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

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I. INTRODUCTION

A. Is Constitutional Dictatorship an Oxymoron?

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

But the paradox, Watkins, insisted, was not a real one. Watkins wrote at the outset of the Second World War, which appeared to be a war of (mostly) constitutional democracies versus dictatorships. Yet Adolf Hitler had risen to power through skillful use of the procedures set out in the Weimar Constitution; Josef Stalin, every bit as much a dictator, presided over a “socialist republic” with an elaborate constitution drafted in 1936. Meanwhile, in Great Britain, Winston Churchill would soon replace Neville Chamberlain as Prime Minister and the political parties would agree to suspend the (unwritten) constitutional norms of parliamentary elections at least every five years until the end of the war.

Watkins’s article had been triggered by various responses to spates of emergency situations in the first decades of the 20th century, in which constitutional governments regularly assumed extraordinary powers. At the same time, even in the absence of declared emergencies, the development of the modern administrative state in the West was rapidly calling into question many traditional assumptions about the rule of law. Governments increasingly delegated wide-ranging discretionary power over important aspects of people’s lives to

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5 Frederick M. Watkins, The Problem of Constitutional Dictatorship, 1 PUBLIC POLICY 324 (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 of them given that the year before, in 1939, he had published The Failure of Constitutional Emergency Powers Under the German Republic, the product of his term as a Junior Fellow at Harvard between 1933-36.
6 Id. at 324.
Thus, for Watkins, the problem of constitutional dictatorship was not the presence of dictatorial elements within constitutional forms of government; these elements had become inevitable. Rather, the problem (and the challenge) was to design structures adequate to forestall the dangerous tendencies of dictatorial powers when the occasion called for them. Thus constitutional dictatorship, far from being a contradiction in terms, was a virtual certainty in a modern state. The point was to recognize it and plan for it in advance.

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 admiringly discussed the institution of the dictator in ancient Rome, which he described as “perhaps the most strikingly successful of all known systems of emergency government.”

In Europe, the best-known modern European theorist of constitutional dictatorship is Carl Schmitt, an important political theorist who also gained lasting obloquy as a legal apologist for the Nazi takeover of Germany in 1933. In Schmitt’s 1921 book, *Die Diktatur* (which presumably needs no translation), he draws on the distinction, traceable to Roman law, between “sovereign” and “commissarial” dictators. A sovereign dictator makes use of a political crisis to overthrow the existing constitutional order to found a new one. 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 return to pre-existing procedures as soon as practicably possible. The Roman dictatorship, in which the dictator held power for a limited term, is an example. One of Schmitt’s best known works, *Political Theology*, notoriously begins by defining the “sovereign” as the person (or institution) whose can suspend ordinary legality by declaring the existence of a “state of exception.”

The commissarial dictator is a constitutional dictator, whose powers are constituted by the basic law; the sovereign dictator, by contrast, has no obligation

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8 Id. at 332.
to return to the constitutional order; indeed, the sovereign dictator constitutes the legal order.

Clinton Rossiter’s brilliant and troubling 1948 book *Constitutional Dictatorship: Crisis Government in the Modern Democracies*,10 studied the responses of France, Great Britain, Germany, the United States and ancient Rome to perceived emergencies, including those generated by the Great Depression and World War II. Some of these were problems of national security, some were economic crises, including, of course, economic dislocations generated by war and its aftermath. Rossiter concluded that one constant in all the examples he studied was the decision to adopt some form of dictatorship, validly legal or otherwise. Like Watkins, Rossiter emphasized the difference between “constitutional” and “unconstitutional” dictatorships, arguing strongly in favor of the former. Similarly, Carl J. Friedrich, one of Harvard’s leading lights in political theory during the mid-20th century, devoted a full chapter of his well-known textbook, *Constitutional Government and Democracy*, to consideration of “constitutional dictatorship,”11 which he contrasted to its more ominous counterpart, “totalitarian dictatorship.”

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. Some political scientists may still consult his important work on the presidency,12 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 or during the first half of the 20th century. “That constitutional dictatorship does have a future in the United States,” Rossiter proclaimed in 1948, “is hardly a matter for discussion”13 Indeed, if Rossiter is to be believed, we will have (and probably already do have)

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10 CLINTON ROSSITER, CONSTITUTIONAL DICTATORSHIP - CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES (2008)(1948). Republished in 1963, it went out of print, to be republished almost 40 years later with a cover picture showing the two burning towers of the World Trade Center and a torn Constitution.
13 CLINTON ROSSITER, CONSTITUTIONAL DICTATORSHIP, at 306.
some form of constitutional dictatorship whether we like it or not. If so, we must pay attention to how these systems of governance work and how best to design them in order to reduce the possibilities for their abuse.

In this essay, we discuss the idea of a constitutional dictatorship, and those elements of constitutional dictatorship that already exist in the American system, particularly in the modern presidency. After describing some increasingly worrisome tendencies in the American presidency, we discuss how we might redesign the constitutional system to counteract those tendencies and head off the dangers of permanent constitutional dictatorship or a government in which dictatorial elements become pervasive in ways that undermine republicanism.

B. Constitutional Dictatorships and Republics

We begin with perhaps the most important theorist of “constitutional dictatorship” in the West, the great Florentine theorist Niccolo Machiavelli. Although Machiavelli is famous 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.\(^{14}\)

“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.” 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.” 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

\(^{14}\) Niccolò Machiavelli, *Discourses on Livy* 95 (Julia Conaway Bondanella and Peter Bondanella trans., Oxford Univ. Press 1997) (1531).
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.”

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. This precipitates what the two of us have 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.

Far more commonplace is what we call a Type One constitutional crisis, in which political leaders, faced with exigent circumstances, publicly announce that they must break the law in order to save the republic. Machiavelli identifies this as the second cause of ruin: “break[ing laws] in order to avoid” disastrous consequences. 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 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.” 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.

What Machiavelli admired about the Roman dictatorship was precisely what distinguished it from John Locke’s far less developed notion of “prerogative” power within a monarchical system. According to Locke, the king always retained the prerogative power to suspend the law more or less by fiat whenever he thought it in the public interest. What concerned Machiavelli the republican

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15 Id. at 95.
17 Id. at __.
18 See JOHN LOCKE, SECOND TREATISE ON GOVERNMENT, Ch. XIV (1680)(C. B. McPherson, ed., 1980).:
theorist 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. The Roman dictatorship was institutionalized, requiring a particular process in order to name the dictator and ending the dictatorship at a specified time. 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, they certainly did not disagree that emergencies might arise within republican government that would indeed test the very notion of constitutional fidelity. Consider in this context Madison’s chilling argument in Federalist 41 that it is basically irrelevant to point to ostensible “constitutional barriers” as protections against “the impulse of self-preservation.” Indeed, the very placement of such barriers—precisely the sorts of clauses that he would elsewhere dismiss as mere “parchment barriers”—would simply “plant[] in the Constitution itself necessary usurpations of power.”

