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The Path of the Presidency

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Writing constitutions to allow for evolutionary change.

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Founders in postcommunist democracies take their constitutional texts very seriously. Slovenia, for example, after enumerating its executive powers, states that these powers "cannot be extended." The same limitation is found in some drafts of the constitution of Belarus. These are founders who want to say now what will be, if not forever, then at least for a very long time; they are drafters who want to assure that the institutions they now establish are respectful of the words they now draft.

All this obsession over text is quite understandable. Coming from a communist past, and trained in a civil law tradition before that, respect for textual limits is an important lesson to relearn. But we might ask nonetheless whether this fetish for code-like constitutions is either useful or realistic. For it has led many to conceive the question of the division of powers quite statically—asking what division of power is best, now and in the future, as if a political system could be fixed in stone like Moses' Ten Commandments. Less focus on text, and more on how the constituted institutions are likely to interact, might lead to a more dynamic question—what division of power is best now, to allow a nation, unique in its history and culture, to evolve into a stable and enduring political system in the future.

The history of the American presidency reveals something of the value in this second question. Ours is the "imperial presidency"—with the chief executive simultaneously the chief administrator, the leading policymaker on the national scene, and the exclusive policymaker on the international scene. Many from postcommunist societies rightly reject this presidency as a model for their own emerging democracies. America, it is said, had a long history of democracy before its constitution was born, and hence a political culture strong enough to resist the dangers of authoritarianism inherent in any strong executive. The same cannot be said of the democracies emerging from (at least) forty years of communism. Having suffered most of the century under totalitarian rule, the region's nascent democracies would be too fragile to resist the temptations of an authoritarian, even if elected, president.

The contrast is a good one, and the lesson apt. But it is instructive to ask just when America achieved this political maturity, or more importantly, just when America's imperial presidency became possible. Modern pretensions notwithstanding, the modern presidency was not a creation of the founding fathers. Nothing in the text of 1787 suggested a presidency anything like the office now occupied by President Bill Clinton. Instead, in 1787 the President was quite a weak executive officer.

To see this, imagine a report about the newly created office of the president from a Chicago correspondent to the American Constitutional Convention of 1787.

After a summer of secret sessions, the convention of 1787 (called to draft amendments to the failed Articles of Confederation) proposed instead a radical, if unauthorized, new constitution. At the core of this document was a single executive officer, a president, elected by state electors at a special convention, and constitutionally independent from Congress. But as the drafters were quick to assure, this president was not to be America's elected monarch. Rather than possessing strong and broad constitutionally vested executive powers, he was to be a relatively weak executive officer. Indeed the constitution granted him just five powers unconditioned by the shared powers of Congress—the power to pardon, to fill vacancies, to order written opinions from executive officers, to receive ambassadors, and to command the military forces. (Even these, in part, depend on Congress—the commander-in-chief power, for example, depends upon Congress' declaration of war.) Beyond these five, the president's powers were powers conditioned by Congress—he had the power to negotiate treaties, that must be approved by the Senate; the power to appoint officers, that must be confirmed by the Senate; the power to veto legislation, that can be overridden by Congress; the power to recommend legislation, that can be ignored by Congress; the power to convene or adjourn Congress in ex-

traordinary times, that Congress can negate by its own similar vote; and finally, the power to "take Care that the laws be faithfully executed," laws that Congress itself sets. Not unlike the relatively weak presidencies recently established in Hungary and the Czech Republic, most of the American president's important powers, then, were powers significantly conditioned by Congress.

Overall, not a terribly strong executive power, and fundamentally unlike the current American presidency. Unlike his Bulgarian counterpart, he had no power over citizenship; unlike the Polish or Romanian presidents, he was not directly elected; unlike the Hungarian president, he had no constitutional power to "watch over the democratic functions of state."

The practices of the first U.S. presidents confirm this original reading. Unlike the modern policy-making executive, the first presidents were embarrassed to advise Congress on presidential views of legislation. As Washington wrote to a friend, "Motives of delicacy have uniformly restrained the [president] from introducing any topic which relates to legislative matters to members of either house of Congress, lest it should be suspected that he wished to influence the question before it." (Leonard D. White, *The Federalists: A Study in Administrative History* 55 [1948].) Even in 1887, when Cleveland urged Congress to pass liberalized trade regulation, Congress was shocked by the president's invasion of the legislative domain. (Louis Fisher, *The Politics of Shared Power: Congress and the Executive* 26 [1987].) The early presidents understood their role to be relatively passive; they exercised their power to advise Congress in just the way a parent advises a teenage son—carefully, infrequently, and with little expectation of acquiescence.

As originally framed, and originally practiced, then, the original president's power was slight. But what is important for our purposes is not this historical understanding, but rather, what accounts for the current presidency's deviation from that past. How has the presidency grown from this modest beginning to, in some eyes, a monster of centralized power today? What, in Vojtech Cepl's words, breathed the "life into his office"?

First, and most importantly, the transformation came not by any change in the constitutional text. No amendment vested in the president any more power than he possessed in 1789. And second, the change came in full view of Congress: this was not a presidency established in a constitutional putsch; it was a presidency gained with the knowing acquiescence of many Congresses.

