**Article**

# Constitutional Dictatorship: Its Dangers and Its Design

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*I'm the commander—see, I don't need to explain—I do not need to explain why I say things. That's the interesting thing about being the president. Maybe somebody needs to explain to me why they say something, but I don't feel like I owe anybody an explanation.*

—George W. Bush[1]

## INTRODUCTION

If Americans know one thing about their system of government, it is that they live in a democracy and that other, less fortunate people, live in dictatorships. Dictatorships are what democracies are not, the very opposite of representative government under a constitution.[2]

The opposition between democracy and dictatorship, however, is greatly overstated.[3] The term "dictatorship," after all, began as a special constitutional office of the Roman Republic, granting a single person extraordinary emergency powers for a limited period of time.[4] "Every man the least conversant in Roman story," remarked Alexander Hamilton in *The Federalist No. 70*, "knows how often that republic was obliged to take refuge in the absolute power of a single man, under the formidable title of Dictator" to confront emergencies caused by insurrec-

1. BOB WOODWARD, BUSH AT WAR 145–46 (2002). Bush famously designated himself "the decider" in 2006, when asked why he was retaining Donald Rumsfeld as Secretary of Defense in spite of increasing calls, some from retired military officers, for Rumsfeld's dismissal. "I hear the voices, and I read the front page, and I know the speculation. But I'm the decider, and I decide what is best." Sheryl Gay Stolberg, *The Decider*, N.Y. TIMES, Dec. 24, 2006, at 4. Bush waited until after the 2006 elections to remove Rumsfeld. *See* Sheryl Gay Stolberg & Jim Rutenberg, *Rumsfeld Resigns; Bush Vows 'To Find Common Ground'; Focus Is on Virginia*, N.Y. TIMES, Nov. 9, 2006, at A1.

2. *Cf.* Miguel Schor, *Constitutionalism Through the Looking Glass of Latin America*, 41 TEX. INT'L L.J. 1, 6 (2006) (noting the constitutional differences between dictatorships and democracy).

3. *Cf.* J.M. Balkin, *Nested Oppositions*, 99 YALE L.J. 1669, 1678–82 (1990) (book review) (explaining how legal and political ideas and institutions that appear to be opposed, on further investigation, depend on or include elements of each other).

4. *See* ANDREW WILLIAM LINTOTT, THE CONSTITUTION OF THE ROMAN REPUBLIC 110 (1999).

tion, sedition, and external enemies.[5] No political constitution was well designed, Hamilton believed, unless it could confront emergencies and provide for energetic executive powers to handle them.[6]

Under this view, dictatorship—the power of government officials to act on important matters free of accountability or timely legal checks—is not the opposite of democracy—or what our Constitution calls a "Republican Form of Government."[7] It is an institutional feature *within* constitutional democracies that can and should be employed to perform valuable civic functions. From this perspective, "dictatorship" becomes—as it was in the early Roman Republic—a term of description rather than a term of opprobrium.[8] It refers to institutions and powers of emergency government that constitution makers might establish to serve the public interest. Indeed, if the institutions are properly designed, "dictatorship" might even have positive connotations—think only of the praise heaped on the legendary Cincinnatus.[9]

5. THE FEDERALIST NO. 70, at 451 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961). Hamilton's point was that Rome did not lose its "republican" character because it used dictatorships in emergencies. *Id.*

6. *Id.* Hamilton, who believed in a strong executive, nevertheless refrained from overtly endorsing any sort of "dictatorship" for the United States; this political caution was sound, given that the aim of *The Federalist Papers* was to gain the votes of wavering Anti-Federalists in New York, who feared concentration of powers (and possibly tyranny) in the new federal government. *See* DAN T. COENEN, THE STORY OF THE FEDERALIST: HOW HAMILTON AND MADISON RECONCEIVED AMERICA 3–5 (2007). The New York Convention's vote was 30 to 27, "so a switch of two votes might well have doomed the 1787 proposal or, at the least, required a new convention." PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 23 (5th ed. 2006); *see also* Cecil L. Eubanks, *New York: Federalism and the Political Economy of Union*, *in* RATIFYING THE CONSTITUTION 300, 300 (Michael Allen Gillespie & Michael Lienesch eds., 1989) (same).

7. U.S. CONST. art. IV, § 4.

8. *See* LINTOTT, *supra* note 4, at 110.

9. Lucius Quinctius Cincinnatus was a famous Roman statesman whom the Senate called from his plow to become dictator and rescue the country from invasion. Sixteen days later, after saving the Republic, he promptly resigned his dictatorship and returned to his plow. *See* 1 TITUS LIVIUS (LIVY), THE HISTORY OF ROME 170–73 (Ernest Rhys ed., Canon Roberts trans., E.P. Dutton & Co. 1912). Cincinnatus was viewed as an exemplar of republican virtue both for his willingness to abandon his family and property to serve the Republic and for his decision to give up absolute power and return to life as a farmer. *See* GARRY WILLS, CINCINNATUS: GEORGE WASHINGTON AND THE ENLIGHTENMENT 20 (1984). Because of his decisions to retire from the Continental Army and the presidency and return to his farm at Mount Vernon, George Washington was called the American Cincinnatus. *See* JOHN SHELTON LAW-

At the same time, the Framers of the American Constitution believed that democracies were dangerous precisely because they might lead to what they called "tyranny"[10]—the sort of denials of liberty that people today now routinely associate with "dictatorship." Even as they celebrated republicanism—rule by the people—they distrusted the passions of majorities.[11] For the Framers, democracy was not the antithesis of dictatorship, either as a logical or an empirical matter. Democracy was a force that always had to be checked, and its passions cooled, in order to realize the benefits of republican government.

Every republic known to the Framers—many of whom were steeped in ancient history[12]—had eventually broken down and led to government by a strongman such as Julius Caesar. The lesson of the past seemed to be that the natural progres-

RENCE & ROBERT JEWETT, THE MYTH OF THE AMERICAN SUPERHERO 130 (2002) (comparing Washington and Cincinnatus); WILLS, *supra*, at 23.

10. *See* THE FEDERALIST NO. 47 (James Madison), *supra* note 5, at 336 ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.").

11. *See, e.g.*, RICHARD HOFSTADTER, THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT 4 (1948) (describing complaints about democracy by delegates to the Philadelphia Convention, including Edmund Randolph, Elbridge Gerry, Roger Sherman, and William Livingston); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 165–67 (1972) (noting that concerns about the excesses of democracy in state governments led to calls for a new constitutional convention).

*The Federalist Papers* are full of warnings about the passions of majorities. *See, e.g.*, THE FEDERALIST NO. 10 (James Madison), *supra* note 5, at 130, 134 (denouncing dangers of "faction," defined as "a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community," as well as noting that majority factions are more dangerous than minorities); THE FEDERALIST NO. 51 (James Madison), *supra* note 5, at 358 ("If a majority be united by a common interest, the rights of the minority will be insecure."); THE FEDERALIST NO. 63 (James Madison), *supra* note 5, at 415 ("[T]he people, stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn."); THE FEDERALIST NO. 71 (Alexander Hamilton), *supra* note 5, at 459 ("When . . . the interests of the people are at variance with their inclinations, it is the duty of the persons whom they have appointed to be the guardians of those interests, to withstand the temporary delusion, in order to give them time and opportunity for more cool and sedate reflection.").

12. *See, e.g.*, DAVID J. BEDERMAN, THE CLASSICAL FOUNDATIONS OF THE AMERICAN CONSTITUTION: PREVAILING WISDOM 1 (2008) ("Classical antiquity molded the legal expectations of the Framers of the American Constitution . . . ."); M.N.S. SELLERS, AMERICAN REPUBLICANISM: ROMAN IDEOLOGY IN THE UNITED STATES CONSTITUTION 22 (1994) ("[T]he basic framework of their education and understanding was classical . . . .").

sion of popular governments was toward demagoguery and eventually tyranny; the most obvious example to the founding generation was the ill-fated English Revolution in 1640 and the rise of Oliver Cromwell as Lord Protector.[13] Therefore, it was crucial to build institutional features like the separation of powers and checks and balances to keep America's experiment with republican government safe from the same fate as previous attempts.

It is better to think of dictatorship, then, neither with associations of praise (Cincinnatus) or dread (Hitler), but with a necessary ambivalence. It is an institutional framework for emergency government that may be valuable and even necessary to constitutional republics; nevertheless, it contains troublesome tendencies that, if allowed to develop unchecked, pose serious threats to democratic government.[14]

Emergency powers may well be necessary to effective governance in a modern state. But precisely because of the growth of emergency powers and other forms of executive discretion in American legal institutions—not to mention the unhappy fate of many other republics—one cannot be sure that the some-

13. *See* CHRISTOPHER HILL, GOD'S ENGLISHMAN: OLIVER CROMWELL AND THE ENGLISH REVOLUTION 147–72 (1970) (describing the history of Cromwell's dictatorship as Lord Protector).

14. Recently Eric Posner and Adrian Vermeule have cast scorn on what they call "tyrannophobia"—the fear that the expansion of executive power in America will lead to dictatorship. *See* Eric A. Posner & Adrian Vermeule, *Tyrannophobia* 1 (Univ. of Chi. Pub. Law, Working Paper No. 276, 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1473858. "[T]he United States," Posner and Vermeule confidently inform us, "has never had a true dictator, or even come close to having one . . . . By now, 233 years after independence, these risks should be close to zero." *Id.*

As we explain in this article, Posner and Vermeule gloss over many important features of American history. One assumes they would respond that none of the examples we offer constitute "true" dictatorship; but excluding them from one's stipulated definition does not prove that they pose no dangers for either civil liberties or republican government.

Even putting definitional quibbles aside, we think the claim that after 233 years America is guaranteed to be "dictator-proof" is entirely too sanguine. It is worth noting that the Roman Republic lasted some 460 years, from the expulsion of the monarchy in approximately 509 B.C., *see* CLINTON L. ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES 17 (1948), until Julius Caesar crossed the Rubicon in 49 B.C., leading to civil war and the ultimate dissolution of the Republic. *See* MATTHIAS GELZER, CAESAR: POLITICIAN AND STATESMAN 336 (Peter Needham trans., 1968). A Roman surveying the scene 233 years after the Roman Kings (some ten years after the *Lex Hortensia* settled the Conflict of the Orders between plebians and patricians) might also have confidently predicted a zero percent chance of either tyranny or Empire, but would also have been sadly mistaken.

times haphazard expansion of executive discretion and emergency power pose no dangers to the United States. We have no reason to think that Americans possess a special immunity from the pathologies that have befallen many other countries.[15] Above all, we should not leave these developments to chance, or assume that the probabilities of things going wrong are nil. If emergency government is necessary, its institutions—and the restraints upon them—should be the subjects of systematic "reflection and choice,"[16] designed to preserve and adapt republican government through the many crises that democracies inevitably face.

In his 1948 book *Constitutional Dictatorship*, Clinton Rossiter surveyed the growth of emergency power in America and other western democracies. "That constitutional dictatorship does have a future in the United States," he concluded, "is hardly a matter for discussion."[17] Rossiter wrote in the aftermath of World War II, at the very beginning of the National Security State. We now have sixty years of additional evidence to assess his conclusions, including the explosion of national intelligence services and our government's response to the 9/11 terrorist attacks and the 2008 economic crisis.[18] Unless, we can reject Rossiter's analysis out of hand, we must pay careful attention to how such systems of emergency governance work. We must also consider how best to design them to prevent their degeneration and abuse, possibilities of which the founding generation was altogether too aware.

Part I of this Article describes the concept of a "constitutional dictatorship," its differences from other forms of dictatorship, and the important debates about constitutional dictatorship that occurred in the middle of the twentieth century. Part II identifies elements of constitutional dictatorship in the American system of government, especially in the modern American presidency following the creation of the National Security State

15. For a survey of how emergency powers have spread and become routinized in many different countries, see Kim Lane Scheppele, *Exceptions That Prove the Rule: Embedding Emergency Government in Everyday Constitutional Life*, *in* THE LIMITS OF CONSTITUTIONAL DEMOCRACY (Jeffrey K. Tulis & Stephen Macedo eds., forthcoming 2010). *See also* OREN GROSS & FIONNUALA NÍ AOLÁIN, LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE 171–244 (2006) (providing numerous examples).

16. THE FEDERALIST NO. 71 (Alexander Hamilton), *supra* note 5, at 89.

17. ROSSITER, *supra* note 14, at 306.

18. *See* Scheppele, *supra* note 15.

in the 1940s.[19] Part III explains the practice of governing through emergency, and the temptations to the politics of emergency that modern presidents now face. Finally, Part IV describes how we might redesign the constitutional system to counteract worrisome tendencies in the American presidency and head off the dangers of constitutional dictatorship while retaining the benefits of a government that effectively handles emergencies.

## I. CONSTITUTIONAL DICTATORSHIP AND REPUBLICAN GOVERNMENT

### A. IS CONSTITUTIONAL DICTATORSHIP AN OXYMORON?

For many people, "constitutional dictatorship" is a contradiction in terms. "The very phrase," Yale political theorist Fredrick Watkins wrote in an important 1940 article, *The Problem of Constitutional Dictatorship*, "has a discouragingly paradoxical ring."[20] The phrase seems to combine "absolutism,"—a government devoid of restraints—with constitutionalism, "a system of government whereby rulers are subjected to the restraining influence of law."[21] "In the strictest possible sense," Watkins suggested, "the two words are antithetical."[22] Constitutionalism ensures both legitimate leadership and substantive limits on what the leader can do, whereas "dictatorship" seems dicey on both counts.

Watkins wrote at the outset of the Second World War—a war that seemed on the surface to be one between constitutional democracies and dictatorships. Yet Adolf Hitler rose to power through skillful use of the constitutional procedures set out in

19. *See, e.g.*, GARRY WILLS, BOMB POWER: THE MODERN PRESIDENCY AND THE NATIONAL SECURITY STATE (2010). Wills builds on arguments going back to Harold D. Lasswell's seminal article, *The Garrison State*, 46 AM. J. SOC. 455, 455 (1941) (describing states in which "specialists in violence" are the most powerful group in society).

20. Frederick M. Watkins, *The Problem of Constitutional Dictatorship*, *in* PUBLIC POLICY 324, 324 (C.J. Friedrich & Edward S. Mason eds., 1940). Because Watkins's long article has almost no footnotes, it is hard to gauge how much he was influenced by similar discussions in Europe, but one suspects that Watkins was well aware given that the year before, in 1939, he published a book on emergency powers in Germany. *See* FREDERICK MUNDELL WATKINS, THE FAILURE OF CONSTITUTIONAL EMERGENCY POWERS UNDER THE GERMAN REPUBLIC (1939).

21. Watkins, *supra* note 20, at 324.

22. *Id.*

the Weimar Constitution;[23] the Russian dictator, Josef Stalin, presided over a "socialist republic" with an elaborate constitution drafted in 1936.[24] Meanwhile, in the liberal democracy of Great Britain, Winston Churchill would replace Neville Chamberlain as Prime Minister in May of 1940, and Britain's political parties would agree to suspend the (unwritten) constitutional norms of parliamentary elections until the end of the war.[25] Although still officially a democracy, there was no election in Great Britain between 1935 and 1945.[26] Thus, Watkins did not believe in a sharp dichotomy between "democracy" and "dictatorship."[27] For him the term "constitutional dictatorship" was not a paradox; it was a fact of life.

Watkins's article appeared in 1940 following several tumultuous decades in which constitutional governments regularly assumed extraordinary powers to deal with emergencies.[28] At the same time, the development of the modern administrative state in the West was rapidly calling into question many traditional assumptions about the rule of law.[29] Governments increasingly delegated wide-ranging discretionary power over important aspects of people's lives to administrative agencies and bureaucrats. Thus, the problem of constitutional dictatorship was not the presence of dictatorial elements within constitutional forms of government; these elements had become commonplace and, by the end of the 1930s, seemed almost inevitable. Rather, the problem—and the challenge—of constitutional dictatorship was to design structures adequate to forestall the dangerous tendencies of dictatorial powers when the occasion called for them.[30]

23. *See* IAN KERSHAW, HITLER 1889–1936: HUBRIS 418 (1998).

24. *See* LEONARD SCHAPIRO, THE COMMUNIST PARTY OF THE SOVIET UNION 410–11 (2d ed. 1971).

25. *See* WILLIAM MANCHESTER, THE LAST LION: WINSTON SPENCER CHURCHILL: ALONE 1932–1940, at 677–81 (1988).

26. *See* William A. Robson, *Post-War Municipal Elections in Great Britain*, 41 AM. POL. SCI. REV. 294, 294 (1947).

27. *See* Watkins, *supra* note 20, at 324.

28. *See, e.g.*, ALONZO L. HAMBY, FOR THE SURVIVAL OF DEMOCRACY: FRANKLIN ROOSEVELT AND THE WORLD CRISIS OF THE 1930S (2004).

29. *See, e.g.*, WILLIAM E. SCHEUERMAN, BETWEEN THE NORM AND THE EXCEPTION: THE FRANKFURT SCHOOL AND THE RULE OF LAW 98–99 (1994) (describing the challenge posed by the administrative and welfare state to traditional ways of conceptualizing law).

30. Watkins, *supra* note 20, at 358 (noting difficulties of administering effective emergency action).

In fact, the idea of a constitutional dictatorship has a long history, as long as that of republics themselves. Like almost all students of constitutional dictatorship, Watkins admired the institution of the dictator in ancient Rome, which he described as "perhaps the most strikingly successful of all known systems of emergency government."[31] As noted previously, in the Roman Republic, "dictatorship" was not a not a term of opprobrium, but a special legal form of governance designed to address particular problems.[32] Watkins believed it had helped maintain the stability and success of the Roman Republic for centuries.[33]

During the 1920s and 1930s, the most important writing on dictatorships, constitutional and otherwise, was by Carl Schmitt, an important political theorist who also gained lasting obloquy as a legal apologist for the Nazi takeover of Germany in 1933.[34] In Schmitt's 1921 book, *Die Diktatur* (which presumably needs no translation), he drew on the distinction, traceable to Roman law, between "sovereign" and "commissarial" dictators.[35] A sovereign dictator uses a political crisis to overthrow the existing constitutional order and found a new one.[36] A commissarial dictator, by contrast, is constituted by and given power by the existing political order; the dictator exercises power temporarily in a crisis in order to save the regime and

31. *Id.* at 332.

32. *See supra* note 9 and accompanying text.

33. *See* Watkins, *supra* note 20, at 331. *But see* NOMI CLAIRE LAZAR, STATES OF EMERGENCY IN LIBERAL DEMOCRACIES 114 (2009) (presenting a more skeptical view of the Roman dictatorship).

34. For an introduction to Schmitt's thought, see, e.g., LAW AS POLITICS: CARL SCHMITT'S CRITIQUE OF LIBERALISM (David Dyzenhaus ed., 1998); DAVID DYZENHAUS, LEGALITY AND LEGITIMACY: CARL SCHMITT, HANS KELSEN AND HERMANN HELLER IN WEIMAR (1997); WILLIAM E. SCHEUERMAN, CARL SCHMITT: THE END OF LAW (1999).

35. *See* ANDREAS KALYVAS, DEMOCRACY AND THE POLITICS OF THE EXTRAORDINARY: MAX WEBER, CARL SCHMITT, AND HANNAH ARENDT 89 (2008) (discussing Schmitt's distinction).

36. *See id.* at 90 (noting that sovereign dictatorship is similar to "the classic legislator who operates outside the existing legal system" and signifies a "break that separates it from the previous system of norms"). The "dictator" need not be an individual. Carl Schmitt viewed the Philadelphia Convention of 1787 as an act of sovereign dictatorship because the delegates sought to overthrow the existing regime constituted by the Articles of Confederation and replace it with a new constitutional order. *Id.* at 96; *see also* 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 49 (1998) ("Illegality was a leitmotif at the Convention from first to last."); THE FEDERALIST NO. 40 (James Madison), *supra* note 5, at 291–92 (defending the presumptive illegality of the Convention by reference to the "crisis" and "exigencies" that justified the delegates in going well beyond their mandate).

return to the status quo as soon as practicably possible.[37] The Roman dictatorship, in which the dictator held power for a limited term, is an example.[38]

The commissarial dictator is a constitutional dictator, whose powers are constituted by the basic law. The sovereign dictator, by contrast, has no obligation to return to the constitutional order; indeed, the sovereign dictator constitutes the legal order. One of Schmitt's best known works, *Political Theology*, notoriously begins by defining the "sovereign" as the person (or institution) who can suspend ordinary legality by declaring a "state of exception."[39]

Clinton Rossiter's brilliant and troubling book, *Constitutional Dictatorship: Crisis Government in the Modern Democracies*, studied the responses of France, Great Britain, Germany, the United States, and ancient Rome to emergencies, real and perceived, including those generated by the Great Depression and World War II.[40] Some of these emergencies involved problems of national security, and some were economic crises, including, of course, economic dislocations generated by war and its aftermath. Rossiter concluded that one constant in all the examples of emergency government he studied was the decision to adopt some form of dictatorship, validly legal or otherwise.[41] Like Watkins, Rossiter emphasized the difference between "constitutional" and "unconstitutional" dictatorships, arguing strongly in favor of the former.[42] Similarly, Carl J. Friedrich, one of Harvard's leading lights in political theory during the mid-twentieth century, devoted a full chapter of his well-known textbook, *Constitutional Government and Democracy*, to consideration of "constitutional dictatorship,"[43] which he contrasted to its more ominous counterpart, "totalitarian dictatorship."[44]

37. *See* KALYVAS, *supra* note 35, at 89.

38. *See, e.g.*, ROSSITER, *supra* note 14, at 20–23.

39. CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 5 n.1 (George Schwab trans., 2006); *see also* GIORGIO AGAMBEN, STATE OF EXCEPTION (Kevin Attell trans., 2005).

40. *See generally* ROSSITER, *supra* note 14.

41. *See id.* at 11–14.

42. *Id.* at 3–4.

