

Three Types of Constitutional Crises

Sanford Levinson and Jack Balkin¹

The language of crisis—and “emergency”—pervades American legal discussion these days. But there is nothing new about its use. No country that has engaged in civil war, suffered a variety of economic depressions, and fought two world wars (and several other major conflicts) could fail to test the limits of constitutional government. Whether or not the September 11 terrorist attacks “changed everything,” we have been repeatedly told, especially by those in power that we are living in an emergency situation, with the need for extreme measures and drastic action. One of us (Levinson) has repeatedly invoked the brooding omnipresence of German philosopher (and Nazi collaborator) Carl Schmitt, the most important theorist of “emergency power” and the “necessary” suspension of ordinary constitutional norms. Schmitt, held that “[t]here exists no norm that is applicable to chaos,”² and the Italian philosopher Giorgio Agamben has argued that “the state of exception tends increasingly to appear as the dominant paradigm of government in contemporary politics.”³

One need not look abroad for similar views. James Madison himself wrote in Federalist No. 41 that “[i]t is in vain to oppose constitutional barriers to the impulse of self-preservation. It is worse than in vain; because it plants in the Constitution itself *necessary usurpations of power*, every precedent of which is a germ of unnecessary and multiplied repetitions.”⁴ Madison could easily have quoted John Locke on the idea of “prerogative power” for a similar view, and his copious readings of Roman history had made him altogether aware of the important role played by the institution of the “dictator” in the Roman Republic.⁵

It is, then, a defining characteristic of what might be called the “phenomenology of emergency” that “usurpation[s] of power” appear, in the words of our Constitution, both “necessary and proper.” As a matter of fact, though, few American political leaders have forthrightly confessed to the exercise of genuine “prerogative powers,” which Locke defined as the power “to act, according to discretion, for the publick good without the prescription of the Law, and sometimes even against it.”⁶ No American President has ever admitted to out-and-out suspension of the Constitution because of exigencies of the situation. Instead our leaders have offered controversial interpretations of the Constitution to legitimize their actions. This was true of Abraham Lincoln; it is certainly true of George W. Bush. To be sure, these claims of

¹ This is a work in progress prepared for initial discussion at a constitutional theory workshop at the University of Michigan Law School, October 2, 2007. Although all comments and suggestions are welcome and should be sent to slevinson@law.utexas.edu or jack.balkin@yale.edu, no public use, including quotation, of this paper should be made without the authors’ express permission.

² Carl Schmitt, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE THEORY OF SOVEREIGNTY* 13 (George Schwab trans., MIT Press 1985)(reprinting 1934 ed.), quoted in Sanford Levinson, *Constitutional Norms in a State of Permanent Emergency*, 40 GA. L. REV. 699, 721.

³ Giorgio Agamben, *STATE OF EXCEPTION* 2 (Kevin Attell trans., 2005).

⁴ *THE FEDERALIST NO. 41*, AT 270 (James E. Cooke ed., 1961).

⁵ See, e.g., Clinton Rossiter, *CONSTITUTIONAL DICTATORSHIP* __ (1948).

⁶ John Locke, *TWO TREATISES OF GOVERNMENT* 392-93 (Peter Laslett ed., 1967)(1690).

constitutional fidelity have been widely disputed. Former Supreme Court Justice Benjamin Curtis bitterly accused Lincoln of overreaching in the name of emergency.⁷ And one could literally fill a book with criticisms of the Bush Administration's theory of the President's powers under Article II.⁸

Presidential exercises of power during war have been the most dramatic (and ominous) occasion for arguments about constitutional limits on the exercise of power, but all sorts of situations can generate arguments about the needs of emergency. Did FDR really have the power to suspend the "Gold Clause" that was then part of U.S. paper money?⁹ Did the President and the Congress have the authority to create vast new national powers to meet the economic crisis of the 1930's? Did Richard Nixon have the power to fire Watergate special prosecutor Archibald Cox, who was, after all, a member of the Executive Branch notionally headed by the President, and then to refuse to disclose what was on the Watergate tapes to Cox's successor, Leon Jaworski? Did the Justices of the Florida Supreme Court have the authority to order recounts of disputed ballots in the 2000 election, and did the United States Supreme Court have the authority to tell them they did not? In each situation, opponents of such actions accused the actors in question of "usurpation" and of precipitating a "constitutional crisis."

But what, precisely, made them such? People have evoked the expression "constitutional crisis" so often these days—just as we have engaged in "wars" on poverty, drugs, sexual predators, obesity, etc.—that it is in danger of becoming synonymous with almost any deeply felt sense of conflict or urgency. In this essay we offer a typology of different types of constitutional crises and suggest why the differences between them should matter to students of constitutional law and, even more obviously, anyone concerned with constitutional design.

Crises versus Emergencies

We begin with an important—but easily overlooked—distinction between crises and emergencies. The connection between what might be termed "emergencies in the world" and more localized "crises within the operation of constitutional discourse and governmental institutions" is contingent rather than necessary. That is, one can have "emergencies" without "constitutional crises"; just as easily, one can have a "constitutional crisis" in a context that no one would identify as an "emergency." For example, the (perhaps apocryphal) challenge by Andrew Jackson to John Marshall concerning the enforcement of decisions protecting the Cherokee Nation may be a paradigm instance of "constitutional crisis," but it is hard to view the localized conflict between the government of Georgia and the Cherokee Nation as constituting a national "emergency." One might offer the same analysis with regard to the protracted struggle between Andrew Jackson and Congress over the Bank of the United States; Jackson's Veto Message raises the most exquisite questions of who, if anyone, has "final" authority to interpret

⁷ Cite to casebook.

⁸ For an explication of that theory, see John Yoo, _____. See also Jack Goldsmith, **The Terror Presidency: Law and Judgment Inside the Bush Administration** (2007)

⁹ The Supreme Court basically said he did not, though it found a way to avoid reaching the merits, by a 5-4 vote. See *U.S. v. Perry*, ___ (1934). It is reliably said that FDR was prepared to defy a Supreme Court directive invalidating the suspension.

the Constitution. But the very fact that the Bank was not due to expire until 1836 underscores that no “emergency” generated congressional extension of the Bank’s Charter or Jackson’s vehement veto. More recently, the Watergate scandal precipitated a number of different constitutional crises, but the firing of Watergate special prosecutor Archibald Cox and Nixon’s refusal to surrender the Watergate tapes were not responses to or the result of emergency. And the contemporary potential shootout between Congress and the Executive over the duty of such former presidential aides as Harriet Meirs and Karl Rove to accept the legitimacy of congressional subpoenas to testify about possible misconduct within the Bush Administration has almost no linkage to anything that could be labeled an “emergency,” as distinguished, of course, from controversies surrounding the response to September 11 and the presumed necessity to gather better and more reliable intelligence about future events.

