

# *Constitutional Dictatorship*

*Crisis Government  
in the Modern Democracies*

*Clinton Rossiter*

*With a new introduction by  
William J. Quirk*

*Transaction Publishers  
New Brunswick (U.S.A.) and London (U.K.)*

TO  
EDWARD S. CORWIN  
AND  
ROBERT E. CUSHMAN

*In Alexander Hamilton's words  
"The ablest adepts in political science"*

# *Constitutional Dictatorship*

*Crisis Government  
in the Modern Democracies*

*Clinton Rossiter*

*With a new introduction by  
William J. Quirk*

---

*Transaction Publishers  
New Brunswick (U.S.A.) and London (U.K.)*

New material this edition copyright © 2002 by Transaction Publishers.  
Originally published in 1948 by Princeton University Press.

All rights reserved under International and Pan-American Copyright Conventions. No part of this book may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopy, recording, or any information storage and retrieval system, without prior permission in writing from the publisher. All inquiries should be addressed to Transaction Publishers, Rutgers—The State University, 35 Berrue Circle, Piscataway, New Jersey 08854-8042.

This book is printed on acid-free paper that meets the American National Standard for Permanence of Paper for Printed Library Materials.

Library of Congress Catalog Number: 2002070330

ISBN: 0-7658-0975-3

Printed in the United States of America

Library of Congress Cataloging-in-Publication Data

Rossiter, Clinton Lawrence, 1917-1970.

Constitutional dictatorship : crisis government in the modern democracies / Clinton Rossiter ; with a new introduction by William J. Quirk.

p. cm.

Originally published: Princeton, N.J. : Princeton University Press, 1948.

Includes bibliographical references and index.

ISBN 0-7658-0975-3 (pbk.: alk. paper)

1. War and emergency powers. 2. Democracy. I. Title.

JF256 .R6 2002

321.8—dc21

2002070330

*"Those republics which in time of danger cannot resort to a dictatorship will generally be ruined when grave occasions occur."*

MACHIAVELLI

*"The people's first intention is that the State shall not perish."*

ROUSSEAU



# CONTENTS

INTRODUCTION TO THE TRANSACTION EDITION	ix
PREFACE TO THE 1963 EDITION	xvii
PREFACE	xix
I. CONSTITUTIONAL DICTATORSHIP.	3
II. THE ROMAN DICTATORSHIP.	15
<i>PART I: CONSTITUTIONAL DICTATORSHIP IN THE GERMAN REPUBLIC</i>	
III. ARTICLE 48 IN THE EARLY HISTORY OF THE REPUBLIC.	29
IV. ARTICLE 48 IN THE LAST YEARS OF THE REPUBLIC.	33
V. ARTICLE 48 IN LAW AND THEORY.	50
<i>PART II: CRISIS GOVERNMENT IN THE FRENCH REPUBLIC</i>	
VI. THE STATE OF SIEGE IN HISTORY, LAW, AND THEORY.	75
VII. THE STATE OF SIEGE IN FACT: THE FIRST WORLD WAR.	79
VIII. THE GOVERNMENT OF FRANCE IN THE FIRST WORLD WAR.	91
IX. CRISIS GOVERNMENT IN POSTWAR FRANCE.	104
<i>PART III: CRISIS GOVERNMENT IN GREAT BRITAIN</i>	
X. CRISIS GOVERNMENT IN GREAT BRITAIN BEFORE 1914; MARTIAL LAW.	117
XI. THE GOVERNMENT OF GREAT BRITAIN IN THE FIRST WORLD WAR.	131
XII. CRISIS GOVERNMENT IN GREAT BRITAIN, 1919-1939.	135
XIII. THE GOVERNMENT OF GREAT BRITAIN IN THE SECOND WORLD WAR.	151
<i>PART IV: CRISIS GOVERNMENT IN THE UNITED STATES</i>	
XIV. THE CONSTITUTION, THE PRESIDENT, AND CRISIS GOVERNMENT.	171
XV. THE GREAT AMERICAN CRISIS: THE CIVIL WAR.	184
XVI. THE GOVERNMENT OF THE UNITED STATES IN THE FIRST WORLD WAR.	207
XVII. THE NEW DEAL AND THE GREAT DEPRESSION.	211
XVIII. THE GOVERNMENT OF THE UNITED STATES IN THE SECOND WORLD WAR.	223
XIX. CONSTITUTIONAL DICTATORSHIP: THE FORMS, THE DANGERS, THE CRITERIA, THE FUTURE.	240
INDEX	255

## Introduction to the Transaction Edition

*The question you propose, whether circumstances do not sometimes occur, which make it a duty in officers of high trust, to assume authorities beyond the law, is easy of solution in principle, but sometimes embarrassing in practice. A strict observance of the written laws 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 written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.*

—Letter of Thomas Jefferson to John B. Colvin, Monticello,  
September 20, 1810

How shall we be governed during the War on Terrorism? Definitely not as we have in the past. Existing governing practices comprehensively failed to protect the people and cannot be continued. Since we have been forced to face the horrors of terror attacks on the United States we likewise need to consider the sort of government such a war will force us to adopt. The “inescapable truth,” Clinton Rossiter wrote in his classic study of modern democracies in crisis, *Constitutional Dictatorship*, is that “No form of government can survive that excludes dictatorship when the life of the nation is at stake.” Saving the country, as Jefferson wrote, is the highest obligation. Rossiter added the stunning thought that dictatorships can be constitutional. Following the last forty years of judicial superiority, his concept of a “constitutional dictatorship” is more shocking today than when he wrote it.

