

Franklin Roosevelt and Presidential Power

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Along with George Washington and Abraham Lincoln, Franklin D. Roosevelt is considered by most scholars to be one of our nation's greatest presidents. FDR confronted challenges simultaneously that his predecessors had faced individually. Washington guided the nation's founding when doubts arose as to whether Americans could establish an effective government. FDR radically re-engineered the government into the modern administrative state when Americans doubted whether their government could provide them with economic security. Lincoln saved the country from the greatest threat to its national security, leading it through a war that cost more American lives than any other. FDR led a reluctant nation against perhaps its most dangerous foreign foe—an alliance of fascist powers that threatened to place Europe and Asia under totalitarian dictatorships. To bring the nation through both crises, FDR drew deeply upon the reservoir of executive power unlike any president before or since—reflected in his unique status as the only chief executive to break the two-term tradition.¹

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¹ There are a great number of works on Roosevelt, with more appearing all the time. I have relied on general works for the background to this chapter. *See generally* JOHN YOO & JULIAN KU, *TAMING GLOBALIZATION: INTERNATIONAL LAW, THE U.S. CONSTITUTION, AND THE NEW WORLD ORDER* (2012); CONRAD BACK, *FRANKLIN DELANO ROOSEVELT: CHAMPION OF FREEDOM* (2003); 1 JAMES MACGREGOR BURNS, *ROOSEVELT: THE LION AND THE FOX 1882–1940* (1956); JAMES MACGREGOR BURNS, *ROOSEVELT: SOLDIER OF FREEDOM* (1970); KENNETH S. DAVIS, *FDR: THE BECKONING OF DESTINY 1882–1928* (2004); FRANK FREIDEL, *FRANKLIN D. ROOSEVELT: A RENDEZVOUS WITH DESTINY* (1991); GEORGE MCJIMSEY, *THE PRESIDENCY OF FRANKLIN DELANO ROOSEVELT* (2000); 1 ARTHUR M. SCHLESINGER, JR., *THE CRISIS OF THE OLD ORDER 1919–1933* (1957); ARTHUR M. SCHLESINGER, JR., *THE AGE OF ROOSEVELT: THE COMING OF THE NEW DEAL 1933–1935* (1958); 3 ARTHUR M. SCHLESINGER, JR., *THE AGE OF ROOSEVELT: THE POLITICS OF UPHEAVAL* (1960); GEOFFREY C. WARD, *A FIRST-CLASS TEMPERAMENT: THE EMERGENCE OF FRANKLIN ROOSEVELT* (1989). Similarly, there are a multitude of works on the New Deal. Some that have been particularly helpful are ALAN BRINKLEY, *VOICES OF PROTEST: HUEY LONG, FATHER COUGHLIN, & THE GREAT DEPRESSION* (1983); ALAN BRINKLEY, *THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR* (1996); BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* (1998); DAVID M. KENNEDY, *FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION*

FDR came to office in the midst of the gravest challenges to the nation since the Civil War. The most obvious and immediate crisis was the Great Depression. FDR placed the president in the role of a legislative leader and produced a dramatic restructuring of the national government, even though the Depression, as a breakdown of the domestic (and global) economy, fell within the constitutional authority of Congress. Large Democratic majorities in Congress expanded federal regulation of the economy beyond anything before seen in peacetime. Regulation of prices and supply, product quality, wages and working conditions, the securities markets, and pensions became commonplace where they had once been rare. Social Security was not just one of the New Deal's most important planks, but the expression of the whole platform.

The federal government would declare responsibility to coordinate and regulate economic activity to provide stability. It had always exercised broad economic powers during wartime, but FDR made management of the economy by a bureaucracy of experts a permanent feature of American life. While the Republican presidents who had dominated elections since the Civil War had left economic decisions to the market, FDR pushed the federal government to provide for economic as well as national security.

FDR's revolution radically shifted the balance of power among the three branches of government, as well as between the nation and the states. Under the New Deal, Congress delegated to the executive branch the discretion to make the many decisions necessary to regulate the economy. Congress did not have the time, organization, or expertise to make the minute decisions required. The New Deal did not just produce a federal government of broad power—it gave birth to a president whose influence over domestic affairs would expand to match his role in foreign affairs. When the Supreme Court stood in the way of the new administrative state, FDR launched a campaign to increase the membership of the Court to change the meaning of the Constitution. When political parties challenged the New Deal, FDR concentrated power in the executive branch, which undermined their ability to channel benefits to their members. The New Deal produced a presidency that was more

AND WAR, 1929–1945 (1999); WILLIAM E. LEUCHTENBURG, *FRANKLIN D. ROOSEVELT AND THE NEW DEAL 1932–1940* (1963); SIDNEY M. MILKIS, *THE PRESIDENT AND THE PARTIES: THE TRANSFORMATION OF THE AMERICAN PARTY SYSTEM SINCE THE NEW DEAL* (1993); and G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* (2000).

institutionally independent of Congress and more politically free of the parties than ever before.²

The Great Depression spawned foreign threats, too. Economic instability in Europe set the conditions for the rise of fascism first in Italy, then in Germany and Japan. Roosevelt realized early that American interests would be best served by supporting the democracies against the Axis powers, but he was confronted by a nation wary of another foreign war and a Congress determined to impose strict neutrality. FDR used every last inch of presidential power to bring the nation into the war on the side of the Allies, including secretly coordinating military activities with Britain, hoping to force an incident with Germany in the North Atlantic, and pressuring Japan until it lashed out in the Pacific. FDR's steady leadership in the face of stiff congressional resistance stands as one of the greatest examples of presidential leadership in the last century, one that redounded to the benefit of the United States and the free world.