43. *See* CARL J. FRIEDRICH, CONSTITUTIONAL GOVERNMENT AND DEMOCRACY: THEORY AND PRACTICE IN EUROPE AND AMERICA 572–96 (1950). *See generally* C.J. FRIEDRICH, CONSTITUTIONAL REASON OF STATE: THE SURVIVAL OF THE CONSTITUTIONAL ORDER (1957) (discussing development of "constitutional dictatorship").

44. CARL J. FRIEDRICH & ZBIGNIEW K. BRZEZINSKI, TOTALITARIAN DICTATORSHIP AND AUTOCRACY (1956). Key to understanding the title is the implicit

Except for Schmitt, who is (in)famous for other reasons, this body of work has not generated much of a legacy, at least in the United States. Friedrich and Watkins are largely forgotten, and Rossiter is now probably best known as the editor of what is probably the most widely cited edition of *The Federalist Papers*. Some political scientists may still consult his important work on the presidency,[45] but his far more probing (and disturbing) work on constitutional dictatorship appears to languish. We believe this is a mistake. The problem of constitutional dictatorship is as important today as it was in ancient Rome and the first half of the twentieth century. Although we often oppose emergency to normal times, emergency and the problems of emergency government are always with us. All the more reason then to study the design—and the dangers—of constitutional dictatorships.

### B. THEORIES OF CONSTITUTIONAL DICTATORSHIP

We begin with perhaps the most important theorist of "constitutional dictatorship" in the West, the great Florentine theorist Niccolo Machiavelli.[46] Although Machiavelli is probably best known for his advice to rulers in *The Prince*, his work on republican theory is far more important to understanding dictatorship in constitutional systems. In his *Discourses on Livy*, Machiavelli praised the Romans for constructing a constitutional structure for dictatorships, before these procedures degenerated and were supplanted by Julius Caesar, the last of the (initially) constitutional dictators.[47]

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premise that there are varieties of dictatorship, including "constitutional" and "totalitarian" versions.

45. *See generally* CLINTON ROSSITER, THE AMERICAN PRESIDENCY (1956); CLINTON ROSSITER, THE SUPREME COURT AND THE COMMANDER IN CHIEF (1951).

46. *See* Harvey C. Mansfield, *Introduction* to NICCOLÒ MACHIAVELLI, THE PRINCE, at vii, vii (Harvey C. Mansfield ed., 2d ed., Univ. of Chi. Press 1998) (1532) (describing Machiavelli's *The Prince* as "the most famous book on politics ever written").

47. NICCOLÒ MACHIAVELLI, DISCOURSES ON LIVY 95 (Julia Conaway Bondanella & Peter Bondanella trans., Oxford Univ. Press 1997) (1531). See LAZAR, *supra* note 33, at 120, for a further discussion of the history of the Roman dictatorship, including the role of Julius Caesar in bringing the "constitutional" phase of Roman dictatorship to an end. Particularly important to this history is the reinstitution of the dictatorship after many years of desuetude by Lucius Cornelius Sulla. On Sulla's innovations, see ARTHUR KEAVENEY, SULLA: THE LAST REPUBLICAN 162 (1982) (noting that Sulla held the dictatorship without a fixed term limit and enjoyed far broader jurisdiction than previous dictators).

"Among all the other Roman institutions," Machiavelli argued, the dictatorship "truly deserves to be considered and numbered among those which were the source of the greatness of such an empire, because without a similar system cities survive extraordinary circumstances only with difficulty."[48] Dictatorship was central to Rome's success because "[t]he usual institutions in republics are slow to move . . . and, since time is wasted in coming to an agreement, the remedies for republics are very dangerous when they must find one for a problem that cannot wait."[49] When emergency—or the appearance of emergency—strikes, there must be political leadership to recognize the situation and make immediate decisions, without fear of bureaucratic hindrances, the need for time-consuming attempts at consensus building and all the various veto points characteristic of representative government.

> Republics must therefore have among their laws a procedure . . . [that] reserve[s] to a small number of citizens the authority to deliberate on matters of urgent need without consulting anyone else, if they are in complete agreement. When a republic lacks such a procedure, it must necessarily come to ruin.[50]

What is the cause of this "ruin"? Machiavelli identifies two possibilities. First, republics can come to ruin by stubbornly "obeying their own laws" even when these laws prevent measures necessary to save the country.[51] This creates what we have elsewhere called a Type Two constitutional crisis—in which political leaders follow the law (as they understand it) strictly and manage to drive the political order over a cliff.[52]

Far more commonplace is a Type One constitutional crisis, in which political leaders, faced with exigent circumstances, publicly announce that they must break the law to save the republic.[53] Machiavelli identifies this as the second cause of ruin: "breaking laws in order to avoid" disastrous consequences.[54] The problem is that if one is willing to break laws in urgent circumstances, this creates a precedent for breaking them again where the urgency is more controversial (or nonexistent); moreover, it encourages political leaders to retain unconstitutional

48. MACHIAVELLI, *supra* note 47, at 95.
49. *Id.*
50. *Id.*
51. *Id.*
52. *See* Sanford Levinson & Jack M. Balkin, *Constitutional Crises*, 157 U. PA. L. REV. 707, 729 (2009).
53. *Id.* at 721.
54. MACHIAVELLI, *supra* note 47, at 95.

norms even after the emergency has passed. What start as emergency measures may become normalized.

Ultimately, recourse to suspending the laws eats away at the foundations of republican government. That is why, Machiavelli argues, "in a republic, it is not good for anything to happen which requires governing by extraordinary measures."[55] We must, Machiavelli teaches, be aware of the possibility of crises and exigent circumstances when we design a constitution, and include ways of responding to emergencies that do not require political leaders to choose between Scylla and Charybdis: the disaster caused by hyperfidelity to legal constraints or the destruction of republican government by recourse to out-and-out illegality.[56]

Contrast Machiavelli's approach, which locates dictatorship squarely within the ground rules of constitutional government, with the thought of John Locke, whose *Second Treatise on Government* has been central to the American political tradition and surely influenced the founding generation.[57] The central focus of the *Second Treatise* is a theory of limited government; nevertheless, a crucial part of Locke's argument was a theory of the monarch's "prerogative" power. According to Locke, the king always retained the prerogative power to suspend the law by fiat whenever he thought it in the public interest.[58] Locke did not spell out the details of his approach, and he did not draw on historical examples of good and bad practices,

55. *Id.*

56. *Id.* at 95–96.

57. *See, e.g.*, BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 28 (1967) (noting the importance of Locke's thought to the Framers). The most famous ascription of Locke's influence on American thought is surely LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA (1955).

58. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 204 (Thomas I. Cook ed., 1947) (1690).

> This power to act according to discretion for the public good, without the prescription of the law and sometimes even against it, is that which is called "prerogative"; for since in some governments the law-making power is not always in being, and is usually too numerous, and so too slow for the dispatch requisite to execution, and because also it is impossible to foresee, and so by laws to provide for all accidents and necessities that may concern the public, or to make such laws as will do no harm if they are executed with an inflexible rigour on all occasions and upon all persons that may come in their way, therefore there is a latitude left to the executive power to do many things of choice which the laws do not prescribe.

*Id; see also* CLEMENT FATOVIC, OUTSIDE THE LAW: EMERGENCY AND EXECUTIVE POWER 37–82 (2009) (surveying various theories of "prerogative" powers in British and American political thought).

as Machiavelli had done. As a result, Locke's notion of "prerogative" is far less developed and helpful to anyone interested in constitutional design.

Locke seems relatively sanguine about the King declaring the power to suspend the law.[59] In contrast, what concerned the republican theorist Machiavelli was the rise of an extraconstitutional dictatorship in cases where the constitution lacked a procedure for appointing a dictator and ending the dictator's reign.[60] The Roman dictatorship had been thoroughly institutionalized; the two consuls had to decide to appoint a dictator, and the dictator's reign would come to an end at a specified time.[61] Naming a dictator might signal an emergency, but, by definition, it did not constitute a "constitutional crisis," precisely because the Roman constitution provided for the institution. Moreover, it wisely separated the institution with the power to identify an emergency and call for emergency powers from the person who executed those powers, the better to prevent the dictator from trying to extend his rule by recharacterizing the situation to his advantage.

Whether the Framers of the Constitution agreed with Machiavelli in all respects, they certainly agreed that emergencies might test the very notion of constitutional fidelity. That, after all, was their own experience. In 1775–76, as a result of a "long train of abuses"[62] by King George III, many of them began a seven-year revolutionary war to overthrow British rule in the American colonies, culminating in the 1783 Treaty of Paris.[63] In 1781, the former Colonies ratified the Articles of Confederation as the first constitution of the fledgling nation.[64]

59. *See* LOCKE, *supra* note 58, at 222–28.

60. *See* MACHIAVELLI, *supra* note 47, at 94–95.

61. *See, e.g.*, LIVIUS, *supra* note 9, at 170–73. That is, until Sulla's ascension in 82 B.C., which gave the dictator the ability to serve as long as he believed the crisis was ongoing. *See* KEAVENEY, *supra* note 47, at 162. Sulla, a conservative, resigned the dictatorship within a year's time, consistent with republican ideals. *Id.* at 162–64. Julius Caesar is said to have mocked Sulla's decision to willingly give up power. *See* C. SUETONIUS TRANQUILLUS, THE LIVES OF THE TWELVE CAESARS 57 (Maurice Filler ed., Alexander Thomson trans., Corner House Publishers 1978) (1882).

62. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776), *reprinted in* THE ANNOTATED U.S. CONSTITUTION AND DECLARATION OF INDEPENDENCE 79 (Jack N. Rakove ed., 2009).

63. Treaty of Paris, U.S.-Gr. Brit., Sept. 3, 1783, 8 Stat. 80.

64. ARTICLES OF CONFEDERATION OF 1781, *available at* http://avalon.law.yale.edu/18th_century/artconf.asp.

The Articles soon proved ineffective, leading to new crises. Faced with financial disarray, the dangers of foreign interference with the fledgling republic, and the recent memory of Shay's Rebellion, the delegates to the 1787 Philadelphia Convention disregarded the limited mandate given them by Congress to "revise" the Articles and ignored Article XIII's requirement that any amendment must receive unanimous assent of the state legislatures.[65] Instead, the delegates wrote a brand new constitution that became valid when ratified by conventions in only nine states.[66] They refused to be bound by what Madison in *The Federalist No. 40* called "ill-timed scruples" or "zeal for adhering to ordinary forms."[67] Madison did not try to portray the Convention as a model of scrupulous legal fidelity. Instead, Madison argued that if Americans ratified the proposed Constitution they would "blot out antecedent errors and irregularities."[68]

Like many of the other delegates to the Philadelphia Convention, Madison had no interest in retaining the Articles of Confederation if it meant a Type Two crisis—political disaster from sticking to an ineffective constitution. Far better to provoke a Type One crisis by admitting that one was willing to violate legal proprieties in the name of the public interest and seek public approval for having done so. In *The Federalist No. 41*, Madison added the bracing assertion that mere "constitutional barriers" cannot deter "the impulse of self-preservation."[69] Trying to erect such barriers would simply "plant[] . . . in the Constitution itself *necessary usurpations of power*."[70]

65. *See* BREST ET AL., *supra* note 6, at 19–22.

66. U.S. CONST. art. VII.

67. THE FEDERALIST NO. 40 (James Madison), *supra* note 5, at 292.

68. *Id.*

69. THE FEDERALIST NO. 41 (James Madison), *supra* note 5, at 295.

70. *Id.* (emphasis added). We can better understand Madison's dismissal of a Bill of Rights as mere "parchment barriers" in this light. *See* THE FEDERALIST NO. 48 (James Madison), *supra* note 5, at 343.

Walter F. Murphy argues that Madison and Hamilton "strongly disagreed with Machiavelli" about the possibility of spelling out procedures to follow in times of emergencies. WALTER F. MURPHY, CONSTITUTIONAL DEMOCRACY: CREATING AND MAINTAINING A JUST POLITICAL ORDER 308 (2007). Thus, in addition to Madison's remarks in *The Federalist No. 41*, Murphy adds Hamilton's statement from *The Federalist No. 23* that the national powers "ought to exist without limitation, because *it is impossible to foresee or define the extent and variety of the means which may be necessary to satisfy them*." *Id.* Murphy may be exaggerating the differences between these authors in order to make a point about the importance of discretion in constitutional government. Ma-

Machiavelli, Locke, Madison, and Schmitt are engaged in a common conversation about how governments can adapt to crises. None of these thinkers believed in quiescence, and each of them discussed, in different ways, the propriety of dictatorial action in response to crisis. Ironically, it is Machiavelli who comes out most strongly for the rule of law: he argues that constitutional designers can and should prepare for dictatorships through regular procedures.[71] Locke, by contrast, seems to rely principally on the good faith of the monarch and offers no serious institutional discussion at all.[72] Locke does famously suggest that if the public believes that the monarch has abused his prerogative powers they can "appeal to heaven" and overthrow the government or king.[73] This, however, is not an argument of constitutional design; rather, it is an invitation to meet one example of law breaking with another one. Indeed, that is what happened both in 1776, when the Americans appealed to heaven and threw off the British Crown, and in 1787, when the Philadelphia Convention abruptly discarded the political system established by the Articles of Confederation. Carl Schmitt offers perhaps the most chilling analysis of all. Although he recognizes the possibility of commissarial dictatorships, where the ultimate goal of dictatorship is restoring the status quo, he assumes that elements of the sovereign dictatorship always lurk in the background, waiting to emerge and to transform any existing political order.[74] No matter how well designed a constitutional system might be, the true sovereign will always be able

chiavelli wanted emergency power to be exercised within constitutional structures. *See* MACHIAVELLI, *supra* note 47, at 95. So did Madison and Hamilton. Madison's and Hamilton's statements in *The Federalist Papers* cannot mean that they were opposed to channeling power through wise institutional design, even in emergencies; otherwise it would be hard to explain the basic argument of *The Federalist Papers*, which calls for checking and balancing political power in order to prevent factions and the passions of majorities from destroying republican government. *See* THE FEDERALIST NO. 51 (James Madison), *supra* note 5, at 355. The fact that emergencies cannot be foreseen and that people will act out of self-preservation does not mean that any constitutional design is as good as any other or avoids the dangers of demagoguery or tyranny equally well.

71. *See* MACHIAVELLI, *supra* note 47, at 94–95.

72. *See* LOCKE, *supra* note 58, at 204.

73. *Id.* at 207 ("[T]he people have no other remedy in this, as in all other cases where they have no judge on earth, but to appeal to heaven; for the rulers, in such attempts, exercising a power the people never put into their hands—who can never be supposed to consent that anybody should rule over them for their harm—do that which they have not a right to do.").

74. *See* KALYVAS, *supra* note 35, at 90–92, 97.

to escape the confines of that design and make exceptions to it.

### C. WHAT IS A CONSTITUTIONAL DICTATORSHIP?

We might define a constitutional dictatorship as a system (or subsystem) of constitutional government that bestows on certain individuals or institutions the right to make binding rules, directives, and decisions and apply them to concrete circumstances, unhindered by timely legal checks to their authority.[75] When they act according to this right, they act clothed with all of the authority of the state. These persons or institutions, however, are subject to various procedural and substantive limitations that are set forth in advance. These may include the time and/or circumstances in which they may exercise authority, the subjects over which they may exercise their authority, and specific means for implementing their decisions.

By "timely" legal checks to authority, we mean procedures that allow aggrieved persons to commence actions relatively quickly to hold decisionmakers accountable for violations of law, even if the controversy is not resolved for some time. For example, assuming Congress has not suspended the writ of habeas corpus, prisoners can immediately bring actions in court challenging their detention, even if the final decision on the petition may come years later. With respect to these issues of personal liberty, therefore, the President has not been empowered to act as a dictator. On the other hand, if Congress has suspended the writ due to emergency, this gives the President a dictatorial power to detain people without charges or a hearing; and courts may not hear habeas actions on the merits until the suspension has been lifted.[76] Even if prisoners can file habeas petitions during the period of the suspension, the courts will refuse to consider them. Once the writ of habeas corpus is restored, the President will be held accountable if he continues to detain individuals; his unilateral and unreviewable powers to detain have ended.

The constitutional dictatorship is a *dictatorship* because the power conferred on the dictator combines elements of judicial, legislative, and executive power. This combination is a dangerous brew; indeed, in *The Federalist No. 47* Madison argued that "[t]he accumulation of all powers, legislative, execu-

75. *See* Watkins, *supra* note 20, at 324.

76. *See Ex parte* Merryman, 17 F. Cas. 144, 148 (C.C. Md. 1861) (No. 9487) (arguing that the President may detain without charges or a hearing only if Congress has suspended the writ).

tive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[77] Note that in this passage, the dictator may consist of "one, a few or many,"[78] and Madison says nothing about how the dictator achieves power, whether through a coup or a regular election. Dictatorships can occur even in democracies, if the public gives officials unchecked powers.[79] Finally, Madison hedges his definition of tyranny by speaking of the accumulation of *all* powers.[80] The more interesting question, however, is what happens if the powers extend only over certain subject matters, may only be exercised using certain specified means, or can be exercised only for a certain limited time. The most interesting examples in the real world are limited in precisely these ways. Since they still combine judicial, legislative, and executive functions, perhaps we should call them limited or special-purpose dictatorships.

For example, if we assumed (which, thankfully, is not the case) that the American President has the power to initiate war, commandeer funds and resources for war, and conduct war at any time for any reason in any manner he pleases, he would be a constitutional dictator with respect to war and all matters related to war. That is because he would combine the right to assess the need for military action with the power to carry it out and with the sole right to judge whether what he did was lawful. (He would not be a dictator with respect to a wide range of other matters, including, for example, environmental protection.) To the extent that the President may create rules in a certain area, apply them, and execute them on his own without the ability of anyone else in the system to check him, he is a law unto himself.[81]

77. THE FEDERALIST NO. 47 (James Madison), *supra* note 5, at 336.

78. *Id.*

79. *See id.*

80. *See id.*

81. The Roman dictatorships were generally limited dictatorships. They lasted six months and usually bore descriptive names that described their substantive purpose—such as *rei gerundae causa* ("for getting things done," a dictatorship for governing the state in an emergency), *seditionis sedandae causa* (for suppressing sedition or rebellion), or *comitiorum habendorum causa* (for summoning the assembly (*comitia*) for elections). *See* FRANK FROST ABBOTT, A HISTORY AND DESCRIPTION OF ROMAN POLITICAL INSTITUTIONS 183 (3d ed. 1963); ROSSITER, *supra* note 14, at 21–22.

Sulla's dictatorship was styled *legibus faciendis et reipublicae constituendae causa* (for the making of laws and settling of the constitution); unlike the

A constitutional dictatorship is *constitutional* because it comes with various limits prescribed by law and enforced by institutional structures.[82] The dictator exercises power according to constitutional procedures that bring the dictatorship into being, end it, and structure its scope and reach.[83] For example, the President might have complete discretion to gather foreign intelligence surveillance directed at persons outside the United States, but not within.[84]

It should be obvious from this definition that many elements of republican government could be seen as "dictatorial" to the extent that they endow government actors with essentially unreviewable discretion to set policy and execute it immediately with the force of law. Think, for example, of Ben Bernanke's decision to bail out troubled financial institutions in the fall of 2008,[85] or the authority of the Centers for Disease Control and Prevention to institute a quarantine.[86] Conversely, many features of authoritarian and totalitarian regimes might seem to be constitutional to the extent that they bestow power on the dictator through legal forms.[87]

If so, if there is no difference, at the end of the day, be-

*rei gerundae causa*, it had no time limit, although Sulla gave up power within a year. KEAVENEY, *supra* note 47, at 161–62, 164. Julius Caesar effectively destroyed the legal practices and customs of the dictatorship; he was named dictator repeatedly, originally styled as *rei gerundae causa. See* LUCIANO CANFORA, JULIUS CAESAR: THE LIFE AND TIMES OF THE PEOPLE'S DICTATOR 289–90 (Marian Hill & Kevin Windle trans., 2007). In 46 B.C. Caesar was named dictator for ten years; his last dictatorship in 44 B.C., ominously, was styled *perpetuus* (perpetual). MATTHIAS GELZER, CAESAR: POLITICIAN AND STATESMAN 320, 337 (Peter Needham trans., 5th ed. 1968).

82. ROSSITER, *supra* note 14, at 4–5.

83. *See id.* at 8–11.

84. For an example of this distinction, see the Foreign Intelligence Service Act (FISA), 50 U.S.C.A. § 1805(a)(2)(A) (West Supp. 2009). The difficulty, of course, arises when, as in the digital world, the distinction between foreign and domestic surveillance threatens to evaporate.

85. *Turmoil in U.S. Credit Markets: Examining the Recent Actions of Federal Financing Regulators: Hearing of the S. Comm. on Banking, Hous. & Urban Affairs*, 110th Cong. 1 (2008) (statement of Sen. Christopher Dodd, Chairman, S. Comm. on Banking, Hous. & Urban Affairs).

86. *See* 42 U.S.C. § 264 (2006) (outlining the powers of the Secretary of Health and Human Services to prevent the introduction, transmission, and spread of communicable diseases into the United States); Questions and Answers on the Executive Order Adding Potentially Pandemic Influenza Viruses to the List of Quarantinable Diseases, http://www.cdc.gov/quarantine/qa-executive-order-pandemic-list-quarantinable-diseases.html (last visited May 6, 2010).

