



**WILEY-
BLACKWELL**



The Center
for the Study
of the Presidency

Why Do Presidents Fail?

Author(s): Richard M. Pious

Source: *Presidential Studies Quarterly*, Vol. 32, No. 4, What Do We Want to Know about the Presidency? (Dec., 2002), pp. 724-742

Published by: [Blackwell Publishing](#) on behalf of the [Center for the Study of the Presidency and Congress](#)

Stable URL: <http://www.jstor.org/stable/27552437>

Accessed: 13/07/2011 13:00

Your use of the JSTOR archive indicates your acceptance of JSTOR's Terms and Conditions of Use, available at <http://www.jstor.org/page/info/about/policies/terms.jsp>. JSTOR's Terms and Conditions of Use provides, in part, that unless you have obtained prior permission, you may not download an entire issue of a journal or multiple copies of articles, and you may use content in the JSTOR archive only for your personal, non-commercial use.

Please contact the publisher regarding any further use of this work. Publisher contact information may be obtained at <http://www.jstor.org/action/showPublisher?publisherCode=black>.

Each copy of any part of a JSTOR transmission must contain the same copyright notice that appears on the screen or printed page of such transmission.

JSTOR is a not-for-profit service that helps scholars, researchers, and students discover, use, and build upon a wide range of content in a trusted digital archive. We use information technology and tools to increase productivity and facilitate new forms of scholarship. For more information about JSTOR, please contact support@jstor.org.



Blackwell Publishing and Center for the Study of the Presidency and Congress are collaborating with JSTOR to digitize, preserve and extend access to *Presidential Studies Quarterly*.

<http://www.jstor.org>

Why Do Presidents Fail?

RICHARD M. PIOUS

Barnard College

As part of the future research agenda for presidency scholars, this article deals with two distinct but related issues: the first involves failed presidential decision making, particularly in the employment of prerogative power; the second involves the failure of interbranch collaborative decision making. Such study of failed presidential decision making is a topic of inquiry related to, but somewhat distinct from, the question of the “failed presidency” that has already engaged some presidency scholars. In some respects, presidential failures are the “black holes,” the singularities of presidential studies—the usual laws of politics that apply to presidential “business as usual” seem not to apply inside the event horizon of fiascoes. Such research might help us to explain the paradoxes of the postmodern presidency: with greater institutional resources, with more delegated powers from Congress, and with (presumably) more accumulated experience from presidency scholarship, one might expect fewer rather than more spectacular failures.

What do we want to know about the presidency? As part of the future research agenda for presidency scholars, I would suggest two distinct but related issues: the first involves failed presidential decision making, particularly in the employment of prerogative power; the second involves the failure of interbranch collaborative decision making.

By presidential failure, I am referring here to the study of the kind of decisions that led John Kennedy to ask himself after the Bay of Pigs, “How could I have been so stupid?” Often these cases become defining moments for presidents: the U-2 flight, the Bay of Pigs, the Vietnam escalation, the Carter energy speech, the Iran hostage rescue attempt, the Iran-Contra affair, Bush the elder’s reversal on “read my lips, no new taxes,” and the Clinton health care plan.

The study of failed presidential decisions and policies is a topic of inquiry related to, but somewhat distinct from, the question of the “failed presidency” that has already engaged some presidency scholars. “They geld us first,” Lyndon Johnson remarked in an interview he gave to David Brinkley after leaving office, “and then expect us to win the Kentucky Derby.”¹ I take as a given the political weakness of the post-World War II presidency, weakness that has been accurately measured and assessed by a generation of scholars analyzing presidential

1. “Thirty Minutes with David Brinkley,” Public Broadcasting System, July 13, 1971.

Richard M. Pious is Adolph and Effie Ochs Professor at Barnard College and is a member of the faculty of the Graduate School of Arts and Sciences, Columbia University.

success rates in dealing with Congress and presidential leadership of public opinion. Presidential weakness as a party and public leader is a fact of American politics, and it surely complicates life in the Oval Office, but I do not think it lies at the root of spectacular failures.² Presidents have experienced fiascos when their political power was at their zenith (Johnson's escalation of the Vietnam War) *and* at its nadir. They have failed when they have used their constitutional powers on their own prerogative (the Steel Seizure) *and* when they have agreed with Congress on new legislation (the tax increases of 1991). They have failed when they have gone public (the Clinton health care plan) *and* when they have operated behind closed doors (the Iran-Contra affair). They have failed at the start of their first term (the Bay of Pigs) *and* after a term's experience under their belts (the U-2 flight). In some respects, presidential failures are the "black holes," the singularities of presidential studies—the usual laws of politics that apply to presidential "business as usual" seem not to apply inside the event horizon, but we do not know the laws that do, and we have yet to develop hypotheses about why fiascos occur.

Related to the study of presidential failure is the exercise of prerogative power. We need to develop systematic hypotheses that can be tested about the probability of failure when prerogative is exercised. In such research, we should distinguish between failures of authority and failures of legitimacy. The failure of authority is twofold: first is the failure of rulers to provide a reasoned elaboration for their decisions.³ But in a deeper sense, it is also the perception that the decision-making process within the White House is flawed. Decision dysfunctions may involve a failure to collect accurate data or intelligence information, or a failure to develop and apply theories that can explain and predict, or a failure to carry public opinion because of a dissonance between underlying values and the values embedded in the decision, or a failure to manage small group decision making. The failure of legitimacy is the failure of rulers to adhere to legal and ethical norms of behavior, so that even if they know what they are doing, Congress or the judiciary do not accept their right to do it and are prepared to use their own powers to check and balance. We need to understand not only how presidents wield prerogative power but also why the attempts at interbranch collaborative decision making, through the passage of framework legislation such as the War Powers Resolution of 1973, the Budget and Impoundment Act of 1974, and the Intelligence Oversight Act of 1980, have had such limited success.

Why should we make a priority out of the study of presidential failures, the exercise of presidential prerogative, and the potential loss for the White House of authority and legitimacy? It seems to me that such research might help us to explain the paradoxes of the postmodern presidency: with greater institutional resources, with more delegated powers from Congress, and with (presumably) more accumulated experience from presidency scholarship, one might expect the institutionalized presidency to perform at a higher level than the premodern or modern presidencies. I believe it would be hard to argue that proposition based on the recent historical record, but it also seems to me that as presidency scholars, we

2. Existing studies of poor presidential performance include Gary Rose, *The American Presidency under Siege* (Albany: State University of New York Press, 1996); Aaron Wildavsky, *The Beleaguered Presidency* (Brunswick, NJ: Transaction Publishers, 1991); William Grover, *The President as Prisoner* (Albany: State University of New York Press, 1989); and Harold Barger, *The Impossible Presidency* (Boston: Scott Foreman, 1984).

3. Carl Friedrich, *Man and His Government: An Empirical Theory of Politics* (New York: McGraw-Hill, 1963), 216-31.

do not yet have a satisfactory set of explanations for why recent performance of incumbents is so wanting and why their failures have been so spectacular.

