See KATE M. MANUEL, CONG. RESEARCH SERV. R44743, EXECUTIVE AUTHORITY TO EXCLUDE ALIENS: IN BRIEF 6-10 (Jan. 23, 2017), <https://perma.cc/TDX3-3Z25>.

²³ U.S. CONST. art. I, § 8, cl. 4.

²⁴ Compare Proclamation No. 9992, *supra* note 13 (noting that Iran had 388 cases of COVID-19 as of Feb. 28, 2020), with Calla Wahlquist et al., *Italy COVID-19 Death Toll Rises to 21 as UK Confirms 20th Case—As It Happened*, GUARDIAN (Feb. 28, 2020), <https://perma.cc/MV32-5JTB> (reporting that Italy had 820 cases as of the same date).

²⁵ Latvia, for instance, had 10 cases on March 11, see *COVID-19 Coronavirus Pandemic: Latvia*, WORLDOMETER, (23:35 GMT), <https://perma.cc/D6SW-XBN5>, and Liechtenstein had three, see *COVID-19 Coronavirus Pandemic: Liechtenstein*, WORLDOMETER, (Jul. 20, 2020, 23:37), <https://perma.cc/G3JF-KUTN>; the United Kingdom had 460. See *COVID-19 Coronavirus Pandemic: United Kingdom*, WORLDOMETER, (Jul. 20, 2020, 23:37 GMT), <https://perma.cc/3K96-HPRQ>.

²⁶ See John Haltiwanger, *Trump Is Increasingly Relying on White-Supremacist Ploys to Fire Up His Base as He Panics over His Reelection Chances*, BUS. INSIDER (June 23, 2020, 5:51 PM), <https://perma.cc/MA3L-698V>.

²⁷ See Meghan Roos, *These Graphs Show How Coronavirus Cases in the U.S. Compare to Other Countries*, NEWSWEEK (June 25, 2020, 1:59 PM), <https://perma.cc/6EPL-4SWM>.

and the elderly—groups that are unlikely to compete for work—and spouses who might or might not seek jobs in the United States. The second order targets workers in sectors, such as computer programming and construction, that have experienced relatively low rates of unemployment.²⁸ A leaked phone call between Trump senior policy advisor Steve Miller and a group of conservative organizations confirmed that the measures are not intended as emergency stop-gap measures, but instead are part of a longer-term strategy to reduce immigration.²⁹

That cannot be what Congress had in mind when it passed Section 212(f). Unfortunately, however, Congress chose extremely broad language with which to delegate authority to the president. This makes it difficult to prevail on any legal challenge to presidential action under that provision.

Indeed, the COVID-19-related travel bans are not the first time President Trump has misused Section 212(f). Early in his administration, he invoked this provision to clamp down on legal immigration from several majority-Muslim countries. Like the current travel bans, these early orders involved no individualized threat determination, but simply carved out entire countries, fundamentally reworking—rather than creating a limited exception to—Congress's immigration scheme. And there was overwhelming evidence that these measures were based on Islamophobia, rather than (as the president claimed) national security.³⁰

The Supreme Court nonetheless upheld the use of Section 212(f) in this context. Even though the plaintiffs alleged a violation of the First Amendment—which ordinarily would trigger strict scrutiny—the majority observed that, “[b]y its terms, [Section 212(f)] exudes deference to the President in every clause,” and determined that the Court should apply *at most* a “rational basis” standard of review.³¹ Essentially, the existence of a facially plausible reason for the government's action would carry the day, regardless of strong evidence that this reason was a post-hoc pretext. While the current travel bans are distinguishable in some respects, the majority's deferential approach and its effective disregard of evidence of bad faith in *Trump v. Hawaii* certainly do not bode well for legal challenges to the president's more recent invocations of Section 212(f).

2. Border Closures

a. CDC Order

²⁸ See Sara Savat, *WashU Expert: H-1B Visa Restrictions Unlikely to Impact Unemployment Rates*, THE SOURCE (June 24, 2020), <https://perma.cc/M6BJ-HXYB>; Editorial, *Trump's Immigration Gift to China*, WALL ST. J., (June 23, 2020, 7:26 PM), <https://perma.cc/5XPT-PF7R>; Jon Healey, Opinion, *Trump Says His Visa Crackdown Will Help Put Americans Back to Work. It Won't*, L.A. TIMES (June 22, 2020, 1:45 PM), <https://perma.cc/VPZ7-ZPVZ>. Some experts have suggested that the restrictions will actually harm the nation's economic recovery, because they will deprive U.S. businesses of labor that cannot be found inside the United States. See, e.g., Margaret Peters, *Trump Wants to Limit Immigration to Protect Jobs. Will That Work?*, WASH. POST (June 29, 2020, 6:00 AM), <https://perma.cc/P9LK-49DH>.

²⁹ See Nick Miroff & Josh Dawsey, *Stephen Miller Has Long-Term Vision for Trump's "Temporary" Immigration Order. According to Private Call with Supporters*, WASH. POST (Apr. 24, 2020, 2:23 PM), <https://perma.cc/VZS9-CVBU>.

³⁰ See generally Brief of *Amicus Curiae* The Roderick & Solange MacArthur Justice Center in Support of Respondents, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (No. 17-965).

³¹ See *Trump v. Hawaii*, 138 S. Ct. 2392, 2400-02 (2018).

On March 24, 2020, the Director of the CDC issued an order “suspending the introduction of certain persons from countries where a communicable disease exists.”³² In the order, the CDC Director concluded:

There is a serious danger of the introduction of COVID-19 into the land [ports of entry] and Border Patrol stations at or near the United States borders with Canada and Mexico, and into the interior of the country as a whole, because COVID-19 exists in Canada, Mexico, and the other countries of origin of persons who migrate to the United States across the United States land borders with Canada and Mexico.³³

This danger is exacerbated, the Director found, by the fact that “many of those persons (typically aliens who lack valid travel documents and are therefore inadmissible)” are then held by Customs and Border Protection “in close proximity to one another, for hours or days, as they undergo immigration processing.”³⁴ Accordingly, aliens arriving at ports of entry or border patrol stations along the Canadian or Mexican border without proper travel documents would be summarily turned away.

The order contains exceptions for legal permanent residents; members of the armed forces and their immediate families; people from countries participating in the visa waiver program; and “persons whom customs officers of DHS determine, with approval from a supervisor, should be excepted based on the totality of the circumstances, including consideration of significant law enforcement, officer and public safety, humanitarian, and public health interests.”³⁵ It contains no express exception, however, for cases in which the United States has a legal obligation to admit the person, such as instances in which the alien seeks asylum and has a credible fear of persecution if returned to his or her country of origin. Border Patrol guidance, leaked to reporters, confirmed that customs officials have been instructed to process only those aliens who volunteer a claim that they would be tortured³⁶—in practice, a small subset of those eligible for asylum protection.

The primary legal authority underlying the CDC order is Section 362 of the Public Health Service Act (PHSA). Like Section 212(f) of the INA, this provision is best understood as a “pseudo-emergency power,” insofar as it grants extraordinary discretion to the executive branch to address an immediate threat to the country. Under Section 362,

Whenever the Surgeon General determines that by reason of the existence of any communicable disease in a foreign country there is serious danger of the introduction of such disease into the United States, and that this danger is so increased by the introduction of persons or property from such country that a suspension of the right to introduce such persons and property is required in the

³² *Centers for Disease Control Order Suspending Introduction of Persons from a Country Where a Communicable Disease Exists*, 85 Fed. Reg 16,567 (Mar. 24, 2020).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ See Dara Lind, *Leaked Border Patrol Memo Tells Agents to Send Migrants Back Immediately—Ignoring Asylum Law*, PROPUBLICA (Apr. 2, 2020, 6:30 PM), <https://perma.cc/4EYW-KBGR>.

interest of the public health, the Surgeon General, in accordance with regulations approved by the President, shall have the power to prohibit, in whole or in part, the introduction of persons and property from such countries or places as he shall designate in order to avert such danger, and for such period of time as he may deem necessary for such purpose.³⁷

The powers conferred by this provision have been delegated to HHS and assigned to the CDC Director.³⁸

The language of Section 362 suggests that it is meant to be used when a disease is present in another country, but not (or at least not significantly) in the United States; restriction on entry would thus “avert” the potential “introduction of such disease.” That was manifestly not the case on March 20, the effective date of the CDC order. At the time, there were 164 reported cases of COVID-19 in Mexico and 1,087 in Canada, compared with 19,551 cases in the United States.³⁹ Public health officials have urged the administration to reverse the order, arguing that asylum seekers can be admitted safely into the country.⁴⁰

It appears that the president is using Section 362 opportunistically to advance a policy goal he has pursued since long before the COVID-19 pandemic: the dismantling of asylum protections. In November 2018, the president issued a proclamation,⁴¹ and the Departments of Justice and Homeland Security issued a joint interim final rule,⁴² intended to prohibit those who enter the country unlawfully from seeking asylum. A U.S. district court enjoined the policy as a violation of the INA,⁴³ and the U.S. Court of Appeals for the Ninth Circuit upheld the injunction.⁴⁴ In January 2019, the administration unveiled the so-called “Migrant Protection Protocols,”⁴⁵ under which asylum-seekers who arrive at the southern border are required to return to Mexico pending a determination of their asylum claim. Once again, a U.S. district court preliminarily enjoined the policy,⁴⁶ and again the Ninth Circuit upheld the injunction⁴⁷ (although the Supreme Court subsequently issued a stay, allowing the policy to remain in place while the challenge wends its way through the courts).⁴⁸

³⁷ 42 U.S.C. § 264 (2018).