This Article will review FDR's approach to executive power by examining three dimensions of his presidency: domestic policy, foreign policy, and civil liberties in wartime. First, it will examine FDR's expansion of presidential power by leading Congress, in the throes of the Great Depression, to create a vast administrative state. He followed with a claim of presidential independence in interpreting the Constitution, which he enforced with a Court-packing plan that eventually forced the Justices to agree. As the administrative state grew in leaps and bounds, FDR expanded the power of the White House in a failing effort to maintain centralized, rational control of the bureaucracy. Second, it will examine FDR's aggressive use of executive authority to face the rise of Imperial Japan and Nazi Germany. FDR stretched existing laws barring U.S. involvement in World War II to the breaking point, and then went even further with claims of sole executive power to assist the Allies. Third, this Article will examine FDR's attitude toward civil liberties in wartime by focusing on three decisions: the use of military commissions to try Nazi saboteurs, the internment of Japanese-American citizens, and the widespread interception of electronic communications.

FDR had a vision of the office in keeping with his great predecessors, Washington and Jefferson. He took full advantage of the independence of the presidency and vigorously exercised its constitutional authorities. In order to respond to crises, both

² See, e.g., MILKIS, *supra* note 1, at 98–124; THEODORE J. LOWI, *THE PERSONAL PRESIDENT: POWER INVESTED, PROMISE UNFULFILLED* (1985).

in peace and war, he contested the Constitution's meaning with the other branches of government. He challenged the Supreme Court's effort to stop the New Deal with his Court-packing plan. To meet the rise of Germany and Japan, he relied on a robust reading of the Commander-in-Chief power—even if it meant ignoring the Neutrality Acts—to bring the United States into the war. FDR understood Berlin and Tokyo's existential threat. He would set the example for the Cold War presidents to follow in both managing the vast regulatory state at home, and meeting the challenges of dire threats abroad.

I. THE NEW DEAL AND THE COURTS

FDR entered office in the midst of the worst economic contraction in American history. Between the summer of 1929 and the spring of 1933, nominal gross national product dropped by fifty percent.³ Prices for all goods fell by about a third; income from agriculture collapsed from \$6 billion to \$2 billion; industrial production declined by thirty-seven percent;⁴ and business investment plummeted from \$24 billion to \$3 billion. About one-quarter of the workforce, thirteen million Americans, remained consistently unemployed, and the unemployment rate would remain above fifteen percent for the rest of the decade.⁵ More than 5000 banks failed, with a loss of \$7 billion in deposits.⁶ From the time of the crash in October 1929 to its low in July 1932, the Dow Jones Industrial Average fell more than seventy-five percent.⁷ It was not a problem caused by famine or drought, dwindling natural resources, or crippled production; crops spoiled and livestock were destroyed because market prices were too low.

Americans were losing faith in their political institutions to solve the crisis. Though the causes of the Depression were complex, some (FDR included) blamed “economic royalists,” financiers and speculators, and the rich. Economists and

³ See MILTON FRIEDMAN & ANNA JACOBSON SCHWARTZ, A MONETARY HISTORY OF THE UNITED STATES 1867–1960, at 299–301 (1963).

⁴ *Id.* at 301.

⁵ *Id.*

⁶ *Id.* at 317, 330.

⁷ To understand the economics of the Great Depression and the New Deal, see 1 ALLAN H. MELTZER, A HISTORY OF THE FEDERAL RESERVE, 1913–1951 (2003); Peter Temin, *The Great Depression*, in 3 THE CAMBRIDGE ECONOMIC HISTORY OF THE UNITED STATES 301 (Stanley Engerman & Robert Gallman, eds., 2000); THOMAS E. HALL & J. DAVID FERGUSON, THE GREAT DEPRESSION: AN INTERNATIONAL DISASTER OF PERVERSE ECONOMIC POLICIES (1998); RICHARD K. VEDDER & LOWELL E. GALLAWAY, OUT OF WORK: UNEMPLOYMENT AND GOVERNMENT IN TWENTIETH-CENTURY AMERICA (N.Y. Univ. Press rev. ed. 1997); BARRY EICHENGREEN, GOLDEN FETTERS: THE GOLD STANDARD AND THE GREAT DEPRESSION, 1919–1939 (1995); and FRIEDMAN & SCHWARTZ, *supra* note 3, at 299–301. JOHN KENNETH GALBRAITH, THE GREAT CRASH 1929 (2d ed. 1988), remains a classic treatment, but one that has been surpassed by more recent work.

historians have argued ever since over the causes of the Depression. Little evidence seems to support the claim that the stock market crash triggered the Depression—stock markets have sharply declined since then, most recently in 1987, with no underlying change in economic growth.