Presidential Leadership

It is said that the Prussian General Staff in the 1890s classified junior officers as intelligent and active (suitable for promotion to the highest levels), intelligent and passive (suitable for headquarters), and stupid and passive (suitable for line command). Then there was the category of stupid and active: those officers were marked down for dismissal, lest they endanger the men under their command.

If only it were as easy to classify presidents and assume that a single cell accounts for failed decision making. But there is no single kind of presidential personality or leadership style that causes presidential failure: incumbents of different levels of intellect and energy, with different leadership styles and character, all make disastrous decisions, and all make decisions that turn out well. Presidents who love their job, enjoy life, and are fluid in their tactics are no more likely to escape from fiascos than energetic presidents with unresolved personality problems who rigidly adhere to a failing course of action in crises.⁴ Clinton, for instance, is the antithesis of the rigidifying personality type: with his ebullience, his gargantuan appetites, his zest for political maneuver, he is the closest we have come in the postwar period to the two Roosevelts in terms of pure political skill and love of the game. Yet it is worth exploring whether Clinton was *too* willing to maneuver and *too* willing to jettison principles or ignore them. Perhaps he did not get into trouble because he rigidified; he got into trouble because he improvised and transgressed, politically, culturally, morally, and ethically. Clinton and Nixon stand at opposite ends of the continuum in terms of personality traits, yet both wound up in impeachment crises. What one can say about the “rigidification” hypothesis can be said about any other generalization about the relationship between presidential personality, performance, and failure: presidents with diverse personality traits often wind up in similar swamps. And so Eisenhower approved the Bay of Pigs concept and Kennedy authorized the operation, yet the personalities of the two presidents could hardly have been more dissimilar.

This leads to the follow-up question: why are some presidents resilient? Why do some succeed after they fail? I would hypothesize that the dysfunctional president (and presidency) blames failure on outside forces and looks for “enemies” and obstacles on which to pin blame, as Johnson and Nixon did with Vietnam; the resilient president assumes responsibility for error and figures out how to make the adjustments for the next situation—as Kennedy did after the Bay of Pigs and Clinton did after his party lost control of Congress in the first midterm elections.

Do presidents fail because they are too political? Or because they are not political enough? It may be time to revisit the distinction Richard Neustadt made between the amateur, who thinks first of the public interest and then of his political stakes, and the professional, who defines the public interest itself in terms of his or her own political advantage,

4. James David Barber, *The Presidential Character*, 4th ed. (Englewood Cliffs, NJ: Prentice Hall, 1992).

assuming that what is good for the country is good for the presidency, and vice versa.⁵ Supposedly amateurs fail because they do not guard their reputation for effectiveness and they do not understand or protect their power stakes. They do not make decisions today that will provide them with influence tomorrow. They do not exploit their vantage points and their leverage. Supposedly professionals succeed because they know how to play all the political angles. These Neustadtian distinctions have been at the core of our theoretical understanding of presidential power, but they cannot account for the spectacular failures of presidents such as Nixon, Johnson, or Clinton, all of whom understood and acted on their power stakes and showed no signs of being willing to sacrifice their political interests for any abstract conception of the public interest. It is worth researching whether acting as Neustadt's "professional" may actually be counterproductive in the context of an antipolitics culture.

While we are at it, we might also reconsider some conventional wisdom about the kind of intelligence best suited for the White House. If one looks at it purely politically, it is not clear that being smarter (or being considered smarter) is always better. First, one does not always get into the White House, or get reelected, by being considered the smarter of the candidates—just ask Stevenson, Mondale, or Gore. The only president since Franklin Roosevelt who completed two full terms and left the White House to a successor from his own party was Ronald Reagan. (True, Clinton served two terms, but he managed for the first time in almost fifty years to turn over a Democratic Congress to the opposition party, and he left the White House to Bush the younger—albeit in a contested election.) Given Clinton's impeachment crisis, a good case can be made that emotional maturity has been underrated and intellectual ability overrated by presidency watchers—which is not so surprising, considering that most presidency watchers come from the academic world.

Yet it is not clear that having brains prevents fiascoes. If it were, John Adams, James Madison, and John Quincy Adams might have been considered three of our greatest nineteenth-century presidents, along with Herbert Hoover in the twentieth century. Nor does emotional maturity prevent failures. Being a nice guy did not prevent Ford from getting involved in the botched rescue of the *Mayaguez*; nor did it prevent Eisenhower from ordering the U-2 flight or Reagan from authorizing the sale of arms to Iran. Presidential personality theorists might well give further thought to developing hypotheses about the relationship between intelligence and failure and between personality and failure.

Presidents, like all politicians, *substitute* other values or decisional rules for economic payoffs. If we did not want their political substitutions, we could simply leave to the marketplace or to an economic planning board (with command authority) the responsibility to make "rational choices" in running the country. A president is a conciliator, a broker and fixer, who uses favors, side payments, compromises, logrolls, and other tactics to reach agreement. A presidential political action always involves the decision about whether to stick with or to shift from a position: to honor or abandon a pledge, to delay or speed up an approval, to grant or deny permission, to confront or evade an issue, to make a process facilitate or frustrate, to appoint or to fire an official, to change procedures and decisional rules or to insist that they be preserved, and so on.

5. Richard Neustadt, *Presidential Power* (New York: John Wiley, 1960).

In exercising political judgment, the president must take into account the real, albeit intangible, risks involving relationships with the public, relationships involving intellectual and moral authority, constitutional legitimacy, and democratic accountability. Some argue the case for presidents who act as transformational lions, putting these values at the center of their enterprise, while others believe that the transactional foxes do better.⁶ Yet we still do not know why some presidents succeed and others fail as transformational leaders: for every Wilson or Roosevelt who succeeds in gaining passage of a New Freedom or New Deal, there is a Carter or Clinton, washed up on the rocks early in their terms even though they came to office with similar ambitions. Who today remembers Carter's "New Foundation" or Clinton's "New Covenant?" And for every Eisenhower, whose modest steps and "middle of the road" course ensured him two terms and high approval ratings, there is a Ford or Bush the elder, turned out of office after one term for similar positioning and compromise, both faulted for lack of "the vision thing." Is there any way we can provide presidents with persuasive advice about when to concentrate on transactional politics and when to attempt transformational politics?

Advisory Systems

What of the advisory system that surrounds the president? One might assume that a president who can manage the advisory system well will succeed and, conversely, that failure is due primarily to a poorly managed and therefore dysfunctional advisory system. These assumptions are flawed on two grounds: first, when presidents have failed, often they and their advisers have thought clearly about issues and the politics surrounding these issues—Vietnam with its "best and brightest" is a case in point, since the Pentagon Papers and White House tapes make it clear that advisers knew what they were getting into; second, successful presidents have managed at times to avoid failure by going against the grain of their advisory system—the Cuban Missile Crisis is the apt example.⁷

The staff in the White House Office and the highest officials of the agencies of the Executive Office of the President constitute the inner circles of power. There is a strain of presidential studies that argues that the institutionalization of the presidency has raised the performance level of White House decision making. I would suggest three hypotheses about institutionalization that might be useful to study systematically.