87. *See* ROSSITER, *supra* note 14, at 10.

tween the director of the Federal Emergency Management Authority (FEMA) commandeering resources to deal with an out-of-control forest fire and Josef Stalin purging kulaks and collectivizing agriculture?[88] Perhaps some more paranoid elements of the public might think so. But this confuses the diminishing sunlight of four in the afternoon with the pitch darkness of four in the morning. No system of government, no matter how well prepared in advance, can do without discretion. This is particularly true of a modern administrative state, which, from its inception, has been in tension with traditional rule-of-law notions.[89] With respect to thousands of minute individual decisions—ranging from the allocation of resources in a public hospital to a police officer's decision to stop and seriously inconvenience a motorist or pedestrian—official discretion may be effectively unreviewable, or the government actor may combine the creation of new rules with their application.[90]

The hallmark of a constitutional system is that it reins in this discretion in various ways without ever fully eliminating it. In most cases, a constitutional system bounds discretion through statutory restrictions on the exercise of power, reporting and oversight mechanisms, and judicial review. We can nevertheless imagine a continuum of possibilities ranging from the discretion that always exists in the interstices of an administrative state all the way to very broad and effectively unreviewable delegations of discretionary power over fundamental issues of life, liberty, property, war, and peace. What we mean by constitutional dictatorship is the far end of that continuum—substantial patches of practically unreviewable discretion with respect to issues of obvious and far-reaching importance that are embedded within a larger system of laws and judicial review.

There is an important and obvious relationship between

88. *See, e.g.*, ROBERT CONQUEST, THE HARVEST OF SORROW: SOVIET COLLECTIVIZATION AND THE TERROR-FAMINE 146–47, 322 (1986) (setting out the history of Stalin's brutality in collectivizing agriculture during the 1930s).

89. The most famous English-language work making this argument is surely A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 10–12, 21–22 (9th ed. 1950). *See* RICHARD A. COSGROVE, THE RULE OF LAW: ALBERT VENN DICEY, VICTORIAN JURIST 66 (1980).

90. See EDWARD L. RUBIN, BEYOND CAMELOT: RETHINKING POLITICS AND LAW FOR THE MODERN STATE 10–11 (2005) for an unusually wide-ranging call for rethinking many of our basic presuppositions in light of the reality of the modern administrative state. *See also* Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1097, 1131–42 (2009) (noting the "grey holes" in federal administrative law).

constitutional dictatorship and the politics of emergency. Emergency, or at least claims of emergency, are the standard cause and the standard justification for creating dictatorships.[91] Every dictatorship, it seems, begins with some sort of claim of crisis or emergency. Therefore, any study of constitutional dictatorship—whether how to enjoy its benefits or to avoid its dangers—must necessarily study emergencies and how governments respond to them.

Although the rhetoric of emergency is the standard justification for dictatorship, dictatorial powers may not be connected to any real emergency. Moreover, even if dictatorship is initially justified by emergency, it may continue after the emergency is over.[92] In this way, dictatorial powers may become normalized.[93] Executive officials, noting the ability of emergency to focus the public's attention, and to route around the unusual impediments to reform, may find themselves in quest of ever-new emergencies to justify the continuation of their authority. As we shall describe later, this leads to a policy of government through emergency, which normalizes dictatorial powers in a different way. Moreover, dictatorial powers may be granted because of the fear of an emergency, even if it has not yet materialized. This gives incentives to magnify both the probability and the dangers of possible scenarios. Finally, by declaring an emergency, and bestowing dictatorial powers on itself, a government may create a self-fulfilling prophecy. The executive judges the situation as an emergency deserving of dictatorial powers, makes rules that frame the situation in this way, and then acts on that framing, thereby confirming it. In this way, a successful dictatorship constructs reality according to its own needs and helps society believe that the dictatorship must continue to stave off threats and harms, both internal and external.[94]

91. *See* Stephen Holmes, *In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror*, 97 CAL. L. REV. 301, 302–07 (2009) (arguing that the prospect of foreseeable emergencies requires the preparation of rule-bound "protocols" designed to minimize the foreseeable prospect of panic and other irrationalities attached to the perception of crisis and emergency).

92. *See* ROSSITER, *supra* note 14, at 10.

93. *See id.*

94. Put in contemporary terms, the successful dictator co-opts "the reality-based community" by generating new versions of "reality" that, not at all coincidentally, assume the need for continued leadership by the executive. This strategy is vividly depicted in the now-classic article by Ron Suskind, published three weeks before the 2004 presidential election. Ron Suskind, *Without a Doubt*, N.Y. TIMES, Oct. 17, 2004, (Magazine), at 44. Suskind quotes a senior

## II. THE AMERICAN PRESIDENCY AS A CONSTITUTIONAL DICTATORSHIP

### A. BUILDING EXECUTIVE POWER THROUGH CONSTITUTIONAL CONSTRUCTION

Machiavelli argued that republics should plan for emergency allocations of power in advance. Does the American constitution meet Machiavelli's test? Does it adequately build the possibilities of emergency into its design, to avoid the dangers of inertia, impotence, and deadlock yet still preserve republican government? Recall Chief Justice John Marshall's famous statement in *M'Culloch v. Maryland* that "[the] constitution [is] intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs."[95] Notably, the word "crises" is italicized in the original opinion. Nevertheless, the text of the American Constitution is remarkably devoid of specific clauses that give government officials emergency powers. The most relevant example is the Suspension Clause, which allocates to Congress (contra the views of Abraham Lincoln) the power to suspend the writ of habeas corpus, but only "in Cases of Rebellion or Invasion [when] the public Safety may require it."[96] Moreover, the Suspension Clause says nothing about other kinds of dangers, for example economic meltdowns, fires, floods and hurricanes, or even the invasion of a drug-resistant virus. Nevertheless, constitutional emergencies may arise from many different sources.

Although the years immediately following the 9/11 attacks understandably focused the public's attention on issues of national security, more recent events, like fears of the swine flu epidemic and the economic collapse of 2008, demonstrate that

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(unnamed) aide of Bush explaining that:

> [G]uys like me [Suskind] were "in what we call the reality-based community," which he defined as people who "believe that solutions emerge from your judicious study of discernible reality." I nodded and murmured something about enlightenment principles and empiricism. He cut me off. "That's not the way the world really works anymore," he continued. "We're an empire now, and when we act, we create our own reality. And while you're studying that reality—judiciously, as you will—we'll act again, creating other new realities, which you can study too, and that's how things will sort out. We're history's actors . . . and you, all of you, will be left to just study what we do."

*Id.* at 51.

95. M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819).

96. U.S. CONST. art. I, § 9, cl. 2.

emergencies can take a variety of forms, both foreign and domestic. It is important to recall that the primary chaos that pervaded Germany during the 1920s was economic.[97] Most of the more than 250 presidential suspensions of rights under the notorious Article 48 of the Weimar Constitution[98] concerned economic matters;[99] government officials repeatedly turned to the mechanisms of emergency power as Germany struggled to respond to the economic and social difficulties created by its defeat in World War I, the Versailles treaty, and a society bitterly divided between left and right, Communists and Nazis.[100]

The first decade of the twenty-first century has made us all too aware of the various dangers that can plague our social orders; even the cost of terrorist attacks may pale in comparison to the damage wrought by tsunamis, hurricanes, earthquakes, or dangerous viruses. Thus in 2009, the President of Mexico, Felipe Calderón, placed the entire country under a "state of emergency" because of the potential swine flu pandemic.[101] As John Ackerman, chief editor of the *Mexican Law Review* has explained, this serves to:

> concentrate political power in his hands. . . . [President Calderón] has authorized his health secretary to inspect and seize any person or possessions, set up check points, enter any building or house, ignore procurement rules, break up public gatherings, and close down entertainment venues. The decree states that this situation will continue 'for as long as the emergency lasts.' . . . This action violates the Mexican Constitution, which normally requires the government to obtain a formal judicial order before violating citizens' civil liberties. Even when combating a 'grave threat' to society, the president is constitu-

97. See, for example, the excellent chapters on Germany in LIAQUAT AHAMED, LORDS OF FINANCE: THE BANKERS WHO BROKE THE WORLD 324–45 (2009).

98. Article 48 provided that:

> If public safety and order in the German Commonwealth is materially disturbed or endangered, the National President may take the necessary measures to restore public safety and order, and, if necessary, to intervene by force of arms. To this end he may temporarily suspend, in whole or in part, the fundamental rights established in Articles 114, 115, 117, 118, 123, 124 and 153 [of the Constitution].

RENÉ BRUNET, THE NEW GERMAN CONSTITUTION 308 (Joseph Gollomb trans., 1922).

99. AGAMBEN, *supra* note 39, at 15.

100. *See, e.g.*, RICHARD J. EVANS, THE COMING OF THE THIRD REICH 255–77 (2004).

101. Thomas Black, *Mexico's Calderon Declares Emergency Amid Swine Flu Outbreak*, BLOOMBERG, Apr. 25, 2009, http://www.bloomberg.com/apps/news?pid=20670001&sid=aEsNownABJ6Q.

> tionally required to get congressional approval for any suspension of basic rights. There are no exceptions to this requirement.[102]

Ackerman notes that Latin America has a "long history of using states of emergency as ploys to . . . return to authoritarianism."[103]

Because the text of the Constitution is silent on how to deal with most forms of emergencies or crises, the American legal system has largely proceeded through what Princeton political scientist Keith Whittington has termed "constitutional construction."[104] Construction involves the implementation of the Constitution's vague clauses and abstract principles—not to mention its silences—through the creation and application of precedents (both judicial and nonjudicial), congressional enactments, administrative regulations, and building of institutions with their own rules and practices.

The most important place we might find elements of constitutional dictatorship in the United States is in the construction of the modern presidency and the executive branch more generally. The Constitution says that the President is vested with "the executive Power" of the United States[105] and is "Commander in Chief" of the armed forces.[106] It also says, notably, that "he shall take Care that the Laws be faithfully executed."[107]

The modern President is far more powerful, and has far more resources at his disposal, than the Framers could possibly have imagined. To give only one example, the President is now commander-in-chief of a standing army of over a million people, with forces stationed all over the world, armed with weapons that no one in the eighteenth century could have envisioned. As the United States has become a global power, and as govern-

102. *See* John M. Ackerman, *An Outbreak of Opportunism: Mexico's President Is Trying to Use the Swine Flu to Consolidate His Power*, SLATE, Apr. 27, 2009, http://www.slate.com/id/2217017/.

103. *Id.* It is worth noting that Ackerman's objection may be directed less to the suspension of ordinary civil liberties than to Calderon's failure to seek judicial authorization.

104. KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 1–15 (1999); Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 566–69 (2009); William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1215–18, 1220–30 (2001); Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 449–61 (2007).

105. U.S. CONST. art. II, § 1, cl. 1.

106. *Id.* art. II, § 2, cl. 1.

107. *Id.* art. II, § 3.

ment has taken on increasing responsibilities—to meet the increasing expectations of its citizens—the presidency has gained ever greater power and discretion. Both the administrative and regulatory state on the one hand, and the National Security State, on the other, offer plenty of opportunities for decisive action, whether it be bailing out financial institutions, announcing bank holidays, imposing quarantines, seizing contraband merchandise, intercepting communications, engaging in covert operations, bombing overseas targets, or moving American troops into harm's way.

Generally speaking, the expansion of presidential authority and capacity has come through the creation of framework statutes by Congress that basically delegate vast authority to the President to build a national security and domestic bureaucracy and, in turn, empower members of these bureaucracies to make various decisions and regulations. Cornell political scientist Theodore J. Lowi has described Congress since the New Deal as committing:

> legiscide . . . in the form of statutes virtually empty of content, stating a desired outcome without providing any guidelines. Each statute was and is a 'delegation of power' to the Executive Branch, authorizing the president to provide the substance of the laws or to sub-delegate policymaking to the relevant agency in the Executive Branch.[108]

Lowi argues that this innovation has created a distinctive political regime within in the United States that he labels the "Fourth Republic."[109] Indeed, Lowi fears that we are headed toward an ominous "Fifth Republic" constituted by the development of even stronger notions of executive prerogative that are legitimated by an increasingly plebescitarian conception of the presidency, one in which the President claims, through election, to speak and act on behalf of the nation as a whole.[110] Whether one accepts Lowi's analysis, to understand the possibilities (and the potential dangers) of constitutional dictator-

108. THEODORE J. LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES, at xiv (40th anniversary ed. 2009) (1979). These features are not unique to the United States. *See* Mark Aronson, *The Great Depression, This Depression, and Administrative Law*, 37 FED. L. REV. 165, 201–03 (2009) (discussing similar developments in other countries, particularly in the United Kingdom, Canada, and Australia).

109. The first three republics were structured, respectively, by the Articles of Confederation, the 1787 Constitution, and the Reconstruction Amendments added as the result of the breakdown of the Second Republic. LOWI, *supra* note 108, at xii–xiv.

110. *Id.* at xvi–xvii.

ship in the United States, one must begin with the executive branch.

### B. PRESIDENTIAL ACCOUNTABILITY AND UNILATERAL ACTION

One might object that no matter how strong the modern presidency has become, the American President *cannot* be a dictator because, after all, he or she is elected. But this is to miss the point that Madison made in *The Federalist No. 47* about what he called "tyranny" and this Article calls "dictatorship." It is the combination of powers that gives rise to tyranny for Madison, not the presence of elections; elected tyrants are still tyrants. Elections, to be sure, help *legitimate* government action. But winning an election says nothing about the actual powers that one attains upon victory, and the degree of constraint (or lack thereof) over those powers.

Nor does the fact of an election tell us how the President will be held accountable once he takes office. Effective accountability may be lacking even if the President's actions are public. Accountability is particularly problematic, however, if a President can keep his most controversial actions secret using the excuse of national security, if he enjoys multiple constitutional privileges against suit, if courts regularly defer to his judgments about national security, and if Congress lacks effective oversight mechanisms to check his adventures.

There is always, of course, recourse to the people. But elections are usually about many issues, not particular usurpations. (Indeed, they are usually about the health of the economy, rather than whether the President has overstepped his bounds.)[111] And after reelection, the Twenty-Second Amendment ensures that a President never has to face that particular form of accountability again.

One might argue that the Impeachment Clause[112] sets up an alternative mechanism for accountability, but history has drained it of any use, especially in the absence of clearly criminal conduct by a President.[113] It is worth noting that there are

111. *See, e.g.*, Larry M. Bartels, Econometrics and Presidential Elections 1, 7 (Feb. 1997), http://www.princeton.edu/~bartels/econpres.pdf (published in abbreviated form in 11 J. ECON. PERSP. 195 (1997)).

112. U.S. CONST. art. II, § 4.

113. *See* SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION 114–21 (2006) (discussing and criticizing the Impeachment Clause).

Indeed, in light of the Clinton impeachment, mere illegality may no longer be enough; some scholars argue that the Impeachment Clause is unavailing against anything other than truly "High Crimes and Misdemeanors," or, at the

many things that a President can do to the national interest far worse than violating the law. Displaying disastrous misjudgment with regard to matters of war and peace, or needlessly inflicting death, destruction, and human suffering are not in and of themselves "High Crimes and Misdemeanors;" yet they might strike many Americans as far worse sins than, say, perjury or tax evasion. And as the Clinton impeachment demonstrated, it is so difficult to convict and remove a President that most Presidents can assume that they will never face a genuine threat from this direction.[114]

A President can be a constitutional dictator, then, to the extent that he is effectively insulated from hindrance and accountability with respect to a certain set of issues. The most obvious examples concern war, foreign policy, intelligence, and covert operations, but, as we shall see later on, the modern administrative state offers a number of opportunities in the domestic sphere to deal with economic meltdowns, health crises, floods, fires, and other domestic disasters.

Until recent times, the clearest example of a constitutional dictator was Abraham Lincoln, who had to deal with a civil war that was simultaneously a military question and a domestic emergency.[115] By the time Lincoln took the oath of office on March 4, 1861, several states had already seceded, joined by several more after the firing on Fort Sumter on April 12. Nevertheless, Lincoln delayed calling Congress into session until July 4. "The eleven weeks between the fall of Sumter and July

very least, in the words of then-University of Chicago Professor Cass Sunstein, "egregious misconduct that amounts to the abusive misuse of the authority of his office." *See Hearing on Impeachment Inquiry Pursuant to H. Res. 581 Before the H. Comm. on the Judiciary*, 105th Cong. 89 (1998), *reprinted in Testimony Before the U.S. House Judiciary Committee*, 32 PS: POL. SCI. & POL. 24, 25 (1999), *available at* http://www.apsanet.org/imgtest/TestimonyUSHouseJudiciary-Sunstein.pdf.

114. It is telling that even George W. Bush's most fervent opponents—including some who believed that Bush may have committed criminal offenses—counseled against the Democrats pursuing his impeachment upon their recapture of Congress in the 2006 elections. *See, e.g.*, Sanford Levinson, *Impeachment: The Case Against*, THE NATION, Feb. 12, 2007, at 21–22, *available at* http://www.thenation.com/doc/20070212/levinson (debating former Rep. Elizabeth Holtzman, who supported impeachment). The Democratic leadership agreed; House Minority Leader (and later Speaker) Nancy Pelosi declared that even if the Democrats regained control of the House, the impeachment of President Bush would be "off the table." *See* Charles Babington, *Democrats Won't Try to Impeach President*, WASH. POST, May 12, 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/05/11/AR2006051101950.html.

115. *See, e.g.*, ROSSITER, *supra* note 14, at 223–39.

4, 1861," Rossiter wrote, "constitute the most interesting single episode in the history of constitutional dictatorship. The simple fact that one man was the government of the United States . . . makes this the paragon of all democratic, constitutional dictatorships."[116]

Lincoln was quite busy during this period. He goaded the South into beginning the war by resupplying Fort Sumter;[117] he unilaterally decided to initiate a legally debatable blockade of all Southern ports;[118] and then, most (in)famously, he suspended habeas corpus,[119] claiming that since Congress was away, somebody had to make the decision, and he was just the person to do it. Like any commissarial dictator, Lincoln argued that he acted only to save the republic, not to found a new regime, and that his actions, even if they appeared illegal,[120] were all calculated to that end. As he famously asked, "are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?"[121] Lord Bryce wrote that Lincoln was "almost a dictator . . . who wielded more authority than any single Englishman has done since Oliver Cromwell,"[122] and Arthur Schlesinger, Jr. recounts Lincoln's Secretary of State William H. Seward "exuberant[ly]" telling a correspondent for the *London Times* that "[w]e elect a king every four years and give him absolute power within certain limits, which after all he can interpret for himself."[123]

116. *Id.* at 224.

117. *See, e.g.*, MAURY KLEIN, DAYS OF DEFIANCE: SUMTER, SECESSION, AND THE COMING OF THE CIVIL WAR 336–37, 405 (1997).

118. *See* Thomas H. Lee & Michael D. Ramsey, *The Story of the* Prize Cases: *Executive Action and Judicial Review in Wartime*, *in* PRESIDENTIAL POWER STORIES 53–54 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009). The blockade was upheld, by a 5 to 4 vote, in The Brig Amy Warwick (The Prize Cases), 67 U.S. (2 Black) 635, 664–65 (1862).

119. *See, e.g.*, BREST ET AL., *supra* note 6, at 278–79.

120. *See, e.g.*, Chief Justice Taney's opinion in *Ex parte* Merryman, 17 F. Cas. 144, 147 (C.C.D. Md. 1861) (No. 9487).

121. Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), *reprinted in* BREST ET AL., *supra* note 6, at 278.

122. *Id.* at 159–60.

123. Arthur M. Schlesinger, Jr., *War and the Constitution: Abraham Lincoln and Franklin D. Roosevelt*, *in* LINCOLN THE WAR PRESIDENT: THE GETTYSBURG LECTURES 159–60 (Gabor S. Boritt ed., 1992). Watkins writes almost casually that "[t]he dictatorship of President Lincoln is an interesting case in point." Watkins, *supra* note 20, at 366. Rossiter, by contrast, writes extensively of the dictatorial aspects of the Lincoln presidency and he describes Lincoln as the most obvious example of a "constitutional dictator." *See* ROSSITER, *supra* note 14, at 224–26.

Indeed, the fact that the United States holds elections for its President becomes a way of *justifying* the expansive powers of constitutional dictatorship, not *limiting* them. Consider the following exchange between reporter Helen Thomas and White House Press Secretary Dana Perino during a news briefing late in President George W. Bush's second term:

> Thomas: "The American people are being asked to die and pay for [the Iraq War]. And you're saying they have no say in this war?"
>
> Perino: "No, I didn't say that Helen. But Helen, this president was elected—"
>
> Thomas: "Well, what it amounts to is you saying we have no input at all."
>
> Perino: "You had input. The American people have input every four years, and that's the way our system is set up . . . ."[124]

The quote opening this Article demonstrates President Bush's firm belief that, once elected, he owed no one any explanations for his conduct as President.[125] Vice President Dick Cheney's remarks to Chris Wallace of Fox News in his final days in office are, if anything, even blunter about the unchecked powers of the President:

> [W]hen you take the oath of office . . . you take the oath to support and defend and protect the Constitution of the United States against all enemies, foreign and domestic.
>
> There's no question about what your responsibilities are in that regard. And again, I think that there are bound to be debates and arguments from time to time, and wrestling back and forth, about what kind of authority is appropriate in any specific circumstance.
>
> But I think that what we've done has been totally consistent with what the Constitution provides for.
>
> The president of the United States now for 50 years is followed at all times, 24 hours a day, by a military aide carrying a football that

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Whether or not Lincoln's admirers acknowledged that he was a dictator, Lincoln's staunchest opponents were quite sure he was a tyrant. John Wilkes Booth, of course, cried out "sic semper tyrannis" (thus always to tyrants) as he shot our sixteenth President. *See* MICHAEL W. KAUFFMAN, AMERICAN BRUTUS: JOHN WILKES BOOTH AND THE LINCOLN CONSPIRACIES 7 (2004). Kauffman's title demonstrates how important Roman analogies were to American political thought, for Booth surely viewed Lincoln as the American Caesar, who deserved the same fate as befell Julius Caesar. *Cf.* Josh Chafetz, *Impeachment and Assassination*, 95 MINN. L. REV. (forthcoming 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1568950 (arguing that the Framers recognized the danger that the emergence of tyrants posed to republics and adapted the impeachment process in part as an alternative to the traditional remedy of assassination).

124. Dan Froomkin, *Bush's Alternate Reality*, WASH. POST, Mar. 21, 2008, http://www.washingtonpost.com/wp-dyn/content/blog/2008/03/21/BL2008032101852.html.

125. *See supra* note 1 and accompanying text.