In their classic *Monetary History of the United States*, Milton Friedman and Anna Schwartz argued that a normal recession deepened into the Great Depression because the Federal Reserve mistakenly responded to the banking panic by restricting the money supply.⁸ A deflation in prices followed, which led to a steep drop in economic activity. Ben Bernanke, the current Chairman of the Federal Reserve, elaborated on this theme by arguing that the Fed's deflationary banking policies tightened the credit available to businesses and households, further suppressing economic activity.⁹ Others argue that the Great Depression must be understood within the context of the international economy, which witnessed bank failures and recession in Germany and France, defaults on World War I loan and reparation payments, abandonment of the gold standard, and the dumping of agricultural products on world markets.

While our understanding of the Great Depression has improved thanks to the scholarship of the last forty years, a clear consensus of its causes has yet to emerge. Unsurprisingly then, to the Americans who lived through it, the collapse of the economy was bewildering, confusing, and without precedent. The Hoover administration's policies did not help, and might have made matters even worse. As historians have realized, Hoover did not adopt the aloof, hands-off attitude that his political opponents charged. During his administration, Congress doubled public works spending, and the federal budget deficit rose to \$2.7 billion, at that time the largest in American peacetime history. He pressed business executives to maintain employment and wages, and experimented with policies, such as the Reconstruction Finance Corporation's emergency loans to businesses, which would set important examples for the New Dealers.¹⁰

But Hoover's initiatives were mere stopgaps that were swamped by other policy mistakes. Though he had initially asked for tariff reductions, Hoover signed the notorious Smoot-Hawley Act, which raised rates and killed international trade flows. Following the conventional economic wisdom of the day, Hoover

⁸ FRIEDMAN & SCHWARTZ, *supra* note 3, at 240–42.

⁹ BEN S. BERNANKE, *ESSAYS ON THE GREAT DEPRESSION* 51 (2000).

¹⁰ KENNEDY, *supra* note 1, at 164–65.

sought to balance the budget with tax increases at a time when the economy needed fiscal stimulus. As Milton Friedman and Allan Meltzer have separately argued, the Federal Reserve pursued a deflationary strategy, cutting off the economy's oxygen, when increases in the money supply were called for.¹¹

Some of Hoover's failure stems from his vision of the presidency. As president, he refused to assume the role of legislative leader, resisted the expansion of the federal agencies, and opposed national welfare legislation—all on constitutional grounds.¹² FDR's vision of the office could not have created a sharper contrast. FDR led the nation through a frenzy of experimentation in policies and government structure without parallel in American history. There appeared to be no comprehensive philosophy behind the New Deal, which comes as little surprise, given the confusion that prevailed at the time over the causes of the Depression.

Without any true understanding of the reasons for the collapse, the New Dealers tried anything and everything. Thinking that overproduction was the culprit, some recommended the cartelization of industries to reduce supply and increase prices. Others who blamed under-consumption advocated public jobs programs and welfare relief. Some believed that the budget deficit was the problem, and urged an increase in taxes and cuts in spending. Some thought international trade was a cause, and advocated both more flexibility in trade negotiations and the dumping of excess agricultural production overseas. Pragmatic and political (he had been a professional politician for most of his life), and unsure about the true causes of the Depression, Roosevelt flittered from idea to idea. Some had the effect of canceling each other out—public works projects sponsored by the National Recovery Administration had to buy raw materials at prices inflated by controls imposed by the Department of Agriculture.

Throughout all the experimentation and expansion of government, the one thing that did not change was the focus on the presidency. FDR became the father of the modern presidency by moving the chief executive to the center of the American political universe. FDR drafted the executive's wartime powers into peacetime service, but without calling for any formal change in the Constitution. In his First Inaugural Address, he declared

¹¹ See FRIEDMAN & SCHWARTZ, *supra* note 7; MELTZER, *supra* note 7, at 271.

¹² Ellis W. Hawley, *The Constitution of the Hoover and Franklin Roosevelt Presidency During the Depression Era, 1930–1939*, in *THE CONSTITUTION AND THE AMERICAN PRESIDENCY* 83, 90–91 (Martin Fausold & Alan Shank eds., 1991).

that “our Constitution is so simple and practical that it is possible always to meet extraordinary needs by changes in emphasis and arrangement without loss of essential form.”¹³ What FDR wanted was access to the constitutional powers granted to the president during time of emergency. He promised to seek from Congress “broad executive power to wage a war against the emergency, as great as the power that would be given me if we were in fact invaded by a foreign foe.”¹⁴ FDR’s expansion of the powers of the presidency, both political and constitutional, would grow from this basic theme—the economy and society would henceforth be regulated in ways that were once considered suitable only for war.