Conversely, not all emergencies involve constitutional crises. Hurricane Katrina involved an emergency but not a threat to the national constitutional order. Whenever political forces in the country are more or less unified in meeting an emergency—for example in wartime, or in dealing with national disasters—there is emergency without constitutional crisis. This may be even more true with regard to economic “emergencies,” such as the current problems involving liquidity. Though some “unitary executive” buffs might object to an independent Federal Reserve Board, there was, otherwise, no suggestion that the intervention of the Fed into the emergency raised any constitutional issues at all, let alone generated a “constitutional crisis.”

Emergencies are *perceptions of urgency* caused by facts on the ground or the way that people perceive those facts. (Emergencies may be precipitated by acts of God, unwise policies, foreign threats, demographic events, new technologies or a combination of all of the above) Constitutional crises, by contrast, are *conflicts about power between persons or institutions*. Constitutional crises arise when there is a dispute, among relevant actors, institutions, or political movements, about whether the energetic agent really has the constitutional and legal authority to act in the way that he or she claims. When that authority is challenged, we have a constitutional crisis on our hands, not because there is emergency or even quite extraordinary action, but, rather, because there is a dispute between constitutional actors about the nature of the emergency and the legitimate way to respond to it, and the two sides, for the moment at least, are determined to fight the question out. “Emergency” and “constitutional crisis” are drawn from two very different systems of discourse.

Thus, when we speak about constitutional crises under Lincoln, we refer always not only to *what* Lincoln did but also to *whom* he did it to, and, perhaps most importantly, *who* objected on legal grounds to his actions. Lincoln’s resupply of Fort Sumter, his failure to call Congress into special session once the South left the Union, his suspension of habeas corpus while Congress was absent, and, most importantly, his emancipation of the Confederacy’s slaves as an emergency measure produced constitutional crises— if crises they were—not because the United States was in peril, but, rather, because not everyone agreed that Lincoln had the powers he claimed at a time in which the United States was, of course, in peril. James G. Randall wrote a famous book about “Constitutional Problems under Lincoln.” For the most part these were problems of overreach by an energetic executive in time of war, but they were only problems when one views them from the standpoint of another constitutional actor who disputed the

executive's asserted claims. Lincoln's unwise trust in the military judgment of George McClellan created a number of significant problems, but no one suggested that *that* was a "constitutional crisis" in the same sense that unilateral suspension of habeas corpus was. From Lincoln's perspective this was not overreach but simply the performance of his constitutional duties to save the Union; from Chief Justice Taney's opposite perspective, it constituted an act of tyranny at least as serious as anything done by George III prior to the American Revolution.. As with the tango, it takes two (opposed) constitutional interpreters to create a constitutional crisis.

Nevertheless, it should now be obvious why claims of emergency often lead to constitutional crises: Claims of exigent circumstances may lead political actors to claim the right to exercise greater powers or—what is frequently the case—to act unilaterally. If no one with any institutional authority to oppose the actor objects, there is no constitutional crisis. More commonly, however, political actors who oppose the claims of power, the claims of emergency—or both—may try to block the claimants, route around them, hold them accountable, or force them to compromise. Both sides to the conflict then justify their actions in terms of their understandings of the legal and constitutional order, producing a constitutional crisis. Thus, although emergency by itself does not create a constitutional crisis,¹⁰ it is a fertile ground in which struggles over power may easily arise.

Yet they need not always arise. In states of emergency—whether real or feigned—someone in the system—usually it is the executive—has the will to act forcefully and energetically to meet a problem, whether or not the problem is accurately described or the solution is the soundest one. If no one—or, perhaps more accurately, no one within the class of "respectable" politicians, jurists, or commentators—objects to the exercise of power to meet the emergency, there is no constitutional crisis, since all the relevant stakeholders who might raise substantial objections are going along. This more or less describes the detention of Japanese Americans and resident aliens during World War II. To be sure, some members of the ACLU objected, as did, apparently, Attorney General Francis Biddle as he gave counsel to the President. And, of course, three members of the United States Supreme Court eventually dissented from the President's policy in 1944. Nevertheless, when Roosevelt signed the relevant Presidential orders in early 1942, there were extremely few "respectable" voices objecting to this display of national power—Biddle's doubts were not conveyed to the public; more to the point, there was no significant opposition in Congress, nor, for that matter, from editorialists or pundits. It counted as an extraordinary personal crisis for the victims of American policy, but not a constitutional crisis for the nation at large.

When claims of emergency do precipitate constitutional struggles for power, often one side or the other may deny the existence of an emergency or deny that it is sufficiently grave to justify what the other side has done. But even when there is genuine disagreement about whether there is emergency, the constitutional crisis may be quite real and it may persist as long as the two sides are at loggerheads. Conversely, everyone can agree that the country faces an emergency but disagree about whether there is a genuine constitutional crisis because actors may have reasons to play up or play down the degree or importance of the conflict between the

¹⁰ See Chief Justice Hughes famous (and somewhat unconvincing) claim to this effect in *Blaisdell*, _____. See Levinson, *supra* n. 2, at (discussing *Blaisdell* as a response to a perceived emergency).

opposing sides. For example, Presidents—who usually have the natural advantages of secrecy, energy, and initiative-- generally try to play down any talk of constitutional crises by insisting that what they are doing is perfectly normal and that their opponents are simply exaggerating their complaints for political gain, while members of Congress, who are on the defensive, and seek to put political pressure on the President, may tend to play up the seriousness of the constitutional stakes. Just as the existence of emergency may depend on perceptions, so too does the requisite severity of political disagreement that would constitute a constitutional crisis.

Crisis, unlike emergencies, can persist over long periods of time, with greater and lesser degrees of urgency. Perhaps most important, the seeds of constitutional crises can exist for many years in the background of political life, becoming salient only when events demonstrate that the existing constellation of political forces is inadequate to meet the needs of everyday governance. The existence of these latent or hidden crises is of the utmost importance to students of constitutional design.

Type One Crises: Declaring a State of Exception

We argue that there are three basic types of constitutional crises, which, for convenience, we will label Types One, Two, and Three. Type One crises are Lockean or Schmittian events: political leaders publicly claim the right to suspend features of the Constitution in order to preserve the overall social order and to meet the exigencies of the moment. They justify the assertion of extraconstitutional powers because of extraordinary events that, they believe, require that they rise to the challenge of the times.