> contains the nuclear codes that he would use and be authorized to use in the event of a nuclear attack on the United States.
>
> *He could launch a kind of devastating attack the world's never seen. He doesn't have to check with anybody. He doesn't have to call the Congress. He doesn't have to check with the courts. He has that authority because of the nature of the world we live in.*[126]

Here, the former Vice President casually informed the American people that the President can start a nuclear war if he deems it appropriate, and nobody can stop him, almost certainly as an empirical matter and possibly as a legal one as well. That is as close to unconstrained power as one can imagine.

Yet the President's power is still circumscribed in other ways, as the exchange between Thomas and Perino suggests. Even the bitterest enemies of the Bush Administration, who believed that Bush and Cheney had systematically made disastrous misjudgments and may even have committed criminal offenses, never genuinely worried that the President and Vice-President would try to extend their terms of office by decree or that they would attempt to suspend the constitutionally required election and the inauguration of a successor. No matter how boldly presidents appear to act, the tradition of regular elections is firmly rooted in the American political system. One might invoke Lincoln's solemn determination to go to the electorate for reelection in 1864[127] and FDR's campaign for reelection in 1944. Indeed, it is this very certainty that elections will be held and that losers will acquiesce in a peaceful transition of power that establishes the United States as a constitutional republic.[128] However much Bush and Cheney disagreed with the electorate's decision to install a President with very different ideas about foreign policy, they handed over power to Barack Obama in January of 2009, as everyone assumed they would.

We should cherish this aspect of our political system. But it does not negate the fact that on occasion many of our Presidents, including (but not limited to) Lincoln, Roosevelt, Bush, or, now, Obama, are, on certain matters, constitutional dicta-

126. Interview by Chris Wallace with Richard Cheney, Vice President of the United States, in Wash., D.C. (Dec. 22, 2008), *available at* http://www.foxnews.com/story/0,2933,470706,00.html (emphasis added).

127. *See* JOHN C. WAUGH, REELECTING LINCOLN: THE BATTLE FOR THE 1864 PRESIDENCY 22, 202 (1997).

128. A poignant example of this is Al Gore's concession in the 2000 presidential election. *See Gore Concedes Presidential Election*, CNN.COM, Dec. 13, 2000, http://archives.cnn.com/2000/ALLPOLITICS/stories/12/13/gore.ends.campaign/index.html.

tors—first, because they exercise basically unchecked powers on important questions of life and death; second, because they exercise these powers under the rules arguably set forth in the Constitution and laws; and third, because they retain their power only so long as the Constitution and laws allow them to.

To be sure, the President's dictatorial powers are ordinarily latent.[129] Perhaps Gerald Ford could have ordered a full-scale nuclear attack on the Soviet Union. There is, however, no reason to believe that he was ever actually tempted or even encouraged to do so.[130] Interestingly enough, that was not the case with Presidents Truman, Eisenhower, and Kennedy. Each of them received advice from high-ranking military officers and other advisors that the United States should use its nuclear monopoly (in the case of Truman[131]) or its advantage in arms (in the case of Eisenhower and Kennedy) to launch a preemptive attack on the Soviet Union and bring an end to what would then be a not-so-Cold War.[132]

Latent traits, however, may become manifest when certain circumstances arise. Presidents may be particularly ambitious to leave a mark on history.[133] Newly perceived threats may

129. *See* ROSSITER, *supra* note 14, at 219–21.

130. *See* LOUIS FISHER, PRESIDENTIAL WAR POWER 154–58 (2d ed. 2004) (describing the military operations initiated by the Ford Administration).

131. *See* STEVEN T. ROSS, AMERICAN WAR PLANS 1945–1950, at 74–75 (1996); Gordon R. Mitchell & Robert P. Newman, *By 'Any Means' Necessary: NSC-68 and Cold War Roots of the 2002 National Security Strategy* 3–8 (Matthew B. Ridgeway Ctr. for Int'l Studies at the Univ. of Pittsburgh, Working Paper No. 2006-5, 2006), *available at* http://www.ridgway.pitt.edu/LinkClick.aspx?fileticket=1rpufk4qCIs%3d&tabid=232.

132. Eisenhower's advisors, who believed that the Soviets would soon develop a hydrogen bomb, advocated a preemptive strike against the Soviet Union while the United States still enjoyed a preponderance of atomic power, even if a few million Americans might be killed in the process. *See* Katie Bacon, *Proceed With Caution*, ATLANTIC.COM, Oct. 10, 2002, http://www.theatlantic.com/doc/200210u/int2002-10-10 (interview with James Fallows describing General Curtis LeMay's advocacy of preemptive nuclear strikes against the Soviet Union during the 1950s). Eisenhower, who disapproved of "preventative war," rejected their advice. *See* John S.D. Eisenhower, *Ike's Son Wonders What Ike Would Do Today*, HISTORY NEWS NETWORK, June 6, 2004, http://hnn.us/roundup/entries/5695.html. LeMay also served as Air Force Chief of Staff during the Kennedy Administration, and lost none of his aggressiveness where nuclear war was concerned. *See* MICHAEL DOBBS, ONE MINUTE TO MIDNIGHT: KENNEDY, KHRUSCHEV, AND CASTRO ON THE BRINK OF NUCLEAR WAR 266–67 (2008); EVAN THOMAS, ROBERT KENNEDY: HIS LIFE 206 (2000).

133. GEOFFREY PERRET, COMMANDER IN CHIEF: HOW TRUMAN, JOHNSON, AND BUSH TURNED A PRESIDENTIAL POWER INTO A THREAT TO AMERICA'S FUTURE 203–04 (2007) (explaining Johnson's decision to escalate the Vietnam War).

emerge that lead presidents to justify armed conflict.[134] Whether or not the 9/11 terrorist attacks "changed everything," they certainly provided everything that a would-be constitutional dictator might wish for. Congress readily ceded broad new powers to the President, in the September 18, 2001 Authorization for Use of Military Force (AUMF),[135] the USA PATRIOT Act of 2001,[136] the Military Commissions Act of 2006,[137] the Protect America Act of 2007,[138] and the FISA Amendments Act of 2008.[139] Indeed, every time the President asked for broad new authorities from Congress, he received them.[140] What is remarkable is that given this record of acquiescence, the Bush Administration tried to grab still more discretionary power, through secret programs that violated existing law, and through theories of the President's Article II powers that, it claimed, allowed the President to disregard any congressional regulations of his powers as commander-in-chief.[141]

134. *See id.* at 143–47 (describing Truman's decision to intervene in Korea without a congressional declaration of war).

135. Pub. L. No. 107-40, 115 Stat. 224 (2001).

136. Pub. L. No. 107-56, 115 Stat. 272 (2001).

137. Pub. L. No. 109-366, 120 Stat. 2600 (2006).

138. Pub. L. No. 110-55, 121 Stat. 552 (2007).

139. Pub. L. No. 110-261, 122 Stat. 2468 (2008).

140. One might object that Congress did not give Bush *everything* that he asked for. *See, e.g.*, Tom Daschle, *Power We Didn't Grant*, WASH. POST, Dec. 23, 2005, at A21 (recounting the debate over the language of the AUMF). But members of Congress, including Senator Daschle, did little to resist the expansion of presidential discretion in what the Administration called its "global war on terror." *See* CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY 121–22 (2007).

141. The most dramatic assertion of such powers can be found in the notorious "torture memo" written by John Yoo and signed by Jay Bybee, then head of the Office of Legal Counsel in the Department of Justice and now a judge on the Ninth Circuit Court of Appeals. Memorandum from Jay Bybee, Assistant Attorney General, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A (Aug. 1, 2002) [hereinafter Bybee Memorandum], *available at* http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf. For the discussion of the "Commander-in-Chief" powers within the memorandum, see *id.* at 31–39. Moreover, President Bush greatly expanded the practice of issuing "signing statements" that rejected Congress's ability to control the President's authority as determined by the President himself. *See, e.g.*, SAVAGE, *supra* note 140, at 228–49.

### C. NATIONAL SECURITY AND DOMESTIC POWERS

What is the scope of the modern President's quasi-dictatorial powers? Even if his critics believed George W. Bush took the notion of presidential autonomy to excess, he and the Administration lawyers who defended presidential prerogatives were not creating an entirely new edifice.[142] Congress has been willing to delegate increasing amounts of power to the President in both domestic and foreign affairs over the years; and it is well worth asking whether the Constitution imposes any significant limits on this delegation.

In the domestic arena, the Supreme Court last debated this question in the constitutional struggle over the New Deal in the 1930s. At first the Supreme Court, supported by conservative Republicans, denounced "delegation run riot" unanimously in the famous *Schechter Poultry* decision invalidating the National Recovery Authority.[143] Shortly thereafter, the nondelegation doctrine died an unceremonious death,[144] and the modern conservative Court has been unwilling to disinter it.[145] In the area of foreign affairs, moreover, Congress has long assumed that it could delegate far more authority to the President through treaties and framework statutes.[146] The conservative Republican Justice George Sutherland might have joined in denouncing the delegation of domestic power to the President during the New Deal, yet a year after *Schechter Poultry* he wrote the famous *Curtiss-Wright* opinion which, (quoting then-Congressman

142. *See, e.g.*, David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 741–48 (2008) [hereinafter Barron & Lederman, *Framing the Problem*] (examining arguments in favor of expansive presidential wartime powers). *See generally* David J. Barron & Martin S. Lederman, *Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941 (2008) [hereinafter Barron & Lederman, *Constitutional History*] (providing an analysis of presidential wartime powers from the ratification of the Constitution through the George W. Bush Administration).

143. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring); *see also* Panama Ref. Co. v. Ryan, 293 U.S. 388, 414–15 (1935) (concluding that a presidential order restricting interstate and international trade in "hot oil" constituted an excessive delegation without standards to the executive branch).

144. *See, e.g.*, Yakus v. United States, 321 U.S. 414, 424–27 (1944).

145. *See* Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 472–76 (2001) (Justice Scalia authored the majority opinion).

146. *See* G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1, 42–44 (1999).

John Marshall) described the President as the "sole organ" of the United States vis-à-vis the outside world.[147]

Clinton Rossiter wrote his book, and presumably chose its title, before George W. Bush was born in 1948; his analysis of the American version of "constitutional dictatorship" is built on the actions of such luminaries as Lincoln, Wilson, and Roosevelt,[148] all of them wartime presidents. Were he alive to write a new edition, he could certainly find more than enough material in post-1948 Presidents.

FDR's successor, Harry Truman, began the use of atomic weapons in warfare;[149] more important for the development of constitutional law, he unilaterally ordered the American military to resist the North Korean invasion of South Korea in June 1950.[150] This was the first major war that the United States fought that did not receive the imprimatur of a congressional declaration.[151] Historians and constitutional analysts increasingly view the Truman presidency as a crossing of the Rubicon toward the President's unilateral power to order military force anytime and anywhere in the world.[152] Truman also over-

147. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936); *see also* White, *supra* note 146, at 46–49 (discussing Sutherland's prejudicial writings on foreign affairs power).

148. *See* ROSSITER, *supra* note 14, at 223–87.

149. *See, e.g.*, MARTIN J. SHERWIN, A WORLD DESTROYED: HIROSHIMA AND THE ORIGINS OF THE ARMS RACE 231–32 (Vintage Books 1987).

150. *See, e.g.*, PERRET, *supra* note 133, at 133–48 (describing Truman's decision to send American troops to Korea).

151. This point was made by at least two justices who joined in the Supreme Court's decision in *Youngstown Sheet & Tube Co. v. Sawyer* (*Steel Seizure*), 343 U.S. 579 (1952). *Youngstown* invalidated Truman's seizure of the nation's steel mills; Truman justified the seizure as a way to provide essential war materiel to the troops fighting (and dying) in Korea. Justice Frankfurter noted that no firmly established "practice can be vouched for executive seizure of property at a time when this country was not at war, *in the only constitutional way in which it can be at war*." *Id.* at 611 (Frankfurter, J., concurring) (emphasis added). He declared that "[i]t would pursue the irrelevant to reopen the controversy over the constitutionality of some acts of Lincoln during the Civil War," which Frankfurter apparently *did* consider a constitutionally legitimated war. *Id.* Similarly, Justice Jackson emphasized that:

> Nothing in our Constitution is plainer than that declaration of a war is entrusted only to Congress . . . . [N]o doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture.

*Id.* at 642 (Jackson, J., concurring).

152. *See, e.g.*, FISHER, *supra* note 130, at 81–104 (detailing the constitu-

saw the creation of the modern National Security State, featuring permanent standing armies strewn around the globe and the creation of the Central Intelligence Agency, with its secret budgets, covert operations, and often tenuous relationship to human rights and the rule of law.[153]

Finally, Truman's Administration argued vigorously (and successfully) for the creation of a "state secrets privilege" in *United States v. Reynolds*[154]—a case that rested, incidentally, on completely mendacious misrepresentations by the United States about the security interests involved.[155] The privilege to hide government operations from courts and from the general public as state secrets is an essential tool in the kit of any would-be dictator, and there is no reason to believe that the Obama Administration has repudiated it.[156] It is perhaps even more valuable than the suspension of habeas corpus, which only allows the President to detain specific individuals.[157] A broad state-secrets privilege ensures immunity from judicial scrutiny in a wide swathe of cases where the President may plausibly claim that national security requires complete judicial abstention.[158] Usually he does not even have to support the claim with evidence, for that might undermine the security he seeks to maintain.[159]

Dwight Eisenhower drew upon Truman's example. He threatened to use nuclear weapons should an armistice not be reached in Korea.[160] He secretly directed the CIA to help

tional arguments concerning President Truman's conduct of the Korean War).

153. *See, e.g.*, TIM WEINER, LEGACY OF ASHES: THE HISTORY OF THE CIA 26–29 (2007).

154. 345 U.S. 1, 6–7 (1953).

155. LOUIS FISHER, IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE *REYNOLDS* CASE 17 (2006).

156. *See* Jake Tapper, *Political Punch: Obama Administration Invokes State Secrets Privilege . . . Again*, ABCNEWS.COM, Oct. 30, 2009, http://blogs.abcnews.com/politicalpunch/2009/10/obama-administration-invokes-state-secrets-privilegeagain.html.

157. *See* FISHER, *supra* note 155, at 245–52.

158. *See id.*

159. *See id.*

160. *See, e.g.*, Roger Dingman, *Atomic Diplomacy During the Korean War*, 13 INT'L SECURITY 50, 50 (1988–89). Although the head of the Joint Chiefs of Staff, Admiral Arthur Radford, advised Eisenhower to use nuclear weapons to relieve the siege against the French at Dien Bien Phu in Vietnam, Eisenhower resisted such advice, perhaps because of his own experience in the military during World War II. *See* Lawrence J. Korb, *The U.S. Air Force's Indifference Toward Nuclear Weapons*, BULL. OF THE ATOMIC SCIENTISTS, June 17, 2008,

overthrow the government of Iran in 1954,[161] and he approved the ill-fated invasion of the Bay of Pigs in Cuba that John F. Kennedy pursued shortly after becoming President in 1961.[162] (The failure of the Bay of Pigs operation, of course, led to further secret activities directed against Fidel Castro.)[163]

Nor should we forget John F. Kennedy's actions during the Cuban Missile Crisis.[164] It is often viewed as Kennedy's finest hour because the United States avoided a nuclear exchange with the Soviet Union.[165] What is often overlooked in the dramatic tales surrounding those "thirteen days"[166] of meetings in Washington with Kennedy and his Ex-Comm (Executive Committee of the National Security Council)[167] is that everyone participating assumed that it was up to the President to decide whether or not to embark on what would surely have become a nuclear war with the Soviet Union.[168] The exact nature of the crisis was hidden from almost everyone in the country.[169]

Kennedy's acolyte Theodore Sorenson reports that at the time Kennedy estimated the odds of nuclear war at one in three.[170] Interestingly enough, Abram Chayes, in his flattering

http://www.thebulletin.org/web-edition/op-eds/the-us-air-forces-indifference-toward-nuclear-weapons.

161. *See, e.g.*, WEINER, *supra* note 153, at 92–105 (offering details of what the CIA apparently regarded as its "greatest triumph").

162. *See, e.g.*, *id.* at 197–206.

163. *See* Tim Weiner, *Robert McNamara, Architect of a Futile War, Dies*, N.Y. TIMES, July 6, 2009, at A20.

164. *See generally* DOBBS, *supra* note 132 (chronicling the events of the Cuban Missile Crisis).

165. *See, e.g.*, THEODORE C. SORENSON, KENNEDY 716–18 (1965).

166. *See, e.g.*, ROBERT F. KENNEDY, THIRTEEN DAYS: A MEMOIR OF THE CUBAN MISSILE CRISIS (1969).

167. *See* John F. Kennedy Presidential Library & Museum, The World on the Brink: John F. Kennedy and the Cuban Missile Crisis, http://www.jfklibrary.org/jfkl/cmc/cmc_intro.html (last visited May 6, 2010).

168. *E.g.*, SORENSON, *supra* note 165, at 694 ("It was the most difficult and dangerous decision any President could make, and only he could make it.").

169. As Secretary of Defense Robert McNamara later recalled, President Kennedy decided "that only a limited number of senior officials would be informed of the missile deployment in Cuba," and that only a select group of fifteen officials, "the so-called Executive Committee of the National Security Council, or 'ExComm,' . . . would advise him throughout the crisis." Robert S. McNamara, *Forty Years After 13 Days*, ARMS CONTROL TODAY, Nov. 2002, http://www.armscontrol.org/act/2002_11/cubanmissile. In addition, "[t]he Ex-Comm would be required to radically restrict any information given to their associates, in order to help ensure that neither the press, Congress, nor the general public learned of the situation until the President was prepared to respond to it." *Id.*

170. SORENSON, *supra* note 165, at 705.

portrayal of Kennedy's conduct during the Crisis,[171] did not suggest that there was anything amiss in Kennedy's risking nuclear annihilation. Kennedy's behavior seems even more potentially reckless if one accepts the argument made at the time—in secret, of course—by Defense Secretary Robert McNamara that the Cuban missiles in fact posed little or no threat to actual American security.[172] After all, the United States had an overwhelming nuclear stockpile and Soviet leaders surely believed that the United States would use it in response to any missiles fired from Cuba.[173]

One is tempted to analyze the Cuban Missile Crisis—and perhaps foreign wars in general—as purely problems of "foreign policy" or "international relations." But these issues—and the ways presidents approach them—are often deeply influenced by domestic politics.[174] One of the reasons that Kennedy found himself in such a delicate situation was the fact that constitutionally required elections were about to take place for Congress, and Republican New York Senator Kenneth Keating, among others, was denouncing him for being soft on Soviet penetration of Cuba.[175] Kennedy needed to retain healthy Democratic majorities in both the House and Senate because he could not always depend on Southern Democrats to support his "New Frontier" agenda.[176] Kennedy was also concerned about his prospects for reelection in 1964.[177]

171. *See* ABRAM CHAYES, THE CUBAN MISSILE CRISIS 1–24 (1974); Sanford V. Levinson, *Fidelity to Law and the Assessment of Political Activity (Or, Can a War Criminal Be a Great Man?)*, 27 STAN. L. REV. 1185, 1191–99 (1975) (reviewing CHAYES, *supra*).

172. *See* Thomas S. Blanton & James G. Blight, *A Conversation in Havana*, ARMS CONTROL TODAY, Nov. 2002, http://www.armscontrol.org/act/2002_11/cubanmissile (quoting McNamara during a 1992 conference as asserting, "[i]t was absurd to believe that the missiles in Cuba affected the global nuclear balance").

173. *Id.*

174. *See, e.g.*, CAMPBELL CRAIG & FREDRIK LOGEVALL, AMERICA'S COLD WAR: THE POLITICS OF INSECURITY 360–70 (2009) (pointing out the interconnection of domestic and international politics).

175. *See* James Reston, *On Cuba and Pearl Harbor—the American Nightmare*, N.Y. TIMES, Oct. 11, 1962, at A1.

176. *See* ARTHUR M. SCHLESINGER, JR., A THOUSAND DAYS: THE PRESIDENCY OF JOHN F. KENNEDY (1965).

177. *See* CRAIG & LOGEVALL, *supra* note 174, at 204–05. Kennedy had received only 49.7% of the popular vote in the 1960 election. *See* United States of America Presidential Election of 1960: Popular Vote and Electoral College Vote by State, http://psephos.adam-carr.net/countries/u/usa/pres/1960.txt (last visited May 6, 2010).

The Cuban Missile Crisis shows the two sides of presidential dictatorship. On the one hand, it reveals the President's constitutional and practical ability, on his own, to order an attack on Cuba that would trigger a Soviet move on Berlin and possibly a far more dangerous response.[178] On the other hand, it shows the interplay between this unilateral power and domestic politics—including the public's ability to vote him out of office in 1964.[179]

The fact that Kennedy stopped short of precipitating an all-out war was not because the Constitution forbade it, but due to judgments of prudence.[180] But a prudent dictator is still a dictator. In fact, one could easily argue that Kennedy, the President of a constitutional democracy, had at least as much discretion as his counterpart in the Kremlin. After all, Nikita Khrushchev paid for his commendable caution with his job, which suggests a degree of accountability that made the Soviet leader significantly less of a full-scale dictator than most Americans assumed.[181]

Since Kennedy's presidency, constitutional understandings about the power of the presidency have not reduced presidential discretion; they have only encouraged it.[182] The President is surrounded by advisors and lawyers who are only too happy to argue that the President enjoys an ever-wider discretion, whether because of the President's inherent authority under Article II or because Congress has authorized it in framework statutes.[183]

Devotees of presidential power are fond of pointing out that the President's powers in Article II differ from Congress's powers listed in Article I because Article II does not limit the President to "all . . . powers herein granted" but says instead that "The Executive power shall be vested" in the President of the

178. *See* SORENSON, *supra* note 165, at 694.

179. *See* CRAIG & LOGEVALL, *supra* note 174, at 204.

180. *See* DOBBS, *supra* note 132, at 350–53.