First, the vaunted expertise of the White House policy and communications aides can be counterbalanced by Congress and outside interest groups, which can hire equivalent or superior expertise, so it is not clear that the president has been advantaged (though not having these aides would certainly put him at a disadvantage). This disadvantage was felt by Clinton in the health care battles, as his top-heavy and unwieldy advisory system was distracted by other crisis (including Troopergate) in the midst of legislative struggles and then outmaneuvered and outspent by an alliance of health care providers and insurers.

6. James MacGregor Burns, *Leadership* (New York: Harper & Row, 1978).

7. On the advice given to LBJ not to escalate the war, including pessimistic accounts from intelligence and national security advisers, see Daniel Ellsberg, *Papers on the War* (New York: Simon & Schuster, 1972); on Kennedy's willingness to strike out in ways far different from those recommended by a majority of his advisers in the Ex Comm, see Robert Kennedy, *Thirteen Days* (New York: Norton, 1969).

Second, the wisdom of the “experts” is suspect, because the databases they rely on and the theories they employ are often not up to the task of understanding where things are or where they are headed (and most important, when phase transitions will occur). A past example (there are many) would be Carter and the so-called energy crisis. His Secretary of Energy James Schlesinger predicted energy prices going sky-high in the 1980s—a combination of deregulation and exploitation of energy fields led to a price collapse instead. (The most recent example would involve economic forecasts by the George W. Bush administration that failed to predict the disappearing budget surpluses.)

Third, to the extent that presidential agencies use sophisticated “gamesmanship,” “crisis management,” or “spatial positioning” techniques, they may provide the occupant of the Oval Office with options that do more harm than good. During the budget crises of 1990, the George H. W. Bush advisers convinced the president to play a game of chicken with the Democrats over the summer. They believed that their reports of huge deficits (which were honest accounts), combined with the looming crisis with Iraq, would induce Democrats to put politics aside and fall into line behind the commander in chief. It turned out their assessment was wrong, as Democrats delayed coming to a compromise, convinced (correctly) that time and events were on their side. Only when Bush abandoned his economic advisers (nicknamed the “three stooges” by leaders of his own legislative party) and worked for a compromise with the Democrats was a budget agreement reached, a reconciliation act passed, and the decks cleared for confrontation with Iraq.

There are also two other topics worth investigating about the institutionalized presidency. First, there is what Louis Koenig referred to as “the invisible presidency,” by which he meant people in and out of government who take on specific tasks for presidents. It seems to me that we know too little about these people and their role as unofficial diplomats, facilitators, fixers, mediators. Until we know more about the advisers or facilitators who do not appear on the organizational charts, we will not have finished understanding the role of presidential advisers in making policy. Much, for example, is made in the Cuban Missile Crisis of the role of Bobby Kennedy as an intermediary. But if the Kennedy “channel of trust” with Soviet ambassador Anatolii Dobrynin had failed, Kennedy had an alternative channel to end the crisis. Late in the evening of October 27, he ordered Secretary of State Dean Rusk to get in touch with Columbia University Professor Andrew Cordier, who was instructed to draft a statement that Secretary General U Thant could issue proposing the removal of the Jupiters for those in Cuba. The statement would be given to Thant on a signal from President Kennedy.⁸ Although the signal was never sent, and the statement never delivered to U Thant, the “Cordier Channel” is proof that Kennedy was ready for a public trade of missiles if that was the only way to avoid war.⁹ It is worth reopening the study of the invisible presidency, using perhaps examples from the Iran-Contra affair (and perhaps from presidential diplomacy in the Gulf states in the aftermath of September 11) in an attempt to develop new hypotheses about the role of “unofficials” in both the formulation of options (the “wise

8. James G. Blight, Bruce J. Allyn, and David A. Welch, *Cuba on the Brink: Castro, the Missile Crisis, and the Soviet Collapse* (New York: Pantheon, 1993), 179.

9. Barton Bernstein, “Reconsidering the Missile Crisis: Dealing with the Problems of the American Jupiters in Turkey,” in *The Cuban Missile Crisis Revisited*, edited by James A. Nathan (New York: St. Martin’s, 1992), 55-129.

men” of the Vietnam escalation, for example) and the implementation of policy. In the Iran-Contra affair, for example, it seems evident that the use of outside fixers such as Manuchar Ghorbanifar to do the actual negotiating with the Iranians over “arms for hostages” in seedy hotel rooms in Europe led to several situations in which the United States delivered arms but received no hostages in return. Presidency scholars might test the hypothesis, already suggested by several researchers, that overreliance on the invisible presidency, particularly in intelligence operations, leads to policy inversion (policy being delegated down the line instead of being formulated at the top), which raises the probabilities of an operations fiasco.¹⁰

Second, there is the question of why there is no learning curve. “My God, Dean, don’t we learn anything?” General Matthew Ridgeway (commanding officer of U.S. forces during the Korean War) blurted to Secretary of State Dean Rusk after learning of President Johnson’s decision to escalate the war in Vietnam with ground combat forces.¹¹ Why does the same kind of failure reoccur time and time again within the advisory system? “It is maddening to see one set of White House officials after another, many of them lawyers,” columnist David Broder remarked about Clinton’s White House stonewalling, “come in and do the same dumb things, skirting the law and then covering it up, that got their predecessors in trouble.”¹² Why do presidential failures seem to follow similar scripts, regardless of presidential personality, political skills and experience, or party margins in Congress? Why is it always déjà vu all over again?

Regimes and Political Time

The outer circles of power involve the constituencies the president can bring to support his party and his administration. Some political scientists believe that presidents such as Jefferson, Jackson, Lincoln, and Franklin Roosevelt created *regimes*: stable relationships for mutual advantage among the elected officials in Washington, voting blocs mobilized by party organizations, and interest groups. Their argument is that regime creators (such as FDR) will be more successful than presidents who inherit regimes and simply maintain them (such as Truman) or those who get elected from the minority party in a deviating election (such as Eisenhower).¹³ According to this theory, presidents who fail are those who lead their regimes to disaster and dissolution, such as John Quincy Adams, James Buchanan, and Herbert Hoover. Presidents who stand outside the existing regime (Nixon railing against the Eastern Establishment) set themselves up for risky confrontations with Congress, the courts, and the media. Regime theories tell us a great deal about the probabilities of good or bad performance over the full course of a president’s term. But they do not tell us whether the president will fail in any *particular* situation. It is easy to point to discrete failures during the terms of regime creators: Washington, Jefferson, Jackson, Lincoln, and Franklin Roosevelt had

10. On policy inversion, see Harold Koh, *The National Security Constitution* (New Haven, CT: Yale University Press, 1990), 113-16.