Interestingly enough, no American president has forthrightly and publicly proclaimed such a power. Thomas Jefferson may have come closest. In private, at least, he admitted that he was never really comfortable with the notion that the United States could more than double its size through the Louisiana Purchase without formal constitutional amendment. Jefferson famously wrote, in an 1810 letter, that “[a] strict observance of the written law is doubtless one of the high duties of a good citizen, but it is not the highest. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to the written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with u; thus absurdly sacrificing the end to the means.”¹¹ Jefferson, however, never *publicly* stated his doubts as a *reason* why he had to disobey the Constitution or claimed that he, as President, had the right to make exceptions to the existing legal order. Nor, of course, did he explain why the Purchase would meet stringent tests of “necessity.” The Purchase is best described was an outstanding, almost literally incredible, *opportunity* to gain territory and secure larger borders rather than a act required to meet some imminent threat and “saving our country.” The only “emergency” immediately facing Jefferson in 1803 was the possibility that Napoleon would withdraw his remarkable offer—or even convey it to another power—unless the United States acted quickly. Jefferson’s Secretary of the Treasury, Albert Gallatin, had no qualms about the constitutionality, because he saw it as an unproblematic use of a basically plenary Treaty Power. Jefferson ultimately chose to swallow

¹¹ Cite.

his doubts, and he cautioned one of his allies in Congress simply to remain silent about constitutional difficulties.

Similarly, Abraham Lincoln came close at times to making a Schmittian argument in private correspondence: He once wrote: “I felt that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution, through the preservation of the nation.”¹² Even so, Lincoln never *publicly* admitted that he had the right to ignore constitutional limits on behalf of the good of the country.

As a practical matter, American constitutional history after George Washington’s inauguration has almost no examples of Type One crises. That is because Type One crises require political leaders to admit publicly (and perhaps even proudly) that they are going outside of the law to preserve the country. This should not be surprising. After all, there is certainly nothing to be gained, and much to be lost, politically, by a leader’s admitting to constitutional infidelity. More to the point, our tradition of constitutional interpretation allows such flexibility in making constitutional arguments with a straight face that no President ever need have to admit that he or she is disobeying the Constitution. The modern Presidency is well equipped with a Justice Department and an Office of Legal Counsel usually containing the cream of the finest legal talent in the country, busily justifying the President’s actions. Moreover, commentators and pundits in the mass media are usually only too happy to explain why what the President is doing is both legal and for the greater good of the nation. As we have seen recently, the Bush Administration has repeatedly suggested that it has no duty to obey either domestic or international laws that conflict with its views of its own powers. Administration officials have contended that Article II vests the President with the whole of “the Executive power” (as opposed to the limited and enumerated power “herein granted” to Congress in Article I); this grant contains inherent authority that neither Congress nor international law can override. Why should a President ever admit that he is outside the law when so many people both in and out of the government are so eager to assert that he is well within it?

Indeed, the last Type One crisis in American history may have occurred in Philadelphia in 1787, when proponents of the new Constitution deliberately ignored their limited mandate from Congress and, more importantly, the requirements of Article XIII of the Articles of Confederation, that any amendments be approved by the state legislature of every one of the thirteen states within the Confederation. The later provision effectively gave Rhode Island a veto over any proposed constitutional changes. Arguing that Article XIII did not bind them, Edmund Randolph told his fellow delegates at the Philadelphia Convention on June 16th, 1787 “There are great seasons when persons with limited powers are justified in exceeding them, and a person would be contemptible not to risk it.” Perhaps our favorite quotation remains that of Alexander Hamilton, addressing the Convention on the same day: “To rely on & propose any plan not adequate to these exigencies, *merely because it was not clearly within our powers*, would be to sacrifice the means to the end.”¹³ We have always loved the use of the word *merely*

¹² Letter of Abraham Lincoln to Sen. Albert Hodges, April 4, 1864, in 2 ABRAHAM LINCOLN: SPEECHES AND WRITINGS, 1856-65, AT 585 (Don E. Fehrenbacher ed., 1989), quoted in Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257, 1260 (2004)..

¹³ Quoted in Paul Brest et al., *Processes of Constitutional Decisionmaking: Cases and Materials* 21 (5th ed. 2006).

in this sentence, as if legal limits were capable of being treated like a troublesome gnat to be crushed. Hamilton, a brilliant lawyer, might have been suggesting legal ambiguity through his use of the term *not clearly*; but it would be difficult indeed to show that degree of indeterminacy in Article XIII. At most one could argue that the delegates deemed the Articles had been dissolved (even though they were declared “perpetual”) and that the ratification of the new Constitution was nothing less than a new regime, a political revolution, an important political event that, nonetheless, raises no serious problems of constitutional fidelity. This is the view taken by our friend and colleague Akhil Reed Amar.¹⁴

We are more inclined to agree with another friend and colleague, Bruce Ackerman, that the creation of the Constitution *did* involve some measure of infidelity. Indeed, if one is a devotee of Ackerman’s take on our constitutional history, it is similarly impossible to reconcile the provenance of the Fourteenth Amendment with the requirements of Article V given that the two-thirds support in the House and Senate was secured only by the ruthless exclusion of the elected officials sent to Washington by presidentially-recognized newly-returned states that had, after all, been counted as sufficiently legitimate to support the ratification of the Thirteenth Amendment. Moreover, when it became obvious that the presidentially-supported unreconstructed state governments would reject the Fourteenth Amendment and thus make it impossible to achieve the constitutionally-mandated magic number of 27 (three-fourths of the states), the Republican majority in the “rump” Congress imposed military reconstruction and created distinctly new state governments predicated on black suffrage. Still, unlike the Philadelphia delegates, the Reconstruction rump Congress of 1866 claimed that it was acting in conformity with the Constitution; it justified kicking out Southern Congressmen and Representatives under its authority to judge the qualifications of its members and military Reconstruction its obligation under Article IV to guarantee the states a Republican Form of Government. There might have been emergencies galore, including the insurgency led by the Ku Klux Klan, but under this account there was no “constitutional crisis.”

Type Two Crises: Struggles For Power Within The Terms of the Constitution

If Type One crises involve acknowledgment of a state of exception, or an open declaration of quasi-hostility to constitutional limits, Type Two crises describe a far more familiar kind of political struggle. In a Type Two crisis the relevant actors all proclaim their constitutional fidelity; they simply disagree about what the Constitution requires and who holds the appropriate degree of power. Indeed, in Type Two crises, each side claims that *their opponents* are violating the Constitution and the law, and the two sides fight it out until one or the other yields, or a compromise is reached. Put another way, in Type Two crises, each side accuses the other of fomenting a Type One crisis, while each claims impeccable legal pedigree for its own actions. The crisis ends when one side or the other backs down, and agrees, however grudgingly, to the practical legality of the new legal status quo. In Type One crises, by contrast, the winners and the losers may or may not agree that the winners always acted legally. They may describe the winner’s actions as a necessary response to a state of emergency, as a temporary displacement of legal institutions, as the founding of a new legal regime, or as a full-fledged revolution. Characteristic of Type Two crises is that those who defend their resolution are clear

¹⁴ This is basically Akhil Reed Amar’s argument. See _____. If the Articles had ceased to apply, then there was no “illegality” occurring in Philadelphia or in the subsequent ratification process.