Finally, consider what may well be the most important lines penned by John Marshall in what is surely his most important state paper/opinion on the American founding:

“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 lawmaking 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. at Sec. 60.

See also the fine book by Clement Fatovic, Liberal Constitutionalism and Emergency Action: Executive Power From Locke To The American Founding (2009)(survey of various theories of “prerogative” powers in British and American political thought).

19 The Federalist 41 (Madison).
Constitution, *McCulloch v. Maryland.* After reminding his readers that “we must never forget that it is a constitution we are expounding,” Marshall goes on to emphasize that “[it is] a constitution, intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.” Adaptation is a loaded concept, as is, of course, “crises.”

Machiavelli recognized that dictatorships could both serve and harm republics depending on how they were designed. In this important sense Machiavelli’s approach is directly opposed to Carl Schmitt’s. Although Schmitt’s political philosophy recognizes the possibility of commissarial dictatorships, he assumes that elements of the sovereign dictatorship always lurk in the background, waiting to emerge and overtake the best laid plans of republics. For Schmitt, parliamentary systems must always give way to some person or persons who are the real sovereigns, and have the right and the power to declare a state of exception. No matter how well designed a constitutional system might be, the true sovereign will always be able to escape the confines of that design and make exceptions to it. One can have a state devoted to the rule of law and one can have a state with a dictator, but one cannot have both.

Machiavelli takes the opposite view. The very purpose of limited grants of dictatorial powers is to preserve republican forms of government, not to undermine them. Therefore the dictator, in whatever form the dictatorship may arise, must always be hemmed in by legal and political checks designed to keep the dictator’s power from spinning out of control, or becoming permanent.

C. *What is a constitutional dictatorship?*

With this in mind, we might define a constitutional dictatorship as a system (or subsystem) of constitutional government that bestows on a certain individual or institution the right to make binding rules, directives, and decisions and apply them to concrete circumstances unhindered by timely legal checks to their authority. When they act according to this right, they act clothed with all of the

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20 17 U.S. 316 (1819).
21 Id. at 407.
22 By “timely” legal checks, we mean procedures that can people can begin relatively quickly to hold the leader accountable for violation 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. On the other hand, if Congress has suspended the writ due to
authority of the state. This person or institution, however, is subject to various procedural and substantive limitations that are set forth in advance. These may include, for example, 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 rules.

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 Federalist 47 Madison argued that “[t]he accumulation of all powers legislative, executive 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.” It is worth noting that Madison hedges his definition by speaking of the accumulation of all powers. The negative pregnant is that if the accumulation is only temporary, or only over certain subject matters, or may only be exercised using certain specified means, it becomes something less than tyranny.

For example, if we assumed (which, thankfully, is not the case) that the president has the power to initiate war, commander 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. To the extent that the president may create rules, 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 him or herself.

A constitutional dictatorship is constitutional because it comes with various limits prescribed by law and by institutional structures. The dictator exercises power according to constitutional procedures that bring the dictatorship into being, end it, and structure its scope and reach. For example, the President might have complete discretion to gather foreign intelligence surveillance directed at persons outside the United States, but not within. (The difficulty, of course, arises when, as in the digital world, the distinction between foreign and domestic surveillance threatens to evaporate.)

emergency, this gives the President a dictatorial power to detain without a hearing, charges, and courts may not hear habeas actions on the merits until the suspension has been lifted. Even if prisoners can file habeas petitions during the time of the suspension, the courts will refuse to consider them.

23 THE FEDERALIST 47 (Madison).
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. To give two examples, think of Ben
Bernanke’s decision to bail out troubled financial institutions, or the authority of
the Centers for Disease Control to institute a quarantine. 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.

Does this mean that there is no difference, at the end of the day, between 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? Perhaps some more
paranoid elements of the public might think it so. But this confuses the
diminishing sunlight of three in the afternoon with the pitch darkness of three 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 formation, has been in tension with traditional rule of law
notions. 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, this discretion may be
effectively unreviewable. In fact, however, the hallmark of a constitutional
system is that it reins in 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, through reporting and oversight.

24 See 24 U.S.C. § 264 (outlining secretary of HHS’s powers 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, at <
http://www.cdc.gov/ncidod/dq/qa_influenza_amendment_to_eo_13295.htm>
(last visited July 19, 2009).
25 The most famous English-language work making this argument is surely
ALBERT VENN DICEY, AN INTRODUCTION TO THE STUDY OF THE LAW OF THE
CONSTITUTION (1885). See RICHARD A. COSGROVE, THE RULE OF LAW: ALBERT
VENN DICEY, VICTORIAN JURIST (1980).
26 See EDWARD L. RUBIN, BEYOND CAMELONT: RETHINKING POLITICS AND LAW
FOR THE MODERN STATE (2005) for an unusually wide-ranging call for
rethinking many of our basic presuppositions in light of the reality of the modern
administrative state.
mechanisms, and through judicial review. We can nevertheless imagine a continuum of possibilities running from the discretion that always exists in the interstices of an administrative state and very broad and effectively unreviewable delegations of discretionary power over fundamental issues of life and death. 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 within a larger system of laws and judicial review.

There is an important and obvious relationship between constitutional dictatorship and declarations of emergency. Emergency is the standard justification for dictatorship. Nevertheless, dictatorial powers may not be connected to any real crisis or emergency. Even if dictatorship is initially justified by emergency, it may continue after the emergency is over. In this way dictatorial powers may become normalized. Executive officials, noting the ability of emergency to focus the public’s attention, to route around the unusual impediments to reform, may find themselves in quest of new emergencies to justify their continuation. 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, 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, confirming it. In this way dictatorship constructs reality according to its own vision and perpetuates the society’s need for its continuation.

II. THE AMERICAN PRESIDENCY AS A CONSTITUTIONAL DICTATORSHIP

A. Building Executive Power through Constitutional Construction

27 See Stephen Holmes, In Case of Emergency, supra n. 4, for an important argument 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.
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 statement in *McCulloch v. Maryland*, quoted earlier, that “a constitution [is] intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.”\(^{28}\) Notably, the word “crisis” is italicized in the original. Nevertheless, the text of the American Constitution is remarkably devoid of specific clauses that give government officials emergency powers. The closest 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 invasion or rebellion when the public safety requires it.”\(^{29}\)

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 arise from multiple sources. From the 9/11 attacks to the economic meltdown of 2008, national security crises involving the “self-preservation” of the nation drew most of the public’s attention. Since that time, Americans have received ample education that crises can take a variety of forms, both foreign and domestic. One should recall that the chaos that pervaded Germany during the 1920s was economic; most of the more than 250 presidential suspensions of rights under the notorious Article 48 of the Weimar Constitution\(^{30}\) concerned economic matters;\(^{31}\) 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, at the margins, between Communists and Nazis.


\(^{29}\) U.S. CONST. Art. I. Sec. 9, cl. 2.