The nation got a taste of what FDR meant when, on his second day in office, he issued the second emergency proclamation in American history. During the period between FDR’s election and his inauguration, a massive run on banks had forced many to close their doors or stop lending. Invoking the Trading with the Enemy Act,¹⁵ FDR imposed a national banking holiday and prohibited all gold transactions.¹⁶ Roosevelt’s use of the Act was questionable, to say the least. Congress had passed the Act in 1917 to give the president broad economic powers during wartime or national emergency, but not to regulate the domestic economy in the absence of a foreign threat. Without the statute, FDR was left to act under an unspecified presidential emergency power. At the end of the banking moratorium, Congress convened in special session and passed the Emergency Banking Act, which gave the federal government powers to control gold and currency transactions, to own stock in banks, and to regulate the re-opening of the banks.¹⁷ Because the Roosevelt administration had only finished drafting the legislation the night before, a rolled-up newspaper substituted as a prop for an actual copy of the bill’s text, and the House spent only thirty minutes discussing the legislation.

Roosevelt set a precedent for his successors by rushing a torrent of legislation through Congress in his first 100 days. The National Industrial Recovery Act (“NRA”), the Agricultural Adjustment Act (“AAA”), the Emergency Banking Act, the Emergency Railroad Transportation Act (“ERTA”), and the Home

¹³ 2 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 15 (1938).

¹⁴ *Id.*

¹⁵ Trading with the Enemy Act of 1917, 50 U.S.C. §5 (2000).

¹⁶ Robert Jabaily, *Bank Holiday of 1933*, FEDERAL RESERVE HISTORY (Nov. 22, 2013), https://www.federalreservehistory.org/essays/bank_holiday_of_1933 [http://perma.cc/HZ4R-FL78].

¹⁷ Emergency Banking Relief Act of 1933, Pub. Law 1, 48 Stat. 1.

Owners Loan Act (“HOLA”) all granted FDR extraordinary economic powers to fight the Depression. Their enactment signaled the breakdown of the previously sharp distinction between the executive and legislative branches. The executive branch took the primary responsibility for drafting bills, Congress passed them quickly with minimum deliberation (sometimes sight unseen), and the laws themselves delegated broad authority to the president or the administrative agencies.¹⁸

Through the agencies, the executive branch would impose an unprecedented level of centralized planning over the peacetime economy. The AAA, for example, gave the executive the power to dictate which crops were to be planted.¹⁹ Under the NRA, agencies enacted industry-wide codes of conduct, usually drafted by the industries themselves, to govern production and employment.²⁰ New Dealers sought to address falling prices for commodities by setting higher prices, reducing competition, and limiting production.²¹

Little attention was given to constitutional problems with the legislation, which threatened to exceed the Supreme Court’s limitations on federal power. Laws like the NRA or the AAA pressed the Constitution’s grant of authority to Congress to make laws “to regulate Commerce . . . among the several States.”²² Other laws, such as the new public employment and unemployment relief programs, raised constitutional issues about the national government’s taxing and spending authority, but again these were only problems of federalism, not of presidential power. They mirrored the steps that the national government had taken to mobilize the economy for military production while reducing domestic consumption—many of the early programs of the New Deal were modeled on World War I efforts. As William Leuchtenburg has observed, war became a metaphor for the calamity brought on by the Depression, and FDR and his advisers turned to the wartime experience for solutions.²³ “Almost every New Deal act or agency derived, to some extent, from the experience of World War I.”²⁴

FDR’s legislative whirlwind set in motion a series of events that culminated in confrontation with the Supreme Court. Even

¹⁸ HAWLEY, *supra* note 12, at 92.

¹⁹ Agricultural Adjustment Act of 1933, 7 U.S.C. ch. 26, § 601 *et seq.*

²⁰ HALL & FERGUSON, *supra* note 7, at 124.

²¹ *Id.* at 124–26.

²² U.S. CONST. art. 1, § 8, cl. 3.

²³ WILLIAM E. LEUCHTENBURG, *THE FDR YEARS: ON ROOSEVELT AND HIS LEGACY* 41–53 (1995).

²⁴ *Id.* at 53.

though the President would suffer politically and constitutionally, he would eventually prevail. The roots of the conflict stretched back to the Progressive Era, when the Justices held that the Interstate Commerce Clause did not allow regulation of manufacturing or agriculture within a state. Under the theory of dual federalism, the Court blocked antitrust enforcement against a sugar-refining monopoly in 1895 because the refining itself did not cross interstate lines.²⁵ In 1918, it held unconstitutional a federal law that prohibited the interstate transportation of goods made with child labor.²⁶ Even though the federal ban applied only when the product moved across state lines, the Court held that “the production of articles, intended for interstate commerce, is a matter of local regulation.”²⁷ When Congress attacked child labor again with a ten percent excise tax, the Court blocked that too, on the ground that Congress could not use a tax to achieve a prohibited end.²⁸