181. *See id.* at 348–49. Just as most Americans probably recoil at the description of our presidents as even limited "dictators," they are likely to overlook the fact that foreign dictators are always part of wider institutional networks that can pose threats to their continuation in power—and, of course, often their lives.

182. *See* FISHER, *supra* note 130, at 127.

183. *See, e.g.*, Barron & Lederman, *Constitutional History*, *supra* note 142, at 1067–68 (describing then Assistant Attorney General William Rehnquist's defense of President Nixon's authority as commander-in-chief to invade Cambodia).

United States.[184] John Yoo, the author of the notorious "torture memos,"[185] has argued that, despite American objections to King George III, the President still enjoys the powers possessed by the English monarch at the time of the American Revolution.[186] Although Parliament retained the powers of the purse, Yoo explains, the King possessed unbounded discretion over the use of military force.[187] Thus, according to the Office of Legal Counsel's memoranda, when the President acts according to his powers as commander-in-chief, he is for all intents and purposes a dictator—or, if one prefers, a constitutional monarch—because neither the Congress nor the courts may interfere with his decisions; at most Congress can refuse to appropriate new money for his adventures.[188] Scholars of all political persuasions have criticized Yoo's conclusions,[189] but the fact that his arguments are particularly clumsy does not mean that there are not other, less aggressive ways of making the case for presidential authority.[190]

No one should assume that the end of the Bush presidency meant the end of lawyerly arguments for increased presidential

184. *See* Bybee Memorandum, *supra* note 141, at 37 (quoting the first sentence of Article II and then stating: "[t]hat sweeping grant vests in the President an unenumerated 'executive power' and contrasts with the specific enumeration of the powers—those 'herein' granted to Congress by Article I").

185. *See, e.g.*, John H. Richardson, *"Torture Memo" Author John Yoo Responds to this Week's Revelations*, ESQUIRE, Apr. 3, 2008, http://www.esquire.com/the-side/qa/john-yoo-responds.

186. *See* JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11, at 32–33 (2005) (explaining the allocation of powers between King and Parliament).

187. *Id.*

188. *See* Jack M. Balkin, *Reductio Ad Dictatorem*, BALKINIZATION, Apr. 7, 2006, http://balkin.blogspot.com/2006/04/reductio-ad-dictatorem.html.

189. *See, e.g.*, JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 141–76 (2008); David Cole, *What Bush Wants to Hear*, N.Y. REV. OF BOOKS, Nov. 17, 2005, at 8, 8–12 (reviewing YOO, *supra* note 186); David Luban, *The Defense of Torture*, N.Y. REV. OF BOOKS, Mar. 15, 2007, at 37, 37–40 (reviewing JOHN YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR (2007)).

190. Moreover, as Rossiter's book suggests, long before the Bush Administration, government lawyers had justified ever-stronger conceptions of presidential power while other scholars had denounced these dangerous tendencies. *See* ROSSITER, *supra* note 14, at 306–14. Consider, as an example, political scientist David Gray Adler's analysis of the Clinton Administration's claims about presidential authority in the realm of foreign affairs: "[a]s things stand today . . . power has replaced law, usurpation has replaced amendment, and executive fiat has replaced constitutionalism." David Gray Adler, *Clinton, the Constitution, and the War Power*, *in* THE PRESIDENCY AND THE LAW: THE CLINTON LEGACY 46 (David Gray Adler & Michael A. Genovese eds., 2002).

discretion and presidential power. We have argued elsewhere that President Bush's successors, beginning with Barack Obama, will be able to present themselves as more moderate by rejecting the Bush Administration's most radical claims while staking out slightly less extreme claims to executive authority.[191]

The central idea of *constitutional* dictatorship, after all, is that the President does not seize power.[192] Rather, his power is bestowed on him, either by the Constitution directly, or, more likely, by framework statutes and authorizations passed by Congress.[193] Presidents (or more correctly, the Presidents' lawyers) tend to read these statutes and authorizations as broadly as possible, so that the President can have as free a hand as possible to save the nation.[194] In fulfilling these authorizations, the President creates new institutions and mechanisms that, in turn, bestow new kinds of authority and new kinds of power.[195] Thus, the great mistake of the Bush Administration was the assumption that presidents should go out of their way to claim power unilaterally. It is far more effective to ask for power and have it given. Then one can proliferate the powers of the office through making broad constructions, through building institutions, and through issuing regulations.

The expansion of presidential power knows no party. It was, after all, President Clinton who sent American troops to Haiti and American bombers to the South Balkans without explicit congressional authority.[196] (For this he was criticized by,

191. Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 FORDHAM L. REV. 489, 529–33 (2006).

192. *See* ROSSITER, *supra* note 14, at 4–5.

193. *See id.*

194. Our friend and colleague Bruce Ackerman has recently argued, in his Tanner Lectures delivered at Princeton in April 2010, that a major development over the last several decades is the increased importance of the Office of Legal Counsel as the de facto non-Article III court of last resort within the executive branch, as well as the exponential growth of the office of the White House Counsel, which increasingly feels empowered to weigh in on the merits of legal disputes about presidential power (and, not surprisingly, finds that the President in fact possesses vast powers). BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC (forthcoming 2010) (manuscript at 130, on file with authors).

195. *See* ROSSITER, *supra* note 14, at 288–90.

196. *See* Barron & Lederman, *Constitutional History*, *supra* note 142, at 1090–91 n.619.

of all persons, John Yoo himself.[197]) And when President Obama announced the escalation of American forces in Afghanistan on December 1, 2009, at West Point,[198] he based the authority for his decision on the 2001 AUMF,[199] ignoring the inconvenient fact that this authorization was based on circumstances and assumptions that may no longer hold today. President Obama will, of course, continue to need to seek additional funding from Congress, but there is little reason to believe that Congress will refuse to support troops who are risking their lives on behalf of the national goals declared by the President. Nor is there any reason to believe that Obama will feel bound by the War Powers Act, which all Presidents (with the exception of Jimmy Carter) have regarded as unconstitutional since its enactment.[200] The War Powers Act was passed over Richard Nixon's veto during the nadir of his presidency, and since then has been honored more in the breach than in the observance.[201]

The most obvious elements of presidential dictatorship tend to be concentrated in areas of foreign policy, intelligence gathering, covert operations, and warfare. Presidents exercise far less unilateral control in domestic politics.[202] Harry Truman once imagined the problems that his successor, General Dwight

197. John C. Yoo, *The Imperial President Abroad*, *in* THE RULE OF LAW IN THE WAKE OF CLINTON 159 (Roger Pilon ed., 2000) (arguing that "the record of the administration has not been a happy one, in light of its costs to the Constitution and the American legal system," and pointing out that "[o]n a series of different international relations matters, such as war, international institutions, and treaties, President Clinton has accelerated disturbing trends in foreign policy that undermine notions of democratic accountability and respect for the rule of law").

198. *See, e.g.*, President Barack Obama, Remarks by the President in Address to the Nation on the Way Forward in Afghanistan and Pakistan (Dec. 1, 2009), *available at* http://www.whitehouse.gov/the-press-office/remarks-president-address-nation-way-forward-afghanistan-and-pakistan.

199. *Id.* ("Just days after 9/11, Congress authorized the use of force against al Qaeda and those who harbored them—an authorization that continues to this day.").

200. *Cf.* Dahlia Lithwick, *What War Powers Does the President Have?*, SLATE, Sept. 13, 2001, http://www.slate.com/id/1008290 (stating that the War Powers Act "looks good on paper, but presidents have generally ignored [it], citing Article II, Section 2 as their authority to send soldiers into combat").

201. *See, e.g.*, JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 48–49 (1993).

202. We should not, however, underestimate the ability of a dedicated President to influence decisionmaking by administrative agencies and, therefore, to procure policy victories that Congress might have denied him. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246 (2001).

Eisenhower, would face once in the White House.[203] Ike would, suggested Truman, come to the White House believing that he could issue orders as he had before and rely on their implementation.[204] He would be sorely disappointed. "He'll sit here, . . . and he'll say, 'Do this! Do that!' . . . Poor Ike—it won't be a bit like the Army. He'll find it very frustrating."[205] Or, as Truman put it in a letter to his sister:

> The people can never understand why the President does not use his supposedly great power to make 'em behave. Well, all the President is, is a glorified public relations man who spends his time flattering, kissing and kicking people to get them to do what they were supposed to do anyway . . . .[206]

Political scientist Richard Neustadt has argued that the President ultimately has only the "power to persuade,"[207] since there are many ways that his wishes, however clearly expressed, could be negated prior to implementation.[208] This only underscores the point that it is misleading to think of the President as a "constitutional dictator" in general terms, especially when it comes to domestic policy.

To be sure, the President can, through unilateral action, prevent many things from happening. For example, presidents successfully veto legislation backed even by healthy (though not two-thirds) majorities in both houses of Congress.[209] This is not so much an example of "constitutional dictatorship" as an additional veto point in a republican system that is already full (some would say too full) of such barriers to reform.[210] The President also can act unilaterally and virtually without limits in his use of the pardon power.[211] Certain Anti-Federalists were critical of the potential for misuse of the pardoning power for this reason: they feared the President would pardon allies who

203. RICHARD E. NEUSTADT, PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP FROM FDR TO CARTER 9 (1960).

204. *See id.*

205. *Id.*

206. PERRET, *supra* note 133, at 138.

207. NEUSTADT, *supra* note 203, at 10.

208. *See id.*

209. *Cf.* LEVINSON, *supra* note 113, at 40 ("More than 95 percent of all presidential vetoes are successful . . . .").

210. *See id.* at 9.

211. *See* JEFFREY CROUCH, THE PRESIDENTIAL PARDON POWER 29 (2009). *See generally* U.S. CONST. art. II, § 2, cl. 1 (stating that the President "shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment").

joined in a "cabal" to threaten the liberties of Americans.[212] Some two hundred years later, we see glimmers of what the Anti-Federalists were worried about, the most obvious examples being George H.W. Bush's Christmas Eve 1992 pardon of colleagues who had pled guilty or had been indicted or convicted in connection with their participation in the Iran-Contra affair.[213] This pardon effectively quashed any further investigation into illegal conduct during the Reagan Administration, in which Bush served as Vice President.[214]

American Presidents enjoy few unilateral powers with respect to domestic issues because most of these issues do not appear to affect national security or involve emergencies. Nevertheless, the line between national security and domestic affairs is often difficult to draw, and increasingly so in a globalized environment. Foreign intelligence can take place anywhere, including within the United States.[215] Biological and environmental threats do not respect national borders, nor, for that matter, do cyberattacks.[216]

Likewise, many kinds of emergencies are domestic, whether they involve natural disasters, diseases, threats to the national power grids, cyberattacks on defense installations or financial institutions, or economic crises. Government actors must move quickly to identify and meet these threats, or to head them off before they occur. Indeed, President Bush began to lose political momentum precisely because he failed to act swiftly or deftly in the face of a domestic disaster, Hurricane

212. *See, e.g.*, *The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents*, PA. PACKET AND DAILY ADVERTISER, Dec. 18, 1787, *available at* http://www.constitution.org/afp/penn_min.txt (warning that the President, "having the power of pardoning without the concurrence of a council, . . . may skreen [sic] from punishment the most treasonable attempts that may be made on the liberties of the people, when instigated by his coadjutors in the senate").

213. *See* Dian McDonald, *Bush Pardons Weinberger, Five Others Tied to Iran-Contra*, FED'N AM. SCIENTISTS, Dec. 24, 1992, *available at* http://www.fas.org/news/iran/1992/921224-260039.htm.

214. More recently, people criticized George W. Bush's commutation of Scooter Libby's sentence. Jim Rutenberg & Jo Becker, *Aides Say No Pardon for Libby Irked Cheney*, N.Y. TIMES, Feb. 17, 2009, at A14, but this episode seems to pale by comparison. Moreover, Bush refused to grant Libby a full pardon at the end of his presidency. *Id.*

215. *See* Peter Baker, *Obama Making Plans to Use Executive Power*, N.Y. TIMES, Feb. 12, 2010, at A13.

216. *See* Susan W. Brenner & Marc D. Goodman, *In Defense of Cyberterrorism: An Argument for Anticipating Cyber-Attacks*, 2002 U. ILL. J.L. TECH. & POL'Y 1, 7–12.

Katrina.[217] Since the Calling Forth Act of 1792,[218] Congress has repeatedly created framework statutes that authorize presidents to respond to domestic emergencies.[219] These framework statutes authorize executive regulations and orders that further empower executive officials, and they create abundant opportunities for unilateral discretion in the domestic sphere.[220]

For example, one thing dictators must do in emergencies is detain people who pose threats to public safety. The Public Health Service Act gives the Surgeon General, subject to the approval of the Secretary of Health and Human Services, the authority "to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession."[221] Accordingly, the Surgeon General may order "inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary."[222] The grant of authority may even provide for "apprehension, detention, or conditional release of individuals" if necessary "for the purpose of preventing the introduction, transmission, or spread of such communicable diseases as may be specified from time to time in Executive Orders of the President upon the recommendation of the Secretary, in consultation with the Surgeon General."[223]

Or consider the steps the executive may take to meet the threat of imminent economic collapse. During the dark days of 1933, many people hoped that President Roosevelt, once inaugurated, would self consciously take on dictatorial powers to head off the gathering economic crisis.[224] As Jonathan Alter

217. *See* Kathleen Frankovic, *Bush's Popularity Reaches Historic Lows*, CBSNEWS.COM, Jan. 15, 2009, http://www.cbsnews.com/stories/2009/01/15/opinion/pollpositions/main4724068.shtml.

218. Calling Forth Act of 1792, ch. 28, 1 Stat. 264 (repealed 1795).

219. *See* Act of Feb. 28, 1795, ch. 36, 1 Stat. 424; Act of July 29, 1861, ch. 25, 12 Stat. 281.

220. *See, e.g.*, 12 Stat. at 281.

221. 42 U.S.C. § 264(a) (2006).

222. *Id.*

223. *Id.* § 264(b).

224. JONATHAN ALTER, THE DEFINING MOMENT: FDR'S HUNDRED DAYS AND THE TRIUMPH OF HOPE 5 (2006).

writes in the prologue to his recent book on FDR's first Hundred Days:

> [the] word —"dictator"—had been in the air for weeks, endorsed vaguely as a remedy for the Depression by establishment figures ranging from the owners of the *New York Daily News*, the nation's largest circulation newspaper, to Walter Lippmann, the eminent columnist who spoke for the American political elite. "The situation is critical, Franklin. You may have no alternative but to assume dictatorial powers," Lippmann had told FDR during a visit to Warm Springs on February 1, before the crisis escalated. Alfred E. Smith, the Democratic nominee for president in 1928, recalled with some exaggeration that "during the World War we wrapped the Constitution in a piece of paper, put it on the shelf and left it there until the war was over." The Depression, Smith concluded, was a similar "state of war." Even Eleanor Roosevelt, more liberal than her husband, privately suggested that a "benevolent dictator" might be what the country needed. The vague idea was not a police state but deference to a strong leader unfettered by Congress or the other inconveniences of democracy.[225]

Alfred M. Landon, the Republican Governor of Kansas who would become Roosevelt's opponent in the 1936 election, declared that "[e]ven the iron hand of a national dictator . . . is in preference to a paralytic stroke."[226] And *Barron's*, a business weekly, stated that "a mild species of dictatorship will help us over the roughest spots in the road ahead."[227]

Roosevelt declined the invitation.[228] Instead, as Presidents often have done in our nation's history, he procured legislation from a compliant—and justifiably "scared"[229]—Congress that delegated vast new powers to the executive branch with minimal deliberation.[230] In fact, the process of extraordinary dele-

225. *Id.*

226. ARTHUR M. SCHLESINGER, JR., THE AGE OF ROOSEVELT: THE COMING OF THE NEW DEAL 3 (1958).

227. WILLIAM E. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL 30 (1963).

228. *See* Frank R. Kent, *White House Technique*, 9 VA. Q. REV. 372, 372–74 (1933).

229. *Id.* (attributing Roosevelt's achievements during the Hundred Days, in part, to the joint presence of a "thoroughly scared country" and "a thoroughly scared Congress"). Clinton Rossiter, who cites Kent's article, ROSSITER, *supra* note 14, at 259 n.12, also quotes Harold Laski's observation that "[i]n a crisis, . . . public opinion compels the abrogation of the separation of powers. There is really only one will in effective operation, and that is the will of the president." *Id.* (quoting HAROLD J. LASKI, THE AMERICAN PRESIDENCY, AN INTERPRETATION 154–55 (1940)).

230. On the evening of March 9, 1933, Congress received "a single copy of [the] emergency banking bill," and, by 8:30 p.m., Congress passed it. Roger I. Roots, *Government by Permanent Emergency: The Forgotten History of the New Deal Constitution*, 33 SUFFOLK U. L. REV. 259, 266 (2000). A Republican oppo-

gation began even before Roosevelt took office. For example, the apparent legal authority for the remarkable acts of Henry Paulsen and Ben Bernanke during the Bear Stearns crisis was an obscure 1932 law, passed during the last year of the Hoover Administration (over Hoover's veto), that delegated almost absolute discretion to the Federal Reserve Board to act in the case of a banking crisis.[231] As already noted, critics of the New Deal—and the members of the Supreme Court in *Schechter Poultry*—might well have labeled Bernanke's actions as exemplifying the problems of "delegation running riot."[232] But the point of the modern state, whether we define it as a "national security" state or simply "the administrative state," is that people often perceive such delegation as "necessary and proper," even if it leaves traditional notions of the rule of law in its wake.[233]

nent, Pennsylvania Representative McFadden told his colleagues, "I regret that the membership of the House has had no opportunity to consider or even read this bill. . . . It is an important banking bill. It is a dictatorship over finance in the United States. It is complete control over the banking system in the United States." 77 CONG. REC. 80 (1933) (statement of Rep. McFadden). "I expect to vote for the bill," said Texas Senator Thomas Connally, "though it contains grants of powers which I never before thought I would approve in time of peace." *Id.* at 65 (statement of Sen. Connally). Virginia Senator Carter Glass told his colleagues that "[t]here are provisions in the bill to which in ordinary times I would not dream of subscribing, but we have a situation that invites the patriotic cooperation and aid of every man who has any regard for his country." *Id.* at 58 (statement of Sen. Glass).

231. *See* David Fettig, *Lender of More Than Last Resort*, THE REGION 14 (2002), http://www.minneapolisfed.org/pubs/region/02-12/lender.pdf. *See generally* Emergency Relief and Construction Act of 1932, ch. 520, § 210, 47 Stat. 709, 715 (providing that "[i]n unusual and exigent circumstances, the Federal Reserve Board, by the affirmative vote of not less than five members" may authorize extraordinary loans). Fettig notes that "the 1932 amendment," itself amended by 1934 legislation, "is only meant to address *crisis situations*." Fettig, *supra*, at 18 (emphasis added).

David Wessel recently emphasized the importance of the 1932 legislation. DAVID WESSEL, IN FED WE TRUST: BEN BERNANKE'S WAR ON THE GREAT PANIC 161 (2009) ("Bernanke and [then President of the New York Federal Reserve Timothy] Geithner knew Section 13(3) of the Federal Reserve Act existed but never thought they would use it. Indeed, within the Fed, there long had been anxiety that any public declaration of circumstances to be 'unusual and exigent' would be so alarming it could make matters worse.").

232. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring).

233. *See* RUBIN, *supra* note 90, at 2; Sanford Levinson & Jack M. Balkin, *Morton Horwitz Wrestles with the Rule of Law*, *in* TRANSFORMATIONS IN AMERICAN HISTORY: LAW, IDEOLOGY, POLITICS, AND METHOD (Daniel W. Hamilton & Alfred L. Brophy eds., forthcoming 2010).

Many of FDR's most important exercises of unilateral power involved issues of war and peace,[234] such as ordering military support for Great Britain in the days leading up to America's entry into World War II.[235] Yet one should not lose sight of the many assertions of power he made concerning the economy, some of which he justified on national security grounds.[236] David Barron and Martin Lederman describe a "notorious speech" that Roosevelt made in September 1942, in which he stated that, should Congress not repeal a certain provision of the Emergency Price Control Act, he would simply decline to enforce it to "avert a disaster which would interfere with the winning of the war."[237] Rossiter terms this speech "[t]he broadest statement of his presidential powers that Mr. Roosevelt ever made—a statement able to stand comparison with the most extreme of President Lincoln's assertions."[238] Rossiter argues that "[i]t is unfortunate for the history of constitutional dictatorship that Congress finally gave in to the President's peremptory threat,"[239] because it prevented a serious constitutional debate about how much power the President should enjoy.[240] But, in fact, nothing is more familiar in American constitutional history than the episode Rossiter describes: Congress acquiesces to presidential requests for increased discretionary power. What the New Deal generated was a greatly increased congressional power to comply with those requests.

If American constitutional dictatorship made its most noteworthy appearance in Abraham Lincoln's presidency, there can be no doubt that the constitutional mechanisms that permitted its expansion arose out of the New Deal and the National Security State. Since the 1940s, it became hornbook constitutional law that Congress may constitutionally delegate wide-

234. *See* Barron & Lederman, *Constitutional History*, *supra* note 142, at 1042–55.

235. *Id.* at 1044–47.

236. *See, e.g.*, *id.* at 1052 n.458.

237. *Id.* (quoting ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 115 (Mariner Books 2004) (1973)). FDR's speech, delivered on Labor Day, occurred within two months of the Supreme Court's disposition of the "Nazi Saboteur's Case." *See id. See generally Ex parte* Quirin, 317 U.S. 1 (1942). During the proceedings in *Quirin*, Attorney General Francis Biddle suggested privately to members of the Court that the President was determined to execute the saboteurs and would execute them regardless of what the Court said. *See* Barron & Lederman, *Constitutional History*, *supra* note 142, at 1051.

238. ROSSITER, *supra* note 14, at 268.

239. *Id.* at 269.