Rossiter concluded, based on the most thoroughgoing study of the use of emergency powers in modern democracies—Weimar Germany, France, England, and the United States—that the facts of history demonstrate that, from time to time, constitutional dictatorship has served as an indispensable factor in maintaining constitutional democracy. President Lincoln acted illegally when, on April 27, 1861, reacting to Baltimore mobs interfering with troop trains moving from Philadelphia to Washington, he authorized the Commanding General of the United States Army to suspend the writ of habeas corpus in Pennsylvania, Delaware, Maryland, and the District of Columbia. When Chief Justice Taney ruled in the circuit court case, *Ex parte Merryman*, 17 Fed. Cas. 146 (1861), that the president had no authority, Lincoln disregarded the decision. He extended the suspension, in March 1863, to all other states. Civil liberty during the Civil War was routinely restricted by arrest without warrant, detention without trial, and release without punishment. Lincoln, in effect, with popular sup-

port, suspended the Constitution, as did Woodrow Wilson in arming the merchantmen, and Franklin Roosevelt on the destroyer deal—and on a number of other occasions, including internment of 70,000 citizens of Japanese ancestry pursuant to Executive Order 9066, probably our greatest abuse of emergency power.

Francis Biddle, Roosevelt's attorney general, was asked later whether the Japanese internment decision was a difficult one for Roosevelt; he explained that he did not think "the Constitutional difficulty plagued him." Moreover, Biddle continued, the "Constitution has not greatly bothered any wartime President. That was a question of law which ultimately the Supreme Court must decide. And meanwhile—probably a long meanwhile—we must get on with the war."

Jefferson did not believe he had authority under the Constitution to buy the Louisiana Territory. He did it because it was essential for the country's future, and Napoleon's difficulties gave us an opportunity that might never be repeated. Elected officials, he wrote to Abigail Adams, must "risk themselves like faithful servants . . . and throw themselves on their country for doing for them unauthorized, what we know they would have done for themselves had they been in a situation to do it." The people, if they did not agree, could not give the Louisiana Territory back to Napoleon, but they could punish the president who bought it.

American law schools, however, teach today, as they have taught generations of lawyers, that the U.S. Constitution is never suspended; it is at all times in full force and effect. The law schools are correct that our Constitution—unlike the Weimar Constitution—makes no express provision for its suspension. Supreme Court doctrine, which is what the law schools teach, does not recognize any implied presidential power to suspend the Constitution: "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances." In short, "emergency does not increase constitutional power nor diminish constitutional restriction" (*Ex parte Milligan*).

The trouble with this view of course, is that it is inaccurate. Rossiter proves this over and over in his analysis of presidential action during the Civil War, World War I, the Depression, and World War II. The problem created by our law schools teaching Supreme Court rhetoric rather than historical truth is that the legal profession, critical in all aspects of the use of emergency power, is misinformed. They should all read Rossiter as soon as possible.

Rossiter's point is that although the normal rules do not apply there are other rules that do and that make the difference between a constitutional dictatorship and a dictatorship. Rossiter writes that every democracy, as a matter of survival, has a mechanism—either express or implied—to suspend the constitution when observing normal rules will endanger the continuation of the state. Is that our situation? Clearly, yes. The normal governmental practice of dealing with terror-

ism—since the downing of Pan Am 103—has been the criminal justice model. We have used police work, evidence, discovery and trials hoping to put terrorists in jail. The criminal law approach is counter-intuitive since police work is normally confined to a single jurisdiction which has agreed to a basic set of rules. Our government's new thought is that police work could be effective dealing with international terrorism because the emerging political world order had created an overall rule of law. Our government's law enforcement model, of course, was a mis-analysis. Its only virtue was that it was so ineffective that it did not arouse Arab emotions. A police force deters criminal behavior, apprehends and arrests perpetrators—it deals essentially with the consequences of criminal activity and will only incidentally prevent it; the military is designed to destroy forces and is morally permitted—unlike the police—to cause collateral damage. The military is used when the procedures appropriate to law enforcement are not realistic—when a state of war exists.

Rossiter wrote at the end of our last declared war, at a time when the country, of course, was fully committed. In the fifty-three years since, the country has engaged in at least a dozen foreign adventures, ranging from Korea and Vietnam to the Gulf War and Kosovo. But none were declared wars. The government did not believe the people were, or could be persuaded to be, fully committed. And if they were not fully committed to the war they were certainly not going to tolerate a suspension of normal constitutional rules. The country was fully committed to the Cold War, but the emergency powers needed for that war were largely non-intrusive. The ambiguity of congressional commitment is exemplified by the War Powers Act, pursuant to which Congress ceded its constitutional power of Declaration of War. The War on Terror, for the first time, finds the country as fully committed as it was during World War II.

Constitutional dictatorship, Rossiter explains, is based upon specific *principles*. He also explains the *dangers* inherent in the concept and its use (as in the Weimar Republic where a constitutional dictatorship degenerated into a dictatorship) and the *criteria* by which the concept's constitutionality can be tested. Rossiter outlines the *principles* of constitutional dictatorship as follows:

*First, the complex system of government of the democratic, constitutional state is essentially designed to function under normal, peaceful conditions, and is often unequal to the exigencies of a great national crisis.*

*Therefore, in time of crisis a democratic, constitutional government must be temporarily altered to whatever degree is necessary to overcome the peril and restore normal conditions. This alteration invariably involves government of a stronger character; that is, the government will have more power and the people fewer rights.*

## CONSTITUTIONAL DICTATORSHIP

*Finally, this strong government, which in some instances might become an outright dictatorship, can have no other purposes than the preservation of the independence of the state, the maintenance of the existing constitutional order, and the defense of the political and social liberties of the people.*

The general principles and the particular institutions of constitutional dictatorship are, in Rossiter's phrase, "political and social dynamite."

The question "of first importance," of course, is to secure the democracy against the dangers inherent in the dynamite. The primary *danger* inherent in a constitutional dictatorship is that it will turn on the order it was established to defend. The crisis institutions of martial law, executive legislation, and the suspension of civil rights facilitate the overthrow of the constitution by revolutionary or reactionary interests.

The other major danger of the constitutional dictatorship is that the employment of special crisis institutions will work changes in the permanent structure of government and society: "No constitutional government ever passed through a period in which emergency powers were used without undergoing some degree of permanent alteration always in the direction of an aggrandizement of the power of the state." This risk is of particular significance in America's War on Terrorism since the crisis, we are told, will last indefinitely. It will not be ended, the Secretary of Defense tells us, by a signing on the deck of the *Missouri* in Tokyo Bay.

