

seem to us calculated, though not intended, to cripple the constitutional powers of the government, and to augment the public dangers in times of invasion and rebellion.



51

PRESIDENTIAL POWERS IN TIMES OF EMERGENCY: COULD TERRORISM RESULT IN A CONSTITUTIONAL DICTATOR?



John W. Dean

At present, the President has opted to exercise only a few of his emergency powers. Under the National Emergencies Act, at this time, he is only utilizing provisions relating to the military.

Will the President choose to use additional powers? It depends on the future. Because we don't know what shape this undeclared war on terrorism will take, we can't know what powers this president—or any successor—might need to cope with the problems of terrorism.

An American President, should he need them, possesses awesome powers. Those powers potentially include what political scientists have described as the powers of a "constitutional dictatorship." No President has ever had to go that far—although they have come close.

Now, however, it is not difficult to conceive of scenarios where terrorist groups, hell-bent on our destruction and refusing to abide by any known rules of war, could employ weapons of mass destruction or bio-terrorism in a manner that could threaten our existence as a nation. What happens then?

Democracy In Crisis: Will It Transform Into Another Form of Government?

Democracy works best in times of peace, when there is debate, compromise, and deliberation in forming governing rules, regulations, and policies. When confronted with a major crisis—particularly one that is, like terrorism, of an unfamiliar nature—the nation will turn to the President for initiative and resolute leadership. If our very existence and way of life are threatened, Americans will want their President to do whatever is necessary.

The history of democratic governments, from the ancient republics of Greece and Rome to the modern states that have replaced earlier totalitarian governments, show that governing by committees, or legislative bodies, never works in times of crisis. Fortunately, our Founders were aware of this when they designed our system.

Alexander Hamilton explained in Federalist No. 70 that the essential nature of the chief executive is his "energy," which "is a leading [element] in the definition of good government. It is essential to the protection of the community against foreign attacks; it is no less essential to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations, which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy."

While our constitution contains no express provision for "emergency" or "crisis" situations, such a provision is not necessary. The U.S. Supreme Court made clear in *Ex Parte Milligan*, following the Civil War, that "the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence." Or as one commentator has added, "self-preservation is the first law of any nation."

Past presidents—principally Abraham Lincoln, Woodrow Wilson, and Franklin Roosevelt—by exercising their powers in time of emergency, have expanded their authority as necessary to meet emergencies they faced. They have, in essence, made the law in times of crisis, not always in the manner envisioned.

Lincoln launched the Civil War unilaterally, without Congressional action, following the secession of seven Southern states. Only later did he obtain Congressional approval. His critics called him a dictator. But he got the job done that had to be done.

Wilson asked for and received near dictatorial powers from Congress when attacks by Germany against American ships and submarines plunged the nation into World War I. He had to raise and equip a large army to fight on foreign soil. To do so, he demanded and received unprecedented new power and authority.

When Franklin Roosevelt was inaugurated in 1933, the world-wide Great Depression had reached its depths. The new President promised action, and during his first 100 days, Congress gave him what he needed to enable him to use federal powers to rout the Depression and rescue every sector of the economy, as well as state and local government, from economic ruin.

Later, following the 1941 attack on Pearl Harbor, which forced the United States into World War II, FDR's exertion of his presidential powers would far exceed anything Wilson or Lincoln had done. Through the strength of his personality, Roosevelt led the nation from that day of "infamy" through battles in Europe, Africa, Asia and the Pacific to total victory.

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While FDR continued to ask Congress for what he needed, he gave them no choice as to whether they would accede. For example, in demanding that Congress repeal provisions in the Price Control Act (prohibiting ceilings on certain food products), he told the Congress: "In the event the Congress should fail to act, and act adequately, I shall accept the responsibility, and I will act." And he reminded the Congress: "The President has the power . . . to take measures necessary to avert a disaster which would interfere with winning of the war."

We've been blessed with strong presidents in times of national crisis. They were men who demonstrated a capacity for leadership, and men who acted undemocratically, but only to preserve our democracy.

