n 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, 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 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, not textual, are illegal? The paradox has considerable relevance to our current thinking about the presidency in particular and constitutionalism in general. Perhaps 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 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 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.

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.
It cannot be disputed that the original understanding of the presidency called for much less presidential authority than is taken for granted today. 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.

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. To be sure, the President did have authority to make rules in some important areas. But by modern standards, this authority was quite narrow. It did not involve much control over the domestic economy.

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

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. He must "take Care that the Laws be faithfully Executed." But often Congress offers very vague guidance. The President has a great deal of policy making discretion. This sphere of discretion includes regulation of the environment, energy, occupational safety and health, communications, and much else besides. There can be no doubt, 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.

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. 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 implement the law. To be sure, Congress has the constitutional authority to create "independent" agencies. It is unclear, however, how "independent" the independent agencies really are, as a matter of law or practice.

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.

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." 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.

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.

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. 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 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.
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 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 warring has been allowed without congressional declaration of war.

INTERPRETATION, AMENDMENT, OTHERS

From all these points we might reaffirm the old truisms 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.

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 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.

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. If 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.

Flexible Provisions and Silences. Many of the changes have occurred because the relevant constitutional provisions are both vague 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. 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 ambiguous, 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.

Common Law Constitutionalism. Some academic observers 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.

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. 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.

Translation. Some people, most notably Lawrence Lessig, 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
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. 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.

CONCLUSIONS AND LESSONS

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

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 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 ornum 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.

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