that no laws (or perhaps no laws of importance) were broken. An example is Michael Stokes Paulsen's attempt to proclaim the unimpeachable constitutionality of the Fourteenth Amendment¹⁵ or, indeed, the constitutionally dubious secession of West Virginia from Virginia and its admission, in 1863, to the Union as a separate state,¹⁶ not to mention all of Lincoln's most controversial assertions of executive authority.¹⁷

Type Two crises are conflicts over power among different actors or institutions *within* the constitutional system. They are conflicts made possible by the constitutional system itself and the ambiguities and the play in the joints that the system in practice provides. In a Type Two crisis both (or all) sides make good-faith arguments that the Constitution, correctly understood, empowers them to act as they wish. We see this logic at work in Roosevelt's struggle with the Supreme Court and his Court-packing plan, in Chief Justice Taney's confrontation with Abraham Lincoln over Lincoln's suspension of habeas corpus, in Andrew Jackson's war against the charter renewal of the Bank of the United States or in Jackson's threat to use arms against South Carolina's attempt to nullify the "Tariff of Abominations" in 1829. First-rate lawyers can be found defending the legality of all sides of these controversies. History may declare one of them to have "won," but it is usually difficult to say that the losers lacked any tenable arguments on their side as. Indeed, this may be true even the most fundamental "constitutional crisis" in our history, the attempt by eleven states to secede from the Union. The Southern States had colorable arguments for their right to leave the Union, even if, on balance, one agrees with Lincoln's constitutional opposition to secession (shared with James Buchanan) and his belief that he was empowered to try to prevent it (which Buchanan rejected).

While the opposing parties remain in conflict and the outcome is genuinely uncertain, everyone feels justified anxiety and a vivid sense of "crisis." But normally, Type Two crises are resolved when one side or the other blinks or the two sides come to a mutual agreement or, at the very least, acquiescence and acceptance of the new balance of power. (Sometimes, as in the Civil War, resolution comes on the battlefield, followed by surrender.) In the ordinary Type Two crisis, the constitutional conflict ends and constitutional stability is restored. And because the winners always get to write the constitutional histories, future generations are told that the losers in fact had "wrong" views of the Constitution and the winners the "correct" views.

To be sure, the resolution rarely returns matters to the status quo— in fact, as was true in many of the examples offered above, the victors may significantly reshape constitutional norms. They may even produce constitutional amendments: formal, as with the so-called Reconstruction Amendments, or informal, as with the New Deal. But the central point remains: Type Two crises are caused by ambiguity about who holds power with respect to some issue, an ambiguity that is resolved through the consequent struggle of forces. Or, more precisely, Type Two crises occur when a sufficiently unbiased and detached observer would recognize such ambiguity even if the actual participants in a given crisis loudly insist that there is in fact only one possible reading of the Constitution.

¹⁵ Cite.

¹⁶ Cite.

¹⁷ See generally *The Constitution of Necessity*, *supra* n. 10.

The ambiguity may be latent or it may have been generated by one or more of the parties in order to shift constitutional authority and remake the institutions of government. Whatever its origins, the crisis is usually resolved and constitutional life goes on. In hindsight people tend to say that the crisis ended and “the system worked.” That is how most people think about the Watergate scandal: Richard Nixon did not destroy the tapes, he did obey court orders, and he did voluntarily and nonviolently give up power in August of 1974 as soon as he recognized that his political position was hopeless. Whether or not Nixon’s behavior leading up to his resignation was illegal and even criminal, most people are relieved that the crisis ended with such a smooth transition of power, so that, in Gerald Ford’s memorable words, “our long national nightmare ha[d] finally ended.”¹⁸

Type Two crises feature a collision of forces, both material and intellectual. One side or the other pushes the limits of their power, hoping to establish that they have the right to do what they propose to do. To this end, they may engage in what Mark Tushnet has delightfully called “constitutional hardball”—stretching the rules (from the perspective of outsiders) to gain a strategic advantage or to force their adversaries into political submission. Both South Carolina’s secession and Richard Nixon’s declaration that he had no legal duty to surrender the Watergate tapes to the Special Prosecutor sought such a *fait accompli*.

Tushnet’s notion of “constitutional hardball” describes practices that seem to transcend settled expectations of what is permissible within the constitutional order. Defenders of hardball tactics claim that they are doing nothing illegal or unconstitutional-- at most they are pushing the envelope or working in areas where questions of legality are unsettled-- while their detractors argue that they are blatantly subverting legal and constitutional norms. When constitutional hardball leads encounters political resistance, it can easily become a Type Two constitutional crisis.

The history of the Bush Administration is an excellent example of how constitutional hardball is practiced and the different reasons why politicians might practice it. The purpose and meaning of these hardball tactics has changed as the fortunes of the Administration have waxed and waned. Note that not all of these practices precipitated significant constitutional crises because for large portions of the Bush Presidency his party controlled all of the levers of power.

We might divide these practices into three categories. The first are acts used to gain power. The second are acts used to attempt to transform the government into a new constitutional order. The third are acts designed to head off accountability following the failure of the attempt.

The first acts of constitutional hardball were by supporters of Bush to help get him into

¹⁸ Compare Nixon to Bush. Nixon made rather aggressive claims about executive power quickly backed off when the courts went against him, even though this meant the end of his Presidency. The reason is partly that he respected the courts, but also that he had lost virtually all of his political support and was facing a strong likelihood of impeachment. George W. Bush also made aggressive claims, perhaps even more aggressive than Richard Nixon, but he has so far felt no political need to surrender, because he is confident that he cannot be impeached and removed. Hence he has proved more stubborn and has essentially played a waiting game until the end of his Presidency.]

the White House. Some of those tactics-- purging voters from the rolls-- were actually illegal under the federal Voting Rights Act. Other acts of constitutional hardball, like the Supreme Court's decision in *Bush v. Gore*, were based on implausible arguments that maintained the outward forms of law. Five members of the U.S. Supreme Court, who did not know what the outcome of the Florida recounts would be, stopped those recounts on questionable legal grounds effectively ensuring a Bush victory. Bush's supporters won this first round of constitutional hardball. Al Gore conceded, and Bush took office.

Once in office, Bush engaged in a second round of constitutional hardball to create an expanded conception of Presidential power and to secure a lasting Republican majority organized around the need to fight what the President at one point termed the "Global War on Terror." At least in the views of his political opponents, he pushed the legal envelope repeatedly following 9/11 in an effort to expand executive power and limit Congressional and judicial oversight and executive accountability. The list of examples is seemingly endless. The most obvious examples are, in no particular order, (1) the Administration's fetish with secrecy, (2) its use of Presidential signing statements to signal to executive branch officials to disregard certain features of law outside of public view, (3) its claim that the President has the power to round up people (including American citizens) and detain them indefinitely without any of the protections of habeas corpus or the Bill of Rights, (4) its domestic spying operations, (5) its detention and interrogation practices, including its system of secret CIA prisons, (6) its theory that the President does not have to obey Congressional statutes when he acts as Commander-in-Chief, and (7) its alternative theory that the September 18th, 2001 Authorization for the Use of Military Force gives the President very broad powers to detain, interrogation, and engage in surveillance notwithstanding laws apparently to the contrary.