So if neither amendment nor force was used, what accounts for the change? In part the remarkable growth of presidential authority follows from an often overlooked aspect of Congress' power, and in balance, from an often ignored history of slow and mutual presidential and congressional accommodation. This was a presidency the American democracy had to *learn*, and like all learning, it took time.

Consider first the part of this transformation owing to Congress' power. Buried in the constitutional text outlining Congress' authority is a somewhat obscure grant of power, known by the framers as the "sweeping clause" but referred to now as the "necessary and proper clause." Under this clause, Congress is granted the power to make "all laws necessary and proper to carry into execution" not just Congress's power, but also "all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Most contemporary commentators thought this clause simply made explicit what would have been understood in any case—that there were implied powers under the constitution. Therefore many thought the clause was a redundancy. But this has turned out to be a mistake. For even if there would have been implied powers without this clause, what the necessary and proper clause assures is that it is *Congress* and not the President which gets to say what those implied powers are, and more importantly, how they are to be structured. Congress gets to say this about *any* federal power, and thus retains ultimate jurisdiction over any expanding federal power.

The importance in this structural design is easily overlooked, but the history of the American presidency makes it hard to ignore. At first, Congress exercised broad powers of control over those powers that we would now consider executive, by vesting them in people other than the president—including prosecutorial powers vested in relatively independent department heads, or in state officials, and other powers of execution vested in state officials. More importantly, the first Congresses acted to assure a relatively weak federal administration. One example gives the overall flavor: Despite constant pleas by presidents and attorneys general, Congress refused (until 1870) to create a centralized department of justice, allowing the prosecution of federal laws to rest with essentially

independent local prosecutors and in some cases, state prosecutors. For most of the history of the American republic, much of the power of the modern presidency was held in check by a jealous and careful Congress.

Over time, all this has changed. As faith in the presidency grew along with impatience over a factionalized and corrupt Congress, Congress finally granted the president increasing control over an increasingly centralized administration. After a century of democratic practice, and a long tradition of democratic executives, Congress permitted the evolution of a presidency that without doubt the founders would have found terrifying. This was a change long in coming, but critically, it is not a change best understood as a *change* in the constitution itself. For to this day, the full range of the resident's power survives solely by the grace of Congress. Under the "sweeping clause" Congress retains broad power to limit and control—to check—an overzealous executive. The president's power is a power by structural delegation, but a careful Congress could at anytime recall the power it has allowed.

No doubt the evolution in the American presidency is unlike the evolution that can be expected of the executive power in postcommunist democracies. For one thing, the countries of Eastern Europe that have established a more-than-ceremonial president are dual-executive democracies. But the constitutional history of the French Fifth Republic, which created a system of this sort, confirms the lesson we have drawn from the American experience: the growth of presidential power cannot be rigidly controlled by a constitutional text. My point about the American experience is not so much about a particular evolution that any constitution will follow. Instead, it is about the nature of a constitution as evolutionary. What is general is not a particular path of presidential growth, but that presidencies have a path of growth, and that at their birth constitutions should understand and accommodate this.

That a practice can be constitutional even if not literally prescribed by a constitutional text is the first general lesson from this history. Three more specific lessons might also be suggested. First, while the American experience is discounted in postcommunist debates, again because of the preconstitutional democratic traditions in America, it is useful to remember that even these early democrats refused constitutionally to entrench a strong executive power. So fearful were the framers of replicating King George that they established at first a small and impotent executive office, and filled it with a not so small (but importantly) sterile (father of no heirs except the country) President Washington. And except for the extraordinary period surrounding the Civil War, this limited executive power would survive on the American continent for at least a century. Even on the brink of economic and political collapse, the framers did not short-circuit the deliberative—if inefficient, if corruptible, if factionalized—responsibility of Congress.

Second, what the "sweeping clause" suggests is that modern constitutionalists should focus less on carving into stone divided executive and legislative powers, and more on devising a system that will allow an effective executive (and Congress) to evolve over time. What the sweeping clause allowed America was a flexibility that Congress could exercise, over time and across historical contexts, in various political battles. This arrangement helped Congress develop as a democratic institution, while checking the anti-democratic tendencies of a strong executive—allowing, in short, a period of maturation. What this suggests for other constitutional regimes is the need for a similar structural device that would permit a similar space for parliament and the executive (or executives) to develop and, more importantly, to develop together.

Such a development will take time and what we might call political space—the third lesson from the American experience. Modern constitutionalists, especially rights-focused constitutionalists, are eager to quash politics in the name of "correct" constitutional principles, eager to avoid political struggles, and move quickly to the "right" constitutional answer, eager to throw law, constitutional law, into battles inherently political. This may have been the impatience of Professor/Justice Valeri Zorkin, who, along with his court of legal academics (9 of the 13 justices were from the academy), like overeager parents, refused to stand aside and allow political institutions to resolve their political conflicts politically—through compromise and agreement. But it is just this skill that a democracy demands. The process of learning this skill, of *learning* democracy, cannot be short circuited—no less in postcommunist democracies today, than in eighteenth-century America.

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