³⁸ See 31 Fed. Reg. 8855, 80 Stat. 1610 (June 25, 1966) (delegating functions of the Surgeon General to the Secretary of the Department of Health, Education, and Welfare); 20 U.S.C. § 3508(b) (2018) (designating HHS as the successor to the Department of Health, Education, and Welfare).

³⁹ Statistics for reported cases of COVID-19 in each country over time are available at WORLDMETER: CORONAVIRUS, <https://perma.cc/PQ9S-8P6L>.

⁴⁰ *Public Health Experts Urge U.S. Officials to Withdraw Order Enabling Mass Expulsion of Asylum Seekers*, RELIEFWEB (May 19, 2020), <https://perma.cc/85HG-4WR4>.

⁴¹ See Proclamation No. 9822, 83 Fed. Reg. 57,661 (Nov. 9, 2018).

⁴² See *Interim Final Rule: Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims*, 83 Fed. Reg. 55,934 (Nov. 9, 2018) (codified at 8 C.F.R. §§ 208, 1003 & 1208).

⁴³ See *East Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d 1094 (N.D. Cal. 2018).

⁴⁴ See *East Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242 (9th Cir. 2020).

⁴⁵ *Migrant Protection Protocols*, DEP'T OF HOMELAND SECURITY (Jan. 24, 2019), <https://perma.cc/MX28-SM76>.

⁴⁶ See *Innovation Law Lab v. Nielsen*, 366 F. Supp. 3d 1110 (N.D. Cal. 2019).

⁴⁷ See *Innovation Law Lab v. Wolf*, 951 F.3d 1073 (9th Cir. 2020).

⁴⁸ *Wolf v. Innovation Law Lab*, 140 S. Ct. 1564 (2020).

Despite these indications that the administration is misusing Section 362 to achieve a goal unrelated to public health, establishing a violation of that provision would be difficult. The statute gives the CDC Director complete discretion to determine when a danger of introduction into the U.S. exists. Moreover, although the word “introduction” suggests that the provision would not apply when the disease is already widespread within the United States, regulations issued under Section 362 interpret it to permit the suspension of entry from other countries “even if the communicable disease has already been introduced, transmitted, or is spreading within the United States,”⁴⁹ and that interpretation would be entitled to deference.

That said, there is a strong argument that the CDC order has been applied in a manner that violates immigration law. Under the Refugee Act of 1980, which in turn implements obligations under international law, aliens who arrive at the U.S. border without proper documentation are entitled to make a claim of asylum and must be afforded the opportunity to establish a credible fear of prosecution.⁵⁰ The requirement to provide a “credible fear” interview applies to any alien who declares an intent to apply for asylum—not just those who claim they will be tortured. These immigration provisions are more specific than, and were enacted after, Section 362 of the PHS Act, so they should prevail to the extent there is any conflict between the two.

b. DHS Orders

On March 24, the Secretary of Homeland Security published notices in the Federal Register of a partial closure of the borders with Canada and Mexico, effective March 20.⁵¹ While the CDC Director’s order, discussed above, restricted the introduction of aliens, the actions of the DHS Secretary restricted cross-border travel regardless of immigration status. It accomplished this end by suspending normal operations at ports of entry and processing “only those travelers engaged in ‘essential travel,’” defined to include:

- U.S. citizens and lawful permanent residents returning to the United States;
- Individuals traveling for medical purposes;
- Individuals traveling to attend educational institutions;
- Individuals traveling to work in the United States (*e.g.*, individuals working in agriculture who must travel between the U.S. and Canada for their jobs);
- Individuals traveling for emergency response and public health purposes;
- Individuals engaged in lawful cross-border trade (*e.g.*, truck drivers moving cargo between the United States and Canada);
- Individuals engaged in official government or diplomatic travel;
- Members of the U.S. Armed Forces and their spouses and children; and
- Other individuals engaged in military-related travel or operations.

⁴⁹ 42 C.F.R. § 71.40(b)(1) (2020).

⁵⁰ See Refugee Act of 1980, 8 U.S.C. §§ 1158(a)(1), 1225(b)(1)(A)(ii) (2018).

⁵¹ See *Customs and Border Protection Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service Between the United States and Canada*, 85 Fed. Reg. 16,548 (Mar. 20, 2020); *Customs and Border Protection Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service Between the United States and Mexico*, 85 Fed. Reg. 16,547 (Mar. 20, 2020).

The restrictions were made effective for one month, but have since been renewed and will likely stay in place for the foreseeable future.⁵²

The DHS notices cite two statutory provisions as legal authority for the restrictions. The first of these, 19 U.S.C. §1318(b)(1)(C), is expressly an emergency power; it allows the Secretary of Homeland Security (exercising authority transferred from the Secretary of the Treasury), “when necessary to respond to a national emergency . . . or to a specific threat to human life or national interests,” to temporarily close, relocate, or modify the services provided by any customs office or port of entry, or (under subparagraph (C)) “[t]ake any other action that may be necessary to respond directly to the national emergency or specific threat.” The second provision, 19 U.S.C. §1318(b)(2), is an emergency power in all but name, authorizing the Commissioner of U.S. Customs and Border Protection “when necessary to respond to a specific threat to human life or national interests . . . to close temporarily any Customs office or port of entry or take any other lesser action that may be necessary to respond to the specific threat.”

Once again, the administration’s use of these authorities is unprecedented. Past invocations have been extremely short-term and, for the most part, limited. The only full closure of the border occurred in the aftermath of President Kennedy’s assassination, and it lasted for less than a day. President Ronald Reagan closed nine ports of entry for a few days in 1985 after a Drug Enforcement Administration agent was abducted in Mexico. Other instances have generally involved heightened security procedures or more extensive inspections at certain ports of entry.⁵³ The Trump administration’s actions, by contrast, go beyond a brief travel restriction and effectively suspend not only cross-border travel, but also immigration itself at the borders.

The administration’s use of the port-closure authorities raises legal concerns for the same reason as its use of INA Section 212(f). In both cases, the authority grants the president the discretion to make exceptions to a statutory status quo. In both cases, however, the “exceptions” the president has put in place are so broad and so temporally indefinite that they effectively rewrite the underlying statutory framework, creating an entirely new immigration system that bears little resemblance to the one Congress carefully crafted in the INA.⁵⁴

Nonetheless, the language of the emergency powers in question makes it difficult to discern the legal limits. Although actions taken under Sections 1318 (b)(1)(C) and (b)(2) must be “temporary,” there is no indication of how long they may last. The ability to close “any Customs office or port of entry” could be read to authorize the closure of *all* Customs offices or ports of entry. And the catch-all language, allowing the Secretary of Homeland Security to “[t]ake any other action that may be necessary to respond directly to the national emergency or specific threat,” leaves courts with little textual basis to anchor a conclusion that the Secretary has overreached.

⁵² See Julia Thompson, *US Extends Border Closure Agreements with Canada, Mexico into July*, USA TODAY (June 16, 2020, 1:31 PM), <https://perma.cc/K8ER-7MJU>.

⁵³ See generally BEN HARRINGTON, CONG. RESEARCH SERVICE LSB10283, CAN THE PRESIDENT CLOSE THE BORDER? RELEVANT LAWS AND CONSIDERATIONS (2019), <https://perma.cc/NH2P-T2FH>.

⁵⁴ In addition, to the extent that the administration was relying on the declaration of a national emergency to trigger 19 U.S.C. § 1318 (b)(1)(C), the president violated the National Emergencies Act by failing to issue an executive order invoking that authority. See 50 U.S.C. § 1631 (2018).

3. Quarantines

The president's January 31 proclamation barring people who had been in China within the preceding 14 days from entering the United States did not apply to U.S. citizens, and it exempted several categories of foreign nationals. Those people, however, were not free to enter the country and go about their business. Instead, the proclamation directed the Secretary of Homeland Security to "take all necessary and appropriate steps to regulate the travel of persons and aircraft to the United States to facilitate the orderly medical screening and, where appropriate, quarantine of persons who enter the United States and who may have been exposed to the virus."⁵⁵

Pursuant to this directive, DHS routed all flights from China through a select list of U.S. airports that were set up and staffed to screen arriving passengers. Passengers who showed symptoms of COVID-19 were to be detained and subjected to a mandatory 14-day quarantine imposed by the CDC. Passengers who had spent time in Hubei Province during the preceding two weeks were also to be placed under quarantine orders, regardless of whether they showed any symptoms.⁵⁶ All other passengers were to be placed in "monitored self-quarantine": they would be required to stay at home for 14 days, during which time they would be monitored by local health departments.⁵⁷

The quarantines went into effect immediately. On January 31, 195 Americans who had been evacuated from Wuhan were taken to the March Air Reserve Base in Riverside County, California, and held there for 14 days. By February 10, more than 800 Americans were being held in quarantine at six military bases across the country.⁵⁸ As the prohibition on entry was expanded to include other countries, so too were the re-routing of aircraft to a list of designated airports; the screening of passengers to determine if any were subject to mandatory quarantine; and the requirement that non-symptomatic passengers self-quarantine at home.

Mandatory quarantines also have been imposed on Americans traveling on cruise ships where some passengers were known to be infected. On February 16, 328 Americans were evacuated from the *Diamond Princess*, which had been held off the coast of Japan for nearly two weeks; all were kept in quarantine for 14 days at either Travis Air Force Base in California or Joint Base San Antonio in Texas.⁵⁹ More controversially, 3,533 passengers on the *Grand Princess* were subject to a *de facto* quarantine when the Trump administration refused to allow the ship to dock in its home port of San Francisco for several days.⁶⁰ Public health officials warned that forcing the passengers to stay aboard the ship in close quarters with one another, rather than bringing them

⁵⁵ Proclamation No. 9984, *supra* note 12.

