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Eighteenth Century Presidency in a Twenty-First Century World, An

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In the United States, the President is controlled by the Constitution, and 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,[1] the constitutional provisions relating to the President have not been changed at all since they were ratified in 1787. But in the late twentieth century, 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 hardly 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 significant illegality.

This is a paradox. Is it not clear that constitutional changes, if not textual, are illegal? The paradox has considerable relevance to our current thinking about the presidency in particular and about constitutionalism in general. Perhaps the framers of the American Constitution feared legislative power most of all;[2] but from well-known events in the twentieth century, it is possible to conclude that it is presidential power that holds out the greatest risks to both liberty and democracy. The President is by far the most visible leader in the nation; he is often the only person in government with a national constituency. Moreover, he is

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1. The major exceptions have to do with how the President is elected and with the diminished authority of the Electoral College. These provisions are closely connected with some of the changes discussed below, because greater democratic legitimacy helps account for greater authority.

2. THE FEDERALIST No. 22 (Alexander Hamilton).

typically in charge of the armed forces, and his distinctive visibility can lead to a kind of "cult" that threatens constitutionalism and legality itself. On the other hand, a strong President has a distinctive democratic pedigree, and he is in a unique position to accomplish enormous good. An understanding of this fact has spurred large-scale changes in our conception of the presidency, especially in the New Deal period.[3]

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;[4] others think that America has a weak president who is circumscribed by congressional "micromanagement" and unable to accomplish the tasks for which he is elected.[5] This debate raises complex questions that I cannot discuss here. My purpose here is far narrower. I intend to show how the modern presidency is quite different from the founders' presidency, and then to make some observations about how all this has come about.

I do not contend that the enormous changes in the nature of the presidency are illegitimate. In fact my purposes are mostly descriptive. But I do think that for those committed to the project of constitutionalism, it is important to maintain a degree of continuity between the twenty-first century president and that of the late eighteenth-century. I offer a few notations on that surprisingly difficult project.

A general proviso: I will be covering a fair amount of territory in a short space, and most of the issues will not receive the detailed attention they deserve. My hope is that a brief and broad-gauged approach will provide a vivid picture of the changes that have occurred, and of how those changes might be defended.

This essay is in three parts. Part I briefly describes some of the contrasts between the president of the late

3. *See* Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 (1987).

4. *See* ARTHUR SCHLESINGER, JR., THE IMPERIAL PRESIDENCY (1973).

5. *See* TERRY EASTLAND, ENERGY IN THE EXECUTIVE: THE CASE FOR THE STRONG PRESIDENCY (1992).

twentieth century and the president of the late eighteenth century. Part II outlines theories of constitutional change in the particular context of the expanded presidency. Part III offers some conclusions.

I. THE PRESIDENT, THEN AND NOW

A. In General

It cannot be disputed that the original understanding of the presidency called for much less presidential authority than is taken for granted today.[6] To be sure the prominent founder Alexander Hamilton, sought a powerful presidency.[7] Moreover, the new Constitution created an executive where the Articles of Confederation did not; the creation of a novel executive branch was one of the most important innovations in the Constitution. But the original American President was exceptionally weak by contemporary standards.

In domestic affairs, the President had relatively little law-making or even law-executing power, in part because of the limited authority of the national government, in part because of the general understanding that the President would have relatively little discretion in the lawmaking process or in law-implementation. In international affairs, the President's power was much narrower than it is now—in part because of the limited role of the United States in the world, in part because the President's principal unilateral power was to repel sudden attacks on the United States.

It seems sensible to speculate that the increases in presidential authority have come in part because of the greater democratic legitimacy of the President given by national elections and by constant media focus on the President's plans and proposals. Nothing of this kind could have been anticipated at the time of the founding. This was true in part because of the filtering effect of the Electoral College, which has withered since the founding period. To say the least, George Washington was a visible person. But the

6. *See* THEODORE LOWI, THE PERSONAL PRESIDENT: POWER INVESTED, PROMISE UNFULFILLED (1985).

7. *See* THE FEDERALIST Nos. 70, 71, 72 (Alexander Hamilton).

enormously high visibility of the President has helped to create a massively different institution from what was anticipated.

B. Particulars

We can put constitutional changes in the power of the President in several categories. First, some changes offend no constitutional provision, but involve alterations from what the framers had expected or had hoped to achieve. Second, some changes do not clearly offend the constitutional text, but do violate the framers' understanding of what the text meant. Third, some changes offend the constitutional text. I will try to distinguish among these different kinds of changes below.