The Court matched its limits on federal authority to regulate the economy with similar restrictions on the states. Where Congress could only exercise the powers carefully enumerated in Article I, states enjoyed a general “police power” over all conduct within their borders. The courts, however, read the Fourteenth Amendment—which forbids states from depriving individuals of life, liberty, or property without due process²⁹—to block a great deal of state business regulation. In *Lochner v. New York*, the Court struck down a state law that prohibited bakers from working more than sixty hours a week or ten hours per day.³⁰ According to the majority, the Constitution protected the bakers’ individual right to contract to work as much as they liked.³¹ The state could not adopt economic legislation to redistribute income within the industry (the law favored established bakeries at the expense of immigrant bakers), or infringe the rights of free labor.³² In dissent, Justice Oliver Wendell Holmes famously accused the majority of following its preferences rather than the law.³³ “[A] Constitution is not intended to embody a particular economic theory, whether of paternalism . . . or of *laissez faire*,” Holmes memorably wrote.³⁴ “The Fourteenth Amendment does

²⁵ See *United States v. E.C. Knight*, 156 U.S. 1, 17–18 (1895).

²⁶ See *Hammer v. Dagenhart*, 247 U.S. 251, 276 (1918).

²⁷ *Id.* at 272, 276.

²⁸ See *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 35–36, 43–44 (1922).

²⁹ U.S. CONST. amend. XIV, § 1.

³⁰ *Lochner v. New York*, 198 U.S. 45, 64 (1905).

³¹ *Id.* at 64.

³² *Id.* at 62.

³³ *Id.* at 75 (Holmes, J., dissenting).

³⁴ *Id.*

not enact Mr. Herbert Spencer's *Social Statics*.³⁵ From the time of *Lochner* to the New Deal, the Court invalidated 184 state laws governing working hours and wages, organized labor, commodity prices, and entry into business.³⁶

Legislation enacted during FDR's first 100 days in office virtually dared the Justices to block the New Deal. The NRA did not just attempt to ban a single product or manufacturing process—it placed all industrial production in the nation under federal regulation. The AAA did the same with agriculture, and another law with coal mining. Laws passed later in FDR's term, such as the National Labor Relations Act and the Public Utility Holding Company Act, set nationwide rules on unions and utilities, while the Social Security Act created a universal system of unemployment compensation and old age pension.³⁷

FDR was following in the footsteps of presidents who dared to interpret the Constitution at odds with the other branches. FDR himself appeared to have held few constitutional doubts. New Deal theorists believed, for example, that the Interstate Commerce Clause pertained to almost all economic activity in the nation because all goods manufactured or grown within a state traveled through the channels of interstate commerce to reach the market.³⁸ While the federal government might usually defer to the states on many matters, the Depression was so grave that the states were powerless to control a nationwide problem.

Roosevelt recognized early on that his program risked antagonizing the federal courts, which were filled with Republican judges.³⁹ He could count on the opposition of Justices James McReynolds, Willis Van Devanter, George Sutherland, and Pierce Butler, known as “The Four Horsemen,”⁴⁰ for their skepticism toward government regulation of the economy and

³⁵ *Id.*

³⁶ *See, e.g.*, *New State Ice Co. v. Liebmann*, 285 U.S. 262, 271, 311 (1932) (striking down a state legislative bar requiring a demonstration of necessity for licensing and business entry); *Williams v. Standard Oil Co.*, 278 U.S. 235, 239 (1929) (finding legislature may not authorize state agencies to set gasoline prices sold in the state); *Adkins v. Children's Hospital*, 261 U.S. 525, 560 (1923) (finding state mandated minimum wages, for women and children, interfered with an individual's constitutional liberty to contract); *Adair v. United States*, 208 U.S. 161, 180 (1908) (holding a federal labor law prohibiting employee termination or discrimination based on labor organization membership unconstitutional); JESSE H. CHOPER, ET AL., *CONSTITUTIONAL LAW – CASES, COMMENTS, QUESTIONS* 292 (9th ed. 2001).

³⁷ National Labor Relations Act, 29 U.S.C. §§ 151–69 (1935); Public Utility Holding Company Act, 15 U.S.C. § 79 (1935), Social Security Act, 42 U.S.C. § 7 (1935).

³⁸ Robert L. Stern, *The Commerce Clause and the National Economy, 1933–1946*, 59 *HARV. L. REV.* 645, 683 (1946).

³⁹ WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 83–84 (1995).

⁴⁰ *Id.* at 3.

their defense of individual economic rights. But FDR believed he could expect the general support of progressives Justices Louis Brandeis, Harlan Fiske Stone, and Benjamin Cardozo. Chief Justice Charles Evans Hughes and Justice Owen Roberts held the swing votes. FDR hoped that the Court would grant the political branches more constitutional leeway to respond to the national crisis of the Great Depression. In previous national security emergencies, the courts had allowed the federal government to mobilize the economy with little objection. FDR had reason for these hopes in early 1934, after 5–4 majorities of the Court upheld state laws setting milk prices and delaying mortgage payments.⁴¹