11. Quoted in Robert Buzzanco, *Masters of War* (Cambridge: Cambridge University Press, 1996), 227.

12. David Broder, “An Aide’s Higher Loyalty,” *Washington Post*, July 7, 1997, National Weekly Edition, p. 2.

13. Steven Skowronek, *The Politics Presidents Make* (Cambridge: Belknap, 1993).

their share of fiascos: one need only recall Washington's failure to win diplomatic concessions from the British in the Jay Treaty and his decision to submit it to the Senate, which was one of the catalysts for the development of political parties that he had hoped to avoid; Jefferson's prosecution of Burr and support of the Embargo Acts; Jackson's Specie Circular that sparked a financial panic and depression; and Roosevelt's court-packing scheme. Why is it that presidents often make disastrous decisions when they are at the peak of their political power? Does it make any difference where presidents are in "political time"? Is it possible that "risk homeostasis" is involved, so that presidents with political capital to spare are more likely to engage in risky business?

Performance versus Failure

We need to distinguish very clearly between performance and failure. An overloaded plane flying against the wind travels slower than a plane without cargo flying with tailwinds; the performance of the two planes can be quantified and correlated with various factors. But if one of the planes crashes, that is not a matter of poor performance. A phase transition has occurred, and we call the inability to function at all a failure.

For the most part, presidential scholars deal with issues involving performance. They attempt to quantify presidential political strength, as measured by public approval ratings, the number of seats the president's party holds in Congress, and the length of time the president has been in office, and then correlate these political factors with outcomes such as budget appropriations, initiatives passed into law, vetoes sustained, and appointments and treaties consented to by the Senate. These correlations provide us with useful benchmarks with which to measure major deviations. Consider an assessment of Clinton's performance: although he won in 1992 with the smallest proportion of the voting age population since John Quincy Adams, for two years his party enjoyed a comfortable margin of seats in the House and Senate. Political scientists correctly predicted that Clinton would enjoy a high "box-score" of legislative successes, but from these scores one could not predict the failure of his health care plan or extrapolate to the midterm electoral debacle and Republican control of Congress. (Newt Gingrich had a grand time at a news conference the evening after the congressional victory, when he remarked how much he enjoyed hearing from the analysts all the reasons why the Republicans won and pointed out these were the same analysts who two days before had given all the reasons why the Republicans would lose.)

We need to supplement quantitative studies of presidential-congressional relations to answer certain questions about the way presidents exploit the legislative processes for political advantage. Clinton, for example, was able to turn his political situation around by *failing* to get a budget compromise in 1995 rather than by making the budget process work—in 1996, Clinton became the first Democratic president ever to win election with Republican control of Congress, and the budget crisis of 1995—which ended in a busted process that never did lead to a reconciliation bill—was key to his political resurrection. Similarly, we need to develop a theory of public opinion that can account for the puzzling phenomenon of Clinton's rise in approval ratings during the impeachment crisis as well as the success of

Democrats in winning a margin of five House seats in 1998—an off-year second-term election in which their representation should have been reduced by a dozen or more seats.¹⁴

To get a better handle on the relationship between performance (involving processes and policies) and failure, we might want to think counterintuitively. Consider the improved performance of airlines: by using computerized operations control centers, they can route planes to get the maximum mileage and maximum flight time for crews, subject to federal regulations. The goal is to keep less than 2 percent of fleets and crews idle. Yet this efficiency may come with a price: any small disturbance plays havoc with routing, and delays may cascade, crews may be in the air too long (in which case they must be grounded for legally mandated rest periods) or may sit on the ground when they should be in the air. Airlines try to control this cascade, to “truncate” it, but the paradox is that their high performance may increase the odds of their system failure because there is no margin for error.¹⁵ It is worth examining whether the increased resources gained by the White House may lead to these performance paradoxes and if the converse proposition also holds: a disorganized and poorly performing White House sometimes avoids failure *because* its performance is weak and erratic. There may well be a negative correlation between performance and resiliency. At any rate, presidents *can* succeed when their expertise is nonexistent, when their power to persuade is negligible, when their authority is ebbing, and when their prerogatives are under challenge. Clinton did so with the Budget Summit of 1995, and it seems as of this writing that George W. Bush had done so in the aftermath of the September 11 attacks.

Prerogative Power

The president’s conduct in office is considered legitimate by the American people when he has the right to be in the Oval Office (by election or procedurally correct succession), when he exercises his powers constitutionally and lawfully, and when his decisions seem fair and in conformity to fundamental values. Twentieth-century presidents have had no problem claiming right of place, but because the Constitution and statutory law are often silent, underdefined, or ambiguous at key points, presidents must often define their powers for themselves. “We elect a King for four years,” Secretary of State William Seward observed about Abraham Lincoln during the Civil War, “and give him vast powers, which after all he can interpret for himself.” The president is free to interpret his powers as he chooses, until checked and balanced by Congress or the courts, and that rarely happens. The real determinant of the legitimacy of presidential prerogative rests with its consonance or dissonance with fundamental American values, where law and the people’s sense of justice intersect.

14. Samuel Kernell’s “The Challenge Ahead for Explaining President Clinton’s Public Support,” *PRG Report: Newsletter of the Presidency Research Group of the American Political Science Association* 21, no. 3 (spring 1999): 1-3, outlines the need for public opinion researchers to take into account new variables. A perfect example of stochastic changes creating a completely new environment of public opinion for the president is found in the article and post-September 11 “afterwards” by Richard A. Brody, “Is the Honeymoon Over? The American People and President Bush,” *PRG Report: Newsletter of the Presidency Research Group of the American Political Science Association* 24, no. 1 (fall 2001): 1, 23-28.

15. James Gleick, “Flight Control,” *New York Times Magazine*, April 28, 1997, p. 24.

Presidents have gone beyond the literal text of the Constitution to lay claim to the sovereign powers of the United States: the powers that the government may exercise by virtue of the sovereignty of the American people, and these claims have led to some of the greatest successes for presidents. Thomas Jefferson decided to acquire the Louisiana Territory by treaty from France, although the Constitution makes no mention of a power for the Union to acquire territory and only lays out the method by which states may join the Union. "The less said about any constitutional difficulties, the better," Jefferson cautioned his attorney general.¹⁶ Presidents exercise these sovereign powers to meet the nation's international commitments. They claim that the general terms of the Constitution (commander in chief, executive power, the "take care" clause) provide them with authority to act unilaterally, to proclaim neutrality, to send the military on humanitarian missions and peacekeeping assignments, to mediate between nations, to combat international terrorism, to uphold collective security commitments. One of the research questions that would be particularly apt in the aftermath of the 9-11 tragedy would be for public law scholars to examine whether the military tribunals being established are consistent with the laws and usages of war or whether they break new ground and establish a new "concomitant of nationality" in the context of antiterrorist defenses.¹⁷

Presidents exercise *emergency powers*, also known as Lockean powers after John Locke, who referred to the power of the executive "to act according to discretion, for the publick good, without the prescription of the Law, and sometimes even against it."¹⁸ To defend his suspension of habeas corpus, Lincoln put the question to Congress in his message of July 4, 1861:

are all the laws, *but one*, to go unexecuted, and the government itself go to pieces, lest that one be violated? Even in such a case, would not the official oath be broken, if the government should be overthrown, when it was believed that disregarding the single law, would tend to preserve it?¹⁹

Presidents claim the right to preserve the "peace of the United States" by intervening with the military in civil disorders or strikes and by using wiretaps and surveillance against suspected foreign and domestic enemies.²⁰ The research agenda for the study of emergency powers involves two aspects: descriptively we will want to know how the new antiterrorism laws delegate power to the president and how the president and the Office of Homeland Security exercise these powers. More important than extending the descriptive narrative, however, are theoretical questions about emergency powers. Clinton Rossiter referred to Lincoln's actions in the Civil War as constituting a "constitutional dictatorship."²¹ It might

16. Paul Leicester Ford, ed., *The Writings of Thomas Jefferson*, vol. 8 (New York: Putnam, 1892-99), 246.

17. On concomitants of nationality as defined by the Supreme Court, see Christopher Pyle and Richard Pious, *The President, Congress and the Constitution* (New York: Free Press, 1984), 237-39, 289-92.