Consider the following particulars, 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 government, and especially from state courts, which elaborated upon the common law of tort, contract, and property.[8] To be sure, the President did have authority to make rules in some important areas.[9] But by modern standards, this authority was quite narrow. It did not involve much control over the domestic economy.[10]

By contrast, the modern President is a principal national lawmaker. The content of federal law has a great deal to do with the President's program and agenda. Much of this shift has occurred simply because of an unanticipated shift in power from the states to the federal government. The decline of limits on the power of the national

8. *See* LOWI, *supra* note 6; STEPHEN R. SKOWONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920 (1982).

9. *See* 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, ADMINISTRATIVE LAW TREATISE (3d ed. 1994).

10. *See* LOWI, *supra* note 6.

government has helped to increase the authority of the President.[11] In implementing national law, the executive branch, therefore, issues an extraordinary range of regulations affecting the national economy.

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 an inevitable result of this shift, the President himself has assumed an array of duties and powers not within the contemplation of the Constitution's authors.

The President's assumption of these powers is not in violation of the constitutional text (except to the extent that the current authority of the national government is itself unconstitutional). But there is no doubt that presidential powers are, along this dimension, quite different from what was anticipated.

2. In issuing regulations and indeed in all of his official acts, the President needs congressional (or constitutional) authorization. He cannot exceed any limits that Congress has laid down.[12] He must "take Care that the Laws be faithfully Executed."[13] But often Congress offers very vague guidance. The President has a great deal of discretion. Perhaps this discretion violates the Constitution, as a violation of the grant of legislative power to Congress.[14] Perhaps this is an impermissible delegation of legislative authority. But the twentieth century has witnessed a judicial refusal to enforce the nondelegation doctrine,[15] which required clear standards from the legislature. The downfall of the nondelegation doctrine has meant that the President can exercise tremendous policymaking discretion in the domestic sphere. This sphere includes regulation of the environment, energy, occupational safety and health, communications, and much else besides.

I do not suggest that the nondelegation doctrine was a clear constitutional imperative in the founding period, or

11. *See* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW (2d ed. 1991).
12. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1959).
13. U.S. CONST. art. II, § 3.
14. U.S. CONST. art. I, § 1.
15. *See* Schechter Poultry v. United States, 295 U.S. 495 (1935).

that in the original understanding, Congress was banned from granting broad discretion to the President.[16] It is frequently observed, and lamented, that the nondelegation doctrine has not been used to invalidate a federal statute since 1935.[17] It is less frequently observed, but no less important, that the doctrine was not used to invalidate a federal statute *until* that same year. The nondelegation doctrine enjoyed only one good year—a point that complicates the view that broad grants of policymaking authority are in violation of the original design.

There can be no doubt, however, that the post-New Deal grant of discretionary authority to the President has altered the President's original constitutional role and greatly expanded his authority over the domestic sphere. We might be skeptical of the idea that courts should invalidate the grant of discretionary authority to the President,[18] while also agreeing that such grants give the President what is, in effect, legislative, or at least discretionary, power far beyond what was contemplated by the original Constitution.

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.[19] If Congress saw fit, it probably had the constitutional authority to insulate some high-level officials from presidential supervision or discharge. This principle might seem to be a dry and 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 almost all high-level officials who im-

16. *See* KENNETH CULP DAVIS & RICHARD J. PIERCE, ADMINISTRATIVE LAW TREATISE (3d ed. 1994).

17. *See* THEODORE J. LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES (1979).

18. *See* Mistretta v. United States, 448 U.S. 361 (1988)(Scalia, J., dissenting).

19. This controversial claim is defended in Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994). A response can be found in Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994).

plement the law.[20] To be sure, Congress has the constitutional authority to create "independent" agencies.[21] It is unclear, however, how "independent" the independent agencies really are, as a matter of law or practice. The Supreme Court has never told us, and in practice, the independent agencies are not so independent of the President.[22] In any case, the heads of the Cabinet, and of most executive agencies, can be discharged by the President whenever the President chooses. In practice, this means that the President has enormous authority to control their activities.

Moreover, Congress has no power to discharge administrative officials on its own and little power to prevent the President from acting however he wishes. (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. When the President changes, the administration changes as well, at least as a matter of technical law and largely, too, as a matter of practice.