240. *See id.*

ranging discretionary authority to the President and administrative agencies.[241] It is worth emphasizing that the key development in the modern state has been an expansion of *Congress*'s power to regulate a wide range of social and economic questions, and to delegate the power to regulate these matters to others. Without those powers, the President could not construct the administrative state, or invoke federal power to regulate all the matters that Congress itself may regulate. Although we identify discretionary powers with the executive, constitutional dictatorship in the United States was facilitated by loosening the constitutional checks that bound Congress. The reason the President became so powerful in the modern period is that Congress became powerful first.

### D. THE CHARACTERISTIC PATTERN OF AMERICAN CONSTITUTIONAL DICTATORSHIP

The example of Franklin Roosevelt in 1933 became the characteristic pattern for the American experiment in constitutional democracy (and constitutional dictatorship): it is not the direct assertion of unilateral power, but the urgent request to Congress for authorization in a crisis, followed by the preservation of these powers in later years and their expansion through broad interpretation by the executive branch. American Presidents, as a rule, do not seize dictatorial powers. Instead, they ask for them in the midst of an emergency (whether genuine or purported) and Congress complies. Presidents then bank these powers away, build on them, employ lawyers to elaborate on them, and then wield them as they think necessary when a future crisis occurs. In this tradition of asking first, Abraham Lincoln may seem the outlier. But even Lincoln sought justification after the fact from Congress for his actions, and Congress, as usual, gave the President its blessing, albeit retroactively.[242] Similarly, President Franklin Roosevelt's declaration of a banking holiday on March 4, 1933, was quickly followed by the March 9, 1933, Emergency Banking Relief Act, which "approved and confirmed" Roosevelt's actions.[243]

Recognizing this pattern places the recent presidency of George W. Bush in a useful light. It makes Bush's experience

241. *See supra* notes 144–48 and accompanying text.

242. *See* Habeas Corpus Act of 1863, ch. 81, § 1, 12 Stat. 755 (granting authority to the President to suspend writs of habeas corpus during the Civil War).

243. Act of Mar. 9, 1933, ch. 1, § 1, 48 Stat. 1, 1.

during his two terms in office far less unusual than his critics have supposed. Immediately following the 9/11 terrorist attacks, George W. Bush played according to the standard script by announcing the existence of an emergency threatening the nation's survival and asking Congress for new powers to deal with it.[244] Congress replied eagerly, first with the September 18, 2001, AUMF,[245] and then with the USA PATRIOT Act of 2001.[246] Congress also reorganized government agencies, consolidated the intelligence services, and created a new Department of Homeland Security,[247] a reform Bush initially opposed, but later supported and used to his political advantage.[248] To this extent, Bush's actions match the traditional pattern. First, the President declares a crisis or emergency, then he asks for new powers, and, finally, Congress grants the request. However, Bush also sought to obtain additional emergency powers *without* asking for congressional approval in three areas: his policy on detentions and interrogation practices, his creation of military commissions, and his secret domestic surveillance programs. This was his great mistake, and the source of some of the most ardent (and well-deserved) criticism.

Bush received pushback from the public and from the courts because he deviated from the traditional script for American Presidents seeking emergency authority. Instead of asking Congress for emergency powers, he simply asserted that he already possessed all the constitutional and legal authority he needed.[249] Bush drew on expansive interpretations of the President's Article II powers and the statutory grants of power created by previous Congresses. The result was decidedly mixed. The Court held some of his detention practices unconstitutional in *Hamdi v. Rumsfeld*,[250] and declared his military commissions plan unconstitutional in *Hamdan v. Rumsfeld*.[251]

244. *See* George W. Bush, Speech to Congress (Sept. 20, 2001), *available at* http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushaddress_092001.html (pledging to work with Congress to fight a new war on terror); *cf.* David Glazier, *Playing by the Rules: Combating Al Qaeda Within the Law of War*, 51 WM. & MARY L. REV. 957, 959 (2009) (discussing the Bush Administration's adoption of the "war" nomenclature after Sept. 11, 2001).

245. Pub. L. No. 107-40, 115 Stat. 224 (2001).

246. Pub. L. No. 107-56, 115 Stat. 272 (2001).

247. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

248. *See* Richard W. Stevenson, *Signing Homeland Security Bill, Bush Appoints Ridge as Secretary*, N.Y. TIMES, Nov. 26, 2002, at A1.

249. *See, e.g.*, GOLDSMITH, *supra* note 189; SAVAGE, *supra* note 140.

250. 542 U.S. 507, 509 (2004).

251. 548 U.S. 557, 567 (2006).

There also was considerable public outcry against his use of Guantánamo Bay, Cuba, his secret use of torture, and his domestic surveillance program.[252]

In Bush's second term, however, he appeared to have learned his lesson. Repeatedly using the language of crisis and urgency, Bush convinced Congress to legitimate important elements of his detention policies in the Military Commissions Act of 2006,[253] and his surveillance policies in the Protect America Act of 2007[254] and FISA Amendments Act of 2008.[255] Whether or not these delegations were wise, by going to Congress for expanded authority, George W. Bush followed a hallowed tradition in the construction of American constitutional dictatorship.[256]

Since World War II, there has been one major exception to the standard pattern of asking and receiving congressional permission for emergency powers: Harry Truman's 1950 deci-

252. *See* Charlie Savage, *To Critics, New Policy on Terror Looks Old*, N.Y. Times, July 1, 2009, at A14.

253. Pub. L. No. 109-366, 120 Stat. 2600 (codified in scattered sections of 10, 18, 28, and 42 U.S.C.).

254. Pub. L. No. 110-55, 121 Stat. 552 (to be codified in scattered sections of 50 U.S.C.).

255. Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (to be codified in scattered sections of 50 U.S.C.).

256. A good example of congressional cravenness in the face of presidential demands for emergency power is Pennsylvania Senator Arlen Specter's treatment of the Military Commissions Act of 2006. Serving as the Republican Chairman of the Senate Judiciary Committee, Specter insisted that the Act would "set back basic rights by some 900 years" by suspending the writ of habeas corpus. Carl Hulse & Kate Zernike, *Legislation Advances on Terrorism Trials*, N.Y. TIMES, Sept. 28, 2006, at A1. Having offered his complaints, Specter promptly voted for the bill. Charles Babington & Jonathan Weisman, *Senate Approves Detainee Bill Backed by Bush; Constitutional Challenges Predicted* WASH. POST, Sept. 29, 2006, at A1. Perhaps Specter had no choice because he had to express solidarity with the leader of his (then) political party or face a primary challenge in a later election. *Cf. id.* (describing the partisan arguments surrounding the passage of the Military Commissions Act of 2006). But many Democrats were equally eager to demonstrate their commitment to President Bush's "war on terror," lest they lose votes in the 2006 midterm elections. *Cf. id.* (stating that some Democrats voted for the Military Commissions Act of 2006). In fact, the Democrats regained control of Congress in those elections. Michael D. Shear & Alec MacGillis, *Democrats Take Control of Senate as Allen Concedes to Webb in Va.*, WASH. POST, Nov. 10, 2006, at A1. Perhaps they gained political benefits from demonstrating that they also believed that Guantánamo detainees had no rights that the United States was bound to respect. *See generally* Sanford Levinson, *Slavery and the Phenomenology of Torture*, 74 SOC. RES. 149, 149–50 (2007) (analogizing treatment of "terrorists" with slavery).

sion to invade Korea without either a declaration of war or a congressional authorization.[257] Three things are interesting about Truman's example, which is an underappreciated moment in the development of the modern National Security State, and a watershed event in the development of the modern presidency. First, Truman argued that America's treaty obligations authorized him to act.[258] He argued that the United Nations Charter, ratified by the Senate immediately following World War II, and United Nations Security Council Resolutions justified the police action in Korea.[259] Second, since Truman, presidents often assert the right to begin wars without congressional authorization, yet they generally seek (and obtain) congressional authorization to maintain political legitimacy for their actions.[260] Third, when Truman pushed too hard and tried to seize the nation's steel mills to support the Korean War effort, the Supreme Court pushed back in *Youngstown Sheet & Tube Co. v. Sawyer*.[261] Truman's construction of the National Security State, including his invasion of Korea, forever changed the powers of the presidency, but it did not change the basic pattern of American constitutional dictatorship.

257. *See* Louis Fisher, *The Korean War: On What Legal Basis Did Truman Act?*, 89 AM. J. INT'L L. 21, 21 (1995).

258. *See id.*

259. *See id.* at 32. The United States was the third country to ratify the United Nations Charter, behind Nicaragua and El Salvador. OFFICE OF THE HISTORIAN, U.S. DEP'T OF STATE, THE UNITED STATES AND THE FOUNDING OF THE UNITED NATIONS, AUGUST 1941–OCTOBER 1945 (Oct. 2005), http://www.state.gov/r/pa/ho/pubs/fs/55407.htm. "In a testament to the sustained wartime efforts to build support for the United Nations, the Charter was approved in the Senate on July 28, 1945, by a vote of 89 to 2, with 5 abstentions." *Id.*

260. President Bill Clinton's bombing of the Federal Republic of Yugoslavia in 1999 is the notable exception. Letter to Congressional Leaders Reporting on Airstrikes Against Serbian Targets in the Federal Republic of Yugoslavia (Serbia and Montenegro), 35 WKLY. COMP. PRES. DOC. 989 (May 25, 1999) (informing congressional leaders of the bombings). Unlike President Truman, President Clinton was not able to base his authority on the U.N. Charter, since there was a plausible argument that the bombing was in violation of Article 2 of the Charter. *Cf. id.* (stating that the authority for President Clinton to conduct the airstrikes was his "constitutional authority to conduct U.S. foreign relations and as Commander in Chief and Chief Executive"). Instead, the President based his authority on his Article II powers and the need "to demonstrate the seriousness of NATO's purpose." *Id.* The Clinton Administration's Office of Legal Counsel eventually justified the bombing on the basis of a strained reading of a congressional appropriations law. *See* Barron & Lederman, *Constitutional History*, *supra* note 142, at 1090 n.619.

261. 343 U.S. 579, 589 (1952).

E. DISTRIBUTED DICTATORSHIP

A focus on executive power as the engine of constitutional dictatorship naturally leads people to identify dictatorship with a single individual, the President of the United States. But this is incorrect. Dictatorial power is almost inevitably dispersed in the modern administrative state. Policy questions in the modern state increasingly require specialized expertise. Even the most able of presidents likely lack the detailed knowledge necessary for quick and decisive action. Consider this *New York Times* article, entitled *Fed Chief Shifts Path, Inventing Policy in Crisis*:

> As chairman of the Federal Reserve, Ben S. Bernanke has long argued that a central bank should base its policies as much as possible on consistent principles rather than seat-of-the-pants judgment.
>
> But now, as the meltdown in credit markets threatens major institutions on Wall Street and a recession appears inevitable, Mr. Bernanke is inventing policy on the fly.
>
> "Modern monetary policy-making puts a lot of weight on rules, but there is no rule book for an economic crisis," said Douglas W. Elmendorf, a senior fellow at the Brookings Institution and a former Fed economist.
>
> On Friday, the Federal Reserve seemed to toss out the rule book altogether when it assumed the role of white knight, temporarily bailing out Bear Stearns, one of Wall Street's biggest firms, with a short-term loan to help avoid a collapse that might send other dominoes falling.[262]

At first glance, this seems like a remarkably Schmittian description of the role played by the Federal Reserve Board—and, more particularly, its Chair, Ben Bernanke. Schmitt's "sovereign" is the person who can successfully define something as a "crisis" and then basically do whatever he or she thinks necessary to meet the crisis.[263] But Ben Bernanke is not a sovereign dictator. He is a commissarial, or constitutional, dictator. He enjoys his power courtesy of congressional statute, the residue of a previous Administration's demand for discretionary power in the face of a perceived emergency.

What is perhaps most important about this story is that the discretion rests not with the President but with Ben Bernanke, Chairman of the Federal Reserve. In this economic cri-

262. Edmund L. Andrews, *Fed Chief Shifts Path, Inventing Policy in Crisis*, N.Y. TIMES, Mar. 16, 2008, at A1 (emphasis omitted).

263. It is telling that *Wall Street Journal* economics editor David Wessel named his recent book *In Fed We Trust: Ben Bernanke's War on the Great Panic*. WESSEL, *supra* note 231.

sis, George W. Bush did not play the role of "the decider."[264] A modern political system facing complicated problems that call for substantial expertise may require a number of de facto dictators in crisis situations, precisely because the nature of crises can be different.[265] We call this development *distributed dictatorship*. Although Congress has given Bernanke, in his capacity as head of the Federal Reserve Board, discretion to save the nation's financial industries, he obviously has no authority to detain people suspected of swine flu. That power rests, in large part, in the head of the Centers for Disease Control and Prevention in Atlanta, the Surgeon General of the United States, and the Department of Health and Human Services. And none of these officials has the power to decide whose e-mails to gather. That power rests in the control of yet another constitutional dictator, the director of the National Security Agency or another intelligence service.

Here, as in many other cases, the administrative state overthrows our conventional notions of a dictator as a single strongman at the top who makes key decisions. Instead, we increasingly see delegation to different constitutional dictators with different areas of expertise. The modern administrative state features a distributed dictatorship, spreading unreviewable power among a variety of different agencies, czars, and bureaucrats. In the economic crisis of 2008, President Bush was largely a figurehead, whether by choice or by circumstance.[266] The Treasury Secretary and the Chairman of the Federal Reserve made the key executive decisions.[267]

The constitutional theory of the unitary executive, which was much touted during the Reagan Administration, is designed to preserve the President's formal ability to control, oversee, and hold accountable all members of the executive

264. *Cf.* Elisabeth Bumiller, *Not 'the Decider,' but Stirring Anxiety*, N.Y. TIMES, Apr. 24, 2006, at A17 (quoting President George W. Bush as stating "I'm the decider, and I decide what's best").

265. *See, e.g.*, S. AFR. CONST. 1996 ch. 2, § 37 (providing that Parliament may declare a state of emergency when "the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency"). Threats to "the life of the nation" may be caused by distinctly different events and may require distinctly different skills to manage.

266. *See, e.g.*, WESSEL, *supra* note 231, at 196 ("Bush did as he did at almost every stage of the Great Panic: he delegated.").

267. *Id.* ("More than a year into a financial panic that had become the biggest threat to American prosperity in a generation, the president of the United States remained largely a spectator as the Treasury secretary and Fed chairman he had appointed made and executed the plays.").

branch.[268] It is no accident that this theory began to gain currency after the work of the executive branch became so variegated and specialized, and following the most dramatic ideological shift in the White House since Roosevelt's replacement of Hoover in 1933.[269] President Reagan's lawyers were attracted to the theory of the unitary executive precisely because they felt, perhaps for good reason, that the administrative state was beyond their control, particularly with regard to civil service protected holdovers from previous administrations might not have shared the Reaganites' ideological preferences.[270] Moreover, Stephen Skowronek has pointed out that the unitary executive theory arose during a period when the President and Congress were usually controlled by opposite parties: defenders of a strong presidency viewed increased control over the bureaucracy as the best way to promote their policy goals without interference from opponents of the President.[271] The theory of the unitary executive is a convenient fiction offered by lawyers to allow presidents to consolidate power within increasingly complex administrations that necessarily feature multiple centers of power and sources of authority. Asserting that the President actually has control over the entire Administration is a bit like the courtiers of King Canute who tried to flatter him by claiming that he could direct even the progress of the ocean's tides.[272] King Canute, on the other hand, had no such delusions of grandeur.[273]

268. *See, e.g.*, STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH (2008) (reviewing the history of the unitary executive theory); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165–66 (1992).

269. *See, e.g.*, STEPHEN SKOWRONEK, THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO BILL CLINTON 411 (1997) ("Whatever the limits of the Reagan reconstruction, no president in recent times has so radically altered the terms in which prior governmental commitments are now dealt with or the conditions under which previously established interests are served.").

270. *Cf.* CALABRESI & YOO, *supra* note 268, at 374 (noting Reagan's efforts to wield greater control over the various parts of the executive branch).

271. *See* Stephen Skowronek, *The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 HARV. L. REV. 2070, 2073 (2009).

272. *See* Barrie Markham Rhodes, *From Viking Warrior to English King—Canute (Knud) the Great*, VIKING NETWORK, Nov. 8, 2000, http://www.viking.no/e/people/e-knud.htm.

273. *See id.*

In practice, of course, the President cannot effectively control many of the discretionary decisions made by lower level officials.[274] And in other circumstances, independent federal agencies and civil service protections prevent the President from immediately firing people who exercise discretion.[275] The theory—or rather, the theoretical fiction—of the unitary executive tries to deal with these realities in three ways. First, it denies that some of these realities exist.[276] Second, it uses the theory to try to consolidate power and avoid oversight in certain circumstances.[277] Third, when pressed, it claims that still other features—like independent agencies—are unconstitutional.[278] Behind the rhetoric of the unitary executive, however, is the reality of increasingly disaggregated forms of power and expertise in the modern executive branch. In the modern administrative state, unilateral decisionmaking power is distributed as often as it is concentrated in a single individual.

## III. GOVERNING THROUGH EMERGENCY

### A. THE PRESIDENT'S ABILITY TO CREATE REALITY

The characteristic pattern of constitutional dictatorship described in this Article has continued even after George W. Bush left office. Barack Obama, like George W. Bush before him, began his presidency by taking advantage of the opportunities presented by emergency; he pushed for a sizeable economic stimulus package to deal with an economic crisis.[279] Or, more correctly, he took advantage of the President's ability to define the situation before him *as* an emergency and assert that bold, decisive action was necessary to avert the particular sort of crisis that he claimed the nation faced. This feature of the characteristic pattern—the President's characterization of the situation—is quite important.[280] As President Obama's incoming Chief of Staff, Rahm Emanuel, famously put it: "[y]ou never

274. *See* CALABRESI & YOO, *supra* note 268, at 376.
275. *See id.*
276. *See* Skowronek, *supra* note 271, at 2095.
277. *See, e.g.*, CALABRESI & YOO, *supra* note 268, at 376.
278. *See id.*
279. *See* David Jackson & Mimi Hall, *Obama Stimulus Bill 'on Track' to Pass*, USATODAY.COM, Jan. 23, 2009, http://www.usatoday.com/news/washington/2009-01-23-obama-friday_N.htm.
280. *See* Stephen M. Griffin, The Bush Presidency and Theories of Constitutional Change 14 (Feb. 12, 2009) (unpublished manuscript, on file with author).

want a serious crisis to go to waste. And what I mean by that is an opportunity to do things you think you could not do before."[281]

In the Roman dictatorship, the Senate declared a state of emergency, which authorized the two consuls to choose a dictator.[282] The dictator could not be held accountable for his actions during the dictatorship and he enjoyed virtually unlimited powers for a limited time.[283] Noteworthy in the Roman dictatorship is the division of labor between the body that declared the existence of an emergency and the person who held emergency powers.[284] Although the American pattern of presidential request for emergency power from Congress may seem similar, it is different in two crucial respects. The first is that emergency powers usually do not evaporate after a limited time, but rather become part of the basic statutory framework.[285] The second is that the President, because of his preeminent political position, has a unique power in the American system of government to define the nature of political reality.[286] This makes it difficult, if not impossible, for Congress to refute his analysis of the situation as involving an emergency; and this, in turn, greatly reduces Congress's ability to refuse his requests for additional authority.

The 9/11 attacks, for example, allowed George W. Bush to define the situation before the nation in existential terms as a war of national survival (rather than as part of a continuing problem of terrorist attacks) and to define himself as a war president, thus purporting to activate all of the powers that a president enjoys in time of war.[287] His greatest achievement

281. *Mara Liasson: On Obama's Team, Ex-Clinton Staffers Get Do-Over*, (NPR radio broadcast Dec. 23, 2008), *available at* http://www.npr.org/templates/story/story.php?storyId=98593976.

282. *See* ROSSITER, *supra* note 14, at 20.

283. *See id.* at 23. Among the limitations were that the Senate would specify the purpose of the dictatorship and that the dictator could not control the treasury, but had to rely on money that the Senate appropriated. *See id.* at 24.

284. *See id.* at 20.

285. *See* discussion *supra* Part II.D.

286. For a scholarly analysis of the President's power to shape public opinion through rhetoric, see JEFFREY K. TULIS, THE RHETORICAL PRESIDENCY (1987).

287. *See, e.g.*, President George W. Bush, Address After Terrorist Attacks on New York and Washington (Sept. 11, 2001), *available at* http://archives.cnn.com/2001/US/09/11/bush.speech.text/index.html (asserting that "our way of life, our very freedom came under attack in a series of deliberate and deadly terrorist acts"); President George W. Bush, Address to a Joint Session of Con-

was convincing Americans to believe in the existence of a war on terror, a war with no defined battlefield and no defined enemy. Since both of these elements were lacking, the President could define the war as taking place literally everywhere, including within the United States.[288] And since the enemy was a shadowy network of loosely connected terrorist organizations, the President could plausibly assert (or imply) that almost any country and any (foreign) organization was connected to Al Qaeda or contained Al Qaeda operatives.[289] Having framed the situation as an existential crisis, Bush insisted that he needed vast powers to detain, interrogate, and make war;[290] he pointed to Iraq and insisted that it was a continuation of the war against Al Qaeda and that invasion was necessary to keep the country safe from nuclear weapons.[291] Thus armed, the President's choice of tactics (secret domestic surveillance, detention without habeas corpus, and torture) and his choice of targets (Iraq)[292] reflected his structuring of the situation, and thus of his own powers. The President presented the situation to the country as an all-out war against the United States; the country would respond to this existential threat with courage and with determination, led by a commander-in-chief over affairs both foreign and domestic.[293]

In like fashion, President Obama repeatedly portrayed the economic meltdown of fall 2008 as the greatest economic crisis since the Great Depression,[294] and the theme of crisis appeared prominently in his inaugural address:

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gress (Sept. 20, 2001), *available at* http://archives.cnn.com/2001/US/09/20/gen.bush.transcript/ ("This is not, however, just America's fight. . . . This is the fight of all who believe in progress and pluralism, tolerance and freedom.").