18. Larry Arnhart, "The God-Like Prince: John Locke, Executive Prerogative, and the American Presidency," *Presidential Studies Quarterly* 9 (1979): 121-30; for a more restrictive view, see Thomas Langston and Michael Lind, "John Locke and the Limits of Presidential Prerogative," *Polity* 24, no. 1 (fall 1991): 49-68.

19. Roy P. Basler, ed., *Collected Works of Abraham Lincoln*, vol. 4 (New Brunswick, NJ: Rutgers University Press, 1953-55), 429-30.

20. *In re Neagle*, 135 U.S. 1 (1880); *In re Debs*, 158 U.S. 564 (1895).

21. Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (New York: Harcourt Brace, 1963).

be useful to compare the extension of power by Congress and the use of prerogative power by the president in this crisis with the Civil War, World War I, and World War II.

Presidents claim a *dispensing power*: the right to refuse to execute the provisions of a law if obeying those provisions might be harmful to the nation, even in the absence of an emergency. While they have an obligation to “take care that the laws be faithfully executed,” that obligation does not appear in the oath of office. They claim that when laws conflict, their oath grants them the prerogative to decide which laws are to be enforced. These claims are American variations of long-standing claims of *arcana imperii*—the secrets of rule possessed by the Prince, which led to claims of *raison d'état* in matters of national security.²² “The president is at liberty, both in law and in conscience, to be as big a man as he can,” Woodrow Wilson concluded. “Only his capacity will set the limit.”²³ Presidents claim vast executive and legislative powers, including the *inherent powers* of a “chief executive” based on an expansive reading of specific constitutional clauses. They claim *implied powers*, arguing that like Congress, they may take actions “necessary and proper” to put their executive powers into effect, having all the means at their disposal that are not forbidden by the Constitution. They combine their constitutional powers with statutes passed by Congress to expand their administrative, diplomatic, and military powers. They issue executive orders, in effect creating a *legislative power*, and their orders (as well as subsidiary memoranda and directives) may go way beyond the scope of the laws Congress passed to deal with a subject, sometimes covering matters on which Congress has not legislated at all.²⁴

The Madisonian concept of a constitution of partial separation of powers, collaborative government, interior contrivances, and checks and balances assumes that before the president makes a decision, he will review it with his top aides, take it before the cabinet or another policy council, and then present his decision to Congress for prior legitimization in the form of a law, an appropriation of funds, or a resolution of authorization or support. The Hamiltonian concept of prerogative power, of “energy in the executive,” is the antithesis of Madisonian principles: it involves governance by *faits accomplis*. When a president institutes prerogative government, he often imposes tight secrecy, confining his deliberations to a very small group. When he is ready to act, he issues proclamations, executive orders, and national security directives; institutes a chain of command flowing from the White House directly to the officials who will carry out his orders; and gives commands to subordinates to execute his orders and follow his policy. He usually does not consult with members of Congress in advance; nor does he ask for legislative authorization.

A president’s decision to use prerogatives precedes the actual operation itself and has a bearing on how the operation itself is planned and implemented. The general principle is that the more the president anticipates that his use of prerogative will be controversial, the greater his incentive to act first and explain later. The president decides, his subordinates implement his policy, and he then informs Congress and the American people. At that point, the politics of prerogative government begins: the president must defend the legiti-

22. The European tradition of executive power is examined in Harvey Mansfield Jr., *Taming the Prince* (New York: Free Press, 1989).

23. Woodrow Wilson, *Constitutional Government in the United States* (New York: Columbia University Press, 1908), 30.

24. Phillip J. Cooper, “By Order of the President: Administration by Executive Order and Proclamation,” *Administration & Society* 18 (1986): 233-62.

macy of his actions against the attacks by the opposition. The greater his risk of authorizing an illegal or unconstitutional act, the greater the distance he will put between himself and the operatives. This leads to several different patterns, particularly if domestic or international law must be violated: one is *plausible deniability*, so that the president can claim subordinates acted on their own; another is *ambiguous signaling*, in which the president signals a goal but leaves it to officials to act on their own responsibility to carry it out; yet another is *inverted responsibility*, in which officials in presidential agencies take operational responsibility when departments refuse to commit illegal acts; related to this is *delegation out*, in which hired hands work the operation. Presidents know that if they can defend the wisdom of the policy, and its consonance with American values, most of the constitutional criticism will not harm them. Winning in the court of public opinion is often more important than winning in a court of law. Even so, the odds in court are usually with the president: the federal courts usually abstain from deciding cases involving presidential prerogatives, using procedural rules or the doctrine of political questions, or else declare them to be constitutional exercises of power. The courts check and balance presidents only when their own prerogatives are at stake, such as the right to obtain evidence in spite of a claim of executive privilege, or to maintain jurisdiction and reject broad claims of presidential immunity, or when presidents make claims of national emergency.²⁵ Presidents usually have little to fear from judicial review of their prerogative power, yet many who won in court later found themselves politically damaged or destroyed after their exercise of such powers. Both Harry Truman and Lyndon Johnson successfully defended presidential war-making powers in the courts, yet these victories did not save them from the loss of public support that ended their chances to win second elective terms.

I believe that a future research agenda involving the study of prerogative governance should focus on its relationship to the viability of operations. The research question would involve the way the president negotiates risk with lower-level officials and how these involve constitutional and legal considerations. Researchers would study a variation of the law of an anticipated reaction: the president, knowing in advance that the use of controversial prerogatives will have to be legitimized sooner or later, and knowing that the authority of the president will be at stake, operationalizes policy through risk negotiation to protect his stakes, even if this lowers the odds of success. We have already seen this in the Bay of Pigs invasion, when Kennedy shifted the location of the operation and put stringent conditions on U.S. tactical support to preserve “deniability,” and in the Iran-Contra affair, in the initial planning for the transfer of arms to Iran by using Israel as the intermediary and in the later decisions to shift to commercial cutouts known as the Enterprise.