⁵⁶ See DHS Issues Supplemental Instructions for Inbound Flights with Individuals Who Have Been in China, DEPT OF HOMELAND SECURITY (Feb. 2, 2020), <https://perma.cc/JRN6-36ZF>.

⁵⁷ See Alex Azar, Sec'y, Dep't of Health & Human Servs., et al., Press Briefing by Members of the President's Coronavirus Task Force (Jan. 31, 2020, 3:42 PM), <https://perma.cc/N6C9-MET3>.

⁵⁸ See Katy Steinmetz, *The U.S. Government Is Quarantining More Than 800 Americans. Here's Why That Very Rarely Happens*, TIME (Feb. 10, 2020, 12:51 PM), <https://perma.cc/VN4Z-R3CG>.

⁵⁹ See Rebecca Falconer, *Diamond Princess Cruise Ship Evacuees Go into U.S. Quarantine*, AXIOS (Feb. 18, 2020), <https://perma.cc/44MJ-P6Y7>.

⁶⁰ Bill Chappell & Vanessa Romo, *Coronavirus: Grand Princess Cruise Ship Docks Off California Coast*, NPR (Mar. 9, 2020, 9:54 AM), <https://perma.cc/YP2R-LA9Y>.

ashore to be quarantined in appropriate facilities, would increase rather than limit transmission of the disease. President Trump nonetheless resisted their advice for several days, on the ground that bringing sick passengers on shore would cause a bump in the number of known U.S. cases. "I like the numbers being where they are," he said. "I don't need to have the numbers double because of one ship that wasn't our fault."⁶¹

The administration's extensive use of quarantines was a radical departure from past practice. Indeed, before the detention of 195 passengers on January 31, the PHSA's quarantine authority had been used only once, when a woman who traveled to the U.S. from Sweden in 1963 was detained on suspicion that she could be carrying smallpox.⁶²

There are several possible explanations for the limited use of federal quarantine authority in the past. For one thing, public health is primarily an area of state and local, not federal, responsibility, and every state has the ability to order quarantines under its own laws. But there are also serious questions about the effectiveness of quarantines in managing highly contagious diseases. Most experts believe that quarantines can at best delay the spread of such illnesses.⁶³

Of course, delay tactics could in theory have bought the administration time to prepare for the pandemic's inevitable arrival. Instead, however, the president appeared to believe that travel bans and quarantines would succeed at keeping the virus out of the country.⁶⁴ Not until COVID-19 had a significant foothold in the United States did the administration announce that it would shift from a "containment" strategy—trying to limit the disease's spread—to a "mitigation" one—trying to ensure sufficient availability of resources for treatment.⁶⁵

⁶¹ Philip Bump, *Which Is Trump More Worried About: Coronavirus Numbers or Coronavirus Patients?*, WASH. POST (Mar. 7, 2020), <https://perma.cc/8VUP-BSE3>.

⁶² See Amy Taxin, *Public Health Experts Urge U.S. Officials to Withdraw Order Enabling Mass Expulsion of Asylum Seeker*, ABC NEWS (Jan. 31, 2020, 10:53 PM), <https://perma.cc/K2U7-PHV8>. It is often reported that Andrew Speaker, who had a rare form of drug-resistant tuberculosis, was subjected to a federal quarantine in 2007 when he ignored a CDC order not to fly, but this was technically an instance of "isolation" (the detention of already-symptomatic individuals) rather than "quarantine" (the detention of people believed to be infected but not yet symptomatic). See Wendy Parmet, *Legal Power and Legal Rights—Isolation and Quarantine in the Case of Drug-Resistant Tuberculosis*, 357 NEW ENG. J. MED. 433, 434 (2007), <https://perma.cc/LZ9J-3DYF>.

⁶³ See, e.g., Shannon Firth, *Travel Bans Can't Stop Coronavirus, Public Health Experts Tell Congress*, MEDPAGE TODAY (Feb. 7, 2020), <https://perma.cc/K6DF-UQVP>; Adam Rogers, *Travel Bans and Quarantines Won't Stop Coronavirus*, WIRED (Feb. 6, 2020, 7:00 AM), <https://perma.cc/L423-NX8E>; Wendy K. Mariner, *Quarantine for Coronavirus? Let's Make That Unnecessary*, STAT BLOG (Feb. 28, 2020), <https://perma.cc/AG37-ZSVS>.

⁶⁴ On March 30, President Trump stated, "I stopped some very, very infected, very, very sick people, thousands coming in from China long earlier than anybody thought, including the experts. Nobody thought we should do it except me. And I stopped everybody. We stopped it cold." Hope Yen & Calvin Woodward, *Fact Check: Some Days Trump Is a "Wartime President." Others, He's a Federal "Backup."* CHI. TRIB. (Apr. 4, 2020, 6:57 PM), <https://perma.cc/B5YP-ANQZ>.

⁶⁵ Administration officials announced a shift to a mitigation strategy on March 8. See Rebecca Klar, *Administration Officials Seek to Offer Consistent Message Amid Shifting Coronavirus Situation*, THE HILL (Mar. 8, 2020, 1:01 PM), <https://perma.cc/2U6Q-28KP>. By that time, there were 541 known cases of COVID-19 in the United States, see *COVID-19 Coronavirus Pandemic: United States*, WORLDOMETER (Jul. 21, 2020, 1:05 PM), <https://perma.cc/VZN3-ZBRX>, and given the shortage of testing kits, it was apparent that the number of actual cases was likely much higher.

All the same, there is no question that the federal government's legal authority to quarantine individuals arriving in the U.S. from other countries is an extremely broad one. Section 361 of the PHS Act gives the Secretary the authority to "make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions."⁶⁶ It specifies that such regulations may "provide for the apprehension, detention, examination, or conditional release of individuals."⁶⁷ Regulations enacted pursuant to this authority allow government officials to detain aircraft or other vessels arriving from outside the United States, conduct non-invasive screenings of passengers, and impose a quarantine if they have "reason to believe that any arriving person is infected with or has been exposed to" a communicable disease.⁶⁸

The legal authority for quarantining the passengers on the *Grand Princess* is somewhat murkier. The ship was arriving from Hawaii, not from another country. The statutory authority to quarantine individuals traveling between states is narrower than the foreign quarantine authority; it is limited to individuals reasonably believed to be infected with a communicable disease (mere exposure is insufficient).⁶⁹ It is unclear from public reports, however, whether the passengers were held on board the ship pursuant to a federal quarantine or the exercise of other legal authorities to prevent the docking of the ship. And while all of the American passengers were quarantined after disembarking, they had by then spent several days confined in close quarters with multiple COVID-19 carriers. Rightly or wrongly, the government would likely rely on this fact to argue that they were "reasonably believed" to be infected.

B. Domestic Measures Under Emergency and Pseudo-Emergency Powers

1. Empty Threats

Several factors might have led one to predict that President Trump would respond to COVID-19 with a dramatic and aggressive use of emergency powers. He has demonstrated an inflated conception of the powers of the president, and he does not hide his admiration for authoritarian rulers and the powers they possess. Emergency authorities enhance presidential power in a way that would seemingly appeal to him, regardless of any specific ends they allowed him to accomplish. He has already shown his affinity for the genre, having declared ten national emergencies in less than three and a half years.⁷⁰

When it comes to the presence of the pandemic inside the United States borders, however, the president has faced a conundrum. Even with the best-planned, most flawlessly executed federal response, a pandemic inevitably will cause harm to both the public health and the economy. And

⁶⁶ 42 U.S.C. § 264(a) (2018).

⁶⁷ 42 U.S.C. § 264(b) (2018).

⁶⁸ See 42 C.F.R. §§ 71.32 (2019).

⁶⁹ See 42 U.S.C. § 264(d)(1) (2018).

⁷⁰ See *Declared National Emergencies Under the National Emergencies Act*, BRENNAN CTR. FOR JUSTICE (June 15, 2020), <https://perma.cc/G4V7-PVSH>. By way of comparison, Presidents Barack Obama and George W. Bush declared 12 and 15 national emergencies, respectively, over the course of the two terms that each served. See *id.*

the administration's early failures in procuring an effective, widely available test (discussed below in Part II.B.2.a) ruled out any best-case scenario. If the president were to impose aggressive emergency measures domestically, he would be forced to claim ownership of the pandemic's consequences, rather than being able to pin them on alleged mismanagement by the states.

The tug-of-war between the inclination to assert sweeping power and the desire to avoid responsibility is evident in the changing ways President Trump has described his own role. He has referred to himself as a "wartime president," suggesting that he is at the helm of the nation's response.⁷¹ He has gone so far as to claim that "[w]hen somebody is the president of the United States, the authority is total."⁷² At the same time, he has asserted that the federal government "is merely a backup for state governments,"⁷³ and he has often referred to the core components of an effective COVID-19 response—such as providing testing and acquiring sufficient personal protective equipment (PPE)—as state responsibilities.⁷⁴

On several occasions, the president has threatened to use sweeping powers that he does not have, only to back down and hand the reins of the domestic COVID-19 response back to the states. On March 28, President Trump told reporters outside the White House, "We might not have to do it but there's a possibility that sometime today we'll do a quarantine—short-term, two weeks for New York, probably New Jersey, certain parts of Connecticut."⁷⁵ It was unclear whether he was referring to an actual quarantine, whereby people in those states would be required to stay in their homes or be placed in federal facilities for two weeks, or a travel ban prohibiting people from traveling into or out of those states.