Those hopes were dashed with the opening of the Court's business in January 1935. In its first case examining a New Deal law, an 8–1 majority of the Court invalidated the NRA's "hot oil" provision, which allowed the executive branch to prohibit the interstate transportation of petroleum produced in violation of quotas.⁴² Chief Justice Hughes wrote that the provision unconstitutionally delegated legislative power to the president.⁴³ That decision was only a preview to May 27, 1935—known as "Black Monday" to New Dealers⁴⁴—when the Court struck down three New Deal laws. The centerpiece was the Court's unanimous rejection of the NRA in the "Sick Chicken" case, *A.L.A. Schechter Poultry v. United States*, in which the owners of a chicken slaughterhouse were prosecuted for violating industrial codes of conduct.⁴⁵

In finding the NRA unconstitutional, the Justices threatened the two core features of the New Deal. *Schechter Poultry* held that the Constitution prohibited Congress from delegating legislative power to the president, especially when rulemaking authority was then sub-delegated to private industry groups.⁴⁶ The NRA also violated the Constitution's limits on the reach of federal economic power.⁴⁷ The owners of the slaughterhouse sold their chickens into a local market, which did not directly impact interstate commerce, even though a high percentage of chickens came from out of state. If the Court were to keep to its precedent that intra-state manufacturing and agriculture lay outside federal authority, more pillars of the New Deal—perhaps even

41 See *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 44–48 (1934); see also *Nebbia v. New York*, 291 U.S. 502, 539 (1934).

42 *Pan. Ref. Co. v. Ryan*, 293 U.S. 388, 405, 433 (1935).

43 *Id.* at 431–33.

44 LEUCHTENBURG, *supra* note 39, at 89.

45 *A.L.A. Schechter Poultry Corp. v. U.S.*, 295 U.S. 495, 508 (1935).

46 *Id.* at 550.

47 *Id.*

the whole program itself—might collapse. In pointed language, the Court specifically rejected the Roosevelt administration's overarching approach to the Great Depression: "Extraordinary conditions do not create or enlarge constitutional power."⁴⁸

FDR responded with a political attack on the Court. In a ninety-minute press conference, the President declared *Schechter Poultry* to be the most significant judicial decision since *Dred Scott*.⁴⁹ While critical of the Court's ruling on executive power, he believed that those problems could be fixed by re-writing the statutes to give more direction and less delegation.⁵⁰ It was *Schechter's* narrow view of the Commerce Clause that posed the real threat to the New Deal. If Congress could not regulate the activities of the butchers because they were local in nature, it would be unable to police most other manufacturing or agricultural enterprises. "The whole tendency over these years has been to view the interstate commerce clause in the light of present-day civilization," Roosevelt told the press. "We are interdependent—we are tied together."⁵¹ To Roosevelt, the Justices' way of thinking failed to take account of the national character of the economy. "We have been relegated to a horse-and-buggy definition of interstate commerce."⁵²

FDR considered a variety of proposals if the Court were to continue ruling against the New Deal: increasing the number of Justices (giving the president enough new appointments to change the balance on the Court), reducing the Court's jurisdiction, or requiring a supermajority of Justices to declare a federal law unconstitutional. He rejected them all as premature, but he had been prepared to respond to a potential rejection of the prohibition on gold transactions with a declaration of a national emergency, a fixed price for gold, and an attack on the Court for "imperil[ing] the economic and political security of this nation."⁵³ But the Court upheld the gold regulations, causing Roosevelt to shelve his plans.⁵⁴

The administration continued to work with Congress to expand federal intervention in the economy. Known as the Second New Deal, these laws went beyond the simple, sweeping delegations of authority to the president in the NRA or the AAA.

⁴⁸ *Id.* at 528.

⁴⁹ THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, *supra* note 13, at 221.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 SUP. CT. REV. 347, 351–54 (1966).

⁵⁴ See *Norman v. Balt. & Ohio R.R. Co.*, 294 U.S. 240, 316 (1935).

New laws such as the National Labor Relations Act and the Social Security Act created specialized bureaucracies to handle discrete areas of economic regulation. While the First New Deal vested the president with emergency powers to handle the Depression, the Second New Deal of 1935–1936 promised permanent government intervention in the economy. One of FDR’s political achievements was to transform the social contract so that government benefits became understood as rights—rights just as real to many Americans as those in the Constitution itself. But they did nothing to avoid the constitutional problems of the First New Deal: Their very success depended on their ability to regulate all economic activity, rather than just trade that crossed interstate borders.

The Court, however, stuck to its guns. Rather than cower before this second outburst of lawmaking, in the spring of 1936, it declared unconstitutional more elements of the New Deal. In *United States v. Butler*, the Court held unconstitutional the AAA’s use of taxes and grants to regulate agricultural production, which lay within the reserved powers of the states.⁵⁵ *Butler* threatened the Social Security Act, which used a combination of taxes and spending to provide relief and pensions to the unemployed and elderly.