A second research question involved in the study of prerogative power would deal with the effectiveness of the framework laws passed by Congress that are designed to ensure collaborative decision making or, put less elegantly, “interbranch policy codetermination.” What has become of the War Powers Resolution? The rescission and impoundment provisions (not to mention sequesters and paygos and caps) of recent budget acts? The “report and wait” provisions and “legislative vetoes”? The “findings” and reporting provisions of intelligence oversight laws? Why do presidents do all they can to treat these laws as unconstitu-

25. *U.S. v. Nixon*, 418 U.S. 683 (1974); *Clinton v. Jones*, no. 95-1853 (May 27, 1997); *Youngstown Sheet and Tube v. Sawyer*, 343 U.S. 579 (1952).

tional infringements on their power? As dead letters to be ignored and evaded at every opportunity? These questions are as much the province of congressional scholars as of presidency scholars, since they cut to the question of the motives of Congress in passing such provisions and the willingness of legislators to use them or confront presidents who ignore them.

A third research question about prerogative power would build on the answers to the second: how legitimate are presidential “shortcuts” that bypass framework legislation? Borrowing from some of the balancing tests used in constitutional law, I would argue that the most rational balancing of competing institutional interests involves weighing the gravity of the situation (and imminence of threat), discounted by its probability, against the constitutional values that are transgressed when framework laws are violated. Case studies of decision making should determine the factors weighed by presidential counsel when the use of prerogative power and the bypassing of framework laws are being considered. Is the role of presidential counsel simply to be an advocate for the most expansive interpretation of presidential power? Or do counsel have greater responsibilities, and should they serve as trustees of constitutional norms as well?²⁶

The Investigated Presidency

The president is the chief law enforcement officer. He takes an oath to execute his office and “preserve, protect and defend the Constitution” and has a separate obligation to take care that the laws are faithfully executed. He is the chief magistrate, presiding over the activities of the government, ensuring against abuse of power. But the (expired) law providing for an independent counsel, the current law providing for appointment of a special prosecutor, and the constitutional impeachment provisions all allow for the possibility that the president, or people he might wish to protect, might be abusing power. Although many of the legal issues have been studied, it seems to me that there are questions to be researched about the patterns of governance when a president is a target of investigation.

When critics make credible accusations of abuse of power and breach of faith, or illegal and unconstitutional actions, the president and his top appointees become potential or actual defendants in civil or criminal cases. How they play the legal and constitutional end-game determines the extent of their failure. I would hypothesize that the successful president is the one who guards the presumption that legality flows down from the White House. The corollary is that the unsuccessful president loses that presumption and, instead, suffers from the presumption that *illegality* flows down—and once that occurs, his administration implodes in a legitimacy crisis. As a scandal unfolds, the initial presumption is that the president will root out aides and officials who have taken advantage of him. But at a certain point a new presumption takes over: that the president will protect those who protect him and that a cover-up is being orchestrated from the top. Then the parade of informants, witnesses, and whistleblowers begins: people who were set up and duped may have information to trade. The kinds of people who get involved in one illegal operation are likely to have their hands in other questionable activities: sooner or later their troubles with prosecutors may induce

26. Cornell Clayton, ed., *Government Lawyers: The Federal Bureaucracy and Presidential Politics* (Lawrence: University Press of Kansas, 1995).

them to drop the dime on people in the administration. The general principle seems clear: the greater the presumed illegality, the more likely the White House will rely on operatives who raise the president's risks. His choices and options become limited; power flows to those at the bottom, with the street smarts to rely on bluff and blackmail. The media, always ready to uncover (and pay for) evidence about a scandal, provides a market. At a certain point, the cost of protecting the president goes too high to continue, while the benefits of giving evidence and telling the story to the media go too high to resist. Once one operative breeches the wall of silence, others will follow.

In Watergate, all this took some time to develop, because it seemed unthinkable at first that the president was involved in a crime or in its cover-up. In the aftermath of Nixon's resignation, a Watergate syndrome took hold, so that as the Iran-Contra events unfolded, the first presumption was that the president had something to hide and might be covering up something or might even be guilty of something. It was as if a new construct of the presidency as "conspirator in chief" had taken over in the American political culture. Because of this construct, presidents are likely to be enmeshed throughout their terms in ongoing credibility crises: they must gain the trust they cannot count on, and at the first whiff of illegalities, the presumptions of legality are inverted. Certainly the Enron affair provides a case study of this inversion phenomenon.

Another research question involves the learning curve in scandals. Why in attempting to contain the damage does the White House seem always to use the same script? First there are denials: no spy plane penetrated over the Soviet Union, there was no White House involvement in a burglary in the Watergate complex, there was no government involvement in funding for the Contras, and there were no arms sold to Iran. When it becomes clear that *something* happened, the White House shifts its ground: only an insignificant event occurred—a weather flight went off course; Watergate was "a third-rate burglary"; one small plane, only half filled with arms, landed in Teheran. Faced with increased media scrutiny and the possibility of congressional inquiry, the White House initially tries to shift blame to low-level operatives: a flight *may* have occurred over the Soviet Union, but it was not authorized; burglars may have penetrated the headquarters of the Democratic National Committee at the Watergate complex, but they were from the Committee to Re-elect the President, not the White House; arms sales to Iran involved Israel and private arms dealers. When these stories are shown by reporters to be incomplete and misleading, the president throws top-level officials to the wolves. In the Watergate affair, the fall guy was to be former attorney general John Mitchell, known as "the big enchilada"; in the Iran-Contra affair, the independent counsel concluded that

the President's most senior advisers and the Cabinet members on the National Security Council participated in the strategy to make National Security staff members McFarlane, Poindexter and North the scapegoats whose sacrifice would protect the Reagan administration in its final two years.²⁷

27. Lawrence Walsh, *Final Report of the Independent Counsel for Iran/Contra Matters—United States Court of Appeals for the District of Columbia Circuit*, vol. 1, *Investigations and Prosecutions* (Washington, DC: Government Printing Office, 1994), xv. Also see Lawrence Walsh, *Firewall: The Iran-Contra Conspiracy and Cover-Up* (New York: Norton, 1997).

But some fall guys do not take the fall. Mitchell was willing, but another designated chump, John Dean, was not; Oliver North initially was willing to “take a spear in the chest” for the president—until his lawyer convinced him otherwise.

As cover-ups unravel and the president is implicated in key decisions, the White House mounts a legal and constitutional defense. It claims the activities (which it now admits did take place) were legal because they were intelligence operations and, therefore, certain laws do not apply; or the laws were never technically violated. The arms dealer Richard Secord claimed the Boland Amendments exempted the National Security Council.²⁸ CIA counsel Stanley Sporkin argued that sec. 501 of the Intelligence Oversight Act did not require a report to Congress from the president, because it “specifically recognizes that there are constitutional prerogatives which are not going to be dealt with by the notification.” He described nonnotification as an option recognized in the law.²⁹ The White House claims that if violations were committed, they were technical, or involved controversial areas of the law, and that their own legal counsel had assured them they were in compliance.³⁰ Or the laws were unconstitutional because they infringed upon presidential prerogatives.³¹ Or the law could be narrowly construed. The next line of defense is to allude to the president’s duty to make foreign policy and claim that Congress has overstepped its bounds.³² But this argument, as used in Iran-Contra, ignored the fact that Reagan had denied that he had known of, or had authorized, many of the operations and that some had taken place before the president had issued a finding. Even if Congress may not restrict certain diplomatic activities of the president, surely it can regulate and restrict activities of *other* executive officials, absent advance presidential direction and authorization. To argue otherwise is to “presidentialize” the entire administration, making presidential prerogative into a catchall executive branch prerogative. The final line of defense is to counterpoise the ends against the means. As White House aide Patrick Buchanan put it, “It is not whether some technical laws were broken, but whether we stop communism in Central America.”³³ North’s secretary Fawn Hall rediscovered Lockean prerogative as she excused her shredding of documents to prevent the FBI from uncovering them by observing, “Sometimes you just have to go above the written law.”