\(^{30}\) Article 48 provided that “If public security and order are seriously disturbed or endangered within the Reich, the President of the Reich may take measures necessary for their restoration, intervening if need be with the assistance of the armed forces. For this purpose he may suspend, in whole or in part, the fundamental rights provided in Articles 114, 115, 117, 118, 123, 124 and 153 [of the Constitution].” The Weimar Constitution, at http://www.zum.de/psm/weimar/weimar_vve.php#Third%20Chapter

\(^{31}\) AGAMBEN, STATE OF EXCEPTION, *supra*, at __.
This first decade of the 21st 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. As John Ackerman has written, this serves to “concentrate political power in his hands. He 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.”’ According to Ackerman, who is editor-in-chief of the Mexican Law Review, “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 constitutionally required to get congressional approval for any suspension of basic rights. There are no exceptions to this requirement.” Ackerman notes the “long history” in Latin America “of using states of emergency as ploys to . . . return to authoritarianism.”

Because the text of the Constitution is largely silent on how to deal with emergencies and other forms of crisis, the American legal system has largely proceeded through constitutional construction. Construction is the implementation of the Constitution’s vague clauses and abstract principles—not to mention its silences—through precedents (both judicial and non-judicial), congressional enactments, administrative regulations and the 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

32 See John M. Ackerman, “An Outbreak of Opportunism: Mexico’s president is trying to use the swine flu to consolidate his power,” SLATE, April 27, 2009, available at http://www.slate.com/id/2217017/. It is worth noting that Ackerman’s objection may be less to the suspension of ordinary civil liberties than to Calderon’s failure to seek judicial authorization.

President is vested with “the executive power of the United States”\textsuperscript{34} and is “commander-in-chief” of the armed forces.\textsuperscript{35} It also says, notably, that “he shall take care that the laws be faithfully executed.”\textsuperscript{36} The modern President is far more powerful, and has far more resources at his disposal, than the Framers imagined or intended. But as the United States has become a global power, and as government has taken on increasing responsibilities—to meet the increasing expectations by its citizens—the Presidency has gained increasing 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 which 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. To understand the possibilities (and the potential dangers) of constitutional dictatorship in the United States, we must begin with the Executive Branch.

B. Presidential Accountability and Unilateral Action

One might object that the president cannot be a dictator because, after all, he or she is elected. But this is precisely what makes a dictatorship constitutional. Elections help establish legitimacy for 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 it say much about how the President will be held accountable once he takes office. This is especially so if the 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

\textsuperscript{34} U.S. CONST. Art. II, Sec. 1.
\textsuperscript{35} U.S. CONST. Art. II, Sec. 2.
\textsuperscript{36} U.S. CONST. Art. II, Sec. 3.
issues, not particular usurpations. (Indeed, they are usually about the health of the economy, rather than whether the president has overstepped his bounds). 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 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. It is worth noting that there are 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 might strike many Americans as far worse sins than, say, perjury or tax evasion. And the Impeachment Clause, at least as conventionally interpreted—and that conventional reinterpretation was, of course, strongly reinforced by defenders of President Clinton—is unavailing against anything other than truly “High Crimes and Misdemeanors.” Moreover, as the Clinton impeachment demonstrated, it is so difficult to remove a President that most Presidents can assume that they will never face a genuine threat from this direction.

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 crises, health crises, floods, fires, and other domestic disasters. It is no accident that 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. Lincoln delayed calling Congress into session after he became president precisely so that he could act without hindrance. And act he did. He goaded the South into beginning a war by resupplying Fort Sumter, and then suspended habeas corpus, claiming that since Congress was away, somebody had to make the decision, and he was just the person to do it. Like any good constitutional 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, were all calculated to that end. As he famously asked “are all the laws, but one, to go unexecuted, and the government

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37 U.S. Const. Art. II, Sec. 4.
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go to pieces, lest that one be violated?” Arthur Schlesinger, Jr. quotes Lord Bryce’s description of Lincoln as “almost a dictator... who wielded more authority than any single Englishman has done since Oliver Cromwell,” and he 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.”

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 during President George W. Bush’s second term between reporter Helen Thomas and White House Press Secretary Dana Perino:

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. . . ."

In the quote opening this article, we noted President Bush’s suggestion that he owes no one any explanations for his conduct as President. In the same

39 Id. at 159-60.
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vein are Vice President Dick Cheney’s remarks to Chris Wallace of Fox News in his final days in office:

... [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 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.\(^\text{42}\)

Dick Cheney casually informs us 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 unchecked power as one is likely to get. Nevertheless, even the bitterest enemies of the Bush Administration, unless they had crossed the line into out-and-out paranoia, never genuinely worried that Mr. Bush (or even Dick Cheney) would try to extend their terms of office by fiat; or that they would attempt to suspend the constitutionally required election and the inauguration of a successor. Critics feared instead that Bush and Cheney would exercise bad and effectively unreviewable judgment during the eight years they enjoyed the powers of the Presidency. No matter how boldly presidents appear to act, the tradition of regular elections is strong in the United States. One might invoke Lincoln’s solemn determination to go to the electorate for reelection in 1864 and FDR’s campaign for re-election 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. Even if Bush and Cheney disagreed with the electorate’s decision to install a President with very different ideas about foreign policy, they

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did not doubt that they would hand over power to Barack Obama in January of 2009. We should cherish this aspect of our political system. But it does not undercut the fact that our presidents, be they Lincoln, Roosevelt, Bush, or, now, Obama, are constitutional dictators, 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, ordinarily the President’s dictatorial powers are merely latent. Whether or not Gerald Ford could have ordered a full-scale nuclear attack on the Soviet Union, Ford was never actually tempted or encouraged to do so. Interestingly enough, that was not the case with Presidents Truman, Eisenhower, Kennedy, and Johnson, all of whom received advice from high-ranking military officers and other advisors that the United States should take advantage of its nuclear monopoly (Truman) or significant advantage in arms (Eisenhower, Kennedy, and Johnson) to engage in a preemptive attack on the Soviet Union to end what would then be a not-so-Cold War.

Latent traits, however, may become manifest when certain circumstances arise. Presidents may be particularly ambitious to leave a mark on history. Newly perceived threats may emerge that lead Presidents to justify armed conflict. Whether or not the September 11, 2001 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 the Use of Military Force (AUMF),\footnote{Authorization for the Use of Military Force (September 18, 2001), 115 Stat. 224 (2001)} the USA PATRIOT Act,\footnote{115 Stat. 272 (2001).} the Military Commissions Act of 2006,\footnote{120 Stat. 2600 (2006).} the Protect America Act of 2007\footnote{121 Stat. 552 (2007).} and the FISA Amendments Act of 2008.\footnote{122 Stat. 2468 (2008).} Indeed, every time the President asked for broad new authorities from Congress, he received them.\footnote{Congress’s willingness to delegate power to the president in affairs both domestic and foreign simply raises in a new form, 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...} What is remarkable is that, given this record, 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 Command-in-Chief.