These acts of constitutional hardball were designed to transform the constitutional order to a new regime that Bush and his supporters hoped to spearhead. This was a constitutional regime with an expansive (some would say limitless) conception of Presidential power to combat a potentially endless war on terror. The President justified his assertion and seizure of new powers through the rhetoric of war and emergency, but in fact the crisis had no real ending point. It was, in effect, the declaration of a permanent state of emergency. This state of emergency required and justified a wide range of incursions on civil liberties and human rights. Not the least of these was the suspension of habeas corpus, a suspension to which, by the way, a supine Congress readily assented. These acts are closest to Tushnet's account of why government actors engage in constitutional hardball-- they want to create a new constitutional regime that lasts for many years. Had the Iraq war not failed miserably due to the incompetence of President Bush and members of his Administration, he might well have succeeded. If he had succeeded, his actions would have been blessed by history. People would have made excuses for them, or, better still, these actions would become correct constitutional practice in the new regime. A successful George W. Bush would have created what one of us (Balkin) calls a "Winner's Constitution-- the way the substantive scope of the Constitution-- and the history of its development-- appear in light of a successful transformation.

A "winner's Constitution" is a Constitution influenced and shaped by successful ventures judged successful by the American people, leading to new constitutional constructions and

constitutional interpretations, and a new constitutional common sense. That is often how the Constitution changes. People fight with each other about how to interpret it in moments of crisis (which are also moments of opportunity), events take their course, and one side or the other ultimately gives way in the face of public opinion. Mark Graber has argued that this is how the constitutional dispute over Texas' admission to the union was finally settled, as well as the legitimacy of the Bush Presidency following *Bush v. Gore* and the September 11th attacks. As with Texas or *Bush v. Gore*, the settlement may be almost instantaneous, because there is no practical alternative short of armed revolution; in other instances, as with the legitimacy of *Roe v. Wade* or of the reach of presidential power, the controversy (and thus the perceived sense of “crisis”) may continue for decades.

The third round of constitutional hardball—and a third round of constitutional crises--began in the wake of the Democratic takeover of Congress and long-delayed investigations into the Bush Administration's activities during its first six years. The major battleground in the third round is likely to be executive privilege and executive secrecy. The President now pushes the constitutional envelope by offering an expansive theory of executive privilege. He asserts, among other things, that he has the right to order individuals who no longer work for him to refuse to testify before Congress. And he defends his domestic surveillance program—and, in effect, any other surveillance program that may be disclosed to the public—on the grounds that any litigation challenging its legality is barred by the doctrine of state secrets.

This third round of constitutional hardball occurred because previous acts of constitutional hardball did not successfully cement a new constitutional regime that would maintain Bush's party or his political agendas in a dominant position for the foreseeable future. He was not able to bootstrap actions of questionable legality into widespread acceptance and thus enjoy the benefits of winner's history and winner's constitutions. Instead, features of his constitutional vision have been decisively rejected, his party has lost control of Congress and there is a very significant chance that his party will suffer for his miscalculations during the next few election cycles.

At this point in Bush's Presidency three things matter above all others. They motivate this final round of constitutional hardball: The first is keeping secret what the President and his advisers have done. The second is running out the clock to prevent any significant dismantling of his policies until his term ends. The third is doing whatever he can proactively to ensure that later governments do not hold him or his associates accountable for any acts of constitutional hardball practiced during his term in office.

If the NSA domestic surveillance program and the Torture Memos were examples of the second round of constitutional hardball, the commutation of Scooter Libby's prison term and the refusal of various aides to testify before Congress are examples of the third round (though, as we shall see below, the Libby commutation and much-expected pardon as Bush leaves office, is exemplary of what we term a Type Three crisis inasmuch as there is no serious controversy about Bush's power to offer the commutation/pardon).

Although his Presidency now seems to be a failure, Bush's third round of constitutional

hardball may be every bit as important as the first two. That is because if Bush is never held accountable for what he did in office, future presidents will be greatly tempted to adopt features of his practices. If they temper his innovations and his excesses only slightly, they will still seem quite admirable and restrained in comparison to Bush. As a result, if Congress and the public do not decisively reject Bush's policies and practices, some features of his Presidency will survive in future Administrations. If that happens, Bush's previous acts of constitutional hardball will have paid off after all. He may not have created a new and lasting constitutional regime, but he will have introduced long-lasting changes (we would say weaknesses and elements of decay) into our constitutional system.

As the two of us have noted elsewhere, the next President, whoever he or she will be, will probably try to maintain many of George W. Bush's innovations as he or she continues the development of the National Surveillance State. The next President will do so because Presidents always think they need as much power as they can get to protect the nation and promote its interests. That is, after all, one of the things that Presidents are supposed to do. (Another thing they are supposed to do is take care that the laws be faithfully executed, but let's not quibble about the details).

Even if George W. Bush's legacy is decisively rejected, by both liberals and conservatives alike, we will have a winner's Constitution. That is one way that the Constitution-in-practice (as opposed to your or my particular vision of the ideal Constitution) tends to stay in sync with the center of political power in the United States. The next President will surely castigate and distance him or herself from parts of what George W. Bush and his Administration did. That will be partly how he or she gets elected. The more interesting question to consider in the years to come will be what parts of Bush's innovations the next President will quietly continue.

Type Three Crises: Failures of Constitutional Design

Type Three crises present a very different problem than Types One and Two. Type Three crises emerge when we believe that all relevant actors are complying with their widely accepted constitutional roles, but we recognize as well that the Constitution, even (or especially) as properly construed, offers no appropriate resolution to a political crisis of the day or, even worse, leads to a terrible result. If Type Two involve a clash of opposed constitutional interpretations, Type Three involve failures of constitutional structures that the relevant actors do not dispute or attempt to escape. One might find a Type Three crisis in the actions (or, more properly, non-actions) of Lincoln's immediate predecessor, James Buchanan, widely thought to be one of our worst presidents. In the period following Lincoln's election in November 1860, Buchanan sat idly by while state after state in the South seceded from the Union. He believed, and strongly argued in his final State of the Union message to Congress, that the seceding states had violated the Constitution. However, he also believed that the Constitution did not give the national government the power to prevent secession by using force. As Buchanan eloquently put it, "The fact is that our Union rests upon public opinion, and can never be cemented by the blood of its citizens shed in civil war. If it can not live in the affections of the people, it must one day

perish. Congress possesses many means of preserving it by conciliation, but the sword was not placed in their hand to preserve it by force.” Buchanan’s views of his own constitutional power reduced him to the role of an onlooker, unable to do anything more than present altogether rational arguments why the Southern States were mistaken in believing that Lincoln’s election truly threatened them.