There is a close connection between authority and legitimacy, and the president must guard both aspects of his relationship with the American people or suffer the consequences. A president must work at maintaining legitimacy: it is not a relationship that may be taken for granted. A president who decides to act unilaterally leaves himself open to two lines of attack once his *fait accompli* has become public: critics will challenge his authority and claim he does not know what he is doing; they will also challenge his legitimacy by claiming that he

28. Richard Secord, *Honored and Betrayed* (New York: John Wiley, 1992), 204.

29. Stanley Sporkin, testimony before Iran-Contra committees, in the *New York Times*, June 25, 1987.

30. See the article by Leonard Garment in the *Washington Post*, May 25, 1987, National Weekly Edition.

31. See arguments by Bruce E. Fein, “The Constitution and Covert Action,” *Houston Journal of International Law* 11, no. 1 (fall 1988): 53-68; also George W. Van Cleve, “The Constitutionality of the Solicitation or Control of Third-Country Funds for Foreign Policy Purposes by United States Officials without Congressional Approval,” *Houston Journal of International Law* 11, no. 1 (fall 1988): 69-82; Robert F. Turner, “The Constitution and the Iran-Contra Affair: Was Congress the Real Lawbreaker?” *Houston Journal of International Law* 11, no. 1 (fall 1988): 127.

32. A useful summary of the literature is found in D. Bruce Hicks, “Presidential Foreign Policy Prerogative after the Iran-Contra Affair: A Review Essay,” *Presidential Studies Quarterly* 26 (1996): 962-77.

33. Lou Cannon, “White House Dissents from Buchanan’s Stance,” *Washington Post*, December 10, 1986, p. A-25.

lacks the constitutional powers he asserts, that he has usurped congressional powers, that he has gone beyond the constitutional powers of the government as a whole, or that he has taken actions that are unjust. A president who is managing an issue successfully will benefit from a “frontlash” effect: constitutional doubts will often be put aside, but when his policy fails, his critics will have no such inhibitions—they will charge that he cut constitutional corners for no good reason. Prerogative politics becomes a high-risk gamble because it cuts against the grain of American democracy and limited constitutional government.

The president has two problems in trying to maintain his legitimacy. First, the people have always been averse to the unchecked exercise of executive power, equating it with monarchs and dictators, so his critics will claim he was autocratic rather than democratic; second, the exercise of prerogative power, if it involved secrecy and a *fait accompli*, will be characterized by the president’s critics as deceptive or evasive. The president has lied to the American people, they will claim. These claims divide the nation and erode national unity. How do presidents respond? By discrediting their critics as best they can. They argue that their actions were required in the national interest: opponents of their policy either lack the facts to understand the national interest or do not have the national interest at heart. Why might their critics be misinformed or uninformed? Because in national security matters, the president has intelligence sources that he cannot reveal (or else they might be compromised). He has information that must remain top secret. He knows things about the situation that his critics cannot know—and that the American people cannot know. The president argues that the critics should reserve judgment until he can brief them and that the American people should trust him and other top officials to act in the national interest and prevent division and disunity—the claim of *arcana imperii*.

To members of his own party, the president will argue that those tempted to desert him are also sealing their own fate, because a party split will only help the opposition. To members of the opposition party, the president will argue that his diplomatic prerogatives should be supported in a spirit of bipartisanship, that war-making prerogatives should be supported because to do otherwise would give “aid and comfort to the enemy” (i.e., involve treason), and that in intelligence matters the president’s prerogatives should not be challenged because it might lead to embarrassing revelations that would damage the standing of the United States and its intelligence capabilities.

Partisanship and Presidential Powers

We know a great deal about how partisanship intersects with the president’s legislative agenda. But we know less (because it has been studied less systematically) about how partisanship intersects with presidential prerogative power. I would hypothesize that for members of Congress, partisan factors are more important than any consistent or principled constitutional position about presidential powers: legislators usually support prerogative power when exercised by presidents of their own party, while their partisan opponents attack their exercise of prerogative. From the studies we have so far, we know that President Franklin Roosevelt won support of most northern Democrats but only a small percentage of Republicans on votes involving presidential powers, a pattern similar for Truman and Kennedy. Only Lyndon Johnson won majorities from both parties on issues involving his pre-

rogatives. Republican presidents Nixon, Ford, and Reagan gained far more support from Republicans than Democrats in Congress on issues of presidential power, while only Eisenhower won bipartisan majorities.³⁴

We need to explain why politicians are prone to this “situational constitutionalism.” Democrats who once supported expansive diplomatic and military powers from Roosevelt through Kennedy later shifted to criticize these powers when exercised by Nixon, Ford, Bush the elder, and Reagan. A similar reversal occurred after the 1994 midterm elections, when Democrats defended President Clinton’s constitutional prerogatives in foreign affairs while the new Republican majority insisted that Congress play a greater role. In 1997, Republicans in Congress resurrected memos written in 1974 by Democratic committee staffers arguing for a broad reading of “high crimes and misdemeanors”—memos that Hillary Rodham had helped research as a staff lawyer during the Watergate crisis but that now would be used two decades later against her husband. Why can we not expect principled positions on constitutional issues from most politicians? And what are the consequences of tactical shifts on presidential legitimacy? In addition to partisan orientation, it may well be the case that perceptions about public support or opposition to the presidential policy may play an important role in determining legislators’ orientations.³⁵

The question of relationship between what the Greeks called *nomos*, the values of the community, and the exercise of prerogative power calls for further exploration. Deep within our political culture is a pragmatic streak that pays less heed to legalities than to practicalities, that cares more about ends than about means, that is willing to bend the law or even break it to get things done, that cares more for decisions made consistent with values than with law. “Americans love a winner,” George Patton (as played by George C. Scott) observed to his troops, and winning covers a multitude of constitutional sins. We can distinguish between legal versus illegal, but we also have a separate dimension for right versus wrong. The best outcome for a president is when his decision is accepted by the people as right: the situation that President George H. W. Bush enjoyed when he made the decision to use force against Iraq and that Clinton enjoyed when he sent forces into Haiti and Bosnia. The worst situation to be in is when an action is considered illegal and unconstitutional and also dead wrong or even criminal. This was Nixon’s problem in Watergate: what values could he summon in his defense? The relationship between values politics and constitutional law was played out in the Clinton impeachment; as with the Clinton budget summit of 1995, it seems to me that presidency scholars should go to school on Clinton’s strategy and tactics.³⁶

Prerogative government may lead to spectacular failures: the Steel Seizure, the Vietnam War, the Nixon budget impoundments (fifty-one court decisions declaring them illegal), the Iran-Contra affair, and many other events have led to a “backlash” effect in which the president’s party splits and some run for the tall grass, public opinion tanks, the legisla-

34. J. Richard Piper, “‘Situational Constitutionalism’ and Presidential Power,” *Presidential Studies Quarterly* 24 (1994): 584, Table 1: Northern Democratic and Republican Support for Presidential Powers on Key Congressional Roll Calls, 1933-1989.

