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How presidential powers can legally expand without constitutional amendment.

CHANGING CONSTITUTIONAL POWERS OF THE AMERICAN PRESIDENT

Cass Sunstein

In the United States, the president is controlled by the Constitution and is in all respects subordinate to it. Insofar as it deals with presidential power, however, the American Constitution has proved to be a highly malleable document. With very few exceptions, the constitutional provisions relating to the president have not been changed at all since they were ratified in 1787, but in 1993 those provisions do not mean what they meant in 1787. The Constitution is a legal document, and it is enforced judicially, but its meaning was not fixed when it was ratified. In particular, the contemporary president has far broader powers than the original Constitution contemplated. It is remarkable but true that large-scale changes in the authority of the president have been brought about without changes in the constitutional text but, nevertheless, without illegality.

This is a paradox. Is it not clear that constitutional changes, if not textual, are illegal? The paradox has considerable relevance to Eastern Europe. The framers of the American Constitution feared legislative power most of all, but from well-known events in the twentieth century it is possible to conclude that it is presidential power that presents the greatest risks for liberty and democracy. The president is the most visible leader in the nation by far; he is often the only person in government with a national constituency; and this visibility can lead to a kind of "cult" that threatens constitutionalism itself. On the other hand, a strong president is in a unique position to accomplish enormous good, and it is possible to think that in Eastern Europe and the ex-USSR, a strong president is a precondition for necessary reforms.

How to produce a strong presidency while limiting the relevant risks is a major task for postcommunist constitutionalism. There are of course significant complexities here. With the exception of the nations of the former Soviet Union, the pattern in Eastern European nations is basically parliamentary, and the president is largely cer-

emonial (at least in comparison to the American president). In the nations of what used to be the USSR, a president—part of a division between the executive and the legislature—has a more important role. But even where the president is largely ceremonial, there will be opportunities for accretions of power over time. Any particular constitutional arrangement is unlikely to be fixed over time.

There is some dispute about whether the task of producing a strong president without endangering liberty has been successfully accomplished in the United States. Some people think that the American president is much too powerful; others think that America has a weak president who is unable to accomplish the tasks for which he is elected. This debate raises complex questions that I cannot discuss here. However those questions may be resolved, it is clear that the original understanding of the presidency called for much less presidential authority than is taken for granted today. Although the prominent American founder, Alexander Hamilton, sought a powerful presidency, and although the new Constitution created an executive where the Articles of Confederation had not, the original American president was exceptionally weak by contemporary standards. Consider the following points, showing the contrast between the eighteenth and twentieth-century American presidencies.

1. In the founding period, the president was supposed to have sharply limited authority in domestic affairs, partly because the federal government as a whole had sharply limited authority in the domestic arena. Basic regulation of the economy was to come from state governments, especially from state courts elaborating the common law of tort, contract, and property. Today, by contrast, the president is a principal national lawmaker—simply because of a shift in power toward the nation. In implementing national law, the executive branch issues an extraordinary range of regulations affecting the na-

tional economy—in large part because of the economic interdependence among various regions, which is now generally acknowledged. It is a simple truth that the national government has far more authority than the framers of the Constitution originally envisaged. It is equally, if less simply, true that as a result of this shift, the president himself has assumed an array of duties and powers not within the original contemplation of the Constitution's authors.

2. In issuing regulations and indeed in all his official acts, the president needs congressional (or constitutional) authorization. He cannot exceed any limits that Congress has laid down. But often Congress offers very vague guidance. The president therefore has a great deal of discretion. Particularly in the latter half of the twentieth century, courts have been reluctant to strike down laws on the basis of the "nondelegation doctrine," which required clear standards from the legislature. The downfall of the nondelegation doctrine has meant that the president can exercise tremendous policy-making discretion in the domestic sphere. This sphere includes regulation of the environment, energy, occupational safety and health, communications, and much else.

3. The framers of the Constitution probably wanted to allow Congress to limit the president's authority over the many high-level officials who implement the laws enacted by Congress. This might seem to be a technical matter, but it has enormous importance. If the Secretary of the Treasury can be controlled by the Congress but not by the president, the allocation of national powers is much changed. It is now generally agreed, however, that the *president has broad power over all high-level officials who implement the law*. The heads of the cabinet, and of most executive agencies, can be discharged by the president whenever the president chooses. Moreover, Congress has no authority to discharge them or to prevent the president from doing so. (Of course both the president and all implementing officials must obey the instructions laid down by Congress.) The result is that most administration of the laws—an extremely large and important category—is subject to the will of the president.

4. It is now generally understood that the president will submit to Congress both (a) a proposed budget and (b) a great deal of proposed legislation. As a result, the president now has a formidable role in the enactment of national legislation. The Constitution contains no ex-

plicit provisions on these points, but it was not originally believed that the president would submit a budget or propose legislation. It was hardly believed that the president would have these powers of initiative, granting him considerable power over the content of national law. The president's current power of initiative, with respect to the budget and lawmaking, is quite fundamental. (Of course much legislation is initiated by people other than the president.)