The emergency, in the case of the War on Terrorism, is open-ended. We are going on a permanent war footing. This makes it different from any of the emergencies analyzed by Rossiter, and which also makes more significant what Rossiter called the "final danger"—that the government by default, rather than design, may lose the *will* to resume its normal constitutional responsibilities, "that the people along with the rulers will fall into the habits of authoritarian government and fail to insist upon a reestablishment of democratic ways." After all, the goal is "not survival alone but survival as a free people." We do not mean to end up as a garrison state.

Rossiter proposed specific *criteria* to judge the worth and propriety of any resort to constitutional dictatorship. The eleven criteria are:

### Initiation

1. *No general regime or particular institution of constituted dictatorship should be initiated unless it is necessary or even indispensable to the preservation of the state and its constitutional order. . . .*

## CONSTITUTIONAL DICTATORSHIP

2. *The decision to institute a constitutional dictatorship should never be in the hands of the man or men who will constitute the dictator.*
3. *No government should initiate a constitutional dictatorship without making specific provision for its termination.*

### Operation

4. *All uses of emergency powers and all readjustments in the organization of the government should be effected in pursuit of constitutional or legal requirements.*
5. *No dictatorial institution should be adopted, no right invaded, no regular procedure altered any more than is absolutely necessary for the conquest of the particular crisis. Certain it is that no normal institutions ought to be declared unsuited to crisis conditions unless the unsuitability be painfully evident.*
6. *The measures adopted in the prosecution of a constitutional dictatorship should never be permanent in character or effect. Emergency powers are strictly conditioned by their purpose, and this purpose is the restoration of normal conditions. The actions directed to this end should therefore be provisional.*
7. *The dictatorship should be carried on by persons representative of every part of the citizenry interested in the defense of the existing constitutional order. . . . Crisis government should be coalition government.*

### Termination

8. *Ultimate responsibility should be maintained for every action taken under constitutional dictatorship.*

9. *The decision to terminate a constitutional dictatorship, like the decision to institute one, should never be in the hands of the man or men who constitute the dictator.*
10. *No constitutional dictatorship should extend beyond the termination of the crisis for which it was instituted.*
11. *Finally, the termination of the crisis must be followed by as complete a return as possible to the political and governmental conditions existing prior to the initiation of the constitutional dictatorship.*

Rossiter's brilliant outline of the criteria provides a clear checklist for the people and Congress to judge the executive's actions. But the reader will note that much of his list rests on a premise missing today—the rapid return to normal government when the crisis is concluded. Most of Rossiter's criteria cannot be met if the emergency is open-ended. For example, "No government should initiate a constitutional dictatorship without making specific provisions for its termination" or "The measures adopted in the prosecution of Constitutional Dictatorship should never be permanent in character or effect." He explains that "emergency powers are strictly conditioned by their purpose which is the restoration of normal conditions." But we have been told at the beginning of this war that normal conditions are not going to be restored.

All previous emergencies have been for a well-defined purpose which could be accomplished fairly quickly. The people have been agreeable to a suspension of normal rules for a limited period. At the same time we can easily see that emergency powers are required—that there will be situations where searches and detention will be done without prior—or even subsequent—judicial authorization. There will be arrests without probable cause, searches without warrants, detentions without charges, and detentions without speedy trial. The executive will exercise those powers even if we choose not to recognize he is doing it.

Should America amend its Constitution to include some express provision for emergency powers? Article 48 of the Weimar Constitution provided:

If a state does not fulfill the duties incumbent upon it under the national Constitution or laws, the President of the Reich may compel it to do so with the aid of the armed forces.

If the public safety and order in the German Reich are seriously disturbed or endangered, the President of the Reich *may take the measures necessary* to the restoration of the public safety and order, and may, if necessary,

intervene with the armed forces. To this end he may temporarily suspend, in whole or in part, the fundamental rights established in Articles 114 (inviolability of person), 115 (inviolability of domicile), 117 (secrecy of communication), 118 (freedom of opinion and expression thereof), 123 (freedom of assembly), 124 (freedom of association), and 153 (inviolability of property).

The President of the Reich must immediately inform the Reichstag of all measures taken in conformity with sections 1 or 2 of this Article. The measures are to be revoked upon the demand of the Reichstag. (emphasis added)

The critical language providing that the President "may take the measures necessary" is as broad as can be written. Would the German courts or legislature prevent the abuse of Article 48? The German courts—as Rossiter notes and readers will recall from the 1965 film, *Judgment at Nuremberg*—made only a small show of trying to restrain the use of Article 48. Indeed, it was even held that special courts could be established under Article 48. The special courts enforced the Nuremberg Race Laws of 1935. The legislature, which the Constitution set up as the primary guardian against the abuse of emergency powers, also failed. The Weimar Constitution's draftsmen's "fatal mistake" was to create the Reichstag as the oversight body, but then to give the president the power to dissolve the Reichstag. Of course, Weimar did not fail because of a drafting error. The Reichstag and German democracy failed. Chancellor Hitler, in 1933, issued his first decrees pursuant to Article 48. After that, he discarded the Weimar Constitution.

The Weimar model, of course, is not one we would want to follow, but some believe we would be better off if we openly recognized the benefits and problems of constitutional dictatorship. We could amend our Constitution to define the initiation, operation, and termination of emergency powers. We would be better off, the argument goes, if we dealt with the problem openly. Rossiter, on balance, disagrees for two main reasons: (1) the existence of such a provision would make the use of emergency powers more common—Weimar's Article 48 was invoked 250 times during its thirteen years of existence; and (2) the provision would likely be drafted too restrictively; it would probably limit the inherent or implied emergency power necessarily and properly used by Jefferson, Lincoln, Wilson, and Franklin Roosevelt.