288. *See* President George W. Bush, Speech in Atlanta at the Georgia World Congress Center in Atlanta (Nov. 8, 2001), *available at* http://archives.cnn.com/2001/US/11/08/rec.bush.transcript/ ("This is a different war from any our nation has ever faced, a war on many fronts, against terrorists who operate in more than 60 different countries. And this is a war that must be fought not only overseas, but also here at home.").

289. *See id.*

290. *See* President George W. Bush, Historical Analogies for the War on Terror: Address at the Heritage Foundation (Nov. 1, 2007), *available at* http://www.presidentialrhetoric.com/speeches/11.01.07.html.

291. *See id.*

292. *See id.*

293. *See* Griffin, *supra* note 280, at 46–47.

294. *See, e.g.*, Barack Obama, *The Action Americans Need*, WASH. POST, Feb. 5, 2010, at A17; President Barack Obama, Weekly Address (Feb. 7, 2009), *available at* http://www.presidency.ucsb.edu/ws/print.php?pid=85738; President Barack Obama, Press Conference by the President (Feb. 9, 2009), *available*

> That we are in the midst of crisis is now well understood. Our Nation is at war against a far-reaching network of violence and hatred. Our economy is badly weakened, a consequence of greed and irresponsibility on the part of some, but also our collective failure to make hard choices and prepare the Nation for a new age. Homes have been lost, jobs shed, businesses shuttered. Our health care is too costly. Our schools fail too many. And each day brings further evidence that the ways we use energy strengthen our adversaries and threaten our planet.[295]

The more severe the crisis, the greater the need for bold, decisive action, and the greater the need for the country to rally around its leader, to whom the public looks to resolve the crisis. Even so, it is also clear, as we travel further into Obama's presidency, that all of the veto points that hinder domestic change remain alive and well, and it is still an open question how much "change we can believe in"[296] President Obama will be able to produce during his tenure in office. What is remarkable about the first year of Obama's presidency is that, following the successful passage of the stimulus plan, he has largely avoided the rhetoric of crisis and emergency with respect to the signature issues of health care and the environment. As one might expect, this choice has had costs: because Obama has been unable or unwilling to portray these issues with the same sense of existential urgency as George W. Bush, his opponents (as well as Senators in his own party) have been strategically better-equipped to delay and hinder his domestic agenda.

At the same time, like other Presidents before him, Obama seems to enjoy relatively greater freedom of action in foreign affairs. Thus, Obama recently decided that the United States would continue and even escalate its commitment in Afghanistan.[297] Indeed, in August 2009 he told the Veterans of Foreign Wars that the Afghanistan war, begun over eight years ago for somewhat different reasons—to retaliate against the then-Taliban government for harboring those who planned the 9/11 terrorist attacks—was "not a war of choice [but] a war of neces-

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*at* http://www.whitehouse.gov/the_press_office/PressConferencebythePresident; Posting of Amanda Scott to Organizing for America, http://my.barackobama.com/page/community/post/amandascott/gGglq4 (Oct. 22, 2008, 13:19 EST).

295. President Barack Obama, Inaugural Address (Jan. 20, 2009), *available at* http://www.whitehouse.gov/blog/inaugural-address/.

296. *See* BARACK OBAMA, CHANGE WE CAN BELIEVE IN: BARACK OBAMA'S PLAN TO RENEW AMERICA'S PROMISE 26 (2008).

297. President Barack Obama, Address at the Veterans of Foreign Wars Convention in Phoenix, Arizona (Aug. 17, 2009), *available at* http://www.presidency.ucsb.edu/ws/print.php?pid=86545.

sity."[298] In doing so, he took ownership of a war begun by George W. Bush (and soon pushed into the background by another claimed "war of necessity" in Iraq). Perhaps more important, by adopting the same kind of crisis rhetoric associated with his predecessor, Obama clearly hoped to seize control of the public's imagination and make it harder for those who see the war as a dangerous gamble[299] to mount an effective political opposition.

One's view about the legitimacy of a particular use of the presidential politics of emergency depends on one's belief about whether presidents have accurately described the nature and the scope of the situation before the country. If they have, of course, their solution, tailored to that description, makes correspondingly more sense, and so does following their leadership. If there really is an emergency along the lines described by the President, then of course, it is very different than if there is no emergency, or if it is not as severe as the President says it is, or if the nature of the problem is different than the President describes, for then the President's solutions are the wrong solutions, and they will lead the country in the wrong direction.

Here we do not focus on who is right or who is wrong in their assessments of the situation the country faces. Instead, we wish to focus on what Bush, Obama, and other modern Presidents share—the way in which the modern President uses the formulation and articulation of crisis and emergency to take control of the political agenda, shape the nation's political imagination, and make resistance seem, at least in the short run, parochial, narrow-minded, and even futile.

Both Bush and Obama's presidencies offer examples of *governing through emergency*: Presidents seek to gain popular support for a political program (and their Administration generally) through describing reality as involving emergency and describing the program in terms of how it deals with the emergency so described. What the President seeks to do, he seeks to do because of the emergency; what he has done has been justified because the emergency demands it.

298. *See id.*

299. *See, e.g.*, Rory Stewart, *The Irresistible Illusion*, LONDON REV. OF BOOKS, July 9, 2009, at 3, *available at* http://www.lrb.co.uk/v31/n13/rory-stewart/the-irresistible-illusion ("[Obama's language] misleads us in several respects simultaneously: minimising differences between cultures, exaggerating our fears, aggrandising our ambitions, inflating a sense of moral obligations and power, and confusing our goals.").

We emphasize that governing through emergency is *not* the same thing as constitutional dictatorship. The former is a political strategy of characterizing a situation to gain political support and realize political reforms; the latter is a set of powers enjoyed by particular persons in the government. One can govern through emergency without enjoying the powers of a constitutional dictator, and one can enjoy those powers without governing through emergency. When the President calls upon the country to meet an emergency, he may not seek programs that give him greater unreviewable discretion, even if they increase the powers of government generally. For example, much of what Barack Obama has sought domestically is new government spending and new government programs that will have various oversight mechanisms and legal restrictions.[300] Nevertheless, the politics of emergency and the techniques of constitutional dictatorship are often connected. That is because historically the politics of emergency has been a major source of the cumulative congressional authorizations that bestow dictatorial powers. The politics of emergency is a time-tested way for presidents to request and obtain the powers of constitutional dictatorship in a particular area of concern. The more often that presidents turn to the politics of emergency, the more likely it is that both Congress and the President will expand the scope of discretionary emergency powers.

### B. PRESIDENTIAL PONZI SCHEMES

The danger of presidential government by emergency is that the President needs to convert the felt sense of crisis into a durable advantage for the President and, by extension, his party, in a relatively short span of time. But this may not be possible if the public tires of crisis, its attention wanders, or life seems to have returned to normal. When the sense of crisis abates, so too may the President's power of initiative and his ability to control the political agenda. As a result, leaders who govern by emergency have to find new ways of stoking the public's sense of urgency to maintain their mandate for change.[301] Ei-

300. *See, e.g.*, Edmund L. Andrews & Stephen Labaton, *Bailout Plan: $2.5 Trillion and a Strong U.S. Hand*, N.Y. TIMES, Feb. 11, 2009, at A1 (noting that the government bailout plan will have more "transparency and oversight" than the Troubled Assets Relief Program).

301. *Cf.* PHILLIP J. COOPER, BY ORDER OF THE PRESIDENT: THE USE & ABUSE OF EXECUTIVE DIRECTION ACTION 71 (2002) ("Presidents clearly have been more than willing to declare emergencies in order to justify their action, and the temptation to do so can be overwhelming.").

ther they must find new aspects of the current emergency on which to focus the public's attention, or they must find new emergencies and new crises to replace the old ones. This is the political equivalent of a Ponzi scheme, in which a president substitutes one crisis for another to maintain a grip on the public's attention and support. Not surprisingly, organizing one's leadership in this way may descend into fear mongering and demagoguery. Moreover, it is an exceedingly dangerous game to play. For if the President cannot maintain the politics of emergency, he will lose support when the public's attention turns to other, more mundane matters, or, even worse, the public will turn on him. (Conversely, the President's opponents will point to other emergencies—as they characterize them—that the President has not addressed, in an attempt to make him appear incompetent and out of touch.) One reason the Bush Administration failed in its ambitions to build a new, long-term Republican majority was that it lost the ability to maintain the public's focus on the threats that it claimed faced the nation. It lost the public's attention partly because of its success in preventing subsequent terrorist attacks, partly through its incompetence in dealing with other foreign policy (Iraq) and domestic problems (Hurricane Katrina), and partly because other issues, like the economy, came to rival the "war on terror" as the focus of public concern.

This last point is worth emphasizing: even if the President has a first-mover advantage to redefine the political situation temporarily to his advantage, he cannot do so indefinitely. Reality (and a resurgence of political opposition) will continually intrude on the Administration's plans. Political opponents will deny the President's claims about reality and assert that they understand the real emergencies the nation faces.[302] At some point presidents must adjust to the responses to their actions,

302. During Bush's presidency, for example, Democrats attacked Bush's lack of attention to Katrina, health care, and the economy; during the first year of Obama's presidency, Republicans have attacked Obama's inattention to terrorism, the growth of government and deficit spending. *Compare* David Firestone, *Democrats Pulling Together United Front Against G.O.P.*, N.Y. TIMES, Mar. 3, 2003, at A19 (noting Democrats' criticisms of President Bush's domestic policies for lacking adequate attention to medical and social needs while threatening the economy), *with* Carl Hulse & David M. Herxzenhorn, *Seeking Cudgel, Republicans Return to National Security Issue*, N.Y. TIMES, May 2, 2009, at A12 (noting Republican criticism of President Obama's terrorism policy), *and* David M. Herxzenhorn, *Senate Clears Spending After Fractious Debate*, N.Y. TIMES, Mar. 11, 2009, at A19 (noting Republican criticism of President Obama's government spending policy).

and to realities that they have not anticipated. Bush and his advisors did not do this successfully, or they delayed too long to make adjustments. The most obvious example is waiting until after the disastrous elections of 2006 to fire Donald Rumsfeld as Secretary of Defense and begin the counterinsurgency strategy misleadingly known as the "surge."[303] If the members of the Bush Administration had been more flexible and less ideologically blinkered,[304] they might well have achieved a new political majority that would last for decades. Because they did not, they created an opportunity for Barack Obama to construct such a majority.

The dangers of the politics of emergency are threefold. First, it leads presidents to misdescribe reality so that they can achieve efficacy. Bush's announcement of a global war on terror and his stoking of fears of weapons of mass destruction in Iraq to justify a war of necessity there wasted blood and treasure and diverted attention and resources from what might have been more effective counterterrorism policies. The second danger is that because the politics of emergency works, at least for a time, it is both seductive and addictive. If the President's policies fail, he may be tempted to find yet another emergency or crisis to give him momentum. This creates a presidential Ponzi scheme: the President and his supporters repeatedly use emergency rhetoric to shore up public support or distract attention from failed policies. Repeated failures, however, eventually create growing problems, not only for the sitting President but also for his successors, who find that they too must adopt the politics of emergency to govern effectively, and the cycle continues. The third danger, noted before, is that the politics of emergency has historically been the best way for presidents to obtain new powers from Congress and pocket them for future use, accelerating the forms and practices of presidential dictatorship.[305]

Like President Bush before him, President Obama may well be drawn to the politics of emergency if things do not go

303. *See* Sheryl Gay Stolberg & Jim Rutenberg, *Rumsfeld Resigns; Bush Vows to Work with Majority*, N.Y. TIMES, Nov. 9, 2006, at A1.

304. Vice President Dick Cheney's powerful influence, especially in Bush's first term, may have contributed to the Administration's inflexibility. *See generally* BARTON GELLMAN, ANGLER 37, 390 (2008) (arguing that Vice President Cheney's truculence, personal loyalty to Donald Rumsfeld, and visible contempt for the views of anyone outside a narrow band of Administration insiders probably caused the Administration significant harm).

305. *See* discussion *supra* Part II.D.

well, or perhaps to ensure that they do. Like Bush, he will be tempted to define the situation as one of crisis to make dissent appear feckless, selfish, out of touch with reality, or irrelevant. Like Bush, and like other leaders before him, Obama might even be tempted to buy himself a little more time by exaggerating the scope of the crisis or by replacing one crisis with another; but, also like Bush, he cannot do this indefinitely. That would require consistently making the situation appear worse than it already is, continually raising the stakes of politics—and that is a very dangerous game. Instead, a President's most daunting task, once he invokes the politics of emergency, is to solve the problem he poses in a way that makes the nation grateful to him and his party and durably changes the structure and assumptions of politics. This is what Lincoln and Roosevelt did, and to lesser extent, what Reagan did. It is what Bush tried, but ultimately failed, to do. He changed some assumptions of politics, to be sure, but not always in the ways he had hoped. Bush used the politics of emergency inartfully, and Obama and future presidents must learn from his example.

Just as we should be concerned about the proliferation of features of constitutional dictatorship in the American political system, we should also be concerned about the normalization of the politics of emergency. As noted above, the two are not identical, but they can reinforce each other. Increasingly, presidents may find that governing through emergency is not an exceptional gambit but standard operating procedure. And because this politics is so dangerous, risking demagoguery, political failure, or both, normalizing it is not a healthy way to run a republic. Both Bush and Obama have relied on the politics of emergency at the beginning of their respective presidencies. It is an interesting and troubling question whether this style of politics will increasingly become the modus operandi of American presidents in the future.

### C. OUR SCHIZOPHRENIC PRESIDENCY

So far, we have discussed Congress's grant of emergency powers to the President. But the other side of the equation is the relationship between the modern presidency and public opinion.

Almost a century ago, Max Weber offered a dark portrait of the likely evolution of parliamentary democracies over time.[306] Viewing matters from the perspective of the early twentieth century, he foresaw an almost inevitable slide toward Caesarism: a plebiscitarian dictatorship in which rulers claim authority through acclamation by the people and then proceed to rule with little oversight from the democratic process.[307] In Weber's account, the legislature becomes increasingly impotent, irrelevant, or both. More and more government functions are concentrated in the executive. The executive, in turn, gains authority from charismatic appeals to the people for the right to rule.[308] Gerhard Casper forcefully drew on Weber's analysis in a 2006 analysis of the contemporary American presidency, which focused on—but was not limited to—the example of the Bush presidency.[309] One could find a complementary analysis in the work of another great Weimar Era theorist of emergency and executive power, Carl Schmitt. Schmitt's support for Hitler's rise to power in 1933 was due in part to his deep skepticism of parliamentary democracy and his belief that a strong and charismatic authority figure was needed to break through the political paralysis generated by the Weimar Constitution.[310]

Although each of us supported Obama's candidacy, it was obvious to us that the 2008 presidential election fit this worrisome plebiscitary pattern: opposed candidates offered highly personal and charismatic appeals to the electorate for the right to rule. Indeed, the Obama campaign strongly centered on the person and image of Barack Obama as a symbol of Americans' hopes for change, even if the precise contours of that change were only vaguely defined.[311] Sarah Palin's meteoric rise was based on her ability to get large masses of people to identify with her personally, as well as her formidable skills as a charismatic populist who claimed to stand up for the ordinary indi-

306. Max Weber, *Parliament and Government in a Reconstructed Germany* (1917), *reprinted in* 2 MAX WEBER: ECONOMY AND SOCIETY 1381, 1451–59 (Guenther Roth & Claus Wittich eds., 1978).

307. *See id.*

308. *See id.*

309. *See* Gerhard Casper, Lecture at the John W. Kluge Center at the Library of Congress: Caesarism in Democratic Politics—Reflections on Max Weber (Mar. 22, 2007), *available at* http://ssrn.com/abstract=1032647.

310. *See* SCHEUERMAN, *supra* note 34, at 39, 106.

311. *See* Thomas L. Friedman, Op-Ed., *From the Gut*, N.Y. TIMES, Sept. 10, 2008, at A25 ("But Obama got where he is today by defining himself as the agent of change and by defining change as the issue in this election.").

vidual against the sneers and disrespect of unspecified urban populations and Washington elites.[312] Palin's mastery of the populist art bordered on the demagogic, and we well understand why Obama's opponents, no doubt taken aback by the enormous crowds and enthusiasm he regularly commanded,[313] repeatedly sought to pin a similar label on him. Even John McCain, perhaps the least charismatic of the bunch, argued that "Washington is broken," and that McCain was the person who could fix it.[314] The need for an inspiring figure, freed from the old politics, who would lead the country toward transformative change was a theme of both parties' campaigns.[315]

The tendencies Weber identified toward an increasingly plebiscitarian democracy with a powerful executive and a weakened legislature well describe aspects of the contemporary American constitutional system. Congress's major functions now seem to be twofold. The first is to hold up significant domestic reforms because of bicameralism, the Senate's byzantine supermajority rules, and the influence of powerful lobbying groups and campaign contributions by concentrated interests.[316] Congress's second major function these days is giving presidents new emergency powers, especially to meet threats to national secu-

312. *See* David Carr, *Drawing a Bead on the Press*, N.Y. TIMES, Sept. 8, 2008, at C1 (describing Palin's appeal as "the kind of woman you could tell your troubles to and she'd give you a hug" (quoting Bonnie Fuller)).

313. *See* Mark Leibovich, *At Rallies of Faithful, Contrasts in Red and Blue*, N.Y. TIMES, Oct. 30, 2008, at A1 (describing Barack Obama's crowds as "the biggest and the loudest," followed by Sarah Palin's crowds).

314. *See* Michael Falcone, *McCain's Break with Bush*, N.Y. TIMES, Aug. 7, 2008, at A17.

315. *Compare id.* (describing McCain's advertisement, in which he states that the United States is "worse off than [it] was four years ago" and describes himself as "the original maverick"), *with* Friedman, *supra* note 311 (noting that Obama defined the primary issue in the election as "change").

For a more realistic, institutionally oriented take on why the American political system is broken, see LEVINSON, *supra* note 113, at 9 (attributing "the defects of our polity" to the inadequacy of the Constitution) and THOMAS E. MANN & NORMAN J. ORNSTEIN, THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK, at x–xi (2006) (listing current practices within Congress that have caused past members of Congress to "barely recognize the House or Senate"), for some reasons why our system of government actually *is* broken.

316. This aspect of our political system leads sober observers to suggest that the United States may be verging on the precipice of "ungovernability." *See, e.g.*, Paul Krugman, *Pass the Bill*, N.Y. TIMES, Dec. 18, 2009, at A35 ("Demand a change in Senate rules that, combined with the Republican strategy of total obstructionism, are in the process of making America ungovernable.").

rity. When added to Congress's limited and relatively ineffective oversight, it is little wonder that the legislature is the least respected branch of the federal government.[317] It is hard to view this as a healthy development in a constitution founded on representative democracy.

There has always been an asymmetry between a single President and a multimember two-house legislature in their respective abilities to capture the public's imagination and support. If anything, this asymmetry has become even more pronounced, first, in an age of mass media and later, in the age of the Internet. Aided by every possible technological innovation, the President, now more than ever, can appeal directly to the public. In the twentieth century the mass media were an important bulwark against presidential overreach, but they have become increasingly toothless, in part because of the rise of access journalism and in part because professional journalism itself is being undermined by the slow and steady destruction of its business models. Indeed, the President can now route around the traditional mass media and take his case to the public directly through the blogosphere or through YouTube.[318] Tight control of message and manipulation of—or routing around—mass media is not just the practice of the Bush Administration; it will likely be characteristic of every Administration from now on.

As a result, the modern presidency is inevitably a cult of personality, and especially so if the President is personally charismatic, like Barack Obama. Even if he is less so, his party and his handlers assiduously work to create such a cult, as they did for George W. Bush. Some of us may be tempted to look back at the steady stream of toadying books and articles written about President Bush's genius, moral clarity, and connection with ordinary Americans as examples of mass delusion.[319]

317. *See, e.g.*, RealClearPolitics, Congressional Job Approval, http://www.realclearpolitics.com/epolls/other/congressional_job_approval-903.html#news (last visited May 6, 2010) (estimating that as of mid-January 2010, polls show that only approximately twenty-one to thirty-two percent of the American public approve of Congress).

318. *See, e.g.*, YouTube: The White House's Channel, http://www.youtube.com/user/whitehouse (last visited May 6, 2010).

319. Although Bush was criticized repeatedly during his Administration by his liberal critics (and at the end of his second term by many of his fellow conservatives), there was an outpouring of encomiums to his character, courage, religious faith, and leadership qualities following the 9/11 terrorist attacks. A sampling of this literature would include: DAVID AIKMAN, A MAN OF FAITH: THE SPIRITUAL JOURNEY OF GEORGE W. BUSH (2004); DAVID FRUM, THE

But if delusion it was, it appeared to work for four or five years; at the very least, it helped Bush gain a second term in 2004.

Presidents now not only set legislative agendas, they also are the chief spokespersons for the meaning of America, its values, its hopes, and its aspirations. They are not only commander-in-chief, they are also comforter-in-chief (able to "feel [our] pain"),[320] preacher-in-chief, educator-in-chief, and role model-in-chief all rolled into one larger than life persona. The American President, unlike most parliamentary leaders, has always been both head of government and head of state; increasingly, however, the President embodies the virtues of the country, and he becomes a vessel into which are projected the hopes of the nation and the virtues of the country (as well as its vices).

At the same time, as noted previously, emergency power, the ability to act decisively in a crisis, is not actually concentrated in the person of the President. Rather, it is distributed among different executive and national security agencies, and much of what the government does in emergency situations is done in secret. As a result, there is a long-term trend of disconnection between the plebiscitarian presidency, with its cult of personality and identification of value and action with a single individual, and the actual practices of constitutional dictatorship, which distribute decisionmaking among many comparatively faceless and anonymous institutions and individuals. The result of these two opposed elements of the modern American presidency is the schizophrenic nature of American constitutional dictatorship. Distributed expertise and secrecy on the inside combine with a plebiscitarian cult of personality on the outside. As a result, the outward manifestation of American power increasingly has little to do with the actual processes of government.