5. The president's power to *veto* legislation has turned out to allow him a surprisingly large role in determining the content of national legislation. The founders of the Constitution deliberately and explicitly gave the president the veto power. But they did not contemplate its current importance, and they might well have been alarmed if they had been forewarned. Their principal goal was to allow the president to veto laws on constitutional rather than policy grounds, particularly in order to permit him to prevent Congress from intruding on the president's constitutional powers. This goal was narrow indeed; it did not anticipate a situation in which the power to veto would entail a significant role in lawmaking.

It is not entirely clear that the framers sought to allow the president to veto legislation solely on the ground that he disagreed with the policy judgments embodied in it (though probably the best reading of the history is that the founders believed that the president could veto legislation on policy grounds). But they thought that this power would be exercised rarely and only in the most extreme cases. The founders certainly did not anticipate the current situation, in which the veto power is a well-understood part of all lawmaking and implies a large and continuous presidential role in lawmaking itself. In short, the president's authority is greatly augmented by Congress' knowledge that the president can veto legislation of which he disapproves.

6. With the emergence of the United States as a world power, the president's foreign affairs authority has become far more capacious than was originally anticipated. For the most part this is because the powers originally conferred on the president have turned out—in light of the unanticipated place of the United States in the world—to mean much more than anyone would have thought. In addition, however, the president has been permitted to initiate military activity in circumstances in which the original understanding would have required

congressional authorization. On the founding view, a *congressional declaration of war was a precondition for war*; the only exception was that the president could act on his own in order to repel a sudden attack on the United States. But in the twentieth century, a large amount of presidential war-making has been allowed without congressional declaration of war.

From all these points we might conclude that the Constitution, at least in the area of presidential authority, is no mere lawyer's document. The original understanding has not controlled the future. The Constitution's meaning is not fixed. It is in large part a function of historical practices and needs, and of shared understandings over time. Often the power of the president is understood to be quite different from what it was, say, twenty-five years earlier.

Yet it would be a mistake to conclude that the president's constitutional power is simply a matter of what seems to him appropriate or necessary, and not a matter of law at all. Often the president loses in the Supreme Court, and in nearly every important case, he has graciously accepted his defeat. To take just a few examples from the twentieth century: President Nixon was forced to hand over his own tape-recorded conversations during the Watergate controversy; President Truman was prevented from seizing the steel mills during the Korean War; President Eisenhower was banned from stopping communists from traveling abroad. These defeats are important in themselves, but they are even more important for the general tone that they set. Every American president knows that his actions are subject to judicial review, and this is a large deterrent to illegal conduct.

For purposes of judicial review, the president's most important constitutional duty is "to take care that the laws be faithfully executed." This provision subordinates the president to the law. It also requires him to adhere to the law, both constitutional and statutory.

I have suggested that the changing understandings of the president's power have occurred without either textual change or flagrant presidential violations of constitutional requirements. I have also suggested that this presents a genuine paradox. We have a president who is much stronger than the framers of the Constitution anticipated; but at least in general, the current presidency is not thought, and should not be thought, unconstitutional. How, then, have the president's powers changed? There

are several possibilities. I outline them here because of their potential importance to current dilemmas in Eastern Europe. Flexible provisions and silences, allowing flexible (but not open-ended) interpretation

Many of the changes have occurred because the relevant constitutional provisions are ambiguous, and they allow adaptation to changing circumstances. For example, the grant of "executive power" to the president leaves much uncertainty.

The Constitution also contains important silences. For example, the Constitution does not discuss whether the president shall submit a budget. But the document is not a blank slate. It is clear that the president must obey the law; it is equally clear that he cannot make law on his own. It is clear that he cannot (for example) dissolve the legislature or the Supreme Court when (as is often the case) they displease him. We should conclude, then, that constitutional change has occurred in part because of constitutional ambiguities and silences. A constitution that is not rigid will allow for adaptation without amendment or illegality.

Emergencies

Many constitutions, including all of those in Eastern Europe, contain emergency provisions, allowing the government to have special powers under conditions of emergency. The American Constitution contains no emergency provisions (although the president is allowed to suspend the writ of habeas corpus during war). It might seem natural to think that in spite of the absence of explicit emergency powers, many increases in presidential authority have occurred as a result of emergencies. In general, however, the president has not been found to have special authority to act during emergencies. A domestic crisis—widespread unemployment, social unrest—does not give the president any new power. There is no judicial understanding that the president has greater authority if he can point to an emergency situation, or claim that unusual presidential action is crucial.

Of course, Congress might well decide to confer statutory authority on the president in order to enable him to respond to a crisis. And Congress has made this decision in emergencies. In the New Deal period, for example, Congress gave the president a range of new authorities because of the perceived need for special responses to the Great Depression. But the president has not been al-

lowed to act on his own. An emergency does not give the president any unilateral powers. A possible lesson is that constitutionally-granted emergency powers are not necessary and may even be harmful.