The central and intriguing question is what would Rossiter suggest in our situation—a possibly permanent crisis—where a number of the Bill of Rights (Amendments 4, 5 and 6 come quickly to mind) assuredly will be disregarded. Probably the closest we can come to Rossiter's thinking is an article he wrote a few years after *Constitutional Dictatorship*, in which he applied his principles to what government would be like in the then dawning Atomic Age. He wrote that just as the defense of free speech is far more a question of public education than



## CONSTITUTIONAL DICTATORSHIP

of laws, so the conditions of workable constitutional dictatorship "exist first of all in the minds and hearts of the American people and only secondarily in the constitution or any laws that we could ever work out." That is, "Political maturity, not paper, made this system work: political maturity, not paper, will save it from destruction." His thought is very close to Learned Hand's 1944 statement, "I often wonder whether we do not rest our hopes too much upon constitutions, upon laws, and upon courts. These are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it." In this nation, however, the lamp of liberty is hard to extinguish. As Rossiter remarked: "we are Americans, not Germans or Russians, and democracy is our most basic political and social tradition."

The president, of course, in a constitutional dictatorship, is the dictator and his actions are aimed at making it more effective. Rossiter suggests the *character* of the president, in a constitutional dictatorship, becomes more significant in both the quality of his judgment and his devotion to democracy. "The emergency powers are," as Rossiter said, "political and social dynamite." Congress is assigned the duty to assure that the dictator acts responsibly. The legislature's duty is to translate the Rossiter criteria into effective limits. Weimar failed because the Reichstag failed to perform its crucial function. Congress, in the current crisis setting, should be in continuous session. Ultimately, though, our system rests on the individual; it is the people's job to keep the Congress honest. The democracy can be preserved and, Rossiter writes: "If we will be resolute about this matter of constitutional dictatorship the future may be brighter than we have hitherto dared to think."

William J. Quirk  
November 2001

## Preface to the 1963 Edition

I send this book for the second time into the worlds of scholarly criticism and public debate with mixed feelings of gratitude and uneasiness. I am grateful because an author ought to be grateful for an unsolicited invitation to reprint a book that has been out of print for some years. I am uneasy because it must be reprinted in 1963 exactly as it was first printed in 1948.

Many things about this study of crisis government in the modern democracies—organization, style, terminology, definitions, distinctions, interpretations of fact, judgments of men and events, recommendations for action—plainly need to be rethought and reframed in the perspective of fifteen years. Yet even if I had the audacity (the audacity, that is to say, of the doctoral candidate of twenty-odd years ago) to write the new book that ought to be written on this subject, I would have to bow to the obdurate fact that my patience and energy are now completely mortgaged to other projects in other fields of political science. At the same time, the economic laws of paperback publishing forbid me to make even minor changes or to add even a few paragraphs. And so, having been persuaded by friends and colleagues that in this instance it is better to have an old book than no book at all, I hereby exhume *Constitutional Dictatorship* and bid its dry bones to live.

No one could be more aware than I of its limitations and faults. The most obvious of the former is that it makes too much of the law and too little of the sociology and psychology of crisis government; the most unsettling of the latter is the confusion I seem to have caused with my too ready assumption that "constitutional dictatorship" had been granted a secure place in the vocabulary of political science as the generic label for such government. That it has not been granted this place is a collective decision that I can protest but not alter. It is therefore likely that, if I had it to do all over again, I would replace the title of this book with the subtitle and restrict the application of "constitutional dictatorship" to those venerable but still lively institutions of martial rule, the state of siege and martial law.

When this book first appeared, it was subjected to a great deal of valid criticism by many scholars who had bothered to read it and to a small volley of abuse by a few polemicists who had not. I hope that all those who buy it in this Harbinger edition will do me the favor of reading it, and will read it as the work of a political scientist who is wholeheartedly committed to the principles, practices, and purposes of constitutional democracy. It is exactly because I cherish our Western style of democracy that I think we must be more knowledgeable and tough-minded about this recurring phenomenon of constitutional government called, for want of a milder and less controversial label, constitutional dictatorship.

This has never been an easy world for constitutional democracy, and it is plainly becoming less easy with each passing year. The future of such democracy—the only kind of democracy so far as we are concerned—may depend, therefore, to a large extent on the skill, courage, and devotion with which our future Lincolns and Churchills make use of autocratic powers and procedures in defense of our precious liberties.\* Since I believe in the essential rightness of this harsh prediction even more profoundly today than I did fifteen years ago, I have permitted my feeling of gratitude to conquer (if not to obliterate) my feeling of uneasiness. If the republication of this book does nothing else, I hope that it will encourage others more competent than I in the skills of comparative government to carry on with the study of this fateful problem.

CLINTON ROSSITER

*Ithaca, New York*  
*July, 1962*

\*Those who are interested in the application of the lessons of this book to the horrid prospect of atomic war may wish to look at my "Constitutional Dictatorship in the Atomic Age," *Review of Politics*, XI (1949), 395, and "What of Congress in Atomic War?" *Western Political Quarterly*, III (1950), 602. These studies, too, need to be reworked and rewritten.

## PREFACE

THIS is a book about dictatorship and democracy. Its treatment of these two patterns of government is not conventional. Instead of setting the one against the other, it proposes to demonstrate how the institutions and methods of dictatorship have been used by the free men of the modern democracies during periods of severe national emergency. It is written in frank recognition of a dangerous but inescapable truth: "No form of government can survive that excludes dictatorship when the life of the nation is at stake."

I can quote Lord Acton's dictum on the corrupting influence of power as approvingly as any man, and I am fully aware of the transient and long-range dangers to constitutional government inherent in this principle which I, following the lead of others, have chosen to call *constitutional dictatorship*. No person professing the democratic faith can take much delight in a study of constitutional dictatorship; the fact remains that it has been with us exactly as long as constitutional government, and has been used at all times, in all free countries, and by all free men.

My decision to devote this survey to four large modern democracies and no smaller ones was rather arbitrary. This I am frank to admit, and I wish that it could have been extended to the British Dominions, the Scandinavian monarchies, Holland, Belgium, Finland, and the rest. I can plead only the limiting factors of time and space. My original intention was to write about the United States, Great Britain, and France, the great and continuing western democracies. Along about the middle of my labors I decided that I could not possibly ignore or treat lightly the pitiful history of the German Republic of 1919-1933; first, because the Constitution of that unhappy democracy contained the most forthright provision for emergency dictatorship in modern constitutional history; secondly, because in the final reckoning this provision contributed heavily to the destruction of the Republic it was instituted to defend. The chapter on the Roman constitutional dictatorship may be ascribed to a classical education.