The president clearly lacked legal authority for the first move. While the PHSA gives the federal government broad authority to examine and detain people coming into the United States from overseas, it limits the federal government's domestic quarantine power as follows:

Regulations prescribed under this section may provide for the apprehension and examination of any individual reasonably believed to be infected with a communicable disease in a qualifying stage and (A) to be moving or about to move from a State to another State; or (B) to be a probable source of infection to individuals who, while infected with such disease in a qualifying stage, will be moving from a State to another State. Such regulations may provide that if upon examination any such individual is found to be infected, he may be detained for such time and in such manner as may be reasonably necessary.⁷⁶

⁷¹ Caitlin Oprysko & Susannah Luthi, *Trump Labels Himself "A Wartime President" Combating Coronavirus*, POLITICO (Mar. 18, 2020, 6:10 AM), <https://perma.cc/J74C-QNZ9>.

⁷² *Donald Trump Coronavirus Press Conference Transcript April 13*, REV BLOG (Apr. 14, 2020), <https://perma.cc/23V5-W699>.

⁷³ Yen & Woodward, *supra* note 64.

⁷⁴ *See, e.g., Trump: U.S. States, Not Federal Government, Must Improve Testing*, REUTERS (Apr. 17, 2020, 7:39 PM), <https://perma.cc/W9G9-SFBT>; Morgan Chalfant, *Trump Lashes Out at Cuomo Over Remarks on Presidential Authority*, THE HILL (Apr. 14, 2020, 10:49 AM), <https://perma.cc/PGK3-YKKL>.

⁷⁵ Noah Higgins-Dunn, *Trump Considers "Enforceable" Quarantine In New York, New Jersey and Parts of Connecticut*, CNBC (Mar. 28, 2020, 10:15 AM) <https://perma.cc/AHX3-H2MK>.

⁷⁶ 42 U.S.C. § 264(d) (2018).

Under this provision, there is no situation in which the federal government could impose a blanket quarantine order on an entire state. Even if it could somehow claim a reasonable belief that every person within that state was infected, it could not order a quarantine until a medical examination confirmed that belief.

As for an interstate travel ban, Section 361 does allow the Secretary of HHS to “make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases . . . from one State or possession into any other State or possession.”⁷⁷ However, the subsequent sentence suggests that Congress had more limited measures in mind than a total travel ban: “For purposes of carrying out and enforcing such regulations, the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary.”⁷⁸ The regulations that have been promulgated mirror this language;⁷⁹ none explicitly authorizes the federal government to seal interstate borders.

Construing the law and its implementing regulations to permit the closure of interstate borders would raise significant constitutional concerns. The Supreme Court has recognized a constitutional right to interstate travel. It has located aspects of that right within the Privileges and Immunities Clause,⁸⁰ which requires states to give equal rights to citizens of other states, and the Dormant Commerce Clause,⁸¹ under which states cannot take actions that interfere significantly with the federal prerogative of interstate commerce. The legal rationale in those decisions presumably would not limit a *federal* interstate travel ban. In other cases, however, the Court has relied on the Due Process Clause⁸² or the Equal Protection Clause⁸³ to analyze state action that burdens or discriminates against those traveling between states. That analysis would apply equally to federal action, and would require the government to show not only that it had a compelling interest, but that a complete ban on interstate travel was the least restrictive means of furthering it.

The president’s threat to quarantine three states came on a Saturday afternoon; by that evening, he had walked the proposal back. In a tweet that made no mention of any legal concerns, he stated, “On the recommendation of the White House CoronaVirus Task Force, and upon consultation with the Governor’s [sic] of New York, New Jersey and Connecticut, I have asked the @CDCgov to issue a strong Travel Advisory, to be administered by the Governors, in consultation with the . . . Federal Government. A quarantine will not be necessary. Thank you!”⁸⁴ The CDC promptly

⁷⁷ 42 U.S.C. § 264(a) (2018).

⁷⁸ *Id.*

⁷⁹ 42 C.F.R. § 70.2.

⁸⁰ *See Saenz v. Roe*, 526 U.S. 489, 501 (1999).

⁸¹ *See Edwards v. California*, 314 U.S. 160, 172 (1941).

⁸² *See Shapiro v. Thompson*, 394 U.S. 618, 642 (1969).

⁸³ *See Zobel v. Williams*, 457 U.S. 55, 60 n.6 (1982).

⁸⁴ Katy O’Donnell, *Trump Backs Off Quarantine of New York, Surrounding Area*, POLITICO (Mar. 28, 2020, 9:40 PM), <https://perma.cc/98HG-Z3SB>.

issued a non-binding travel advisory, urging residents of New York, New Jersey, and Connecticut “to refrain from non-essential domestic travel for 14 days.”⁸⁵

Oddly, this threat to seal off three states occurred four days *after* President Trump said that he wanted the nation “opened up and just raring to go by Easter,” which fell on April 12.⁸⁶ Although he subsequently postponed the target date, his message from that point on (the proposed tri-state quarantine notwithstanding) was that the states should be preparing to lift their shut-down orders. These orders varied from state to state. At that time, most involved the closure of schools and non-essential businesses, as well as a prohibition on public gatherings.

When observers pointed out that state and local officials are responsible for deciding when to lift their own orders, President Trump responded on Twitter:

For the purpose of creating conflict and confusion, some in the Fake News Media are saying that it is the Governors [sic] decision to open up the states, not that of the President of the United States & the Federal Government. Let it be fully understood that this is incorrect. . . .

. . . [I]t is the decision of the President, and for many good reasons. With that being said, the Administration and I are working closely with the Governors, and this will continue. A decision by me, in conjunction with the Governors and input from others, will be made shortly!⁸⁷

At a press conference that evening, the president reiterated that “I have the ultimate authority” to lift the state-imposed restrictions. He followed up with his now-infamous claim that “[w]hen somebody is the president of the United States, the authority is total. And that’s the way it has to be.”⁸⁸ Instead of correcting the president, Vice President Pence echoed him: “Make no mistake about it, in the long history of this country, the authority of the president of the United States during national emergencies is unquestionably plenary.”⁸⁹

By the following day, the president had changed his message and his planned course of action. On April 14, he said that he would “authorize,” not order, the states to re-open, and that each state or locality would decide when that was appropriate: “The governors are going to be opening up their states. They’re going to declare when. They’re going to know when.”⁹⁰ He then suggested that the federal government, rather than forcing states to lift their orders as he had threatened the day before, might actually force some stays to keep their orders in place: “There’s some that want to open up almost now. Now if we disagree with it, we’re not going to let them open. . . . If some

⁸⁵ Joseph Spector, *CDC Issues “Domestic Travel Advisory” for NY, NJ and Connecticut. Here’s What It Means*, USA TODAY (Mar. 29, 2020, 7:58 AM), <https://perma.cc/LMU4-AJB8>.

⁸⁶ Kevin Liptak et al., *Trump Says He Wants the Country “Opened Up and Just Raring to Go by Easter” Despite Health Experts’ Warnings*, CNN (Mar. 24, 2020, 11:47 PM), <https://perma.cc/UBE4-2QKB>.

⁸⁷ Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 13, 2020, 10:53 AM), <https://perma.cc/2K2G-TZBG>.

⁸⁸ *Donald Trump Coronavirus Press Conference Transcript April 13*, *supra* note 72.

⁸⁹ *Id.*

⁹⁰ *Donald Trump Coronavirus Press Briefing Transcript April 14: Trump Halts WHO Funding*, REV BLOG (Apr. 14, 2020), <https://perma.cc/N4TH-PZFS>.

governor has a lot of problems, a lot of cases, a lot of death, and they want to open early, we're not going to let it happen."⁹¹

To date, the president has not ordered any state either to lift or to keep in place its emergency orders. Instead, the administration issued non-binding guidelines to assist states in deciding when and how to "re-open." When those guidelines were criticized as lacking specifics, President Trump responded, "We want the governors to call those shots."⁹² Nonetheless, he has never retracted his claim that the president has absolute power, not only to require states to lift or maintain their shut-down orders, but to make any and all decisions during emergencies.

That claim is manifestly and dangerously wrong. As noted above, there are no express emergency powers in Article II of the Constitution, and the president's inherent emergency powers are limited even during wartime, when they are at their peak. The fact that the president has declared a "national emergency" does not change the analysis. That phrase, invoked by Vice President Pence as a basis for claiming plenary presidential authority, has no constitutional significance. Rather, it appears in more than 120 statutory provisions that provide the president with specific authorities when he declares a "national emergency." The National Emergencies Act sets forth procedural rules for declaring, renewing, terminating, and reporting on national emergency declarations.

Because Congress has not defined "national emergency," courts have been reluctant to second-guess the president's determination that such an emergency exists;⁹³ in that sense, the authority that Congress delegated is quite broad. However, the *powers* triggered by an emergency declaration are unquestionably limited to the specific authorities Congress has provided, and those limits are enforceable by the courts.⁹⁴ And there are no statutory provisions that enhance whatever authority the president might otherwise have, in the absence of a national emergency declaration, to override state orders of the type at issue here.⁹⁵

Indeed, even Congress would likely face some limits on its ability to override the measures that the states have taken to address COVID-19. The Tenth Amendment reserves to the people and the states any powers not granted to the federal government.⁹⁶ A core state power is the so-called "police power"—the authority to make and enforce laws governing the public health, safety, and welfare.⁹⁷ Accordingly, most aspects of public health are widely considered to fall within state

⁹¹ *Id.*

⁹² Megan Cassella & Brianna Ehley, *Unemployed Workers Face Choice Between Safety and Money as States Reopen*, POLITICO (Apr. 29, 2020, 7:09 PM), <https://perma.cc/6FXE-QP85>.