This was the opposite of a collision of forces. Rather, it was a President who sincerely believed that the Constitution did not allow him to deal with the most urgent problem facing the nation. However much there may have been a genuine emergency, there was nothing he could do to forestall its consequences beyond urging the political leaders of the seceding states to change their minds. Both Buchanan and his Southern adversaries agreed that the Constitution afforded him no remedy. From Buchanan’s perspective, to act would foment a Type One crisis, for he would have to go well beyond his constitutional powers. One might think, however, that if there was ever an occasion for a Schmittian (or Lockean or Hamiltonian) understanding of presidential prerogative, it was the secession crisis of 1860-61. Note as well—and we shall return to this point in a moment—that the existence of this Type Three Crisis assumes that no other reasonable interpretation of the Constitution was possible. If Buchanan had different views about secession and acted to halt the exit of Southern states, he would have generated a Type Two crisis, which is exactly what happened after Abraham Lincoln took the reins of power.

For a second example of a Type Three crisis, consider an incompetent but mentally sane President serving in his second term and who has done nothing that a “respectable” lawyer would describe as the commission of a “high crime or misdemeanor.” Even though his continued presence in the White House causes the country irreparable harm in loss of life and treasure, there is nothing anyone can do to get him to leave beyond editorial imprecations to resign. The fixed constitutional calendar and the provisions on impeachment mean that the country must suffer through his feckless incompetencies until the next election--at which point they must wait still another ten weeks for the inauguration of a new Chief Executive!

Yet another example of a Type Three crisis concerned the effects of the three-fifths rule for representation in Congress, which gave the South extra representation in the House of Representatives and extra votes in the Electoral College. This “slavery bonus” in the electoral college explains why Thomas Jefferson and not John Adams was elected to the presidency in 1800, with remarkable consequences for the development of American politics.¹⁹ All of this helped the South dominate the federal government throughout the antebellum period and helped to turn the United States into what Don Fehrenbacher has termed a “slaveholder’s republic.”²⁰ As Mark Graber has argued, the fact that the Constitution requires that every member of Congress be elected locally means that political issues that have strongly regional dimensions may become especially hard to resolve, as election-seeking politicians have very incentive to focus on the presumptive interests of their constituents and forego any particular concern about a wider national interest. Thus, Graber argues, the Constitution itself helps to account for the ever-growing regional intransigence leading to 1860 and the inability to engage in compromise. (One might, of course, applaud this inability if the alternative was avoiding war and maintaining

¹⁹ Cite to Garry Wills or Paul Finkelman.

²⁰ Cite.

slavery,²¹ but this, of course, requires us to address another Type Three Crisis, which is precisely the fact that the 1787 Constitution, correctly understood by almost all “respectable” interpreters, did indeed require significant collaboration with slaveowners.)

Nor are the consequences of regionalism absent in contemporary politics. Even today the Senate’s malapportionment and overrepresentation of sparsely populated states and rural areas prevents the United States from reaching sensible policies on energy and agriculture, [as the wheat- and –corn states of the prairie and upper Midwest (the Dakotas, Iowa, Minnesota, Nebraska, and Kansas), with less than 5% of the national population, have 12% of the voting power in the Senate. As much to the point, as political scientists Francis Lee and Bruce Oppenheimer as demonstrated, because these small states are generally more homogeneous in their economies than are large states, senators are more likely to concentrate their energies on bringing home very specific bacon than are senators from large, far more heterogeneous, states with complex, and often conflicting economic interests.

As the above examples suggest, Type Three crises are brought about by features of constitutional structure whose defects are magnified by changing circumstances. What might have been a useful or merely anodyne feature of the constitutional system at one point may become a serious problem in a new context. In this light, consider the consequences of the fact that the Constitution assigns the power to veto legislation to the President. Although there was some controversy at the beginning whether this veto power included simply “policy-based” disagreement, as against the President’s belief that a given statute passed by Congress was unconstitutional, there is no live controversy today about the President’s ability to negate the wishes of majorities of both houses of Congress by vetoing any and all legislation. A low-level “crisis” about the scope of the presidential veto power has long since been “settled” in favor of what is basically a presidential plenary power. What this means is that the Constitution in effect establishes a *tricameral* structure for legislation inasmuch as the President, because of the very threat to veto disliked legislation, becomes a key player in fashioning any legislation in which he or she has significant interest. Especially when the national government is divided between the two bitterly-opposed major parties, it becomes next to impossible to pass substantial legislation treating items of significant concern to most Americans (and not only Americans). That overwhelming majorities of Americans today have little regard for President or Congress—and believe that the country is headed in the wrong direction—might well be regarded as a genuine “constitutional crisis.”

Type Two crises are disputes between actors over their relative power. Type Three crises are problems with the Constitutional structure itself, problems that actors may not even notice because they are background features of the political system that all sides take for granted. Moreover, to the extent that our political culture is one defined by a significant measure of “constitutional faith” and Madisonian “veneration” for the Constitution,²² it may become particularly unlikely that the citizenry would blame the Constitution itself for any felt degrees of anxiety about the capacity of our political system to respond adequately to great issues of the day. Instead of focusing on the implications of the structures of governance established by the Constitution, it is far easier to blame “lack of leadership,” the “absence of sufficient political

²¹ See, e.g., Jack Balkin and Sanford Levinson, *Thirteen Ways of Looking at Dred Scott*, ____

²² See Sanford Levinson, *CONSTITUTIONAL FAITH* (1988); ____

will,” or, as in a recent book breathlessly titled *The Genius of America: How the Constitution Saved Our Country and Why It Can Again*,²³ unfortunate “attitudes of the men and women” who populate those structures. No doubt we could use better leadership, more vigorous will (in behalf of beneficial programs), and more conformity to what Eric Lane and Michael Oreskes vaguely and somewhat incoherently refer to as the proper “constitutional conscience.” But one should note as well that the Constitution often operates as a stacked deck against quite capable political leaders who are able to summon up considerable political will and possess exemplary dispositions to respect constitutional norms, but this is still not good enough to overcome the remarkable number of “veto point” that the Constitution places in the way of achieving results.

Although there may be widespread feelings that “the country needs to do something,” the proffered suggestions will only rarely, if ever, take cognizance of the extent to which the Constitution itself generates obstacles to what it is that may need doing. It is worth noting, incidentally, that these obstacles are altogether different from interpretive dilemmas posed by the classical mantra that ours is a “limited government of assigned powers.” For better or worse, the meaning of the New Deal revolution is that Article I, Section 8 is little more than what Madison called a “parchment barrier” with regard to establishing genuine limits; the same thing may be said, perhaps, about the Bill of Rights. Thus constitutional interpretation mavens may well agree that the Constitution “allows” Congress to engage in sweeping changes regarding, say, the provision of medical care (if one is on the left) or the closing off of American borders (if one is on the right). Our point is that no such changes, in these and many other policy areas, are likely to take place because we have a system tilted toward gridlock. Such legislation as passes is often likely to be “symbolic” rather than providing effective solutions to deep problems.