An especially interesting illustration of this phenomenon is the new process of White House supervision of agency rulemaking. This process received its most striking endorsement during the presidency of Ronald Reagan.[23] President Clinton has made a similar claim of authority.[24] In fact, President Clinton has gone somewhat farther than President Reagan, and in two different ways. First, he has asserted at least a measure of control over the so-called independent agencies; second, he has apparently claimed the authority to block regulations. At least as a technical matter, the process of White House supervision means that the

20. The key decision is Myers v. United States, 272 U.S. 52 (1926).

21. Humphrey's Executor v. United States, 295 U.S. 602 (1935).

22. *See* Lessig & Sunstein, *supra* note 19.

23. Exec. Order No. 12,291, 3 C.F.R. 127 (1981), *reprinted in* 5 U.S.C. § 601 (1988); Exec. Order No. 12,498, 3 C.F.R. 323 (1985), *reprinted in* 5 U.S.C. § 601 (1988).

24. *See* Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *reprinted in* 5 U.S.C. § 601 (1993).

President will have firm control over the rulemaking process.

The assumption of broad presidential power over the executive agencies is not itself unconstitutional. That power is probably contemplated by Congress itself when it delegates authority to an executive agency, and there is nothing troublesome about presidential control of agents whom Congress has subjected to presidential control. But our current understanding of the constitutional landscape is not the founding understanding. Existing limits on Congress' power to structure what we call "the executive branch"—however indistinct they may appear in hard cases—are far more severe than the limits at the founding period.[25]

4. It is 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 explicit provision on the budget, and it does not clearly sort out the President's role with respect to congressional consideration of legislation. To be sure, the Constitution does grant the President the power to "recommend to [Congress'] consideration such measures as he shall judge necessary and expedient."[26] But it was not originally believed that the President would submit a budget to Congress, or that he would have a great deal of authority over the expenditure of national funds; nor was it understood that the President would play a dominant role in the national legislative process.

Indeed, it is unclear exactly how much authority the President was supposed to have over the initiation of legislation. Despite the Constitution's provision on this point, President Washington suggested that " '[m]otives of delicacy . . . have uniformly restrained the P[resident] from introducing any topick [sic] which relates to Legislative matters to members of either house of Congress, lest it

25. *See* Lessig & Sunstein, *supra* note 19.

26. U.S. CONST. art. II, § 3.

should be suspected that he wished to influence the question before it.' "[27] Hence, Washington "would not permit congressional committees to solicit his opinion, but intimated his willingness to express his views, when asked, to a friend."[28]

Washington's own approach does seem extreme; as I have noted, the Constitution itself authorizes a broader role.[29] But in the founding period, it was hardly believed that the President would have the current powers of initiative, granting him considerable power over the content of national law. The President's modern power of initiative, with respect to the budget and lawmaking, is quite fundamental to the nature of our government. Of course, much legislation is initiated by people other than the President. But it is plausible to think that no one has as much authority as the President himself. This is not a violation of the Constitution. It is, however, a wholly unanticipated increase in presidential power.

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.[30] But they did not contemplate its current importance, and they might well have been alarmed if they had been forewarned.

In granting the President the power to veto legislation, the framers' principal goal was to allow the President to veto laws on constitutional, rather than policy, grounds.[31] Their special goal was to permit him to prevent Congress from intruding on the President's constitutional powers. This goal was narrow indeed. The framers did not anticipate a situation in which the power to veto would entail a significant role over the development of policy in lawmaking. It is not entirely clear that the framers sought to allow

27. LEONARD D. WHITE, THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY 55 (1948)(quoting George Washington, Letter (Feb. 1792), *in* 31 THE WRITINGS OF GEORGE WASHINGTON 493 (John C. Fitzpatrick ed., 1931-44)).

28. *Id.*

29. U.S. CONST. art. II, § 3.

30. *See* U.S. CONST. art. 1, § 7, cl. 3.

31. THE FEDERALIST No. 51 (James Madison).

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[32]). 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 legal and political authority is greatly augmented by Congress' knowledge that the President can veto legislation of which he disapproves. The deterrent effect of the veto should not be understated. The current veto power is probably best viewed as constitutionally acceptable, but as nonetheless producing a situation that the founders did not expect and would not have welcomed.

