How Presidents Interpret the Constitution

Hal Bruff

Rosenbaum Professor of Law, the University of Colorado

The most important single interpreter of the United States Constitution is the president. This statement is surprising and seems wrong, but two examples drawn from American history will illustrate the truth of it. When Thomas Jefferson encountered the stupendous opportunity to buy Louisiana from Napoleon, he knew that the Constitution contained no explicit power for the new United States to acquire territory by treaty or otherwise. Jefferson decided to treat the purchase as constitutional by submitting the treaty to the Senate for ratification and by asking the House of Representatives for the necessary appropriations. The president reasoned that if Congress and the American people accepted the deal it would become part of the Constitution. And so it has.

When Abraham Lincoln considered issuing the Emancipation Proclamation, he concluded that his power as commander in chief authorized him to free slaves in states that were rebelling against federal authority. Lincoln saw the Proclamation as a military measure that would help defeat the Confederacy, as it did. The president concluded, however, that he had no power either to free slaves in states that had not rebelled or to end slavery as an institution. He thought that such actions would take a constitutional amendment; hence he supported the eventual Thirteenth Amendment to end slavery forever.

These examples show that a very common articulation of the central principle of the separation of powers in our system of government is oversimplified and misleading. Every American student learns that Congress makes the laws, the president executes them, and the courts interpret them. As a broad generality, the principle is true, but it obscures the everyday

reality of the functioning of the three branches. In fact, each of the branches interprets both the Constitution and existing statutes constantly as it operates. When Congress legislates it asserts that its new statutes are constitutional. When presidents execute the Constitution and statutes, they claim that their actions are constitutional. As the courts perform their interpretive functions they decide cases properly before them but there are many issues that they do not reach. Inescapably, all three branches generate new law constantly—the important question is what the limits are to their interpretive discretion.

My recent book *Untrodden Ground* tells the story of how all forty four American presidents have interpreted the Constitution. The title comes from George Washington's remark that in the new office of president he stood on untrodden ground and everything he did would form a precedent that would guide and might bind his successors. He was right about that—as the Louisiana example reveals, many precedents in the form of presidential constitutional interpretations have become so ingrained that they have become constitutional law in every important sense, even if the courts have never blessed them. If Congress and the American people accept a presidential action it will likely be repeated by future presidents. If not, a barrier will form.

Some ground has been contested between the two political branches for a long time. Throughout our history presidents have claimed that their constitutional power as commander in chief enables them to use military force to respond to at least some kinds of attacks on Americans without the need for Congress to provide advance authority through its power to declare war. The boundary between these presidential and congressional powers is indistinct and has mostly been defined by historical practice not by judicial interpretation.

Precedent has put some ground off limits for presidents. Although the Constitution says nothing about the number of justices on the Supreme Court, a political firestorm greeted Franklin Roosevelt's ill-advised Court-packing plan, which would have added several justices for obviously partisan purposes. Objections to the plan were stated in constitutional terms—that no president may apply force to the Court to obtain desired rulings. No subsequent president is likely to repeat the mistake. The barrier lies somewhere along the indistinct line between politics and constitutional law.

Presidential constitutional interpretation is fundamentally unlike that of the other two branches because it is ultimately performed by a single person not a group. This means that it is deeply personal in a way that a collective decision never is. *Untrodden Ground* identifies five ingredients that go into presidential interpretation. First, a president's personal character is crucial. Abraham Lincoln and Theodore Roosevelt, strong men, pursued aggressive interpretations of their powers. James Buchanan and Warren Harding, weaklings, were diffident about their powers. Second, the president's general political values affect his or her overall view of the Constitution, especially concerning the role and power of the federal government. Lyndon Johnson and Ronald Reagan did not share a common vision of the government or of its Constitution. Third, crises that arise affect judgments about what the Constitution should mean if the nation is to survive and thrive. Fourth, the incentives that presidents encounter once on the job, such as the need to counter opposition seeming to come from everywhere, press them to claim capacious powers. And fifth, the weight of precedents bearing on proposed options steer presidents toward ground that predecessors have occupied successfully and away from ground that has proved swampy in the past.

Thus the process of presidential constitutional interpretation is complex. Barack Obama once said that the final, crucial element in making a difficult decision is what is in the interpreter's "heart," which I take to mean both the sum of the vectors that I have just described along with the elusive elements of judgment that in great presidents like Lincoln become statesmanship.

Compared to the other two branches of government with their multiple membership at the top, presidential interpretation has natural advantages of speed and of potential consistency in the hands of any particular incumbent. Controlling the executive apparatus of government, presidents have the first mover advantage—they can create a state of affairs that places Congress and the courts in an uncomfortably reactive position, for example when troops are ordered into harm's way without prior authorization by Congress. Often the other branches cannot easily undo presidential actions without possible harm (or at least embarrassment) to the nation.

It should not surprise anyone that the president's constitutional powers have accreted over the years. Presidential self-interest in broad power has combined with both the executive's institutional advantage in taking action and with the needs of a maturing nation for a strong government to form a modern White House with great and often alarming power. In particular, the end of World War II produced a tectonic shift in presidential power as the nuclear age and the Cold War dawned together. The result was formation of the massive national security establishment that we know today, in place of the demobilization that had followed all previous wars. Now that presidents command constantly available military and intelligence forces having unmatched power there is always an opportunity—and temptation—to put it to use for desired ends without first asking Congress to supply the necessary tools and specific legal authority.