I have used the words *constitutional* and *democratic* almost synonymously in this book as adjectives descriptive of the form of government under which we live. This is wholly a matter of convenience, and I realize that there have been plenty of constitutional governments which were not at the same time democratic. This book deals with four governments which were both. Just for the record, I am one of the bitter-

#### PREFACE

enders who believe that, even if a government can be constitutional without being democratic, it cannot be democratic without being constitutional.

The Machiavelli quoted opposite the title page is the republican-statesman who labored for years over *The Discourses*, not the Old Nick who dashed off *The Prince* in a vain attempt to wheedle a job out of Lorenzo de' Medici.

I would like to thank a number of "characters preeminent for ability and virtue" (another of Hamilton's phrases) for their criticism, help, and encouragement: Professor Mario Einaudi, Mr. John P. Roche, and Miss Ann Aikman of Cornell; Mr. Malcolm O. Young of Princeton; and Professor Frederick M. Watkins of McGill. My chief debts are acknowledged on the dedicatory page.

CLINTON L. ROSSITER

*Ithaca, N.Y.*  
*January, 1948*

# *Constitutional Dictatorship*

## Constitutional Dictatorship

Is there in all republics this inherent and fatal weakness? Must a government of necessity be too *strong* for the liberties of its people, or too *weak* to maintain its own existence?" The man who posed that question was Abraham Lincoln. The date was July 4, 1861. The occasion was a message to Congress, a remarkably candid account of certain extraordinary measures which he had been forced to adopt during the first feverish weeks of the Civil War. If he had been living in 1942, he might have framed his question in more modern terms. He might have asked: "Can a democracy fight a successful total war and still be a democracy when the war is over?"

Mr. Lincoln never did get a direct answer to his question, nor did he really need one. He had already answered it himself with a series of unusual actions whereby he had personally initiated a military, administrative, and legislative program to suppress the rebellion of the southern states and preserve the American Union, and his answer was this: that in all republics there is *not* this inherent and fatal weakness, that a democratic, constitutional government beset by a severe national emergency can be strong enough to maintain its own existence without at the same time being so strong as to subvert the liberties of the people it has been instituted to defend.

In support of that answer this book proposes to examine the experiences with emergency government of four large modern democracies—the United States, Great Britain, France, and the German Republic of 1919-1933—and to see just what sort of unusual powers and procedures these constitutional states saw fit to employ in their various periods of national trial. The study will be partly historical; it will record the actions of some of democracy's great crisis governments and will present the personalities who sparked those governments and gave them leadership—Lloyd George, Clémenceau, Heinrich Brüning, Lincoln, Wilson, Franklin D. Roosevelt, and Winston Churchill. But it will be analytical too; it will examine these actions in terms of definite institutions and will demonstrate the recurring pattern which they have assumed in every democratic country. The modern version of Mr. Lincoln's question—"Can a democracy fight a successful total war and still be a democracy when the war is over?"—will be answered affirmatively by the incontestable facts of history.

#### CONSTITUTIONAL DICTATORSHIP

Consider for a moment the government of the United States which piloted the American people through the crisis of the second World War. In the successful prosecution of a bitter struggle for survival the administration at Washington had continuous resort to actions that would have been looked upon as unconstitutional, undemocratic, and downright dictatorial in time of peace. Since it was a time of war these actions seemed altogether necessary and proper, and the American people generally gave them their support and applause. The ordinary citizen can list any number of unusual governmental procedures that were instituted in the four years of the war, procedures which only the paramount necessity of victory in an all-out war could have sanctioned: the Price Control Act, through which Congress handed over lawmaking power to the executive branch of the government; the history-making "destroyer deal," in which the President disregarded several statutes; the strict control of the American free economy by a host of temporary governmental agencies, most notably the WPB and the OPA; the direct invasion upon the freedom of the individual effected by rationing, the draft, and almost confiscatory taxes; military rule in Hawaii; the forcible removal of tens of thousands of American citizens from their homes on the Pacific Coast; the arbitrary suppression of the seditious words and periodicals of other American citizens; and the spectacular Army seizure of Montgomery Ward and Company. In these actions the government of the United States demonstrated conclusively that in the maintenance of its own existence it could possess and wield authoritarian power, and yet in the course of these same actions—whatever individual injustices and hardships may have been worked—the pattern of free government was left sufficiently unimpaired so that it functions today in full recognition of the political and social liberties of the American people, and in substantial accord with the peacetime principles of the constitutional scheme. We have fought a successful total war, and we are still a democracy.

What the ordinary citizen may not realize is that this more potent and less gentle government of his was pursuing in fact and theory a well-established principle of constitutional government, the principle of *constitutional dictatorship*. The word *dictatorship* should be no cause for alarm. The *dictator* in Mr. Webster's dictionary is primarily "one appointed to exercise, or one exercising, absolute authority in government, esp. in a republic." Indeed, the qualifying adjective *constitutional* is almost redundant, for the historical conception of dictatorship was that it could not be other than constitutional. The original dictatorship,

#### CONSTITUTIONAL DICTATORSHIP

that of the Roman Republic, involved the legal bestowal of autocratic power on a trusted man who was to govern the state in some grave emergency, restore normal times and government, and hand back this power to the regular authorities just as soon as its purposes had been fulfilled. The phrase *constitutional dictatorship*, hyperbole though it may be in many instances, will serve as the general descriptive term for the whole gamut of emergency powers and procedures in periodical use in all constitutional countries, not excluding the United States of America.