C. National Security and Domestic Powers

President Bush and Vice President Cheney attracted accusations of dictatorial ambitions largely because of the unpopularity of some of their policies. But now that the Bush presidency has receded into history, we can begin a more reflective discussion of how we should describe the presidency of Barack Obama and his successors. To what extent does anyone who holds the modern Presidency enjoy quasi-dictatorial powers? Even if Bush has taken the notion of presidential autonomy to excess, it should be obvious that he and the Administration lawyers who defended presidential prerogatives are not creating an entirely new edifice.49

New Deal in the 1930s. At first the Supreme Court, supported by conservative Republicans denounced “delegation run riot” unanimously in the famous Schechter decision invalidating the National Recovery Authority. A.L.A. Schechter Poultry Corporation v. United States, 295 U.S. 495 (1935). Shortly thereafter, the non-delegation doctrine died an unceremonious death see Yakus v. United States, 321 US 414 (1944), and the modern conservative Court has been unwilling to disinter it. See Whitman v. American Trucking Associations, Inc., 531 U.S. 457 (2001)(Scalia, J.).

In the area of foreign affairs, Congress has long assumed that it could delegate far more authority to the President through treaties and framework statutes. The conservative Republican Justice George Sutherland denounced 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 John Marshall, described the President as the “sole organ” of the United States vis-à-vis the outside world. United States v. Curtiss-Wright Export Corporation, 299 U.S. 304, 319 (1936). See also G. Edward White, The Transformation of the Constitutional Regime of Foreign Relations, 85 VA. L. REV. 1 (1999)(discussing Sutherland’s pre-judicial writings on foreign affairs power).

49 Further proof of this proposition can be found in the magisterial articles by David J. Barron and Martin Lederman, The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding, 221 HARV.
Clinton Rossiter wrote his book, and chose its title, the year George W. Bush was born, and his analysis of the American version of “constitutional dictatorship” is built on the actions of such luminaries as Lincoln, Wilson, and Roosevelt.

As we have noted, Lincoln is the most obvious example of a President who assumed quasi-dictatorial powers during a national emergency. But consider John F. Kennedy’s actions during the Cuban Missile Crisis. It is often viewed as John Kennedy’s finest hour because the United States avoided a nuclear exchange with the Soviet Union. What is often overlooked in the dramatic tales surrounding those “thirteen days” of meetings in Washington with Kennedy and the Ex-Com is that everyone assumed that it was up to Kennedy to decide whether or not to embark on what would surely have become a nuclear war with the Soviet Union. Kennedy’s acolyte Theodore Sorenson noted that Kennedy estimated the odds of such a war at one in three.\textsuperscript{50} Interestingly enough, Abram Chayes, in his almost fawning portrayal of Kennedy’s conduct during the Crisis, did not suggest that there was anything amiss in Kennedy’s risking nuclear annihilation for Soviet actions that Defense Secretary Robert McNamara himself recognized posed little or no threat to actual American security, given the extent of the American nuclear stockpile and the credibility of threats of retaliation.

Ironically, 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 New York Sen. Kenneth Keating, among others, was denouncing him for being soft on Soviet penetration of Cuba.\textsuperscript{51} Kennedy needed to retain healthy Democratic majorities in both the House and Senate in a


\textsuperscript{51}And, of course, Kennedy’s initial meeting with Nikita Khrushchev in Vienna had been a near-fiasco, not least because of Kennedy’s abject unpreparedness for the responsibilities that had been given him by the American people, not to mention the possibility that he was significantly affected during the Vienna encounter by drugs that he was taking for various concealed medical problems. See, e.g., BARBARA LEAMING, JACK KENNEDY: THE EDUCATION OF A STATESMAN (2006).
period in which he could not always depend on Southern Democrats to support his “New Frontier” agenda. Kennedy was also concerned about his prospects for re-election in 1964. (Like Lincoln, Kennedy was a minority president, winning approximately 49.7% of the popular vote in 1960, which was nevertheless substantially closer to a majority than Lincoln’s 40% in 1860.).

The Cuban Missile Crisis 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. It also reveals the interplay between this unilateral power and domestic politics—including the public’s ability to vote him out of office in 1964. 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. 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.

Long term tendencies in the construction of the office of the Presidency have not reduced his discretion; they have only encouraged it. The President is surrounded with advisors and with lawyers who are only too happy to argue that the President enjoys an ever wider discretion, whether because Congress has authorized it in framework statutes or because of the President’s inherent authority under Article II. In fact, John Yoo’s memos in the Bush Office of Legal Counsel argued, in essence, that when the President acts according to his powers as Commander-in-Chief he is for all intents and purposes a dictator, because neither the Congress nor the Courts may interfere with his decisions; at most Congress can refuse to appropriate new money for his adventures. Yoo has been criticized, indeed denounced, by scholars of all political persuasions, but his clumsy arguments do not mean that there are not other, less aggressive ways of making the case for Presidential authority.

52 [cite to Yoo Memos]
55 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. Consider as an
Indeed, we have argued that President Bush’s successors will likely present themselves as more moderate by rejecting the Bush Administration’s most radical claims. But this means only that they will retreat a bit from the far end of the spectrum of positions currently occupied by John Yoo, Dick Cheney, David Addington. Yet later Presidents will still find ways to interpret the powers of the Presidency—often by reading Congressional authorizations broadly—to enable the President to do more or less whatever the President wants.

The central idea of constitutional dictatorship, after all, is that the President does not seize power. Rather, his power is bestowed on him, either by the Constitution directly, or, more likely by framework statutes and authorizations passed by Congress. Presidents (or more correctly, the President’s lawyers) tend to read these statutes and authorizations as broadly as possible, so that the President can have as free a hand as possible in order to save the nation. In fulfilling these authorizations, the President creates new institutions and mechanisms that, in turn, bestow new kinds of authority and new kinds of power. Thus, the great mistake of the Bush Administration was the assumption that Presidents need to claim power unilaterally. It is far more effective to ask for power and have it given. Then one can proliferate the powers of office through 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 a scintilla of explicit congressional authority to do so. (For this he was criticized by, of all persons, John Yoo himself). It is by no example political scientist David Gray Adler’s analysis of the Clinton Administration’s claims about presidential authority in the realm of foreign affairs: “As 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 (2002)(David Gray Adler and Michael A. Genovese, eds.).

56 On Addington, see especially BARTON GELLMAN, ANGLER (2008).
58 See Barron and Lederman, supra n. __, at 121 HARV. L. REV. 1090-91 n. 619.
59 John C. Yoo, “The Imperial President Abroad,” in THE RULE OF LAW IN THE WAKE OF CLINTON 159 (2000)(Roger Pilon, ed.)(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,
means clear that President Obama will seek additional congressional approval before putting further American military personnel in harm’s way in Afghanistan. Nor, of course, is there any reason to believe that Obama will reverse what is now a generation-long tradition (with the exception of Jimmy Carter) of presidential disdain for the constitutionality of one or more aspects of the War Powers Act, legislation passed over Richard Nixon’s veto and since then honored more in the breach than in the observance.