⁹³ *See, e.g.*, *Beacon Products Corp. v. Reagan*, 633 F. Supp. 1191, 1194-95 (D. Mass. 1986).

⁹⁴ *See, e.g.*, *California v. Trump*, 407 F. Supp. 3d 869, 891-99 (N.D. Cal. 2019) (holding that the Trump administration's diversion of Department of Defense funds to build the border wall exceeded the authority provided by 10 U.S.C. § 2808, which allows the Secretary of Defense to reallocate funds for "military construction projects" that are necessary to support the armed forces during a declared national emergency).

⁹⁵ *See Guide to Emergency Powers, supra* note 9.

⁹⁶ U.S. CONST. amend. X.

⁹⁷ *See United States v. Morrison*, 529 U.S. 598, 618 n.8 (2000) ("[T]he Constitution created a Federal Government of limited powers, while reserving a generalized police power to the States.")

rather than federal jurisdiction.⁹⁸ The same is true for the regulation of business and travel within state borders.

Of course, if the federal government is acting pursuant to one of its own enumerated powers, it will prevail in any conflict with the state's police power, by virtue of the Supremacy Clause.⁹⁹ The broadest and most relevant of the federal government's powers is arguably contained in the Commerce Clause, which empowers Congress to pass laws regulating commerce between the states and with other nations.¹⁰⁰ Since the 1930s, courts have interpreted this clause extremely broadly to authorize Congress to "regulate purely local activities" as long as they are "part of an economic class of activities that have a substantial effect on interstate commerce."¹⁰¹

Some aspects of the states' shutdown orders—for instance, the temporary closure of non-essential businesses—might well pass that low threshold (although Congress could at most lift the prohibition on these businesses' operation; it could not compel them to operate¹⁰²). But the reach of the Commerce Clause is not infinite. State or local orders closing schools, requiring people to wear face masks in public, imposing a 6-foot social distancing rule, or prohibiting gatherings in public spaces have a more tenuous tie to economic activity and might well be insulated from congressional interference. In any event, the power to regulate interstate commerce belongs to Congress, not the president. Unless or until Congress passes a law giving the president the authority to override aspects of the states' orders—which Congress has not done—he cannot act.

1. The Underused Powers

At the same time that he was imposing immigration bans and threatening to use powers he did not have to override the states' authority, the president was balking at using the emergency powers that are available to help shore up the domestic public health response to COVID-19. The primary such powers are contained in, or flow from, the Public Health Service Act, the Federal Food, Drug, and Cosmetic Act, the Stafford Act, the Social Security Act, the National Emergencies Act, and the Defense Production Act.

a. The Public Health Service Act and Related Laws (the Federal Food, Drug, and Cosmetic Act and the PREP Act)

⁹⁸ See *Responsibilities in a Public Health Emergency*, NAT'L CONF. OF STATE LEGS. (Oct. 29, 2014), <https://perma.cc/F6RG-TNUT> ("The preservation of the public health has historically been the responsibility of state and local governments.").

⁹⁹ See U.S. CONST. art. VI, cl. 2; see also *Hamilton v. Ky. Distilleries Co.*, 351 U.S. 146, 156 (1919) ("That the United States lacks the police power, and that this was reserved to the States by the Tenth Amendment, is true. But it is nonetheless true that when the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a State of its police power.").

¹⁰⁰ See U.S. CONST. art. I, § 8, cl. 3.

¹⁰¹ *Gonzales v. Raich*, 545 U.S. 1, 17 (2005) (internal quotation marks omitted).

¹⁰² See *Nat'l Fed. Indep. Bus. v. Sebelius*, 567 U.S. 519, 555 (2012) (observing that "[t]he Framers gave Congress the power to *regulate* commerce, not to *compel* it") (emphasis in original).

Secretary Azar declared a public health emergency under the PHS Act on January 31, on the heels of a similar declaration by the World Health Organization.¹⁰³ Much like a presidential declaration of national emergency, this declaration gives executive branch officials the *ability* to take a number of steps to address the crisis, but it is not self-executing; the relevant officials must take further action to implement the measures they deem appropriate.

One of the most important emergency powers available during a public health emergency is the ability, as set forth in the Federal Food, Drug, and Cosmetic Act, to speed up the Food and Drug Administration's (FDA) approval of medical tests and treatments. Ordinarily, such approval can take months or longer, as a product undergoes a series of required safety and efficacy review measures. In a public health emergency, however, manufacturers can apply for "emergency use authorizations" (EAUs), which allow them to begin marketing a product before the review process is complete.¹⁰⁴

On January 31, when Secretary Azar declared a public health emergency, the rapid development and widespread distribution of an effective diagnostic test was arguably the most important measure the federal government could have taken to limit the spread of COVID-19. The FDA issued an EAU to the CDC on February 4. By February 8, it was apparent that the CDC's test was badly flawed. Even though multiple hospitals, universities, and companies were eager to develop their own tests, however, it was not until three weeks later that the FDA issued its next EAU (to the New York State Department of Health). A third EAU—the first one issued to a commercial manufacturer—did not come until March 12.¹⁰⁵

A key reason for the delay was the FDA's lack of flexibility when the EAU process itself proved to be a roadblock for research scientists. As the *Washington Post* reported, "the EAU was a bureaucratic puzzle they had never encountered."¹⁰⁶ To comply with FDA regulations, applicants had to spend dozens of hours on paperwork and to submit hard copies of their applications by mail. On February 28, a large group of clinical scientists sent a letter to Congress complaining that the FDA's rules were slowing rather than hastening the development of working tests: "[N]o test manufacturer or clinical laboratory has successfully navigated the EUA process . . . to date."¹⁰⁷

On February 29, the FDA announced a revised policy, allowing laboratories to begin using tests that had shown promise before submitting all the necessary paperwork.¹⁰⁸ But its delay meant

¹⁰³ See *Determination that a Public Health Emergency Exists*, DEP'T OF HEALTH & HUMAN SERVS. (Jan. 31, 2020), <https://perma.cc/BRV4-B8WW>; Press Release, Dr. Tedros Adhanom Ghebreyesus, Director Gen., World Health Organization [WHO], Statement on IHR Emergency Committee on Novel Coronavirus (Jan. 30, 2020), <https://perma.cc/D3ZL-PLF6>.

¹⁰⁴ Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 360bbb-3 (2018).

¹⁰⁵ See Shawn Boburg et al., *Inside the Coronavirus Testing Failure: Alarm and Dismay Among the Scientists Who Sought to Help*, WASH. POST (Apr. 3, 2020), <https://perma.cc/QBG4-Y4QV>; Bob Ortega et al., *How the Government Delayed Coronavirus Testing*, CNN (Apr. 9, 2020, 8:07 PM), <https://perma.cc/RXX6-VB3P>; *Emergency Use Authorizations for Medical Devices*, FDA (last visited June 12, 2020), <https://perma.cc/UTX9-HEZ4>.

¹⁰⁶ See Boburg et al., *supra* note 105.

¹⁰⁷ *Id.*

¹⁰⁸ See Press Release, Center for Devices and Radiological Health, Policy for Coronavirus Disease-2019 Tests During the Public Health Emergency (Revised) (May 2020), <https://perma.cc/7UQK-2K8D>.

that one of the most important emergency authorities available to the administration was effectively unused for several weeks.

Even after test production increased significantly, states' capacity to test for COVID-19 continued (and still continues) to lag far behind the need. This is in part due to a shortage of equipment needed to administer the tests.¹⁰⁹ Such shortages could be addressed through more aggressive deployment of the Defense Production Act (discussed below in Part II.B.2.d.). However, the president has consistently maintained that ensuring sufficient testing capacity is a state rather than a federal responsibility.¹¹⁰

The pressing need for equipment implicates another public health emergency resource: the "strategic national stockpile" (SNS). The stockpile, established under the PHS Act, is a reserve supply of "drugs, vaccines, and other biological products, medical devices, and other supplies in such numbers, types, and amounts . . . to provide for the emergency health security of the United States . . . in the event of a bioterrorist attack or other public health emergency."¹¹¹ Under the law, deployment of stockpile resources to respond to an actual or potential emergency is "at the discretion" of the Secretaries of HHS and FEMA.¹¹²

By most accounts (including an HHS Inspector General report¹¹³ and agency documents provided to Congress¹¹⁴), the distribution of materials from the SNS during the COVID-19 emergency has been both slow and inadequate. Many states experienced delays in obtaining requested items and received only a fraction of what they needed. In the meantime, hospitals in those states were suffering acute shortages of personal protective equipment and ventilators. By early April, 90 percent of the stockpile had been depleted, with the remaining 10 percent held in reserve for federal use, leaving states to compete with each other in the private market for needed supplies.¹¹⁵

Some of these problems were a result of conditions predating the pandemic, and cannot fairly be viewed as a failure by the Trump administration to properly invoke and implement emergency powers. The SNS has long been underfunded and understocked. Much of the PPE in the stockpile was used during the H1N1 outbreak in 2009 and never replenished. Even if it had been well-supplied, public health officials maintain that the stockpile was never intended to furnish adequate

¹⁰⁹ See Kelsy Ketchum & Leo O'Connor, *COVID-19 Testing Problems Started Early, U.S. Still Playing from Behind*, MODERN HEALTHCARE BLOG (May 11, 2020, 2:55 PM), <https://perma.cc/RB75-L2YF>.