The principle of constitutional dictatorship finds its rationale in these three fundamental facts: first, *the complex system of government of the democratic, constitutional state is essentially designed to function under normal, peaceful conditions, and is often unequal to the exigencies of a great national crisis*. Civil liberties, free enterprise, constitutionalism, government by debate and compromise—these are strictly luxury products, and in but a fraction of the governments of man since the dawn of history has the pattern of government and society which the American people take for granted been able to thrive and prosper. "Democracy is a child of peace and cannot live apart from its mother," writes one noted publicist.<sup>1</sup> "War is a contradiction of all that democracy implies. War is not and cannot be democratic," adds a respected Justice of the Supreme Court.<sup>2</sup> Henry Sumner Maine's incisive reminder of the *fragility* of free government is perhaps more valid today than ever before. In the pages to follow it will be seen how frankly the responsible leaders of the modern democracies have admitted the inexpediency of normal constitutional government in periods of national emergency.

Therefore, *in time of crisis a democratic, constitutional government must be temporarily altered to whatever degree is necessary to overcome the peril and restore normal conditions*. This alteration invariably involves government of a stronger character; that is, *the government will have more power and the people fewer rights*. Considered in the light of the recent war, this is a rather astounding admission. At the very moment when the people of the United States were shouting about the differences between democracy and dictatorship, they were admitting in practice the necessity of conforming their own government more closely to the dictatorial pattern! The wartime inadequacies of their constitutional government were remedied in most instances by an un-

<sup>1</sup> William E. Rappard: *The Crisis of Democracy* (Chicago, 1938), p.265.

<sup>2</sup> Wiley Rutledge, in a foreword to "A Symposium on Constitutional Rights in Wartime," *Iowa Law Review*, xxix (1944), p.379.



## CONSTITUTIONAL DICTATORSHIP

conscious but nonetheless real imitation of the autocratic methods of their enemies. The second World War was proof enough that crisis government means strong and arbitrary government, and that "in the eternal dispute between government and liberty, crisis means more government and less liberty."<sup>2</sup>

There are three types of crisis in the life of a democratic nation, three well-defined threats to its existence as both nation and democracy, which can justify a governmental resort to dictatorial institutions and powers. The first of these is *war*, particularly a war to repel invasion, when a state must convert its peacetime political and social order into a wartime fighting machine and overmatch the skill and efficiency of the enemy. The necessity of some degree of readjustment in the governmental structure and of contraction of the normal political and social liberties cannot be denied, particularly by a people faced with the grim horror of national enslavement.

The second crisis is *rebellion*, when the authority of a constitutional government is resisted openly by large numbers of its citizens who are engaged in violent insurrection against the enforcement of its laws or are bent on capturing it illegally or even destroying it altogether. The third crisis, one recognized particularly in modern times as sanctioning emergency action by constitutional governments, is *economic depression*. The economic troubles which plagued all the countries of the world in the early thirties invoked governmental methods of an unquestionably dictatorial character in many democracies. It was thereby acknowledged that an economic crisis could be as direct a threat to a nation's continued and constitutional existence as a war or a rebellion. And these are not the only crises which have justified extraordinary governmental action in nations like the United States. Fire, flood, drought, earthquake, riots, and great strikes have all been dealt with by unusual and often dictatorial methods. Wars are not won by debating societies, rebellions are not suppressed by judicial injunctions, the reemployment of twelve million jobless citizens will not be effected through a scrupulous regard for the tenets of free enterprise, and hardships caused by the eruptions of nature cannot be mitigated by letting nature take its course. The Civil War, the depression of 1933, and the recent global conflict were not and could not have been successfully resolved by governments similar to those of James Buchanan, William Howard Taft, or Calvin Coolidge.

<sup>2</sup> Cecil T. Carr: "Crisis Legislation in Great Britain," *Columbia Law Review*, XL (1940), p.1324.

## CONSTITUTIONAL DICTATORSHIP

Finally, *this strong government, which in some instances might become an outright dictatorship, can have no other purposes than the preservation of the independence of the state, the maintenance of the existing constitutional order, and the defense of the political and social liberties of the people.* It is important to recognize the true and limited ends of any practical application of the principle of constitutional dictatorship. Perhaps the matter may be most clearly stated in this way: the government of a free state is proceeding on its way and meeting the usual problems of peace and normal times within the limiting framework of its established constitutional order. The functions of government are parceled out among a number of mutually independent offices and institutions; the power to exercise those functions is circumscribed by well-established laws, customs, and constitutional prescriptions; and the people for whom this government was instituted are in possession of a lengthy catalogue of economic, political, and social rights which their leaders recognize as inherent and inalienable. A severe crisis arises—the country is invaded by a hostile power, or a dissident segment of the citizenry revolts, or the impact of a world-wide depression threatens to bring the nation's economy down in ruins. The government meets the crisis by assuming more powers and respecting fewer rights. The result is a regime which can act arbitrarily and even dictatorially in the swift adoption of measures designed to save the state and its people from the destructive effects of the particular crisis. And the narrow duty to be pursued by this strong government, this constitutional dictatorship? Simply this and nothing more: *to end the crisis and restore normal times.* The government assumes no power and abridges no right unless plainly indispensable to that end; it extends no further in time than the attainment of that end; and it makes no alteration in the political, social, and economic structure of the nation which cannot be eradicated with the restoration of normal times. In short, the aim of constitutional dictatorship is the complete restoration of the *status quo ante bellum*. That historical fact does not comport with philosophical theory, that there never has been a perfect constitutional dictatorship, is an assertion that can be made without fear of contradiction. But this is true of all institutions of government, and the principle of constitutional dictatorship remains eternally valid no matter how often and seriously it may have been violated in practice.

It is here that the need for the qualifying adjective becomes apparent. All the dictatorial actions in the recent war were carried on in the name of freedom. The absolutist pattern was followed and absolutist institu-

tions were employed for one great and sufficient reason: that constitutional democracy should not perish from the earth. The democracies fought fire with fire, destroyed autocracy with autocracy, crushed the dictators with dictatorship—all that they might live again under their complex institutions of freedom and constitutionalism. The wide gulf between constitutional and fascist dictatorship should need no demonstration. Like the Grand Canyon, it is there for anyone to see. It was and is a difference of kind as well as degree. However, there is one feature of constitutional dictatorship which sets it off most sharply from the Hitler variety: it is temporary and self-destructive. The only reason for its existence is a serious crisis; its purpose is to dispense with the crisis; when the crisis goes, it goes. The distinction between Lincoln and Stalin or Churchill and Hitler should be obvious.