In *Carter v. Carter Coal Co.*, a 5–4 majority struck down a 1935 law that set prices, wages, hours, and collective bargaining rules for the coal industry.⁵⁶ The Court found that the production of coal did not amount to interstate commerce, but instead fell within the reserved powers of the states.⁵⁷ “[T]he effect of the labor provisions . . . primarily falls upon production and not upon commerce,” Justice Sutherland wrote for the majority.⁵⁸ “Production is a purely local activity.”⁵⁹ *Carter* made clear that the sick chicken case was not a fluke; any federal regulation of intra-state industrial production or agriculture was now in constitutional doubt. In *Jones v. SEC*, the Justices attacked the proceedings of the Securities and Exchange Commission as “odious” and “pernicious” and compared it to the “intolerable abuses of the Star Chamber.”⁶⁰ *Morehead v. Tipaldo* held that New York’s minimum wage law violated the Due Process Clause, just as it had earlier found that such laws interfered with the

⁵⁵ *United States v. Butler*, 297 U.S. 1, 78 (1936).

⁵⁶ *Carter v. Carter Coal Co.*, 298 U.S. 238, 316–17 (1936).

⁵⁷ *Id.* at 303.

⁵⁸ *Id.* at 304.

⁵⁹ *Id.*

⁶⁰ *Jones v. Sec. & Exch. Comm’n*, 298 U.S. 1, 27–28 (1936).

right to contract.⁶¹ As the Court had already found a federal minimum wage in the District of Columbia unconstitutional in the 1920s, it had made the regulation of wages, in FDR's words, a "no-man's land" forbidden to both the federal and state governments.

In the space of just two years, the Court had ripped apart the central features of the First New Deal and was promising the same for the Second. Roosevelt stopped discussing the Court's decisions publicly, and did not make any proposals about the Court during his re-election campaign. He attacked business and the rich as "economic royalists" and the "privileged princes of these new economic dynasties."⁶² Roosevelt proposed a new economic order that would provide stability and security through new forms of government-provided rights. FDR reconceived rights from the negative—preventing the state from intruding on an individual liberty—to the positive—a minimum wage, the right to organize, national working standards, and old-age pensions. Running against the lackluster Republican Alf Landon, FDR secured one of the great electoral victories in American history: 523 electoral votes to Landon's eight (the largest advantage ever recorded in a contested two-party election in American history), every state but Maine and Vermont, more than sixty percent of the popular vote, and a Democratic Congress with two-thirds majorities in both Houses, including seventy-five of the ninety-six seats in the Senate.⁶³ Observers could legitimately question whether the Republican Party would shortly disappear as a political force.

Fresh off his victory, FDR proposed a restructuring of the Court that would eliminate it as an opponent of the New Deal. On February 5, 1937, he sent Congress a judiciary "reform" bill that would add a new Justice to the Court for every one over the age of seventy. Because of the advanced age of several Justices, Roosevelt's proposal would have allowed him to appoint six new Court members. Rather than criticize the Court for its opposition to the New Deal, Roosevelt disingenuously claimed that the elderly Justices were delaying the efficient administration of justice.⁶⁴ In his message to Congress, FDR pointed out that the Court had denied review in 695 out of 803 cases.⁶⁵ How can it be

⁶¹ *Morehead v. N.Y. ex rel. Tiplado*, 298 U.S. 587, 618 (1936).

⁶² President Franklin D. Roosevelt, Acceptance Speech for the Renomination for the Presidency, THE AMERICAN PRESIDENCY PROJECT (June 27, 1936), <http://www.presidency.ucsb.edu/ws/?pid=15314> [<http://perma.cc/L5AP-L8NL>].

⁶³ Election of 1936, THE AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/showelection.php?year=1936> [<http://perma.cc/XQ93-MFHY>].

⁶⁴ 81 Cong. Rec. 878 (1937) (reprinting FDR's message to Congress).

⁶⁵ *Id.*

“that full justice is achieved when a court is forced by the sheer necessity of keeping up with its business to decline, without even an explanation, to hear 87 percent of the cases presented to it by private litigants?”⁶⁶

Only indirectly did FDR imply a link between the advanced age of the Justices and their opposition to the New Deal. “Modern complexities call also for a constant infusion of new blood in the courts,” FDR wrote.⁶⁷ “A lowered mental or physical vigor leads men to avoid an examination of complicated and changed conditions. Little by little, new facts become blurred through old glasses fitted, as it were, for the needs of another generation.”⁶⁸ FDR declared that the remedy would bring a “constant and systematic addition of younger blood” that would “vitalize the courts and better equip them to recognize and apply the essential concepts of justice in the light of the needs and the facts of an ever-changing world.”⁶⁹ The President’s purpose could not have been clearer. He submitted the plan on the Friday before the Court would hear Monday arguments challenging the constitutionality of the National Labor Relations Act, one of the pillars of the Second New Deal.

Despite his electoral success, FDR’s court-packing plan—the first domestic initiative of his second term—suffered a humiliating defeat. Mail and telegrams to Congress went nine-to-one against the plan, and polling showed a majority of the country opposed.⁷⁰ Elements of the New Deal coalition, such as farmers and some unions, attacked the plan early. Senate Republicans unified in opposition shortly after the President announced his proposal, and conservative Senate Democrats came out against the plan within days. Several liberal supporters of the New Deal followed. Hatton Sumners, the chairman of the House Judiciary Committee, organized a majority of his committee against the bill, saying “[b]oys . . . here’s where I cash in my chips.”⁷¹ Various college and university presidents, academics, and the American Bar Association opposed the plan. The coup de grace was delivered by none other than Chief Justice Hughes, in a letter made public during Senate Judiciary Committee hearings, who rebutted point by point FDR’s claims that the Court was overworked and that the older Justices could not perform their duties. Both Brandeis and Van Devanter

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201, 212 (1994).