¹¹⁰ See, e.g., Amy Goldstein, *Administration Leaves Testing Responsibility to States in Report to Congress*, WASH. POST (May 24, 2020, 10:08 PM), <https://perma.cc/B5K8-LBWR>.

¹¹¹ 42 U.S.C. § 247d-6b(a)(1) (2018).

¹¹² 42 U.S.C. § 247d-6b(a)(3)(G) (2018).

¹¹³ See U.S. DEP'T OF HEALTH & HUMAN SERVS., OFF. OF INSPECTOR GEN., OEI-06-20-00300, HOSPITAL EXPERIENCES RESPONDING TO THE COVID-19 PANDEMIC: RESULTS OF A NATIONAL PULSE SURVEY MARCH 23-27, 2020 (2020), <https://perma.cc/W3DT-B4WB>.

¹¹⁴ See U.S. DEP'T OF HEALTH & HUMAN SERVS., SNS PPE DISTRIBUTION REPORT FOR THE COMM. ON OVERSIGHT AND REFORM, 116TH CONG. (Apr. 6, 2020), <https://perma.cc/K5K3-TT49>; see also Dinah Voyles Pulver & Erin Mansfield, *Rare Look at Stockpile Handouts Shows Which States Got Ventilators, Masks Amid Coronavirus*, USA TODAY (Apr. 10, 2020, 11:23 AM), <https://perma.cc/VUE8-66EA>.

¹¹⁵ See Assoc. Press, *Coronavirus Leaves Federal Stockpile of Protective Equipment Nearly Depleted*, NBC (Apr. 9, 2020, 7:02 AM), <https://perma.cc/8R58-DR7T>.

resources for a major pandemic, but rather to serve as a back-up for the states' own reserves, and/or as a stopgap pending ramped-up production.¹¹⁶

It is clear, however, that there was not a well-coordinated and aggressive effort to ensure that the supplies in the stockpile were quickly distributed to the locations that most needed them. Official records show significant delays in fulfilling requests made by some states (while other states received much quicker responses). Local officials' attempts to communicate with the federal government about access to stockpile supplies were often met with silence. Allocations of PPE were made largely on the basis of the states' populations, rather than the number of COVID-19 cases, resulting in a system of distribution that did not fairly reflect actual needs.¹¹⁷

When questioned about these problems, administration officials insisted that states were responsible for procuring their own equipment. Jared Kushner, the president's son-in-law and the designated head of supply-chain issues, stated, "The notion of the federal stockpile was it's supposed to be our stockpile; it's not supposed to be the state stockpiles that they then use."¹¹⁸ His words were inconsistent with language on the HHS website, which indicated that the stockpile's purpose is to ensure an adequate supply of equipment for states. That language was quickly changed to hew more closely to Kushner's characterization.¹¹⁹

One authority available during public health emergencies that the administration did not hesitate to use was the Public Readiness and Emergency Preparedness (PREP) Act. This law provides broad immunity from liability to entities, including government agencies, that manufacture, distribute, or administer medical tests or treatments to respond to a public health emergency. People harmed by these medical countermeasures are limited to claims based on "willful misconduct."¹²⁰ The HHS Secretary issued a declaration conferring immunity under the PREP Act on February 4—the same day he issued an Emergency Use Authorization to the CDC to develop a test for COVID-19.¹²¹

b. The Stafford Act and the Social Security Act

Another emergency authority that lay dormant for several weeks was Section 1135 of the Social Security Act. This provision allows the Secretary of HHS to waive certain Medicare,

¹¹⁶ See Sarah Fitzpatrick, *Why the Strategic National Stockpile Isn't Meant to Solve a Crisis like Coronavirus*, NBC (Mar. 28, 2020), <https://perma.cc/KS8Q-P2AL>.

¹¹⁷ See Press Release, H. Comm. on Oversight and Reform (Apr. 8, 2020), <https://perma.cc/2NS3-8SR8>; SNS PPE DISTRIBUTION REPORT, *supra* note 114, at 89; Lydia DePillis et al., *Here's Why Florida Got All the Emergency Medical Supplies It Requested While Other States Did Not*, PROPUBLICA (Mar. 10, 2020, 10:36 AM), <https://perma.cc/HF76-X6K2>; Sara Murray & Scott Glover, *Nation's Stockpile Proves to be No Match for a Pandemic*, CNN (May 6, 2020, 7:37 PM), <https://perma.cc/XE4L-YMEB>.

¹¹⁸ Assoc. Press, *Trump Administration Tries to Narrow Stockpile's Role for States*, L.A. TIMES (Apr. 3, 2020), <https://perma.cc/DB74-VCEJ>.

¹¹⁹ See *id.*

¹²⁰ 42 U.S.C. § 247d-6d (2018).

¹²¹ See *Dep't of Health and Human Services Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19*, 85 Fed. Reg. 15,198 (Feb. 4, 2020).

Medicaid, and Children's Health Insurance Program requirements in order to facilitate the provision of health care services. For instance, the Secretary can waive conditions of participation or other certification requirements, preapproval requirements, and requirements that physicians and other health care professionals be licensed in the state in which they are providing services. The Secretary may invoke Section 1135, however, only if two states of emergency are in effect: (1) a public health emergency declared by the Secretary under the PHS Act, and (2) either a Stafford Act emergency or a national emergency declared by the president.¹²²

As COVID-19 spread through the country and states began to take unprecedented emergency action, the president's failure to declare a national emergency became conspicuous. (The failure to declare a Stafford Act emergency was more explicable—or at least seemed so—because state governors generally must request such a declaration.) A declaration of national emergency would not only unlock Section 1135; it would also carry great symbolic significance, both marking the seriousness of the crisis and conveying a presidential commitment to tackling it.

During this period, however, President Trump appeared intent on downplaying the significance of the pandemic.¹²³ Reports emerged that the president was reluctant to declare a national emergency because it would contradict his message that matters were under control and that the coronavirus was no worse than the seasonal flu. Acknowledging the gravity of the crisis might have led to even greater turmoil in the stock markets, which in turn could have affected the president's reelection prospects.¹²⁴

It was not until March 13 that the president bowed to public pressure and declared a national emergency.¹²⁵ When he finally acted, he did so with characteristic disregard for the boundaries of the law. While the national emergency declaration was well within his discretion, he simultaneously declared a "nationwide" Stafford Act emergency, even though no state governor had requested one.¹²⁶ In doing so, he invoked a provision of the law that allows the president to declare an emergency without a state request if "the emergency involves a subject area for which, under the Constitution or laws of the United States, the United States exercises exclusive or preeminent responsibility and authority."¹²⁷ As discussed above, public health is an area in which state governments—not the federal government—have primary jurisdiction.

In practice, this overreach probably changed little. State governors clearly could have—and, eventually, likely would have—requested state-by-state declarations, and the legal standard for issuing them was clearly met. Nonetheless, the assertion that public health is an area of "exclusive

¹²² See 42 U.S.C. § 1320b-5 (2018 & Supp. II 2020).

¹²³ For instance, on February 24, 2020, President Trump tweeted, "The Coronavirus is very much under control in the USA. We are in contact with everyone and all relevant countries. CDC & World Health have been working hard and very smart. Stock Market starting to look very good to me!" Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 24, 2020, 4:42 PM), <https://perma.cc/U6QG-VV7D>.

¹²⁴ See Anita Kumar, *Trump Fears Emergency Declaration Would Contradict Coronavirus Message*, POLITICO (Mar. 11, 2020, 6:46 PM), <https://perma.cc/9JY2-D567>.

¹²⁵ See Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 13, 2020).

¹²⁶ See Letter from Pres. Donald J. Trump to Chad F. Wolf, Acting Sec'y, Dep't of Homeland Security, Steven T. Mnuchin, Sec'y, Dep't of the Treasury, Alex M. Azar II, Sec'y, Dep't of Health & Human Servs., and Pete T. Gaynor, Adm'r, Fed. Emergency Mgmt. Agency (Mar. 13, 2020), <https://perma.cc/WB2X-SFND>.

¹²⁷ 42 U.S.C. § 5191(b) (2018).

or preeminent” federal authority must be viewed in light of President Trump’s claims that the president’s authority in an emergency is “total,” as well as similar claims that he has made in other contexts, such as his notorious statement that Article II of the Constitution allows him to do “whatever I want to do.”¹²⁸ Against this backdrop, it is difficult to view any instance in which President Trump lays claim to power he does not have as harmless error.

By virtue of the national emergency and Stafford Act emergency declarations (either of which would have been sufficient for the purpose), the Secretary of HHS was able to invoke Section 1135, and he thereafter issued a series of waivers under that authority. Among other things, the Secretary eased constraints on the practice of telemedicine; waived provisions that would otherwise have limited the number of beds in critical-access hospitals to 25, and the length of stay to 96 hours; allowed admission to nursing homes without a prior three-day hospital stay; made it easier for hospitals to hire additional doctors, acquire new office space, and move patients within their facilities; and temporarily suspended Medicare eligibility screening requirements, including fingerprinting and in-person site visits.¹²⁹ Somewhat more controversially, the Centers for Medicare and Medicaid Services suspended certain enforcement activities and issued blanket waivers of sanctions under the Stark Law, which prohibits doctors from referring patients for Medicare-covered services to an entity or person with whom the doctor has a financial relationship.¹³⁰ In addition, under the Stafford Act declaration (but not the national emergency declaration), the federal government assumed 75% of the costs incurred by states in providing a wide range of emergency-response services.¹³¹

At the same time he declared a nationwide Stafford Act emergency, the president invited states to request “major disaster” declarations. This, too, was possibly an overreach. Under the Stafford Act, a declaration of a major disaster (which requires a gubernatorial request in all instances) triggers greater authorities and resources than an emergency declaration. The definition of “major disaster,” however, is significantly narrower. An “emergency” is defined as “any occasion or instance for which, in the determination of the President, Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe.”¹³² A “major disaster” is limited to “any natural catastrophe (including any hurricane, tornado, storm, high water, winddriven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought), or, regardless of cause, any fire, flood, or explosion.”¹³³ On its face, it is far from clear that this language would encompass a pandemic. No previous president has ever declared a “major disaster” to respond to a public health crisis.