The most obvious elements of Presidential dictatorship tend to be concentrated in areas of foreign policy, intelligence gathering, covert operations, and warfare. Presidents exercise less unilateral control in domestic politics. Harry Truman once imagined the problems that his successor, General Dwight Eisenhower would face once in the White House. Ike would, suggested, Truman, come to the White House believing that he could issue orders as he had before and rely on their being implemented. 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.” Describing these remarks in his classic book Presidential Power, historian Richard Neustadt argued that the President ultimately had only the “powers of persuasion,” since there were so many ways that his wishes, however clearly expressed, could be negated prior to implementation.

To be sure, the President can, through unilateral action, prevent many things from happening. For example, Presidents can successfully veto legislation backed even by healthy (though not 2/3) majorities in both houses of Congress. This is not so much an example of “constitutional dictatorship” than simply an additional veto point in a republican system that is already chock full (some would say too full) of such barriers to reform. The President also can act unilaterally and virtually without limits in his use of the pardon power. Certain anti-Federalists

President Clinton has accelerated the disturbing trends in foreign policy that undermine notions of democratic accountability and respect for the rule of law.”)

60 We should not understate the ability of a truly dedicated President to influence decisionmaking by administrative agencies and, therefore, to procure policy victories that might well have been denied him by Congress. See Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245 (2001).


62 See Sanford Levinson, Our Undemocratic Constitution: Where The Constitution Goes Wrong (And How We The People Can Correct It) 38-49 (2006)(presidential vetoes upheld approximately 95% of the time).
Constitutional Dictatorship

were highly critical of the potential for misuse of the pardoning power for this very reason: they feared that the President would pardon allies who had joined in a “cabal” to threaten the liberties of Americans. Some two hundred years later, we can see glimmers of what they might have been worried about, the most obvious examples being George H.W. Bush’s Christmas Eve 1992 pardon of colleagues who had been indicted for their participation in the Iran-Contra affair. This pardon effectively quashed the investigation into illegal conduct during the Reagan Administration, in which Bush served as Vice-President. 63

Although American presidents enjoy few unilateral powers with respect to the vast majority of domestic issues, that is because most domestic issues do not appear to affect national security and do not 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 facilities within the United States. Biological and environmental threats do not respect national borders, nor, for that matter, do cyberattacks.

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. National authorities must act swiftly 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 Katrina. Since the Militia Act of 1792 and the Insurrection Act of 1807, Congress has repeatedly created framework statutes that authorize Presidents to respond to domestic emergencies. 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.

For example, one thing that dictators must do in emergencies is detain people who pose threats to public safety. Section 361 of the Public Health Service Act 64 gives 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

63 Recently, people have criticized George W. Bush’s commutation of Scooter Libby’s sentence, but this episode seems to pale by comparison. Moreover, Bush refused to grant Libby a full pardon at the end of his Presidency.

64 42 U.S.C. § 264.
countries into the States or possessions, or from one State or possession into any other State or possession.” These regulations may include, “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.” They may even include “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.”

Or consider the steps that the executive must 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. “A mild species of dictatorship,” wrote the respected pundit Walter Lippmann in one of his pre-Inauguration columns, “will help us over the road in the roughest months ahead.”

Roosevelt declined the invitation. Instead, as Presidents have so often done in our nation’s history, he procured legislation from a compliant—and justifiably “scared”--Congress that delegated vast new powers to the Executive Branch. Indeed, some of powers delegated to Roosevelt in the 1930s were cited

65 Quoted in JONATHAN ALTER, THE DEFINING MOMENT: FDR’S HUNDRED DAYS AND THE TRIUMPH OF HOPE 187 (2006). Indeed, Alter writes, Lippmann had traveled to Warm Springs, Georgia on February 1, 1933, to impress upon Roosevelt the possibility of his having to assume dictatorial powers. Indirect proof of the depth of Lippmann’s conviction on this point is provided by the fact that he had, prior to the election, “heaped” a great deal of “abuse” on Roosevelt. Most famously, he had described Roosevelt as “a pleasant man who, without any important qualifications for the office, would very much like to be President.” Quoted in RONALD STEEL, WALTER LIPPMANN AND THE AMERICAN CENTURY 292 (1999).

66 See Frank Kent, White House Technique, 9 Virginia Quarterly Rev. 372 (1933), which attributed Roosevelt’s achievements during the Hundred Days to the joint presence of a “thoroughly scared country” and “a thoroughly scared Congress.” Rossiter, who cites Kent’s article, p. 259 ft. 12, immediately goes on to quote Harold Laski’s observation published seven years later in his book on the American presidency: “In a crisis, to be it shortly, public opinion compels the abrogation of the separation of powers. There is only one will in effective operation, and that is the will of the President.” HAROLD LASKI, THE AMERICAN PRESIDENCY 154-155 (1940).
by decisionmakers claiming the power to save the American and world economic order in 2008. The apparent legal authority for Ben Bernanke’s remarkable acts during the Bear Stearns crisis was a hitherto obscure New Deal-era law that delegated almost absolute discretion to the Fed and the Secretary of the Treasury to act in the case of a banking crisis. 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.” But the point of the modern state, whether we define it as a “national security” state or simply “the administrative state,” is that such delegation is often perceived as “necessary and proper” even if it leaves certain traditional notions of the rule of law in its wake.

Even if some of FDR’s most historically important exercises of unilateral power involved issues of war and peace, such as ordering military support for Great Britain in the days leading up to America’s entry into World War II, 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. David Barron and Marty 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, he would simply decline to enforce it in order to “avert a disaster which would interfere with the winning of the war.” 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.” Rossiter argues that “[i]t is unfortunate for the history of constitutional dictatorship that Congress finally gave in to the President’s peremptory threat” because it prevented a serious

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67 *Schechter Poultry*, 295 U.S. at 553..
68 See EDWARD L. RUBIN, BEYOND CAMELOT, supra n. __. See also Sanford Levinson and Jack M. Balkin, “Morton Horwitz Wrestles With the Rule of Law,” in _____ (forthcoming, 2009)
69 See Barron and Lederman, supra n. __, at 1042-1055.
70 Id. at 1052 n. 458. Interestingly enough, FDR’s speech, delivered on Labor Day, occurred within two months of the Supreme Court’s disposition of the “Nazi Saboteur’s Case,” Ex parte Quirin, 317 U.S. 1 (1942), in the course of which Attorney General Francis Biddle suggested privately to members of the Court that the President was determined to execute the saboteurs and would not obey a judicial opinion invalidating such a power. See id. at 1051 n. 451.
71 Rossiter, at 268.
72 Id. at 269.
constitutional debate about how much power the President should enjoy. 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. We emphasize that this is a story both about presidential requests for authority and Congress’s greatly increased 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 has become hornbook constitutional law that Congress may constitutionally delegate wide ranging discretionary authority to the President and to administrative agencies. 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 has been facilitated by loosening the constitutional checks that bound Congress. The reason the President has become 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 has become the characteristic pattern for the American experiment in constitutional democracy (and constitutional dictatorship): It is not the direct assertion of unilateral power but rather 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: they ask for them in the midst of an emergency (genuine or purported) and Congress gives it to them. 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 hits. In this tradition of asking first,

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73 See note 48 supra.
Abraham Lincoln may seem the outlier, but even Lincoln sought justification after the fact from Congress for what he did, and Congress, as usual, gave the President its blessing, albeit retroactively.