Development of the Constitution through case-by-case decisions over time

Some distinguished academic observers (most notably Harry Wellington and David Strauss) believe that interpretation of the U.S. Constitution depends on particular judicial decisions, allowing the meaning of the document to change over time. Indeed, *constitutional law in America (and in many other nations as well) has many features of the common law process.*

In that process, a hallmark of Anglo-American legal systems, no one sets down broad legal rules in advance. Instead the rules emerge narrowly, as judges decide individual cases. Governing principles come from the process of case-by-case adjudication, and sometimes they cannot be known in advance. Much of constitutional law in the United States comes not from the constitutional text itself, but from judge-made constitutional law, interpreting constitutional provisions. For this reason, the meaning of the document is not rigidly fixed when the document is written and ratified.

Something along these lines is certainly true for the powers of the president, and the system of common law constitutionalism helps explain the shifting understanding of presidential power. Consider, for example, the complex question of whether Congress or the president may discharge high-level public officials (the secretary of state, the attorney general, the secretary of the interior). The text of the Constitution does not speak clearly on this issue; instead, the governing constitutional principles have been worked out in the process of case-by-case adjudication.

It might be added that much of the president's authority turns not on judicial decisions at all, but on traditional practices and shared understandings between the president and Congress. The development of these practices and understandings resembles the process of common law development. It is recognized that a certain practice "works." Congress and the president endorse the practice, and the practice therefore operates as a guide for the future. Of course no such practices may violate the Constitution where that document speaks with clarity.

Translation

Some people (most notably Lawrence Lessig) have argued that, when circumstances have changed, the Supreme Court must "translate" the original constitutional text in order to adapt it to the new conditions. Suppose, for example, that the founders of the Constitution originally sought to allow the president to make war on his own only for defensive purposes to repel sudden attacks on the United States. Suppose, too, that in modern conditions, threats to (say) Canada and Mexico are extremely threatening to the United States because of the strategic importance of these nations. Or suppose (as many people believe) that under current conditions, the line between "offensive" and "defensive" use of the military becomes extremely thin.

If this is true, perhaps the original constitutional provision, translated into a new context, gives the president new and broader authority. If we want to adhere to the original constitutional goal (i.e., to allow the president to act unilaterally when this is necessary), perhaps the president may act unilaterally, not simply to repel sudden attacks on the United States, but in any case in which American interests are at serious risk. Perhaps this view accounts for many of the changes I have described. Thus, for example, we might think that the president's authority over the cabinet must expand in an area in which the cabinet is exercising such extraordinary power over the nation. Perhaps the expansion is justified if we are to be faithful to the founding commitment to political accountability. The "translation" argument raises many complexities, but it has appeared in several Supreme Court opinions as a way of making sense of the practice of interpretation in changed circumstances.

Several constitutional regimes?

Some people think America has had more than one constitutional regime, that at crucial moments in our history, the people have inaugurated large-scale changes in the Constitution. The Civil War, for example, is said to have inaugurated a Second American Republic, with new understandings of the allocation of power between the nation and the states and with new understandings of individual rights. Some people think that President Roosevelt's New Deal also produced constitutional change. In his influential book, *We the People: Foundations*, for example, Bruce Ackerman argues that the United

States has had three constitutional regimes, not simply one.

If America has had more than one constitutional regime, we might think about presidential power in a somewhat different way. In the New Deal period, for example, the national government appeared to acquire significant new constitutional authority. The president was a principal beneficiary of this shift, especially insofar as the Supreme Court refused to enforce the nondelegation doctrine, which, as noted above, required any legislative delegations of power to the executive to be narrow and clear. Some people think that the New Deal effectively amended the Constitution, giving the president a range of new powers.

Conclusion

There are some diverse explanations of the changing nature of constitutional power in the hands of the American president. I think that the most promising explanations stress the flexibility of the original text and the process of common law adjudication. If these are the best explanations, it seems clear that a special advantage of the original constitutional provisions governing the president is that they allow adaptation over time. Moreover, it emerges that one of the virtues of the American constitutional experience is the process of case-by-case adjudication, giving the meaning of constitutional provisions through close encounter with particular cases.

What lessons can be drawn from this experience for Eastern Europe? It is hazardous to think that the experience of one nation has any lessons at all for another; there

are many distinctive features to the American experiment in constitutionalism, and it is reasonable to think that few general lessons can be drawn from what has happened in the United States. But if we are to draw lessons, perhaps two are of special importance. The first involves *the limited effects of constitutional text*, at least over time. Constitutional meaning depends, in large part, on shared understandings and practices, and most of these will not be in the constitution itself. Although the Constitution is a legal document, there will be a great deal of opportunity to adapt constitutional meaning to changes in understanding and practice over time.

A second (and somewhat conflicting) lesson involves *the importance of a culture of constitutionalism*—to which judicial review is an important contributor—to ensure against the most egregious abuses of legal authority. In America, judicial review has been important as a check after the fact and, perhaps even more, as a before-the-fact deterrent to presidential illegality. A culture of constitutionalism and the rule of law, spurred by judicial review, has helped deter presidential lawlessness in cases in which the need for action seemed great to the president, and the legal technicalities seemed like an irrelevance. In some such considerations, lies the solution to a remarkable and insufficiently analyzed paradox of American constitutionalism: a dramatically changed and strengthened presidency brought about without constitutional amendment and nonetheless without significant illegalities.

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