¹²⁸ Michael Brice-Saddler, *While Bemoaning Mueller Probe, Trump Falsely Says the Constitution Gives Him “The Right to Do Whatever I Want,”* WASH. POST (July 23, 2019), <https://perma.cc/7Q53-5LYU>.

¹²⁹ See *COVID-19 Emergency Declaration Blanket Waivers for Health Care Providers*, CTR. FOR MEDICARE & MEDICAID SERV. (June 5, 2020), <https://perma.cc/9CZ5-UHAZ>.

¹³⁰ See *id.*

¹³¹ See ELIZABETH M. WEBSTER, WILLIAM L. PAINTER & ERICA A. LEE, CONG. RESEARCH SERV. R46326, STAFFORD ACT DECLARATIONS FOR COVID-19 FAQ (2020).

¹³² 42 U.S.C. § 5122(1) (2018).

¹³³ 42 U.S.C. § 5122(2) (2018).

All 50 states, the District of Columbia, and four U.S. territories took the president up on his invitation to request major disaster declarations.¹³⁴ The resulting declarations provided access to a much larger pot of federal money (\$41.6 billion) than the emergency declarations (\$600 million).¹³⁵ They also entitled states that had deployed National Guard units to a 100% reimbursement of the deployment cost.¹³⁶ In theory, they could have allowed the federal government to provide many different types of assistance to individuals affected by the pandemic, including unemployment assistance, housing assistance, and legal services. However, the only form of individual assistance the administration has provided pursuant to the major disaster declarations is crisis counseling, which has been made available in ten states.¹³⁷

c. National Emergency Powers

As noted above, the president resisted declaring a national emergency for several weeks. Since declaring one on March 13, he has invoked least three of the authorities that become available in a national emergency.

First, in the proclamation declaring a national emergency, he invoked the waiver provisions of Section 1135 of the Social Security Act, discussed above in Part II.B.2.b. Those provisions are triggered by a combination of a public health emergency declaration and either a national emergency declaration or a Stafford Act emergency declaration. Because he declared a Stafford Act emergency simultaneously, the national emergency declaration was not actually necessary to invoke the 1135 waiver authority.

Second, on March 27, the president issued an executive order authorizing the Departments of Defense and Homeland Security to order as many as 1,000,000 members of the Ready Reserve to active duty to assist in COVID-19 relief efforts.¹³⁸ He relied on several statutory provisions that allow the activation of the Ready Reserve and retired military officers during declared national emergencies. Several thousand reservists have been deployed under this order¹³⁹ and have engaged in activities such as packaging and distributing food and other supplies, building facilities such as medical field hospitals, cleaning and disinfecting common spaces, and providing labor for call centers.¹⁴⁰ These activities have been appropriate and helpful; the question is why it took the president almost two months to declare a national emergency and then take this step after both the World Health Organization and his own Secretary of HHS had declared a public health emergency.

Third, on April 19, the president issued an executive order authorizing the Secretary of the Treasury, in consultation with the Secretary of Homeland Security, to extend deadlines for the payment of duties, fees, and taxes on the importation of goods by “importers suffering significant

¹³⁴ See *COVID-19 Disaster Declarations*, FED. EMERGENCY MGMT. AGENCY, <https://perma.cc/ZV2J-DCM6>.

¹³⁵ See WEBSTER, PAINTER & LEE, *supra* note 131, at 26.

¹³⁶ See Press Release, Fed. Emergency Mgmt. Agency, FEMA Releases Information Regarding National Guard Title 32 Status (Mar. 29, 2020), <https://perma.cc/UH2Q-VYZ9>.

¹³⁷ See WEBSTER, PAINTER & LEE, *supra* note 131, at 12-13.

¹³⁸ See Exec. Order No. 13,912, 85 Fed. Reg. 18,407 (2020).

¹³⁹ See *COVID-19 Infographic*, DEP'T OF DEF. (May 27, 2020), <https://perma.cc/3RKC-APKN>.

¹⁴⁰ See Press Release, Nat'l Conf. of State Legs., National Guard Assists Response to the COVID-19 Pandemic (Apr. 4, 2020), <https://perma.cc/SF4U-2XF7>.

financial hardship because of COVID-19.”¹⁴¹ The order constituted an invocation of 19 U.S.C. §1318(a), under which the president may authorize the Secretary of the Treasury to extend statutory deadlines for “the performance of any act” during a declared emergency. While the measure, implemented by the Treasury Secretary on April 22,¹⁴² provided relief for U.S. companies that rely heavily on importation, domestic industry associations argued that it actually worsened the economic distress of companies that rely on domestic production (because it placed them at a competitive disadvantage).¹⁴³

d. Defense Production Act

A major impediment in responding to the COVID-19 pandemic has been the inability of health care providers to obtain needed supplies and equipment. Diagnostic test components, personal protective equipment, and ventilators have all been in short supply. Under these conditions of scarcity, states have often found themselves in competition with one another—and sometimes with foreign nations—to purchase the items they need from private manufacturers. This has driven up the cost and effectively priced some states out of the market.

By early March, there were calls for the president to invoke the Defense Production Act of 1950. The law authorizes various actions to ensure an adequate supply of materials necessary for “national defense.” It defines “national defense” to include “emergency preparedness activities conducted pursuant to title VI of The Robert T. Stafford Disaster Relief and Emergency Assistance Act,”¹⁴⁴ which in turn defines “emergency preparedness” to include “all those activities and measures designed or undertaken to prepare for or minimize the effects of a hazard upon the civilian population [and] to deal with the immediate emergency conditions which would be created by the hazard.”¹⁴⁵ The DPA thus can be viewed as an emergency power, and there is little question that it may be used to respond to the COVID-19 pandemic.

The law contains several provisions that have relevance in the COVID-19 context. Under Section 101 in Title I, the president may require companies to prioritize federal contracts that he deems “necessary or appropriate to promote the national defense” over others in the queue; he may also require the acceptance and performance of federal contracts “by any person he finds to be capable of their performance.”¹⁴⁶ In addition, the president may “allocate materials, services, and facilities in such manner, upon such conditions, and to such extent as he shall deem necessary or appropriate to promote the national defense,”¹⁴⁷ although subsection (b) states that he may not use the DPA to “control the general distribution of any material in the civilian market” unless he finds

¹⁴¹ Exec. Order No. 13,916, 85 Fed. Reg. 22,951 (2020).

¹⁴² See 19 C.F.R. pt. 24 (2019).

¹⁴³ Frances P. Hadfield et al., *President Trump Issues an Executive Order to Temporarily Extend Deadlines for Certain Duty Payment*, CROWELL & MORING INT'L TRADE LAW: CUSTOMS BLOG (Apr. 20, 2020), <https://perma.cc/F53E-JYYV>.

¹⁴⁴ 50 U.S.C. § 4552(14) (2018).

¹⁴⁵ 42 U.S.C. § 5195a(a)(3) (2018).

¹⁴⁶ 50 U.S.C. § 4511(a)(1) (2018).

¹⁴⁷ 50 U.S.C. § 4511(a)(2) (2018).

that the material is “a scarce and critical material essential to the national defense,” and that there is no other workable way to meet the need.¹⁴⁸ Under Section 102, the president may prohibit the hoarding of, and profiteering off, materials that he designates.¹⁴⁹

Title III of the DPA authorizes the president to create financial incentives for the production of materials necessary for the national defense. He may issue direct loans or loan guarantees;¹⁵⁰ he may also purchase or make purchase commitments for needed materials, make subsidy payments, or install and purchase equipment for government- and privately-owned industrial facilities to expand their productive capacity.¹⁵¹ Finally, under a provision of Title VII, if the president finds that “a condition exists which may pose a direct threat to the national defense or its preparedness programs,” the president may approve voluntary agreements by companies and industries to cooperate in the production of needed materials.¹⁵² The president’s approval constitutes a legal defense if the parties’ actions under the agreement would otherwise violate antitrust or contract laws.¹⁵³

Following pleas from governors, health care providers, and lawmakers—including a March 6 letter from nine senators¹⁵⁴ and a March 13 letter from 57 members of the House¹⁵⁵—President Trump issued an executive order on March 18 purporting to invoke the Defense Production Act. The order included a presidential finding that “health and medical resources needed to respond to the spread of COVID-19, including personal protective equipment and ventilators, meet the criteria specified in Section 101(b) of the Act.”¹⁵⁶ It did not, however, implement any of the measures authorized by the statute. Instead, it delegated the president’s authority under Section 101 of the DPA to the Secretary of HHS, and authorized him to use that authority as he saw fit. On March 23, the president issued an order that similarly delegated the DPA’s anti-hoarding authority to the Secretary.¹⁵⁷

As the days went by and no apparent action was taken pursuant to the orders, public pressure mounted. On March 24, the administrator of FEMA appeared on CNN and asserted that the administration would use the DPA to expedite the production of 60,000 test kits and 500 million face masks. Speaking at a White House news conference that evening, however, President Trump said it would not be necessary to use the Act, and FEMA was forced to walk back its statement.¹⁵⁸

Defending his increasingly conspicuous failure to use the DPA, President Trump painted it as an extreme and extraordinary measure. At a White House press conference, he (wrongly)

¹⁴⁸ 50 U.S.C. § 4511(b) (2018).