Recognizing this pattern places the recent Presidency of George W. Bush in a useful light. It makes Bush’s experience during his two terms in office far less unusual than his critics have supposed. Immediately following the September 11, 2001 terrorist attacks, George W. Bush played according to the standard script: He announced the existence of an emergency threatening the nation’s survival and asked Congress for new powers to deal with it. Congress replied eagerly, first with the September 18, 2001 Authorization for the Use of Military Force and then with the USA Patriot Act. Congress also reorganized government agencies, consolidated the intelligence services, and created a new Department of Homeland Security, a reform Bush initially opposed but later supported and used to his political advantage. To this extent Bush’s actions match the traditional pattern: he declared a crisis, asked for emergency powers and received them. However, Bush also sought to obtain additional emergency powers for himself without asking for Congressional approval in three areas: his policy on detentions and interrogation practices, his creation of military commissions, and his secret programs of domestic surveillance. 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 them, claiming that he already possessed all the constitutional and legal authority he needed. The result was decidedly mixed: The courts held parts of his detention practices unconstitutional in *Hamdi v. Rumsfeld*, declared his military commissions plan illegal in *Hamdan v. Rumsfeld*, and there was considerable public outcry against his use of Guantanmo Bay, Cuba, his secret use of torture, and his domestic surveillance program.

In Bush’s second term, however, the President appeared to have learned his lesson. Repeatedly using the language of crisis and urgency, Bush got Congress to legitimate important elements of his detention policies in the Military Commissions Act of 2006 and his surveillance policies in the PROTECT America Act of 2007 and FISA Amendments Act of 2008. Each of us opposed features of

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these acts on the merits. But what cannot be denied is that by going to Congress for expanded authority, George W. Bush was following a hallowed tradition in the construction of American constitutional dictatorship. Congress responded in the usual way, even though, by 2006, Bush faced a hostile Democratic majority in Congress that had been elected in large part to curb his adventures in Iraq and elsewhere.

E. Distributed Dictatorship

Like most Congressional authorizations of discretionary presidential power, Roosevelt’s request for power to save the economy in emergencies has remained in our constructed Constitution, and it bore fruit some fifty years later. Consider this article in the March 16, 2008 New York Times, tellingly headlined "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.

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—given Schmitt’s definition of "the sovereign" as the person who could successfully define something as a "crisis" and then basically do whatever he thought necessary to meet the crisis. (It is surely telling that Wall Street Journal

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economics reporter David Wessel titled his recent book *In FED We Trust: Ben Bernanke’s War on the Great Panic.* But 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 more important about this story is not that the government enjoys discretion to act in emergency circumstances, but that the discretion rests in Ben Bernanke, Chairman of the Federal Reserve. In this economic crisis, George W. Bush, the President of the United States, did not play the role of the “great decider.” A modern political system facing complicated problems calling for deep expertise may require a number of de facto dictators in crisis situations, precisely because the nature of crises can be so different. We call this development *distributed dictatorship.* Although Congress has given Bernanke discretion to save the nation’s financial industries, he may not detain people suspected of swine flu. That power rests in the Centers for Disease Control. And neither Bernanke nor CDC can decide whose e-mails to gather. That power rests in the control of yet another constitutional dictator, for example, the director of the National Security Agency.

Here, as in many other cases, the administrative state overthrows our conventional notions of a dictator as a single strongman at the top, making 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 fall of 2008, President Bush was largely a figurehead, whether by choice or by circumstance. The key executive decisions were made by the Treasury Secretary, the Chairman of the Federal Reserve, and the head of the Federal Reserve’s New York branch.

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79 This point is made especially way by the text of Article 37 of the South African Constitution, which provides 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.” “[T]he life of the nation” may be threatened by distinctly different events that may take distinctly different skills to manage.
The constitutional theory of the Unitary Executive, which began to be touted during the Reagan Administration, is designed to preserve the President’s formal ability to control, oversee and hold accountable all of the members of the Executive Branch. It is no accident that this theory begins to gain currency after the work of the Executive Branch had become so variegated and specialized. President Reagan’s lawyers used it precisely because they felt that the Administrative State was beyond their control and they wanted to try to regain authority, particularly over holdovers who might not have shared their ideological preferences. Moreover, Steven Skowronek has pointed out that the theory arose during a time when the President and Congress were controlled by opposite parties, so that defenders of a strong Presidency viewed increased control over the bureaucracy as the best way to promote their policy goals without interference.\textsuperscript{80}

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 really does have control over the entire Administration is a bit like King Canute’s claim to control the progress of the ocean’s tides.

In practice, of course, the President cannot control many of the discretionary decisions made by lower level officials. And in other circumstances, independent federal agencies and civil service protections prevent the President from immediately firing people who exercise discretion. 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. Second, it uses the theory to try to consolidate power and avoid oversight in certain circumstances. Third, when pressed, it claims that still other features—like independent agencies—are unconstitutional.

III. GOVERNING THROUGH EMERGENCY

A. The President’s Ability to Create Reality

The characteristic pattern of constitutional dictatorship we have identified in this article has continued even after George W. Bush left office. Barack Obama, like George W. Bush before him, has taken advantage of the opportunities presented by emergency. Or, more correctly, he has taken advantage of the President's first mover advantage to define the situation before him as an emergency and to assert that bold, decisive action is necessary to avert the particular sort of crisis that he claims the nation now faces. This feature of the characteristic pattern—the President’s characterization of the situation—is quite important. As President Obama’s Chief of Staff, Rahm Emanuel, famously put it: "You never 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."

In the Roman dictatorship, the Senate declared a state of emergency, which authorized the two consuls to choose a dictator. The dictator could not be held accountable for his actions and enjoyed virtually unlimited powers for a limited time. (Among the limitations were that the Senate would specify the purpose of the dictatorship, that normally the dictator could not leave Italy and that the dictator could not control the treasury, but had to rely on money appropriated by the Senate).