It is important for the American citizen of 1948 to realize that his super-government of the past few years was nothing new or novel. Indeed, the leading characteristics of constitutional dictatorship are its antiquity and universality, for it is coeval and coextensive with constitutional government itself. The fact that the institutions of free government cannot operate normally in abnormal times has always been recognized. The striking power of autocracy has many times been used to preserve democracy, and more than one constitution has been suspended so that it might not be permanently destroyed. All constitutional countries have made use of constitutional dictatorship, none to any greater extent or with more significant results than the democracies of the twentieth century.

Constitutional dictatorship is a rag-bag phrase, and into it can be tossed all sorts of different institutions and procedures of emergency government. Just what these institutions and procedures are, what extent of governmental readjustment and invasion of civil liberty they involve, what type of crisis invokes their initiation, and how frequently they have been put to use will come to light in the chapters to follow. The present discussion is merely to introduce what lies ahead, and not until the final chapter will an attempt be made to give a precise definition to the major forms of constitutional dictatorship. Nevertheless, it would be of advantage at this early juncture to list the two or three outstanding institutions of constitutional dictatorship to be found in the history of all modern democracies and to add a few words of explanation to each.

In general, all institutions and techniques of constitutional dictator-

ship fall into one of two related, yet reasonably distinct categories: emergency action of an executive nature, and emergency action of a legislative nature. The crisis of rebellion is dealt with primarily in an executive fashion and calls for the institution of some form of military dictatorship. The crisis of economic depression is dealt with primarily through emergency laws (although these too have to be executed) and calls for lawmaking by the executive branch of the government. The crisis of war, at least total war, is dealt with in both ways. If a situation can be dealt with judicially, it is probably not a crisis.

The basic institution of constitutional dictatorship of an executive nature is *martial rule*; in one form or another it has existed in all constitutional countries. Martial rule is an emergency device designed for use in the crises of invasion or rebellion. It may be most precisely defined as an extension of military government to the civilian population, the substitution of the will of a military commander for the will of the people's elected government. In the event of an actual or imminent invasion by a hostile power, a constitutional government may declare martial rule in the menaced area. The result is the transfer of all effective powers of government from the civil authorities to the military, or often merely the assumption of such powers by the latter when the regular government has ceased to function. In the event of a rebellion its initiation amounts to a governmental declaration of war on those citizens in insurrection against the state. In either case it means military dictatorship—government by the army, courts-martial, suspension of civil liberties, and the whole range of dictatorial action of an executive nature. In the modern democracies the military exercises such dictatorship while remaining subordinate and responsible to the executive head of the civil government. Martial rule has a variety of forms and pseudonyms, the most important of which are *martial law*, as it is known in the common law countries of the British Empire and the United States, and *the state of siege*, as it is known in the civil law countries of continental Europe and Latin America. The state of siege and martial law are two edges to the same sword, and in action they can hardly be distinguished. The institution of martial rule is a recognition that there are times in the lives of all communities when crisis has so completely disrupted the normal workings of government that the military is the only power remaining that can restore public order and secure the execution of the laws.

The outstanding institution of constitutional dictatorship of a legislative nature is *the delegation of legislative power*. What this amounts

#### CONSTITUTIONAL DICTATORSHIP

to is a voluntary transfer of lawmaking authority from the nation's representative assembly to the nation's executive, a frank recognition that in many kinds of crisis (particularly economic depressions) the legislature is unequal to the task of day-to-day, emergency lawmaking, and that it must therefore hand over its functions to someone better qualified to enact arbitrary crisis laws. On its face this would not seem to be a procedure of a particularly dictatorial character. When the age-old battles fought in all constitutional countries to thrust the executive out of the field of lawmaking are recalled to mind, however, it is obvious indeed that the transfer of legislative power from Parliament to Prime Minister or Congress to President is a highly unusual and even dictatorial method of government.

The delegation of power may be limited in time, made in and for a particular crisis, or it may be permanent, to be exercised by the executive in the event of some future crisis. Permanent delegations for emergency purposes have in modern times been cast in the form of statutes enacted by the national legislature. In some countries, however, the constitution itself has granted the executive branch of the government a provisional power of issuing emergency ordinances with the force of law. When the delegation of lawmaking power is a large scale proposition, that is, when the executive is empowered to make emergency laws for the solution of some or all of the nation's major problems, this device may be known as *the enabling act*.

Martial rule and executive lawmaking are both marked by a correlative technique or characteristic of constitutional dictatorship, *the governmental invasion of political or economic liberties*. The crisis expansion of power is generally matched by a crisis contraction of liberty. When a censorship of the press is instituted in time of war, when public meetings are absolutely forbidden in an area racked by rebellion, when a man's house can be legally searched without warrant, when a national legislature itself postpones the elections which it is supposed to face, or when a barkeeper is told in 1944 that he cannot sell a glass of whiskey for more than he charged in 1942—then political and economic rights of free men have been definitely abridged. That all these invasions of liberty and many more like them have been effected in periods of crisis by constitutional governments will shortly become apparent, and the ultimate reason in each case was apparently good and sufficient—the preservation of the state and the permanent freedom of its citizens.

There are many other devices and techniques of constitutional

#### CONSTITUTIONAL DICTATORSHIP

dictatorship: the cabinet dictatorship, the presidential dictatorship, the wartime expansion of administration, the peacetime emergency planning agency, the "war cabinet," the congressional investigating committee, the executive dominance of the legislative process—just to mention a few. Not all of them are necessarily dictatorial, but each can be regarded as an institution of constitutional dictatorship—a technique or device to which a constitutional government may resort in time of emergency. It is important to realize that they all overlap one another, and that there have been plenty of crisis governments, particularly those engaged in total war, which have made use of all of them at once. It is equally important to realize that they are legal and constitutional, that the people of the constitutional democracies have recognized openly that their leaders should have extraordinary power in extraordinary times.