Type Two crises feature a dispute about who is playing by the rules, a dispute that continues until one side or another gives ground. In Type Three crises, by contrast, the problem is with the rules themselves as everyone (probably correctly) understands them. If everyone plays by the rules, as everyone expects and plans to do, the Constitution will fail us. In Type Two crises, it is by no means foreordained that the Constitution will fail and the crisis will not be resolved satisfactorily. Indeed, if the Constitution is well designed, a Type Two crisis will usually be resolved, albeit with a shift in understandings and authority. The system, as they say, will have worked. In Type Three crises, the system is not part of the solution. It is part of the problem. It suggests the potential for what Mark Brandon has labeled “constitutional failure,” attributable not to the defects of the citizenry but, instead, the defects of the Constitution itself. To paraphrase Shakespeare, the fault, dear Americans, may lie not in the stars or “we the people” and our leaders, but within the Constitution.

Transformations Between Different Types of Crises

We have described these three models for analytical clarity, but in practice one kind of crisis can turn into another. The reasons often have to do with the assumptions packed into each

²³ Eric Lane and Michael Oreskes, *The Genius of America: How the constitution Saved Our Country and Why It Can Again* 181 (2007).

model.

Constitutional crises involve gaps or disjunctions between people's recognition of problems, their political will to meet them, and their beliefs about constitutional power. In Type One crises, actors recognize serious problems and have the political will to resolve them but they believe that they have only limited constitutional power to realize their goals within the constitutional scheme. Hence they self-consciously exceed what they believe to be their constitutional authority in the name of the state. As with James Madison in Federalist #40, they are prepared to seek the "approbation" of the people that would, if given "blot out antecedent errors and irregularities."²⁴ Almost inevitably, such arguments take on a "plebiscatory, perhaps even Caesarist, dimension, as leaders seek absolution from a surrounding public that is presumed, at the end of the day, to treat constitutional fidelity as secondary to the achievement of instrumental goals, whether national security, economic growth, or the reinvigoration of the national *volk*.

In Type Two crises, at least one party sees a problem, has the political will to resolve it, and believes that they have the constitutional powers to do so, but their opponents disagree. The crisis is resolved when one side or the other changes their minds about the powers that either they or their opponents possess. Here everyone is presumed to care genuinely about the Constitution and, indeed, to exemplify this care by being bitterly critical of those with presumptively "wrong" views as to what the Constitution really means. Perhaps this is best illustrated in sometimes vituperative criticism directed at the Supreme Court. The standard trope of such criticism is that the judges have misinterpreted the Constitution, which, correctly interpreted, would provide sufficiently happy endings to the concerns of the day. It is far easier to believe that judges have gone on an anti-constitutional rampage than to admit that they have correctly interpreted what may then be revealed as a deficient, even "evil," Constitution.²⁵

Type Three crises occur in two situations. In the first situation, all the relevant actors believe that the Constitution does not provide tools for actors to solve problems and nobody has the political will to abandon those limits as they understand them. This is the situation during the last years of the Buchanan Administration. In the second, the rules-- as all relevant actors understand them-- are leading the country toward greater and greater difficulties but nobody recognizes the problem because they are too invested in maintaining and exercising the powers the system gives them. They accept the background rules, in spite of the fact that they are causing their situation to worsen, until they reach a point of crisis—a conflict that comes from playing by the rules, not against them. This is the sectional crisis created by the antebellum Constitution's rules for representation. Our country had managed to avoid driving off the cliff before (with the various "compromises" of 1820 and 1850); we were unable to recognize the limitations of our constitutional structure and lacked an easy way to change the basics of the political system to resolve the crisis short of war.

If the assumptions behind these models of constitutional crisis change, one kind of crisis can turn into another. For example, replace Buchanan with Lincoln, and a Type Three crisis

²⁴ Quoted in Brest et al. 21 (5th ed. 2006).

²⁵ See Balkin and Levinson at ____.

becomes a Type Two crisis, because the new President thinks that he has the power to stop secession.²⁶ Even so, the “secession winter” of 1860-61 featured a full-scale Type Three crisis generated by the 1787 Constitution’s delaying the inauguration of the new president until March 4 and thus maintaining in power a completely discredited incumbent between his de facto repudiation in November for an additional three months. Perhaps this made sense in 1787; it was strikingly dysfunctional during a period during which the country was in the midst of dissolution and strong and decisive action was needed. Another Type Three crisis was generated by the old Constitution’s provisions that the new Congress elected in November 1860 would not have to meet until December 1861. Although Lincoln in fact called it into special session on July 4, 1861, he could have called it into session even earlier. His failure to do so essentially gave him the powers of a dictator, which he certainly used, to make decisions without having to worry about any congressional second-guessing or oversight. As Clinton Rossiter wrote, Lincoln’s “arbitrary” decision led to “[t]he simple fact that one man was the government of the United States in the most critical period in all its 105 years, and that he acted on no precedent and under no restraint, makes this the paragon of all democratic, constitutional dictatorships.”²⁷ Rossiter also notes that “Carl Schmitt cite[d] Lincoln as “a *kommisarischer Diktator*, one who suspended the Constitution in order to save it.”²⁸ Ironically, the strongest argument against Schmitt is to say that Lincoln was wholly within his constitutional power to refuse to call Congress back into earlier session and then to agree with Michael Stokes Paulsen that he indeed had authority derived from his oath of office to take all of the actions he did. The point is that a “constitutional dictatorship” is no less a “dictatorship,” and one might count it as a Type Three crisis that our venerated Constitution not only does not prevent dictatorship, but, at times, actually facilitates such an ominous development.

Some of the more “paranoid” opponents of the 1787 Constitution focused on the presidential pardoning power and spun out accounts by which a president would engage in dangerous cabals against the public interest and then use his pardoning power to make sure that none of his confederates would be held accountable. The pardon of Scooter Libby would not surprise these hyper-suspicious ancestors, and it is a perfect example of a Type Three Crisis. To be sure, it is a relatively low-scale one as crises go, but no one should take any pride in the ability of a President to exempt criminal confederates from punishment for acts taken in ostensible service to the President’s agenda.