We've been fortunate, for the distinction between a "constitutional dictator" and a strong president is remarkably thin, if not non-existent. As Writ columnist Michael Dorf has noted, there are few checks on our Commander in Chief.

Constitutional Dictatorships: What Happens to Democracies in Emergencies

Rossiter looked at the phenomenon of constitutional dictatorships in the aftermath of World War II, for he was concerned that "more rather than fewer periods of crisis" lay ahead. In *Constitutional Dictatorship*, he examines the experiences of crisis governments ranging from the ancient constitutional state of Rome to four modern states (Germany, France, Great Britain, and the United States), focusing on four major crises in the United States: the Civil War, the two World Wars, and the Great Depression.

Professor Albert Sturm, a student of Rossiter's work, has also written of constitutional dictatorships. In a 1949 essay "Emergencies and the Presidency" in the *Journal of Politics*, for example, Sturm found that these "temporary concentrations of power in an executive" for meeting emergencies, which have been "employed by vigorous democracies since ancient times," are necessary for "the preservation of the established system in the face of temporary crisis." Typically, such authority lasts only as long as the crisis, Sturm notes, and it is sanctioned by the "existing constitutional system."

Constitutional Dictatorship: Could It Happen Here?

Of course, the very concept of a "dictatorship" is offensive and inimical to our political thinking as citizens of a democracy. And Rossiter acknowledges that no American government has ever been a true constitutional dictatorship, as that concept is understood by students of government. Rather, he uses the term, in the American context, as "convenient hyperbole"—an exaggeration meant to underscore how many, and how extensive, have been the powers American presidents have necessarily arrogated to themselves in wartime.

Nevertheless, Rossiter, and other students of constitutional dictatorships, do not rule out the idea that one could ever exist in America. Indeed, they raised

questions in the aftermath of World War II that are still relevant today as we find ourselves in an undeclared war, and the first stages of emergency government.

Recall that FDR took the nation from a "limited" national emergency on September 8, 1939, to an "unlimited" emergency by May 27, 1941, and then to total war by December 7, 1941. Anyone who does not believe the war on terrorism will escalate, as well, is in denial.

Rossiter does not address the question of whether Americans could tolerate the undemocratic ways of a constitutional dictatorship. Instead, he is interested in the question of whether we could survive the alternative. He asks, that is, if we could "afford not to resort to undemocratic methods when such methods are essential to the preservation of the state?" To raise the question suggests the answer.

Terrorism Could Indeed Result In A Constitutional Dictatorship

"Constitutional dictatorship is a dangerous thing," Rossiter advises. Such governments are the result of necessity, of the sheer imperative of survival. The greatest danger with such a form of government, and its related institutions and laws, is that they can remain after the crisis has abated.

These are not decisions that should be made by the President and Congress each time the crisis escalates; rather, we should think about them carefully in advance in order to make prudent decisions later.

One need only look at the haste and thoughtlessness with which we have adopted the potentially dangerous USA Patriot Act, most of which Republicans and Democrats alike had earlier rejected, to understand why legislating in the aftershock of terrorism should be avoided if possible.

Our present emergency laws and regulations are a hodgepodge, a patchwork quilt. They respond to precedents from past great crises, and that is wise, but unfortunately these precedents do not contemplate a protracted war on terrorism, or an enemy unlike any we have ever confronted.

Congress has the power to determine whether it wants the American equivalent of a constitutional dictator in the White House. The only way to be certain that we don't make that decision during a crisis, is to revise and codify our emergency laws now—before fear and anger in the aftermath of a possible attack might cause us to make bad decisions, and too easily trade liberty for security in numerous areas.

As I write this column, President Bush has announced that he will address the nation about his plans for restructuring the government for fighting the war on terrorism. None of Professor Rossiter's observations about our history is more chilling than his finding that each national crisis has left the nation a little less democratic than before. With the President's announcement, it is not too soon to consider whether, in fighting terrorism, we really want a constitutional dictator to lead us. I certainly don't, nor do I know anyone who does, but if a future attack comes, and is devastating, the pressure to resort to constitutional dictatorship may be irresistible.



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