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 position of the United States in the world—to mean much more than anyone would have thought. The constitutionally granted authorities have led to a great deal of unilateral authority, simply because the United States is so central an actor on the world scene. The posture of the President means a great deal even if the President acts clearly within the scope of his constitutionally-granted power. Indeed, mere words from the President, at a press conference or during an interview, can have enormous consequences for the international community.

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 dec-

32. *See* THE FEDERALIST No. 73 (Alexander Hamilton).

laration of war was a precondition for war.[33] The only exception was that the President could act on his own in order to repel a sudden attack on the United States.[34] But in the twentieth century, a large amount of presidential warmaking has been allowed without congressional declaration of war.[35]

We should distinguish among three categories here. First, some of these exercises of authority may have been unconstitutional. Some of them may have required a congressional declaration as a precondition for national action. Second, some may have been permissible because they involved military action short of "war." Third, some may have been permissible because the category of "sudden attack" must be understood capaciously under current conditions. I cannot desegregate these various possibilities here. Instead I offer a simple point: in any of these cases, the President's power goes far beyond what was expected.

II. INTERPRETATION, AMENDMENT, OTHERS

From all these points we might reaffirm the old truism 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.[36] Often the power of the President is understood to be quite different from what it was, say, twenty-five years earlier.

But 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

33. *See* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW (2d ed. 1991).
34. *Id.*
35. *Id.*
36. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1959) (Frankfurter, J., concurring).

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 travelling abroad.[37] 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."[38] 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.

A. Flexible Provisions and Silences

Many of the changes have occurred because the relevant constitutional provisions are both spare and ambiguous, and they allow adaptation to changing circumstances. For example, the grant of "executive power" to the President leaves much uncertainty. To many modern readers, the term connotes all or much law-implementation.[39] It may have carried a narrower meaning in the founding period. Or consider the authority of the President in the area of foreign affairs. The relevant provisions are highly ambig-

37. *See* United States v. Nixon, 418 U.S. 683 (1974); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1959); Kent v. Dulles, 357 U.S. 116 (1958).

38. U.S. CONST. art. II., § 3.

39. *See* Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992).

uous, certainly on their face. It is hardly crystal clear what powers accompany the authority to be "Commander-in-Chief of the armed forces."

The Constitution also contains important silences. The Constitution does not say whether the veto power comprehends policy disagreements. It does not describe the precise relation between the President and the administration. It does not discuss whether the President may submit a budget. Constitutional change has occurred in part because of constitutional ambiguities and silences. It seems obvious that a constitution that is not rigid, and that leaves gaps and uncertainties, will allow for adaptation without amendment or illegality.

B. Emergencies

Many constitutions contain emergency provisions, allowing the government to have special powers under conditions of emergency. Most notably, the American Constitution contains no emergency provisions (although the President is allowed to suspend the writ of habeas corpus during war[40]). 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. Certainly it is true that some such increases occurred in the New Deal period, as a result of what some people believed to be the emergency conditions of the Great Depression. And some of the most dramatic exercises or vindications of presidential authority involved what many thought to involve emergency.[41]

In general, however, changing powers of the presidency are not a product of emergencies. It would be a mistake to think that authorities have been conferred on the President because of an implicit "emergency provision" allowing American officials to do what is necessary in dire circumstances. Indeed, the President has rarely been found to have special authority to act during emergencies. A domestic crisis—widespread unemployment, social unrest—

40. U.S. CONST. art. I, § 9.
41. *See* Dames & Moore v. Regan, 453 U.S. 654 (1981).

does not give the President any new power.[42] 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. Of course 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 allowed to act on his own. An emergency does not give the President any unilateral powers.

C. Common Law Constitutionalism

Some academic observers[43] believe that in the United States, interpretation of the Constitution depends less on constitutional text and history and more on particular, case-specific judicial decisions. This process of case-by-case development allows 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, no one sets down broad legal rules in advance. The meaning of the Constitution is not a product of antecedent rules. 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. It does seem clear that 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.

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42. *See* Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); New York Times v. United States, 403 U.S. 713 (1971).

43. *See* Harry H. Wellington, *Common Law Rules and Constitutional Double Standards*, 83 YALE L.J. 221 (1973); David Strauss, Common Law Constitutional Interpretation (August 1, 1994)(unpublished manuscript, on file with the University of Chicago Law School).