35. Richard M. Pious, “The Constitutional and Popular Law of Impeachment,” *Presidential Studies Quarterly* 28, no. 4 (1998): 806-15.

36. Richard M. Pious, “The ‘Hard’ Case for Presidential Power: Impeachment Politics and Law,” in *Presidential Power: Forging the Presidency for the Twenty-First Century*, edited by Robert Y. Shapiro, Martha Joynt Kumar, and Lawrence Jacobs (New York: Columbia University Press, 2000), 473-88.

tive agenda stalls, and in some extreme “overshoot and collapse” situations the president faces investigation, and possible censure or even impeachment. In such a situation the presidency is paralyzed, and in at least two (Nixon during Watergate and Reagan during Iran-Contra) power flowed to secretaries of state (Kissinger and Shultz) and a new White House chief of staff (Baker) who managed to hold things together—in itself a phenomenon akin to parliamentary governance (since their power and authority seemed to flow from the confidence reposed in them by Congress). Such quasi-parliamentary power bases in impeachment crises would be an interesting topic for political scientists to explore.

We also have had some spectacular *successes* in using prerogative power, and it is no exaggeration to say that our Mount Rushmore presidents got there not only by fashioning new political regimes but also through using their expansive use of constitutional prerogatives. We have one example of a phase transition from weak, limited “government” to an all-powerful (in constitutional terms) Union—Lincoln just before and during the Civil War. Presidency scholars might do well to focus on such phase transitions between limited government in routine times and the State in times of crisis—described in somewhat static public law terms by the constitutional law scholars writing in the post-Civil War period.³⁷ Their problem was how to justify a return to weak governance after the Civil War, when the commerce power of Congress and the police powers of the states were hobbled by federal court interpretations of the Commerce Clause and the Due Process clause. And so they distinguished between the limited power of “government” functioning in normal times and the almost unlimited power of “the State” functioning during crises. These apologists for Republican laissez-faire could have their constitutional cake and eat it too. The rise of the national security state in the aftermath of World War II called forth similar dichotomous approaches to government.³⁸

In the post-September 11 period, we have something akin to this form of constitutionalism. The domestic agenda of president George W. Bush remains wedded to the idea that government governs best when it taxes and regulates least; while his national security agenda, particularly the military order (not the same as an executive order) establishing military judicial commissions and suspending the writ of habeas corpus, the additional surveillance powers granted to the Department of Justice and the FBI and Immigration and Naturalization Service, the infringement on lawyer-client privileges, the granting of additional powers of detention over immigrants, and the creation of a “Homeland Security” czar by executive order without prior statutory authorization all rely on prerogative emergency powers rather than statutory warrant.³⁹ As the domestic antiterror program develops, it is becoming an important subject to study in its own right, but just as important, the eventual

37. Thomas Cooley, *The General Principles of the Constitutional Law in the United States of America* (Boston: Little, Brown, 1880); Christopher Tiedemann, *The Unwritten Constitution of the United States* (New York: Putnam, 1890); W. W. Willoughby, *An Examination of the Nature of the State* (New York: Macmillan, 1896).

38. Harold Kohl, *The National Security Constitution* (New Haven, CT: Yale University Press, 1990).

39. “Military Order on Detention, Treatment and Trial of Certain Non-Citizens in the War against Terrorism,” November 13, 2001. On suspension of habeas corpus, see sec. 7(B)(2)(i). Other provisions involve the president’s determining who is to be tried before the commissions, defense lawyers appointed by the commissions, an absence of due process rights such as the right to confront witnesses, and rules that permit illegally obtained evidence to be used. Except for death penalty provisions, verdicts need not be unanimous. The proof is not “beyond reasonable doubt,” but convictions are obtained on “probative value to a reasonable person.” There is no right of appeal to federal courts, though an appeals process was created within the military commission structure.

outcome of Bush's domestic antiterrorism policy will have an enormous impact on the contours of presidential power. It will also help us refine our understanding of how prerogative governance works.⁴⁰

Conclusion

Success in the Oval Office does not always come from the power to command, as Neustadt informed us, but nor does it always come from the power to persuade. It certainly does not come from the institutionalized resources available to the presidency; nor is it automatically conferred because presidents can institute prerogative governance or because they are rightly situated in "political time." I believe that the next generation of presidency scholars needs to supplement the study of macro-levels of presidential performance during an entire term with a micro-level study using "backward mapping."⁴¹ Scholars will need to focus on White House command and control and delegation of responsibility, information flows, presidential management of risk, and techniques of gamesmanship, spatial positioning, and decisions based on power stakes.

We need to question the fundamental assumptions of existing theories and use the conventional axioms and assumptions, not as givens from which to deduce the probabilities of power, but as assumptions open to question. We need to consider questions not usually raised by presidency scholars: What happens when presidents *do* formulate policies to protect their political stakes? When they *do* control the implementation of their decisions? When they *do* make rational choices to maximize their preferences? Is it possible that they fail *because* they are able to implement their decisions, *because* they act in a politically astute manner, *because* they are adept at gamesmanship and positioning, *because* they have already experienced success? What if the White House *systematically* produces certain kinds of errors that are likely to lead to fiascoes? What if the presidency is *organized* to do so by functioning on or beyond the possibility frontier? By systematically renormalizing risk?⁴²

These are not the only questions presidency scholars should investigate, but I believe that if presidency scholars try to answer them (or to reformulate them) they would advance the state of the discipline and the knowledge base of our field.

40. My own prediction, for what it is worth, is that Congress will acquiesce in a great deal of the program, but when the perceived risks and uncertainties diminish, the presidency will be "renormalized" and many of these powers will be allowed to lapse. It may also be the case that the Supreme Court pulls an *Ex Parte Milligan* and reads the president a lecture on judicial power and the role of federal courts—but this would be unlikely until after the crisis subsides. Congress might act to put military commissions on a statutory basis, but if past history is any guide, it will remain paralyzed and on the sidelines, which is its usual posture when presidents assert prerogative power in emergencies. (It is more likely to spring into action with congressional oversight over the distribution of contracts involved in antiterror activities.)

41. My focus is not on the form of government itself (macro), or on a single case study of events (micro), but a "meso" level of analysis, dealing with the workings of an institution (in this case the presidency) in dealing with policy problems. For a discussion of this level of analysis, see Mark Bovens and Paul 'tHart, *Understanding Policy Fiascoes* (New Brunswick, NJ: Transaction Publishers, 1996), 106-7.

42. These questions are well known to organizational theorists. See, for example, Diane Vaughan, *The Challenger Launch Decision* (Chicago: University of Chicago Press, 1996), xiv.