Sometimes Type Three crises can be recognized and corrected. Although it took a full two generations after Lincoln’s inauguration, Congress did finally propose, and the states ratified, the Twentieth Amendment, which assured that the newly-elected Congress would be in session during speeded-up presidential inauguration. But almost 80 years after that Amendment, we should recognize more than we do the importance of the fact that a repudiated

²⁶ [Use the NSA domestic surveillance controversy as an example of how different types of constitutional crises might transform into each other over time? Bush says that if Congress prevents him from acting we will be attacked. That would make the crisis Type III. However, Bush also claims that he can act unilaterally despite what Congress says. So in fact the crisis is Type II. However, Congress says it is Type I, that Bush is going outside of FISA.]

²⁷ Clinton Rossiter, *Constitutional Dictatorship* 224 (2d ed. 2002).

²⁸ *Id.* at 228 n. 15, citing *Die Diktatur* 136.

incumbent continues to have the full legal authority of the presidency for ten, even if no longer for almost sixteen, weeks. Consider what might have happened, for example, had John Kerry in fact won the 2004 election on the basis of a rapid withdrawal from Iraq and the rejected incumbent George W. Bush had exercised his authority as Commander-in-Chief to send more troops to that unhappy country. Would this have been merely a “political crisis” or exemplified a full-scale Type Three “constitutional crisis”?

These examples suggest an important point about how constitutional systems evolve over time. Type Three crises occur because people share basic understandings about the rules and have insufficient incentives or abilities to abandon them or interpret them in different ways. But necessity is the mother of invention, and some Type Three situations become Type Two crises because political actors usually have incentives to reimagine and reconceptualize their powers to their perceived advantage. Once this happens, disagreements about the rules may emerge where none existed before. Thus, the continual emergence of new problems combined with continuous incentives for actors to reinterpret their own powers to their advantage may produce a series of Type Two crises that will be resolved when the losers accept the winner’s new conception of constitutional order. By repeatedly turning potential Type Three crises into Type Two crises through artful reinterpretation, the American Constitution system may have worked itself out of any number of potential dead ends. Problems created by constitutional regimes give incentives for actors to engage in creative interpretations, which in turn, generate Type Two crises that lead to resolutions that change the rules, leading to new problems down the road, and new Type Two crises, and so on. If this is an accurate picture of how the constitutional system evolves—turning potential dead ends into uncomfortable but resolvable conflicts—it suggests how very unique were the sectional disputes that led to Civil War. They were a set of problems that could not be resolved through this process of creative interpretation, crisis generation and crisis resolution.

For these reasons, it may often be quite difficult to know whether one is genuinely in a Type Three situation—that is, a genuine failure of the constitutional system. The real fault may lie in lack of political will, in misjudgments about the nature of the dangers facing the country, or in mistaken assumptions about constitutional powers. Type Three situations may become Type Two situations for any number of reasons. First, the set of relevant political actors may change and new actors may appear (or become relevant) who disagree with the previous consensus and believe they have constitutional powers. Deciding whether the problem consists of the background rules or a dispute about the meaning of the rules depends on what we think are the boundaries of reasonable construction of the rules. When the rules are subject to reasonable dispute, the problem may not be the rules themselves but lack of political will.

Second, if one waits long enough, potential Type Three crises may simply resolve themselves. For example, incompetent presidents eventually must leave office. If the President has not done too much irreparable damage, a new President and a new Congress will repair what was broken and remedy what was left undone. The crisis remains Type Three only if time was of the essence and the incompetent President managed affairs so badly that the political situation has become incorrigible. This suggests that the temporal framing of a crisis may be quite important in deciding whether there is a crisis, and if so, what sort of crisis it is.

But, of course, there is a third possibility, that there is no timely escape from the “iron cage” establishing by the Framers in 1787 and that one must therefore come fully to grips with the fact that the Constitution, far from being a “cure” (at least when correctly interpreted) for what ails us as a society, is in fact the source of our ills. One might well believe that we are currently in a Type Two constitutional crisis with regard to delineating the extent of executive power. But we should leave open the possibility that we are increasingly faced with a Type Three crisis as well. It may be that George W. Bush’s presidency is merely an exaggerated symptom of a long term trend of an increasingly powerful Plebiscitarian Presidency that rules through secrecy and surveillance. Given changes in media technology and the technologies of warfare, our country may be on a downward slide toward Caesarism, with Presidents who claim greater and greater unaccountable authority in order to fight a never ending war against a tactic—terror.

Those who ponder the Constitution most seriously might be able to discern the potential for Type Three crises. Perhaps the most notable example of such insight is provided by Kurt Godel, perhaps the greatest mathematical logician of the 20th century, with regard to his becoming a citizen of the United States after leaving Germany in the 1930’s.²⁹ Albert Einstein and Oskar Morgenstern accompanied Godel to Trenton for the event. Godel had prepared very carefully for his interrogation as to his knowledge of the Constitution and, as required by statute, his “attachment” to the “principles of the Constitution.”

On the day before the interview G told Morgenstern that he had discovered a logical-legal possibility of transforming the United States into a dictatorship. Morgenstern saw that the hypothetical possibility and its likely remedy involved a complex chain of reasoning and was clearly not suitable for consideration at the interview. He urged G to keep quiet about his discovery.

The next morning Morgenstern drove Einstein and G from Princeton to Trenton. Einstein was informed; on the way he told one tale after another, to divert G from his Constitution-theoretical explanations, apparently with success. At the office in Trenton, the official in charge was Judge Philip Forman, who had inducted Einstein in 1940 and struck up a friendship with him. He greeted them warmly and invited all three to attend the (normally private) examination of G.

The judge began, 'You have German citizenship up to now.' G interrupted him, 'Excuse me sir, Austrian.' 'Anyhow, the wicked dictator! but fortunately that is not possible in America.' 'On the contrary,' G interjected, 'I know how that can happen.' All three joined forces to restrain G so as to turn to the routine examination.

In context, of course, this is simply an amusing anecdote. But, of course, Godel might also have been on to something very important, and future events might have made his

²⁹ Hao Want, *Reflections on Kurt Gödel*, p. 115f, available at <http://www.sm.luth.se/~torkel/eget/godel/constitution.html>, citing H-Zemanek and E.Köhler, *Elektronische Rechenanlagen*, vol. 5, 1978, pp. 209-211).

concerns more worthy of serious discussion, especially once there arise real incentives for clever lawyers to follow “logical” arguments to their full extent in behalf of the interests of their clients, including power-seeking presidents of the United States..

Lawyers may be especially astute at offering solutions to Type Two crises, inasmuch as they always involve conflicting interpretations of the Constitution. It is totally unclear that lawyers who are taught only the arts of constitutional interpretation, and not the implications of constitutional design, have much to contribute with regard to the solutions of Type Three crises. Among the implications of this last sentence, of course, is that we may be facing a crisis with regard to the design of our “constitutional law” curriculum within the legal academy inasmuch as it focuses exclusively on Type Two crises, even with occasional glances at Type One crises, while completely ignoring the dangerous potential (and, some would argue, reality) of Type Three Crises.