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. 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. 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, thus making it difficult, if not impossible, for Congress to refute his analysis of the situation as involving an emergency; 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

83 Congress’s suspension of habeas in 1862 and selected provisions of the USA PATRIOT Act are notable exceptions.
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. His greatest achievement 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. 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. Thus armed, the President's choice of tactics (conducted largely in secret, including secret domestic surveillance, detention without habeas corpus, torture) and his choice of targets (Iraq) reflected his structuring of the situation, and thus of his own powers: It was a war against the United States that our country would fight led by a Commander-in-Chief over affairs both foreign and domestic.84

In like fashion, Barack Obama has repeatedly portrayed the current economic crisis as the greatest the country has faced since the Great Depression. He does not hesitate to explain that the situation is frightening and should be so. 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.

The declaration of emergency, however, is only the beginning. The greater the crisis, the more severe the emergency, the more the president must do, the more plans he must make, and the more often he must return to Congress, which in turn must continue to ratify his plans. If the members of Congress do not cooperate, the President will go over their heads to the American people, explaining that Congress does not understand the seriousness of the dangers we face and the crisis in which we are enmeshed. Quick, bold, decisive action is necessary. Leaders must lead, others must follow. If this sounds familiar, it should: It is George W. Bush's strategy of September 2001.

Both Bush and Obama have made use of the President's power to define emergency and crisis in ways that shape others' imaginations, and that legitimate the steps they assert must be taken. Bush insisted that he needed vast powers to detain, interrogate and make war; he pointed to Iraq and insisted that it was a continuation of the war against Al Qaeda. Obama insists that he must have an enormous stimulus to jump start the economy, he must take control of major

84 Griffin, The Bush Presidency and Theories of Constitutional Change, supra.
banking institutions to stave off financial meltdown, and he must propose a remarkably ambitious new budget with new programs for infrastructure development, health care, education, energy conservation and environmental protection to sustain economic capacity and global competitiveness in the future. Given the crisis we face, the only way forward, Obama tells us, is to reject Reaganism and embark on a Second New Deal focused on guarantees of health care for all Americans, financial regulation and/or government control of financial institutions, environmental protection, energy independence, and infrastructure investment. Just as Bush identified his crisis to justify the policies he pursued, so Obama has defined his crisis to justify his proposed solutions.

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 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 solutions are the wrong solutions, and 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-- whether Bush or Obama-- uses the formulation and articulation of crisis and emergency in order 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.

Bush and Obama’s Presidencies are examples of governing through emergency: they 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.

Governing through emergency is not the same thing as constitutional dictatorship. The former is a political strategy of characterizing a situation in order to gain political support and realize political reforms; the later 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 is new government spending and new government programs which will have various oversight mechanisms and legal restrictions. Nevertheless, the politics of emergency and the techniques of constitutional dictatorship are often connected. That is because the politics of emergency is a sure fire way to request and obtain the powers of constitutional dictatorship in a particular area of concern.

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 space of time. But this may not be possible if the public tires of crisis, or their 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 sense of urgency to maintain their mandate for change. Either 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 a new, ever larger one to maintain a grip on the public’s attention and support. Not surprisingly, organizing one’s leadership in this way often descends 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 its attention turns to other, more mundane matters, or, even worse, the public will turn on him. One reason the Bush Administration failed was that it lost the ability to maintain the public’s focus on the threats faced by the nation, partly through its success in preventing subsequent terrorist attacks, partly through its incompetence and partly because other issues, like the economy, came to dominate the public’s attention.

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 even more to the point, a resurgence of political opposition) will continually intrude on the Administration’s plans. At some point Presidents must adjust to the responses to their actions, and to realities
that they have not anticipated. Bush and his advisors did not do this successfully. If they had, 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.

Like President Bush before him, President Obama will, for the time being, invoke crisis and emergency as the justification for his programs. He will attempt to define the situation 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 he cannot do this indefinitely. That would require consistently making the situation appear worse than it already is, continually raising the stakes of his 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 did and Roosevelt did, and to lesser extent, what Reagan did. It is what Bush tried to do 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.

The great danger that American politics faces is the politics of emergency will become a continuing cycle. The first president employs it and fails, creating new problems and new difficulties that lead the next president to justify his reforms in terms of emergency, and so on. The danger of emergency politics is that whether it succeeds or fails, it is both seductive and addictive. If the President succeeds, he loses momentum. If the President fails, he may set in motion further problems, leading his successor to resort to the politics of emergency once again.

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 or 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 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. Viewing matters from the perspective of the early 20th 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. 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 to rule from charismatic appeals to the people for the right to rule. Gerhard Casper forcefully drew on Weber’s analysis in a 2006 analysis of the contemporary American presidency, which although drawing on the example of the Bush presidency was by no means limited to it. The 2008 presidential election fits this pattern of plebiscite: opposed candidates offered highly personal and charismatic appeals to the electorate for the right to rule. Indeed, the Obama campaign was 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.

The tendencies Weber identified: toward an increasingly plebiscitarian democracy featuring a powerful executive and a weakened Congress, to describe aspects of the contemporary American constitutional system. Congress’s major functions seem 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

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86 This was the theme of Gerhard Casper’s Inaugural Kronman-Postol lecture at the Yale Law School, in December 2006. See Gerhard Caspar, “Caesarism in Democratic Politics, Reflections on Max Weber,” at http://www.law.yale.edu/documents/pdf/News___Events/CaesarismYLS.pdf.
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concentrated interests. The second is giving Presidents what they want whenever they come calling for additional emergency powers. When added to Congress’s limited and relatively ineffective oversight powers, it is little wonder that the legislature is the least respected branch of the federal government. There has always been an asymmetry between a single President and a multimember two House body 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 20th 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 through the blogosphere or directly, for example, through YouTube. 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. Perhaps in a decade we will 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 an example of mass delusion. But if delusion it was, it appeared to work for four or five years.

87 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 immediately following the September 11, 2001 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 RIGHT MAN: AN INSIDE ACCOUNT OF THE BUSH WHITE HOUSE, (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); PEGGY NOONAN, WE WILL PREVAIL: PRESIDENT GEORGE W. BUSH ON WAR, TERRORISM AND FREEDOM, (2004); JOHN PODHORETZ, BUSH COUNTRY: HOW DUBYA BECAME A GREAT
and succeeded in gaining President Bush reelection 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, 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 democracies, 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 the vices).

At the same time, as we have 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 emergencies situations it does 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 long term result of these two opposed elements of the modern American Presidency is the schizophrenic nature of American constitutional dictatorship. Distributed expertise and secrecy internally combines with a plebiscitarian cult of personality on the outside, a vision of leadership which increasingly has little to do with the actual processes of governance.

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

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President While Driving Liberals Insane, (2004); and Bill Sammon, Misunderestimated: The President Battles Terrorism, John Kerry, and the Bush Haters, (2004).
dealing with domestic affairs.\textsuperscript{88} If so, the question is not whether we will have emergency provisions but how they will be designed, 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, what might be called the further “legalization” of the presidency.\textsuperscript{89} The War Powers Act is a paradigmatic example. 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;\textsuperscript{90} the problem, of course, is that presidential lawyers decided to read these substantive requirements away or, declare them unconstitutional as impinging on the President’s inherent powers as Commander-in-Chief under Article II.\textsuperscript{91}

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. (Since, as we have noted previously, the President himself is not making many of the judgment calls, 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 argumentation. Determined lawyers set upon a course of


\textsuperscript{89} The existence of such legalization since World War II is a major theme of Goldsmith’s important book, though he is quite critical of much of it and suggests instead that we realize that our primary reliance is on the capacities for wise judgment by presidents.