Something of this kind is certainly true for the powers of the President, and the system of common law constitutionalism helps explain the shifting understandings of presidential power. Consider, for example, the complex question 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. In *Myers v. United States*,[44] the Court said that high-level executive officers must be subject to the plenary control of the President. In *Humphrey's Executor v. United States*,[45] the Court qualified this rule, saying that officials exercising quasi-legislative and quasi-executive functions may be immunized from the President. In *Bowsher v. Synar*,[46] the Court distinguished between a congressional role in removal of law-implementing officials, which would be impermissible, and independence, which would be acceptable. And in *Morrison v. Olson*,[47] the Court said that purely executive officers may sometimes be made independent of the President. This elaborate body of doctrine, reflecting changing understandings over time, is a classic illustration of how the process of case-by-case adjudication, unburdened by general rules given in advance, can allow presidential authority to shift.

It might be added that a good deal of presidential authority turns not on judicial decisions at all, but on traditional practices and shared understandings between the President and Congress. Common law constitutionalism occurs outside the judiciary. 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 should be permitted

44. 272 U.S. 52 (1926).
45. 295 U.S. 602 (1935).
46. 478 U.S. 714 (1986).
47. 487 U.S. 654 (1988).

to violate the Constitution where that document speaks with clarity.

D. Translation

Some people, most notably Lawrence Lessig,[48] have argued that when circumstances have changed, the Supreme Court must "translate" the original constitutional text or history 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 Canada and Mexico are extremely threatening to the United States because of the strategic importance of these nations to the American capacity for self-defense. Or suppose (as many people believe) that under current conditions, the line between "offensive" and "defensive" use of the military becomes extremely thin. New circumstances have made that original line far more ambiguous than it was at the founding.

Consider another example.[49] Perhaps the original document gave the President less than complete authority over those who administer the laws. Perhaps the founders believed that Congress could insulate some administration from the President, on the theory that insulated administration would not, under the assumptions of the founding period, endanger any important constitutional commitments. It may be that insulated administration does endanger important constitutional commitments once the founding assumptions have been altered. Now that administration of the laws involves large-scale domestic policymaking, it may be intolerable—*from the perspective of original constitutional commitments*—to allow administrators to operate independently of the President, at least outside of certain confined areas. To maintain fidelity to constitutional com-

48. *See* Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993); Lawrence Lessig, *Understanding Changed Readings: Fidelity in Theory*, 47 STAN. L. REV. (forthcoming March 1995).

49. *See* Lessig & Sunstein, *supra* note 19.

mitments, we must understand the document to give the President power that he did not have at the founding.

If this is true, perhaps it is generally true that original constitutional provisions, translated into a new context, give the President new and broader authority. If, to return to the first example, we want to adhere to the original constitutional goal—to allow the President to act unilaterally when 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.

The "translation" argument raises many complexities. The notion of "translation" is no more than a metaphor, and the task of interpreting a provision in new circumstances is hardly identical to the task of rendering words in another language. There are considerable complexities in deciding what it is that is being translated. What is being translated is not a brute fact, but itself the product of interpretation, in the form of a constructive account of some sort, one that has important evaluation dimensions. But the general idea of translation has appeared in several Supreme Court opinions as a way of making sense of the practice of interpretation in changed circumstances.[50] In many ways the metaphor is useful.

E. Several Constitutional Regimes?

Some people, most notably Bruce Ackerman, 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.[51] 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 the allocation of power between the nation and the states, and with new understand-

50. *See, e.g.*, Tennessee v. Garner, 471 U.S. 1 (1985); Weems v. United States, 217 U.S. 349 (1910).

51. *See* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991).

ings of individual rights. Some people think that President Roosevelt's New Deal—responding to the Great Depression—also produced constitutional change. In his influential book, *We the People: Foundations*,[52] Ackerman argues that the United States has had three constitutional regimes, not simply one. In Ackerman's view, the New Deal was a constitutional moment, inaugurating a new constitutional regime.

If America has had more than one constitutional regime, we might think about presidential power in a somewhat different way. During the Civil War period, the presidency became somewhat different from what it had been before.[53] In the New Deal period, there were additional changes, many of them discussed above. 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, required any legislative delegations of power to the executive to be narrow and clear. Some people therefore conclude that the New Deal effectively amended the Constitution, giving the President a range of new powers.