Three constitutional sources have supported presidential powers that are claimed today. First, control of the nation's foreign policy gravitated to the presidency from the earliest days of the Republic and was essentially in place by the time of Jefferson, even though the Constitution's grants of foreign policy power to the president are fragmentary. Article II of the Constitution, which creates the executive branch, vests the "executive power" in the president, which implies at least some substantive grant of power. Then it authorizes the president to receive foreign ambassadors and to submit treaties to the Senate for ratification. On this thin base presidents since Washington have built their primacy in determining foreign policy, largely as a result of the need for the nation to speak with one voice to other nations and the president's supervision of the diplomatic corps.

An example of the breadth of the foreign policy power is the executive agreement that President Obama negotiated with Iran and a group of European nations to limit Iran's nuclear capacity. Presidents since George Washington have made agreements with other nations without submitting them to the Senate for ratification as treaties. Sometimes these concern minor matters, but many presidents have used executive agreements for major foreign policy decisions. Congress has sometimes modified or even repudiated particular agreements by statute, but has generally acquiesced in the existence of the overall practice. Famous examples of these agreements include Franklin Roosevelt's recognition of the Soviet Union and President Richard Nixon's recognition of Communist China.

Second, the president's power as commander in chief both implies the existence of foreign policy powers short of war (such as saber-rattling) and authorizes at least some military measures to protect the nation without a formal declaration of war by Congress. Over the centuries, the president's capacity to initiate military actions that are claimed to be less than a

full war in the legal sense has built a long record of clashes with other nations or less formal groups. Some of these actions have led to extended national commitments, most notably in Vietnam. During the Cold War, presidential control of nuclear weapons and the need for possibly instantaneous response to a missile threat vastly concentrated executive power. At the height of the Cuban Missile Crisis in 1962, the fate of civilization rested on direct and secret negotiations between two men, President John Kennedy and Soviet Premier Nikita Khruschev. There was no outside control in the form of either meaningful participation by Congress or the contemporaneous knowledge of the American people.

Third, the Constitution commands the president to ensure the faithful execution of both the office of president and of the laws more generally. This faithful execution duty confirms the president's ultimate responsibility for what the executive branch does. It also confers substantial power on modern presidents. We now live in an age of statutes, and the faithful execution duty implies a power to reconcile their often cloudy or apparently conflicting commands. Even without modern congressional gridlock, Congress is unable to resolve every legal issue that arises under statutes. Nor can the courts answer every question. Because enforcement resources through congressional appropriations are always limited, each president has the duty and opportunity to set priorities among the many demands for the federal government to do this or refrain from that.

Presidents exercise their control over the bureaucracy by issuing executive orders, which are commands to officers telling them how to do their statutory duties. Nowadays it is generally understood that the president can issue executive orders that are either supported by express or implied statutory authority or are at least in a "twilight zone" where no statute clearly allows or forbids a particular action. By contrast, presidential actions that are forbidden by statute are

ordinarily illegal, because they can be upheld only by establishing that constitutional executive power overrides a particular congressional limitation (and courts are properly reluctant to come to that conclusion). Presidents can ordinarily craft their executive orders in ways that steer between statutory reefs, so the faithful execution duty confers broad practical power to form and execute policy.

Theodore Roosevelt's early modern presidency featured a vigorous use of executive orders to promote values of conservation that were neither clearly authorized nor forbidden by existing statutes. He created many national monuments and other reserves of federal lands and successfully resisted congressional attempts to override his actions. Subsequent presidents have taken his example to heart. In the most prominent current controversy, Barack Obama ordered immigration officials to prioritize deportations of undocumented aliens by focusing on criminals and other dangerous persons and by deferring deportation of families including members who are United States citizens. Enforcement resources allow deportation of only a small fraction of the millions of undocumented people in the United States. The president was obligated to decide which aliens to pursue and which ones to leave alone for the time being. Heated controversy and litigation have resulted from the massive scale of this executive order program. It is, however, different only in size and not in kind from actions many modern presidents have taken.

In the twenty-first century, the American people confront a basic dilemma about presidential constitutional power that the generation that framed the Constitution could not have imagined. Today's most important challenge is the existence of a massive and secretive national security bureaucracy that wields immense power and is subject to only tenuous constitutional controls. It is very difficult for either Congress or the people to monitor this bureaucracy effectively. Of equal concern, it is very difficult for the single individual who occupies the

presidency to monitor these subordinate officers. In our time of a seemingly never-ending “war on terror,” novel constitutional issues proliferate, for example the legality of “cyberwar” directed against computers in foreign nations or of drone strikes against suspected terrorists far from our shores.

The challenge for the American people and their presidents today is to adapt our eighteenth century Constitution to twenty-first century conditions. That is a task for all of us. To begin, we must realize during this presidential election year that the forty fifth president will take office with an opportunity to shape the Constitution through his or her interpretations in ways that may last for the ages.

5/23/2016/2206words