It is perhaps unfortunate that the controversial *law of necessity* has to be mentioned at all. Actually this well-known doctrine is little better than a rationalization of extra-constitutional, illegal emergency action. The fact remains that there have been instances in the history of every free state when its rulers were forced by the intolerable exigencies of some grave national crisis to proceed to emergency actions for which there was no sanction in law, constitution, or custom, and which indeed were directly contrary to all three of these foundations of constitutional democracy. When Abraham Lincoln said: "Often a limb must be amputated to save a life, but a life is never wisely given to save a limb,"<sup>4</sup> he was grounding a number of unconstitutional and dictatorial actions on the law of necessity. The Constitution and certain statutes told him that he could not raise the limits of the army and navy, pay money to persons unauthorized by law to receive it, or contract a public debt for the United States—but Mr. Lincoln decided and candidly declared that the necessity for preserving the Union was sufficient cause for him to go ahead and do these things anyway.

"Every man thinks he has a right to live and every government thinks it has a right to live. Every man when driven to the wall by a murderous assailant will override all laws to protect himself, and this is called the great right of self-defense. So every government, when driven to the wall by a rebellion, will trample down a constitution before it will allow itself to be destroyed. This may not be constitutional law, but it is fact."<sup>5</sup>

<sup>4</sup> Lincoln to Hodges, J. G. Nicolay and John Hay: *Complete Works of Abraham Lincoln* (New York, 1905), II, p. 508.

<sup>5</sup> S. G. Fisher: "The Suspension of Habeas Corpus during the War of the Rebellion," *Political Science Quarterly*, III (1888), p. 485.

"The law is made for the state, not the state for the law. If the circumstances are such that a choice must be made between the two, it is the law which must be sacrificed to the state. *Salus populi suprema lex esto.*"<sup>6</sup>

This is the theory of *Not kennt kein Gebot*, necessity knows no law.<sup>7</sup> It isn't a very pleasant theory, because Hitler could shout "necessity!" as easily as Lincoln, but there is no denying the fact that responsible statesmen in every free country have broken the law in order to protect the nation in time of serious national emergency, and responsible statesmen will do it again. And the nation was always pretty solidly behind them. In Rousseau's words: "In such a case there is no doubt about the general will, and it is clear that the people's first intention is that the State shall not perish."<sup>8</sup>

There is one other feature of constitutional dictatorship that should be explained here, an obvious and even axiomatic feature, yet still deserving of passing mention. In the last resort, it is always the executive branch in the government which possesses and wields the extraordinary powers of self-preservation of any democratic, constitutional state. Whether the crisis demands the initiation of martial rule or an enabling act or a full-blown war regime, it will be to the executive branch that the extraordinary authority and responsibility for prosecuting the purposes of the constitutional dictatorship will be consigned. *Crisis government is primarily and often exclusively the business of presidents and prime ministers.* Where the forms of constitutional dictatorship have been worked out and given a legal or constitutional basis—as in the state of siege, the enabling act, or the statutes which give the President of the United States certain emergency powers—it is always the executive organ which is selected by the legislators to be the spearhead of crisis action. Where the forms have not been worked out, it is still the executive, this time selected by nature and expediency, which must shoulder the burden and deal with the emergency under the law of necessity.

<sup>6</sup> Joseph Barthélemy: *Problèmes de Politique et Finances de Guerre* (Alcan, 1915), p. 121.

<sup>7</sup> The law of necessity was particularly dear to the German jurists of the pre-1914 era, and received its classic statement (complete, with authorities) in Josef Kohler's controversial *Not kennt kein Gebot* (Berlin, 1915), in which a famous legal authority set forth the philosophical justification of the German invasion of Belgium. The law of necessity found its practical application in the vindication of emergency executive law-making in the absence of the legislature. The best statement of this doctrine is, strangely enough, by the French writer L. Duguit: *Traité de Droit Constitutionnel* (2nd ed., Paris, 1921-1925), III, pp. 700 ff. See also W. Jellinek: *Gesetz und Verordnung* (Vienna, 1887), pp. 376 ff.; J. K. Bluntschli: *Allgemeines Staatsrecht* (Munich, 1857), II, p. 109.

<sup>8</sup> *Social Contract*, IV, 6.

Locke could champion the supremacy of the legislature and bespeak the Whig fear of overweening executive power, but even he had to admit that it was the undefined power of this organ—the Crown's prerogative "to act according to discretion for the public good, without the prescription of the law and sometimes even against it"<sup>9</sup>—that was the ultimate repository of the nation's will and power to survive. It is never so apparent as in time of crisis that the executive is the aboriginal power of government.

The thesis and title of this book are both open to heavy and trenchant criticism. Dictatorship, even when softened by a popular adjective like constitutional, is a very nasty word. Webster's definition notwithstanding, dictatorship means exactly one thing to a world that has just rid itself of Hitler and Mussolini and still leaves a large variety of brown, red, and indifferent totalitarian regimes at large, and a lot of good people will resent its use in description of the valiant governments which brought them through the crisis and preserved their liberty. More than this, the line of argument in these first few pages may have exhibited a glib assumption that a constitutional democracy can use dictatorial powers and make abnormal readjustments in an emergency without making those powers and readjustments a permanent part of the constitutional scheme. If that be the impression, let it be corrected here and now. The general principle and the particular institutions of constitutional dictatorship are political and social dynamite. No democracy ever went through a period of thoroughgoing constitutional dictatorship without some permanent and often unfavorable alteration in its governmental scheme, and in more than one instance an institution of constitutional dictatorship has been turned against the order it was established to defend. Indeed, it is an inevitable and dangerous thing, and must be thoroughly understood and controlled by any free people who are compelled to resort to it in defense of their freedom. That is exactly what makes this problem so critical, for no free state has ever been without some method by which its leaders could take dictatorial action in its defense. If it lacked such method or the will of its leaders to use it, it did not survive its first real crisis. It is in this twentieth century and indeed in these very days that the age-old phenomenon of constitutional dictatorship has reached the peak of its significance. Men are just as willing today as they were in ancient Rome

<sup>9</sup> *Of Civil Government*, II, chap. 14, sec. 160.