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RIGHT MAN: THE SURPRISE PRESIDENCY OF GEORGE W. BUSH (2003); RONALD KESSLER, A MATTER OF CHARACTER: INSIDE THE WHITE HOUSE OF GEORGE W. BUSH (2004); STEPHEN MANSFIELD, THE FAITH OF GEORGE W. BUSH (2003); RICHARD MINITER, SHADOW WAR: THE UNTOLD STORY OF HOW BUSH IS WINNING THE WAR ON TERROR (2004); JOHN PODHORETZ, BUSH COUNTRY: HOW DUBYA BECAME A GREAT PRESIDENT WHILE DRIVING LIBERALS INSANE (2004); BILL SAMMON, MISUNDERESTIMATED: THE PRESIDENT BATTLES TERRORISM, JOHN KERRY, AND THE BUSH HATERS (2004); "WE WILL PREVAIL": PRESIDENT GEORGE W. BUSH ON WAR, TERRORISM, AND FREEDOM (Nat'l Review ed., 2004).

320. *See, e.g.*, Harrison Rainie, *The New Era of Redemption Politics*, U.S. NEWS & WORLD REP., Sept. 26, 1994, at 18, 18 (recalling Bill Clinton's "I feel your pain" statement).

## IV. DESIGNING ACCOUNTABILITY IN A CONSTITUTIONAL DICTATORSHIP

### A. LEGALITY AND ITS DISCONTENTS

It is very unlikely that the United States will soon dismantle its national security apparatus, or its collection of surveillance and data mining practices we call the National Surveillance State, much less a host of emergency measures dealing with domestic affairs.[321] If so, the question is not whether we will have emergency provisions but how the government will design them, and what additional checks and balances we can put in place to enjoy the benefits of discretion without its dangers.

The most obvious solution, at least to lawyers, is additional legal regulation, or "legalization" of the presidency.[322] The War Powers Act is a paradigmatic example.[323] To prevent the President from doing things we do not like, we create rules that make it difficult for him to repeat the activity in the future. We might impose either procedural or substantive hurdles to action. Take torture as an example: procedural limits would require special "torture warrants" issued by an independent Article III judge; substantive limits would simply bar these methods entirely. One might have thought that we *had* already done this, in the anti-torture statute and in various international law obligations;[324] the problem, of course, is that the President's lawyers decided to read these substantive require-

321. *See* Jack M. Balkin, *The Constitution in the National Surveillance State*, 93 MINN. L. REV. 1, 3–4 (2008) ("The question is not whether we will have a surveillance state in the years to come, but what sort of surveillance state we will have."); Balkin & Levinson, *supra* note 191, at 533.

322. *See* GOLDSMITH, *supra* note 189, at 65–66 (noting the increase in legalization since World War II). Goldsmith is quite critical of the trend toward legalization and argues that Americans should place their primary reliance on the capacities for wise judgment by presidents. *See* Sanford Levinson, *Constitutional Dictators*, DISSENT, Summer 2009, at 99, 105 ("We ignore the importance of character, and overestimate the importance of 'law,' at our peril, according to Goldsmith.").

323. War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified as amended at 50 U.S.C. §§ 1541–1548) (setting various time limits on presidential introduction of troops into hostilities without congressional approval).

324. *See* 18 U.S.C. § 2340A (2006); Detainee Treatment Act of 2005 (McCain Amendment), 42 U.S.C. § 2000dd (2006); Convention Against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85, 23 I.L.M. 1027 (entered into force June 26, 1987).

ments away or declare them unconstitutional as impinging on the President's inherent powers as commander-in-chief.[325]

The strategy of legalization has three major problems. The first is Jack Goldsmith's objection that laws are the enemy of discretion; increased legalization means increased bureaucracy that will hamper the President's ability to make effective policy and take effective action.[326] (Since, as we have noted previously, the President himself is not making many of the judgment calls,[327] legalization means that lower-level officials will spend more time processing paperwork and preparing reports.) The second problem with legalization is that it may not actually impede bad judgment, but merely give incentives for strained or disingenuous legal arguments. Determined lawyers set upon a course of finding ways around legal restraints are likely to do so, even if the arguments are very poor. In *The Federalist No. 41*, James Madison reminds us that "[i]t is in vain to oppose Constitutional barriers to the impulse of self-preservation. It is worse than in vain; because it plants in the constitution itself necessary usurpations of power, every precedent of which is a germ of unnecessary and multiplied repetitions."[328] If this is true of people of the very highest character and judgment, it is probably even truer of people who are rash, foolish, or venial.

A third objection to increased legalization is that legalization has not been the enemy of discretion, but rather its enabler. When Congress creates new emergency powers for the President, it does so through passing new laws.[329] When the President wants to build out his institutional capacities for meeting emergencies, he often does so through issuing new regulations and signing new executive orders. Our experience of the last eight years of the Bush Administration may cause us to think that evasion of law is the great danger of constitutional dictatorship. In fact it may be precisely the opposite—the proliferation of legal avenues for executive branch officials to act, which can then be defended through pointing to various laws, regulations, and executive orders that authorize the discretionary action.

325. *See* Bybee Memorandum, *supra* note 141, at 33–39 (arguing that congressional interference with the President's power to detain and interrogate persons would violate Article II).

326. *See supra* note 322 and accompanying text.

327. *See* discussion *supra* Part II.E.

328. THE FEDERALIST NO. 41 (James Madison), *supra* note 5, at 295.

329. *See* discussion *supra* Part II.D.

Lest we be misunderstood, we do not believe that direct legal restraints on executive decisionmaking are unimportant; our point is rather that they are often a limited and incomplete solution to the problem, and in some cases may even be counterproductive. A different way of addressing the question is to focus on structural mechanisms. The first are political checks, the second are methods of accountability after the fact, and the third are methods of surveillance and oversight of executive action, either before or after the fact.

### B. STRUCTURAL REMEDIES

As a preliminary matter, we note that parliamentary systems may have some modest advantages over presidential systems in heading off the dangers of constitutional dictatorship, if only because the Prime Minister has to maintain—and answer to—a parliamentary majority coalition. Presidents, by definition, are able to create their own political base separate from the legislature.[330] Presidents who combine the attributes of head of government with head of state have the additional advantage of being symbols of the nation itself and are well-suited to garner public support and frame social realities. In the United States, for example, the President, who enters public occasions to the playing of "Hail to the Chief" and is surrounded by an enormous retinue, increasingly combines the dignitary trappings of monarchy with the media promotions accorded a rock star.[331]

American Presidents have been plebiscitary leaders for some time. In other countries with presidential systems, particularly in Latin America, charismatic presidents have occasionally allied with the military against the legislature and the judiciary, creating the obvious dangers of dictatorial power or degeneration into military-controlled governments.[332] Nevertheless, Professor José Antonio Cheibub has argued that politi-

330. *Cf.* GIOVANNI SARTORI, COMPARATIVE CONSTITUTIONAL ENGINEERING: AN INQUIRY INTO STRUCTURES, INCENTIVES AND OUTCOMES 83 (1994) (defining one criterion for the presidential system as "the direct or direct-like popular election of the head of state").

331. *See* RICHARD J. ELLIS, PRESIDENTIAL TRAVEL: THE JOURNEY FROM GEORGE WASHINGTON TO GEORGE W. BUSH 4 (2008) (describing the progressive "monarchization" of presidential travel over our history, which paradoxically causes the President to be "more visible but less [personally] accessible" to any given American citizen).

332. *See* JOSÉ ANTONIO CHEIBUB, PRESIDENTIALISM, PARLIAMENTARISM, AND DEMOCRACY 159 (2007).

cal scientists have overestimated the potential dangers of presidential as opposed to parliamentary systems.[333] Parliamentary systems do not necessarily avoid the problems of constitutional dictatorship, especially if the Prime Minister is the strong leader at the head of the political party that controls parliament. Even if presidential systems present particular dangers, the problem of holding strong leaders truly accountable may be ubiquitous.

Turning to the American presidential system, there are ways of tinkering with the present Constitution to provide a greater measure of accountability. If one especially fears the lack of future electoral accountability in a second-term President, for example, then one might consider repealing the Twenty-Second Amendment. Doing so, however, creates a potential difficulty in the opposite direction: a charismatic President might generate crisis after crisis and keep returning to office. There is somewhat less reason, however, to think that many presidents would be able to exceed two terms, especially in modern times. The modern American presidency seems to chew up its occupants in fairly short order. It is possible that this may be partly due to the political environment created by the Twenty-Second Amendment, but the problem predates the 1950s.

Even if the public repealed the Twenty-Second Amendment, the threat of losing a future election would provide only a very modest mechanism of accountability. Rejection at the polls might occur only years later, by which point the public will have moved on to other concerns.[334] Moreover, in our current electoral college system for selecting presidents, it is quite common for a President to be elected with less than an absolute majority of the popular vote. (Richard Nixon in 1968, Bill Clinton in 1992 and 1996, and George W. Bush in 2000 are the four most recent examples.)[335] It is somewhat less frequent for an incumbent President to be reelected with less than an absolute

333. *See id.* at 3 (arguing that "[p]residentialism can be as stable as parliamentarism").

334. Newly reelected presidents might also enjoy a "honeymoon period" that shields them from public scrutiny. However, the honeymoon might not last long, especially in a president's second term. (The experiences of George W. Bush, Bill Clinton, and Ronald Reagan are all instructive in their own ways.).

335. *See* LEVINSON, *supra* note 113, at 82–83.

majority, but it happened in 1996.[336] As a result, there might actually be majority disapproval of, and lack of confidence in, the President from day one, or shortly thereafter. To be told that the public should have to wait another four years to register disapproval of the President's judgment on matters of life and death is an inadequate remedy.

Instead (or in addition), one might support a vote of no-confidence mechanism that would allow Congress and/or the public to remove an American President at any time before the next scheduled election.[337] The mechanism could involve some mix of congressional and popular votes of no-confidence.[338] For example, perhaps Congress, by a two-thirds vote of all members convened as a single body, could vote "no-confidence" and declare the office of the Presidency vacant.[339] One might take a page from the German Constitution and Israeli legislation and allow such a vote only if that same Congress had already decided on a suitable successor (the so-called constructive vote of no-confidence).[340] One might go even further and require that the successor be from the President's own political party to avoid the specter of a "party coup" that would change the partisan character of the government without an intervening election. In the alternative, the vote could be followed by the dissolution of Congress and public elections for both Congress and the presidency (with the "fired" President presumably free to make his case to the public). The point is to establish a mechanism for the public and Congress to monitor and respond to failures of judgment on issues of the greatest importance.[341] In our present system, by contrast, we must endure disastrous

336. Bill Clinton received only forty-nine percent of the popular vote, though he decisively defeated the Republican candidate, Senator Robert Dole, who received forty-one percent. Third-party candidate Ross Perot received eight percent. *See* Richard L. Berke, *Clinton Elected to a 2d Term with Solid Margins Across U.S.; G.O.P. Keeps Hold on Congress*, N.Y. TIMES, Nov. 6, 1996, at A1.

337. *See* LEVINSON, *supra* note 113, at 119–21 (proposing that a "no confidence" vote replace the current impeachment system).

338. *See id.* at 119–20.

339. *See id.* at 120.

340. *See* DELEGATION AND ACCOUNTABILITY IN PARLIAMENTARY DEMOCRACIES 152, 156 (Kaare Strøm, Wolfgang C. Müller & Torbjörn Bergman eds., 2003) (describing the constructive vote of no-confidence and its adoption in various countries). Israel's no-confidence legislation can be found in Basic Law: The Government, 2001, S.H. 1780, § 28, *available at* http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm.

341. *See* LEVINSON, *supra* note 113, at 120.

presidents in office no matter how much damage they may cause until the next scheduled election.

Perhaps equally important, a vote of "no-confidence" would have ripple effects throughout the political system that would bolster whatever other legal requirements we might wish to employ to rein in executive discretion—whether they be congressional oversight mechanisms, reporting and internal auditing requirements, or judicial review of administrative action. Congress and the public might reject a President they believe has acted too high-handedly no matter what the courts say. When the next President takes office, Congress may impose new legal or other oversight requirements as a condition of taking office. At the very least the previous rejection becomes a precedent, or a stern warning from Congress, about the sort of activities that future presidents may not engage in, and a demand that the next President be more solicitous to Congress.

The very possibility of a no-confidence vote might have two beneficial effects. First, it may give Congress an opportunity to pass legislation regulating the President with less fear that the new President will veto it. Second, the threat of future no-confidence motions will make presidents more accountable to Congress and less likely to reject oversight mechanisms. Congress can use its advantage to pass oversight and mandatory reporting mechanisms and coax later presidents to abide by them. (One can hardly imagine George W. Bush following much of Dick Cheney's advice to maximize unilateral executive power and ignore requests for oversight and reporting if Bush could have faced a vote of "no-confidence.")

Thus, the structural reform of no-confidence motions can pay dividends for other kinds of reform. For example, presidents may use their veto less often if they fear that Congress's response will be to veto *them*. Even if votes of no-confidence are relatively rare, they would be sufficiently thinkable to serve as an effective deterrent. Conversely, votes of no-confidence put pressure on Congress to supervise and take responsibility for a failing presidency. Constituents will reasonably ask why Congress has allowed an incompetent or corrupt President to remain in office. Considerations like these help explain why we think that a focus on additional legal regulation by itself may be insufficient without attention to larger structural issues. Designing structures differently gives legal rules additional practical force and effect.

One might think even more boldly. Rossiter offers several suggestions, based on his overview of the various emergency regimes in the five countries he studied. He begins with the seemingly obvious point that no "constitutional dictatorship should be initiated unless it is necessary or even indispensable to the preservation of the state and its constitutional order."[342] Although unobjectionable in principle, this suggestion is more difficult to implement than it first appears. Indeed, everything depends on how many forms of executive discretion in the modern administrative and National Security State we wish to label examples of "constitutional dictatorship." As discussed above, in a distributed dictatorship, many different agencies and individuals have unreviewable discretion, ranging from the head of the Federal Reserve to the Centers for Disease Control and Prevention.[343]

Rossiter's second suggestion for a well-designed institution of constitutional dictatorship is adopted from ancient Rome: "the decision to institute a constitutional dictatorship should never be in the hands of the man or men who will constitute the dictator."[344] As we have seen, the American system flunks this essential test.

To the extent that the American—or any other—constitution seemingly allows a President both to declare the existence of an emergency and to engage in effectively unreviewable action, it has moved far closer to the Schmittian conception of the sovereign dictatorship. In fact, as we have seen, this is still possible in a commissarial dictatorship, if Congress by statute places the right to declare an emergency in the President, and then directs the President to take whatever steps he deems appropriate. In fact, some American framework statutes have this very character, and they take us very close to the Schmittian notion that the President decides for himself when to make exceptions to the rules. However, in this case, the "exception" to the normal legal order is part of the normal legal order, because the power to declare an emergency and to deal with that emergency is already built into the framework statute.

One response, as suggested by the South African Constitution,[345] is to require the legislature to vote to activate the executive's emergency powers for each particular emergency. The

342. ROSSITER, *supra* note 14, at 298 (emphasis omitted).
343. *See* discussion *supra* Part II.E.
344. ROSSITER, *supra* note 14, at 299 (emphasis omitted).
345. *See* S. AFR. CONST. 1996 art. 37, § 2.

American system tends not to choose this path. Instead, it creates framework statutes that bestow emergency powers on the President or some other executive official, including the power to declare an emergency in the first place. So although Congress has technically authorized these powers, it may be a Congress that sat long ago. Consider the Militia Act of 1795,[346] the Insurrection Act of 1807,[347] and the Suppression of Rebellion Act of 1861[348] as examples, or the Depression-Era banking statutes that empowered Henry Paulson and Ben Bernanke in 2008.[349] There is no contemporaneous congressional vote on whether an emergency exists; instead the framework statute leaves that question to the executive, thus doing an end run around the South African (and Roman) model. The closest that the American system comes to this model is the declaration of war, which activates the President's war powers, or, following World War II (the last declared war), authorizations for the use of military force, which, however, never seem to be repealed.

In any case, there are two additional problems with the South African and Roman model, which requires the legislature to declare emergencies and activate special powers each time the executive requests them. The first arises when we are indeed faced with a crisis that demands functionally immediate decisionmaking, when there simply is not enough time to gain legislative authorization. Although the most obvious examples may involve military attack, certain kinds of economic emergencies or health emergencies may also occur suddenly.

The second problem may be even more basic. It operates even when time is not of the essence. In his classic book on the American presidency, Clinton Rossiter emphasized that one of the six "hats" worn by the President is that of "party leader."[350] Rick Pildes and Daryl Levinson have argued that legislative oversight of an aggressive President, even in a presidential sys-

346. Militia Act of 1795, ch. 36, 1 Stat. 424 (repealed in part 1861 and current version at 10 U.S.C. §§ 331–335 (2006)).

347. Insurrection Act of 1807, ch. 39, 2 Stat. 443 (current version at 10 U.S.C. §§ 331–335 (2006)).

348. Suppression of the Rebellion Act of 1861, ch. 25, 12 Stat. 281 (current version at 10 U.S.C. § 332 (2006)); *see also* Ku Klux Klan (Civil Rights) Act of 1871, ch. 22, §§ 3–4, 17 Stat. 13, 14–15 (expired in part in 1873 and current version at 10 U.S.C. § 333 (2006)). For a discussion of the Militia Acts, see Stephen I. Vladeck, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149, 156–69 (2004).

349. *See* discussion *supra* Part II.E.

350. *See* ROSSITER, *supra* note 14, at 16–25.

tem, may not operate adequately when the political party the President leads also dominates the legislature.[351] In fact, it may be in the electoral interest of the President's party to argue that the country faces a particularly fearful situation, which demands the kind of radical action that can be provided only by the President and members of his party. The Bush Administration's war on terror is a recent example.

Pildes and Levinson call for emulating the German practice and guaranteeing that certain important committees in the legislature be placed in the hands of the opposition party, in order to assure some measure of significant oversight.[352] Similarly, Professor David Fontana has suggested constitutionalizing the role of the "party in opposition" in a modern party system.[353] But even these proposals may not respond adequately to the possibility that a legislature controlled by the President's (or Prime Minister's) own party will be more than happy to delegate to the Maximum Leader all sorts of discretionary powers associated with constitutional dictatorship.

Another solution would be to require supermajorities for the declaration of emergencies and/or the delegation of emergency powers. To this we might add fixed sunset provisions. Bruce Ackerman has suggested escalator clauses, which require larger and larger majorities to keep emergency powers in place after specified time limits.[354] This would make dictatorial powers increasingly difficult to obtain and to keep.

Finally, another solution would be to take the decision away from the process of ordinary politics completely. The model might be the Federal Reserve Board, which is relatively independent from the President and Congress, and uses its expertise to manage the money supply in the public interest. As a thought experiment, imagine the creation of an Emergency Council whose consent would be required to declare the existence of a state of emergency that would trigger the exercise of extraordinary powers for the executive. In the United States, such a Council might consist of some number of officials subject to the Senate's advise and consent powers (perhaps requiring a

351. *See* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006).

352. *See id.* at 2368–72.

353. David Fontana, *Government in Opposition*, 119 YALE L.J. 548, 554 (2009).

354. *See* BRUCE ACKERMAN, BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM 80 (2006).

two-thirds majority, to ensure bipartisan support). It might also include a number of persons who serve *ex officio*, for example, a group of former presidents or retired secretaries of state, former heads of the Joint Chiefs of Staff, or former heads of the Federal Reserve Board. The members of the group would be chosen for their demonstrated probity and good sense in crises as well as the public's general confidence in their judgment.

Just as we might alter who has the power to declare an emergency, we might also consider altering who is authorized to respond to it. The President might not be the right person to serve as the "constitutional dictator" for every particular kind of emergency. If the problem is staving off a threatened military invasion, one might prefer someone with demonstrated military or diplomatic experience. If, on the other hand, the threat is imminent economic collapse, military experience would presumably be irrelevant, and someone like the head of the Federal Reserve (or another senior economist with wide-ranging government experience) might be the appropriate person. Rossiter and other admirers of ancient Rome have emphasized that the Roman consuls could not select themselves for the office of dictator; hence, they had incentives to ensure that the person they chose for the office had the character, skills, and judgment needed for the particular task. Just as in the Roman context, the term of emergency power would be limited. This model of delegation to specified experts seems to fly in the face of the ideology of the unitary executive. As we have argued, however, this theory is honored more in the breach than in the observance.

## CONCLUSION

There is a great debate in the West about the value of constitutional dictatorships that spans the ages. On one side, we have Niccolo Machiavelli and Alexander Hamilton, who argued, in Hamilton's words, that "societies of men" must be "capable [of] . . . establishing good government from reflection and choice"—that is, deliberate design—rather than generating their "political constitutions" from "accident and force."[355] If emergency government is necessary, its institutions and the restraints upon them should be prepared in advance, to preserve and adapt republican government through the many crises that nations inevitably face. On the other side, we have Max Weber,

355. THE FEDERALIST NO. 1 (Alexander Hamilton), *supra* note 5, at 89.

who warned against and feared the spread of Caesarism in parliamentary democracies, and Carl Schmitt, who welcomed the slide toward Caesarism as the natural condition of politics. For Schmitt, constitutional (i.e., commissarial) dictatorships were but an unstable temporization that delayed the inevitable reality of sovereignty, the power to declare a state of exception.

We place ourselves firmly on the side of Hamilton and the great Florentine statesman of the *Discourses*. We cannot leave the growth of republics to chance and circumstance; one must design systems for emergencies in advance to head off problems before they occur. That is why all students of constitutionalism, including those who study the presidency, must also be students of constitutional design. We forget the lessons of Machiavelli, revived in the past century by Watkins, Rossiter, and Friedrich (and, yes, even Carl Schmitt) at our peril. The notion of "constitutional dictatorship" may seem at first a contradiction in terms, but it is a reality that every modern democracy (like every ancient one) must eventually face. Whatever problems may attend the design of emergency powers in a constitutional democracy, it would be even worse to slide into patently unconstitutional dictatorships; the past century alone has witnessed far too many examples.