¹⁴⁹ See 50 U.S.C. § 4512 (2018).

¹⁵⁰ See 50 U.S.C. § 4532 (2018).

¹⁵¹ See 50 U.S.C. § 4533 (2018).

¹⁵² 50 U.S.C. § 4558 (2018).

¹⁵³ See *id.*

¹⁵⁴ See Alex Ward, *Senators Urge Trump to Use Defense Production Act to Make More COVID-19 Tests*, VOX NEWS (May 6, 2020, 3:00 PM), <https://perma.cc/N8C5-YR7P>.

¹⁵⁵ See Press Release, Andy Levin, Rep., 9th Dist. of Mich. (Mar. 13, 2020), <https://perma.cc/QJT3-2KAS>.

¹⁵⁶ Exec. Order No. 13,909, 85 Fed. Reg. 16,227 (2020).

¹⁵⁷ See Exec. Order No. 13,910, 85 Fed. Reg. 17,001 (2020).

¹⁵⁸ See Rebecca Ballhaus & Andrew Restuccia, *FEMA Pulls Back from Defense Production Act Amid Mixed Signals*, WALL ST. J. (Mar. 24, 2020, 8:51 PM), <https://perma.cc/EW9E-UQPQ>.

characterized using the Act as nationalizing industry. “[W]e’re a country not based on nationalizing our business,” he said. “Call a person over in Venezuela; ask them how did nationalization of their businesses work out. Not too well.”¹⁵⁹ He suggested that even putting the Act in play through his March 18 order was “actually a big deal. I mean, when this was announced, it sent tremors through our business community and through our country.”¹⁶⁰

In fact, as the Congressional Research Service has noted, the authority to prioritize contracts under Section 101 of the Act “is routinely employed by” the Defense Department, which “includes a priority rating as a standard clause” in virtually all eligible contracts and orders.¹⁶¹ The Department estimates that it uses the law approximately 300,000 times a year.¹⁶² News outlets reported a more plausible reason for the President’s reluctance: the Chamber of Commerce was actively lobbying the administration not to use the law, arguing that it would impose too much “red tape” on American businesses.¹⁶³

On March 27, with great fanfare, the president announced that his administration would use the DPA to require General Motors to produce ventilators.¹⁶⁴ General Motors had drawn the president’s ire in March of 2019, when it closed down a manufacturing plant in Lordstown, Ohio, creating economic hardship in an area of the country critical for the president’s reelection prospects. On the day of the DPA announcement, the president tweeted, “General Motors MUST immediately open their stupidly abandoned Lordstown plant in Ohio, or some other plant, and START MAKING VENTILATORS, NOW!!!!!!”¹⁶⁵ It is unclear, however, how much practical impact, if any, the DPA had in this context; according to the company, it already had been in talks to produce ventilators, and the contract it ultimately signed was consistent with those negotiations.¹⁶⁶

On the same day as the General Motors announcement, the president delegated his authority under Titles III and VII of the DPA to the Secretary of HHS.¹⁶⁷ Since then, the administration has used the DPA on a handful of occasions. These uses have included requiring the prioritization of federal contracts for ventilators to be delivered to the Strategic National Stockpile; direct

¹⁵⁹ Pres. Donald J. Trump et al., Press Briefing (Mar. 22, 2020), <https://perma.cc/V56J-7CWW>.

¹⁶⁰ *Id.*

¹⁶¹ MICHAEL H. CECIRE & HEIDI M. PETERS, CONG. RESEARCH SERV. R43767, THE DEFENSE PRODUCTION ACT OF 1950: HISTORY, AUTHORITIES, AND CONSIDERATIONS FOR CONGRESS 8 (2020), <https://perma.cc/GM99-GK5W>.

¹⁶² See Zolan Kanno-Youngs & Ana Swanson, *Wartime Production Law Has Been Used Routinely, but Not with Coronavirus*, N.Y. TIMES (Mar. 31, 2020), <https://perma.cc/7GGQ-R6MC>.

¹⁶³ David E. Sanger, Ana Swanson & Maggie Haberman, *Trump Bets Business Will Answer Call to Fight Virus, but Strategy Bewilders Firms*, N.Y. TIMES (Mar. 22, 2020), <https://perma.cc/AUZ9-HPGC>.

¹⁶⁴ See Memorandum from Pres. Donald J. Trump on Order Under the Def. Production Act Regarding Gen. Motors Co. to the Sec’y of Health & Human Services (Mar. 27, 2020), <https://perma.cc/8YJM-56TR>.

¹⁶⁵ W.J. Hennigan, *Inside Trump’s Coronavirus Theatrics on War Powers, Ventilators and GM*, TIME (Mar. 31, 2020), <https://perma.cc/7F4J-N3AQ>.

¹⁶⁶ See Breana Noble et al., *Trump Orders GM to Make Ventilators for the Government*, DETROIT NEWS (Mar. 22, 2020, 8:31 PM), <https://perma.cc/28MW-FDAC>.

¹⁶⁷ See *id.*

investment under Title III to increase the domestic production capacity of respirators and testing swabs; and the levying of criminal charges in two cases for hoarding designated goods.¹⁶⁸

Few observers, however, would characterize the president's use of the statute as aggressive. By early June, the Defense Department had obligated only \$167 million of the \$1 billion Congress made available under the CARES Act for DPA-related spending;¹⁶⁹ moreover, many of those contracts were for items seemingly unrelated to COVID-19.¹⁷⁰ Lawmakers have continued to complain that the president is underusing the DPA.¹⁷¹ And at the time of this writing, in early July, health care providers continue to face critical shortages in needed equipment.¹⁷² In short, those who had hoped that the president would use the DPA to create a mass mobilization of domestic production resources—one that would be sufficient to meet ongoing needs—have been disappointed.

CONCLUSION

Although states are generally at the forefront of managing public health crises, the president has several emergency and pseudo-emergency powers at his disposal to assist in the response to COVID-19. All of these have been delegated to him by Congress, as there are no explicit or inherent constitutional authorities accorded to the president to deal with pandemics. The only such powers that the president has exercised vigorously, however, are the authorities that allow him to restrict immigration. He has made unprecedented use of these powers, often to pursue what appear to be longstanding policy goals that are unrelated to public health. Although he has threatened to use what he calls his "total" authority as president of the United States to impose multi-state quarantines and to override governors' decisions on state shut-downs, he has pulled back from these threats.

The most remarkable feature of the president's approach has been his tardy and often tepid use of those emergency and pseudo-emergency powers that hold the most promise for alleviating the current crisis. At every stage, our national response to COVID-19 has been hampered by a lack of available testing, testing equipment, personal protective equipment, ventilators, and other medical supplies. The president could have attacked this problem early on with a strategic combination of authorities triggered by the Public Health Service Act, the Federal Food, Drug, and Cosmetic Act,

¹⁶⁸ See MICHAEL H. CECIRE & HEIDI M. PETERS, CONG. RESEARCH SERV. IN11337, THE DEFENSE PRODUCTION ACT (DPA) AND THE COVID-19 PANDEMIC: RECENT DEVELOPMENTS AND POLICY CONSIDERATIONS (2020); Dylan Smith, *The 1st COVID-19 Prosecutions Under Defense Production Act*, LAW 360 BLOG (May 6, 2020, 5:07 PM), <https://perma.cc/8FJY-47ZH>.

¹⁶⁹ See Joe Gould, *Pentagon Taps \$688 Million in Coronavirus Aid for Defense Industry*, DEF. NEWS (June 2, 2020), <https://perma.cc/JCA7-QXQ4>.

¹⁷⁰ See Aaron Gregg & Erica Werner, *Pentagon's Coronavirus Plan Includes Millions for Missile Tubes and Body Armor*, WASH. POST (June 4, 2020, 2:00 PM), <https://perma.cc/LEW8-9E8U>; *DOD Announces Defense Production Act Title 3 COVID-19 Projects to Support Space Defense Industrial Base*, SEMICONDUCTOR TODAY (June 2, 2020), <https://perma.cc/S2RB-HPRB>.

¹⁷¹ See *Schatz To Trump: Fully Invoke Defense Production Act*, BIG ISLAND VIDEO NEWS (May 15, 2020, 8:38 AM) <https://perma.cc/4U2X-E7AR>.

¹⁷² See Dinah Voyles Pulver et al., *Despite Warnings, the US Wasn't Prepared with Masks for Coronavirus. Now It's Too Late.*, USA TODAY (July 2, 2020, 10:11 AM), <https://perma.cc/2MXZ-5NWY>.

the Stafford Act, the Social Security Act, the National Emergencies Act, and the Defense Production Act. Instead, the administration was slow to use these authorities—in some cases, it appears, because of political concerns—and it still has not maximized the benefit they could be providing.

The use of emergency powers is discretionary by nature, and it would be a mistake to change that. Abuse of discretion, however, comes in many different forms. It is a clear abuse of emergency powers to deploy them for political gain where no emergency exists. In his response to COVID-19, President Trump may have illuminated a different type of abuse that few were expecting to see from him: the politically-motivated failure to deploy emergency powers in a genuine crisis.