There can be no doubt that after the New Deal, the Constitution meant something different from what it had meant previously. There can be no doubt that changing understandings of presidential power were an important part of this change. We may doubt, however, whether the notion of constitutional amendment is the most helpful way to conceive of things. In the United States, we identify the constitution with a written text. It is customarily thought that constitutional amendments cannot occur without changes in constitutional text. The absence of a textual change seems devastating to the view that the New Deal amended the Constitution. To say that an unwritten change qualifies as a constitutional amendment does too much violence to our common understandings of what a Constitution is.

52. 1 *id.*
53. 1 *id.*

On the other hand, it is right to point to the creative features of the New Deal period, and also to insist that our conception of constitutional meaning was different after Roosevelt from what it had been before. We can fruitfully think of the New Deal developments—if they are to be legitimated—as an effort to maintain fidelity with constitutional commitments through new interpretations as a result of changes over time. The commerce power, for example, plausibly means something quite different in the context of a highly interdependent economy from what it means in a period in which interstate consequences are far less likely. Permissible delegations of legislative power to the President may also shift when rapid changes in national policy became more necessary in light of the extent of national regulatory power and the need to keep up with changing developments of fact and policy.[54] Moreover, we can take the Supreme Court's new constitutional interpretations post-New Deal as precedents, establishing the legitimacy of the New Deal entitled to a high degree of respect from subsequent generations.

Discussions of "constitutional amendment" are helpful insofar as they draw attention to the creative aspects of the New Deal shift. But the notion of amendment seems too exotic and adventurous when more modest explanations do equally good explanatory work.

III. Conclusions

In this essay, I have outlined some aspects of the extraordinary changes in the constitutional power of the President. I have also offered some diverse explanations of the changing nature of that constitutional power. There is no question that the current President is quite different from the founders' President. In some ways, it is hard for those committed to the project of constitutionalism to explain the discontinuities, which complicate the idea that the written constitution has a high degree of stability over time. One of the distinguishing features of the American Constitution is

54. See the criticisms of Ackerman in Cass R. Sunstein, *New Deals*, THE NEW REPUBLIC, Jan. 20, 1992, at 32.

its flexibility. The changed nature of the presidency is a testimonial to this fact.

What best accounts for the changes? I have suggested that emergencies are not the source of constitutional change, and that it is too exotic to think that the Constitution was amended by the New Deal. The most promising explanations stress the flexibility of the original text, the process of common law adjudication, and the need to maintain fidelity with original commitments over changed circumstances. If these are the best explanations, it seems clear that a distinctive feature of the constitutional provisions governing the President is that they allow a large degree of 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 meaning of constitutional provisions through close encounter with particular cases.

The discussion suggests some broad outlines for constitutional interpretation as well. More "offensive" presidential authority with respect to military action is probably a good way of maintaining faith with the constitutional framework, in light of the problematic nature of the offense-defense distinction under modern conditions. General presidential control of the administration is also appropriate in light of the now-enormous authority of what has become known as the executive branch.[55] It would be a mistake to reinvigorate the nondelegation doctrine, except, perhaps, for extreme cases; the purposes of the doctrine should be served through other means.[56] These general propositions leave many particular questions, but they might be taken to suggest some directions for the future.

What lessons can be drawn from the American experience with constitutional constraints on presidential power? The question is of special importance not only for Americans, but for all others concerned with the nature of written constitutions, including those in Eastern Europe and South

55. *See* Lessig & Sunstein, *supra* note 19, for the argument and for qualifications.

56. *See* Richard B. Stewart, *Beyond Delegation Doctrine*, 36 AM. U. L. REV. 323 (1987).

Africa. Perhaps two lessons 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. 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 both understanding and practice over time. Words are outrun by circumstances. They may be rendered ambiguous by the sheer passage of time. New problems will emerge, and constitutional text may well fail to solve them, or even to address them.

A second (and somewhat conflicting) lesson involves *the importance of a culture of constitutionalism* in maintaining a constitutional order. Judicial review is an important, but by no means the only, contributor to the creation of such a culture. Without the courts, presidential illegality would be less frequently discouraged, and less frequently countered. But much of the relevant culture comes from shared understandings within the executive and legislative branches. This culture is needed to ensure against the most egregious abuses of legal authority, from the President as well as from others.

In America, judicial review, and the constitutional culture more broadly, have 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 irritating irrelevance. In such considerations, I suggest, 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.