\textsuperscript{90} See 18 U.S.C. § 2340A; Detainee Treatment Act of 2005, 119 Stat. 2680 (McCain Amendment); [Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Geneva Conventions, Common Art. III.]

\textsuperscript{91} [Cite to OLC memos on torture]
finding ways around legal restraints are likely to do so, even if the arguments are very poor. In Federalist 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 repetition.”92 If this is true of people of the very highest character and judgment, it is probably even more true of people who are rash, foolish, or venial.

There is, however, a third objection to increased legalization. It 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. 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.

Lest we be misunderstood, we do not believe that direct legal restraints on executive decision making 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 post-action accountability, and the third are methods of surveillance and oversight of executive action, either before the fact 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 contrast, are able to create their own political base separate from the legislature. Presidents who combine the attributes of head of government with head of state, as in the American model, are best able to make use of charisma to control events and

92 The Federalist 41 (Madison).
American presidents are plebiscitary leaders, and have been 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, with the obvious dangers of dictatorial power or degeneration into military controlled governments. Prof. Cheibub has argued that many political scientists have overestimated the potential dangers inherent in presidential systems, and the debate is far from over. Moreover, 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 wish to repeal of 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, it would provide only a very modest mechanism of accountability; rejection at the polls would occur only at some time in the future, perhaps, practically speaking, three or more years away. Newly reelected presidents might enjoy a “honeymoon period.” 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.) Moreover, in our current electoral college system for selecting presidents, it is quite common for a president to be elected with less than absolute majority of the popular vote (Nixon in 1968, Carter in 1976, Clinton in 1992 and 1996, and George W. Bush in 2000 are the five most recent examples. It is somewhat less frequent for an incumbent to be reelected with less than an absolute majority, but it does happen.). As a result, there might

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93 José Antonio Cheibub: Presidentialism, Parliamentarism, and Democracy (2007).
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 would be 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. The mechanism could
involve some mix of congressional and popular votes of no-confidence. For
example, perhaps Congress, by a 2/3 vote of all members convened as a single
body, could to vote No Confidence and declare the office vacant. 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”). One might go even further and
require that the successor be from the President’s own political party in order 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 elections for both Congress and the
presidency (with the “fired” president presumably free to make his/her 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.
In our present system, by contrast, we must endure disastrous presidents in office
no matter how much damage they may cause until the next scheduled election.

Perhaps equally important, a vote of no-confidence has ripple effects
throughout the political system that 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 effect of the possibility of a no-confidence vote could be twofold: First,
it may give Congress an opportunity to pass legislation regulating the President
without 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 leverage to pass
oversight and mandatory reporting mechanisms and coax later Presidents to abide by them. (One can hardly imagine George Bush following much of Dick Cheney’s advice about how 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 will help explain why we think that a focus on additional legal regulation by itself may be insufficient without attention to larger structural issues. Designing structure differently gives legal rules additional practical force and effect.

One might think even more boldly. Rossiter offers eleven 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.” Although unobjectionable in principle, this suggestion is more difficult to implement than it first appears: 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.

Rossiter’s second suggestion for a well-designed institution of constitutional dictatorship is adopted from ancient Rome: “[T]he decision to institute a constitutional dictatorship should never be in the hands of the man or men who will constitute the dictator.” 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 extraordinary action that may well skirt the boundaries of the law, then one moves

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94 ROSSITER, CONSTITUTIONAL DICTATORSHIP, at 298 (emphasis omitted).
95 Id. at 299 (emphasis omitted).
far closer to the Schmittian conception of the sovereign. 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, of course, as suggested by the South African Constitution, is to require the legislature to vote to activate the executive’s emergency powers for each particular emergency. The 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 1792 and the Insurrection act of 1807 as examples, or the New Deal Era banking statutes that empowered Ben Bernanke in 2008. 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 first arises when we are indeed faced with a crisis that demands functionally immediate decisionmaking, when there simply isn’t 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.”96 Rick Pildes and Daryl Levinson have argued that legislative oversight of an aggressive president, even in a presidential system, may not

operate adequately when the legislature is dominated by the political party of
which the president is the leader. 97 To the contrary, it may be in the electoral
interest of the President’s party to join in suggesting 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 in the hands of the
opposition party, precisely to assure some measure of significant oversight.98
Similarly, Professor David Fontana has also addressed how to constitutionalize
the role of the “party in opposition” in a modern party system.99 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.100 This will 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. Imagine the creation
of a Council of Elders who would be required to declare the existence of a state of
emergency that would presumably trigger the exercise of extraordinarily powers.
In the United States, such a Council might consist, say, of all former presidents or
retired Secretaries of State, former heads of the Joint Chiefs of Staff, former heads
of the Federal Reserve Board, and the like, including, if one wishes, significant
leaders from the private sector who have demonstrated good judgment in times of

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97 Daryl J. Levinson and Richard H. Pildes, Separation of Parties, Not Powers,
119 Harv. L. Rev. 2311 (2006)
98 Id. at __.
99 David Fontana, Government in Opposition, at
http://www.law.northwestern.edu/colloquium/constitutionallaw/Fontana_Govern
ment_in_Opposition.pdf.
100 BRUCE A. ACKERMAN, BEFORE THE NEXT ATTACK (2007).
stress and challenge. Some members of the Council, like former presidents, might serve ex officio, while others might be nominated by the President and confirmed by the Senate (perhaps by a two-thirds vote).

Moreover, we might doubt that a given President, however attractive he or she might be in many respects, would be just the right person to serve as the “constitutional dictator” for a particular kind of emergency. If the problem is staving off a threatened military invasion, one might prefer someone with demonstrated military experience. If, on the other hand, the threat is imminent economic collapse, military experience would presumably be irrelevant, and someone like Ben Bernanke (or another senior economist with wide ranging government experience) might be just the person desired. Rossiter and other admirers of ancient Rome have noted 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 seems to fly in the face of the ideology of the unitary executive. As we have noted, however, this theory is honored more in the breach than in the observance.

V. CONCLUSION

There is a great debate in the West about 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 . . . establishing good government from reflection and choice”--that is, deliberate design-- rather than generating their “political constitutions” from “accident and force.”101 If emergency government is necessary, its institutions and the restraints upon them should be prepared in advance, in order to preserve and adapt republican government through the many crises that nations inevitably face. On the other side, we have Max Weber, 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, commissarial dictatorships were but an unstable temporization that delayed the inevitable reality of sovereignty, the power to declare a state of exception.

101 The Federalist No. 1 (Hamilton).
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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 very 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.