⁷¹ *Id.* at 214.

approved the letter, which most historians believe ended the court-packing plan for good. Upon its release, Vice President Garner called FDR in Georgia to tell him, “We’re licked.”⁷²

Historians and political scientists have argued ever since over how, or even whether, FDR still won the war. On March 29, 1937, a week after the release of the Hughes letter, the Court handed down a 5–4 decision upholding a Washington state minimum wage law for women.⁷³ In *West Coast Hotel Co. v. Parrish*, the lineup of votes for and against New York’s minimum wage, which had been struck down in *Tipaldo* the year before, remained the same—except for Justice Roberts, who switched sides to uphold the law.⁷⁴ Overruling the earlier bans on minimum wage laws, *Parrish* made clear that the Due Process Clause would no longer stand in the way of government regulation of wages or hours.

Two weeks later, the Court upheld the National Labor Relations Act, which had been challenged on the same grounds raised in the Sick Chicken and *Carter* cases.⁷⁵ In *NLRB v. Jones & Laughlin Steel Corp.*, Chief Justice Hughes led a 5–4 majority in rejecting the doctrine that manufacturing did not constitute interstate commerce. Jones & Laughlin Steel was the fourth-largest steel company in the nation, with operations in multiple states. As the Court observed, “the stoppage of those operations by industrial strife would have a most serious effect upon interstate commerce.”⁷⁶ “It is obvious,” the Court found, that the effect “would be immediate and might be catastrophic.”⁷⁷ Henceforth, the Court would allow federal regulation of the economy, even of wholly intrastate activity, because of the interconnectedness of the national market. To do otherwise would be to “shut our eyes to the plainest facts of our national life” and to judge questions of interstate commerce “in an intellectual vacuum.”⁷⁸ Justice Roberts again switched positions to make the 5–4 majority possible.

The Court’s about-face sapped the strength from FDR’s court-packing campaign. By May 1937, it appeared that an outright majority of the Senate opposed the proposal, and opinion

⁷² *Id.* at 220.

⁷³ See *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937).

⁷⁴ *Id.* at 379.

⁷⁵ See generally *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *NLRB v. Fruehauf Trailer Co.*, 301 U.S. 49 (1937); *NLRB v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58 (1937); *Assoc. Press v. NLRB*, 301 U.S. 103 (1937); *Wash., Va. & Md. Coach Co. v. NLRB*, 301 U.S. 142 (1937).

⁷⁶ *Jones & Laughlin Steel Corp.*, 301 U.S. at 41.

⁷⁷ *Id.*

⁷⁸ *Id.*

polls showed that only one third of the public supported it.⁷⁹ At the end of the month, the Senate Judiciary Committee reported the bill out with an unfavorable recommendation.⁸⁰ Two more events finished things. Justice Van Devanter announced his retirement, timed for the same day as the Judiciary Committee vote, giving Roosevelt his first Supreme Court appointment. His departure would give the New Deal a secure majority on the Court. The Court also upheld the Social Security Act from attack as an unconstitutional spending measure or an invasion of state sovereignty.⁸¹ The court-packing bill lost all momentum, never emerged from the House Judiciary Committee, and never reached a floor vote.

While FDR lost in Congress, he had won his larger objective. The Court would not strike down another regulation of interstate commerce for almost sixty years. Journalists and political scientists immediately attributed the “switch in time that saved nine” to FDR’s threat to pack the Court.⁸² Even today, a few creative scholars like Bruce Ackerman defend the sweeping constitutional changes of the New Deal—which, unlike Reconstruction, were never written into a constitutional amendment—with the 1936 electoral landslide and the attack on the Court.⁸³ More recent work claims that the Court’s jurisprudence was evolving in a more generous direction toward federal power anyway.⁸⁴ The Court, this work points out, had confidentially voted to uphold the minimum wage in *West Coast Hotel* on December 19, 1936, six weeks before FDR sprung his proposal on the nation.⁸⁵ The court-packing legislation could not have pressured the Court because it obviously had little chance of passage. The argument that the 1936 elections prodded the Justices to switch positions on the New Deal also suffers from the absence of the Court as an issue during the campaign.⁸⁶ If anything, FDR suffered politically from his confrontation with the Court. A growing bipartisan coalition against the New Deal

⁷⁹ TOM S. CLARK, *THE POLITICS OF JUDICIAL INDEPENDENCE: COURTS, POLITICS, AND THE PUBLIC* 140 (Bruce Peabody eds., 2011).

⁸⁰ Cushman, *supra* note 70, at 222–23.

⁸¹ *See, e.g.*, Charles C. Steward Machine Co. v. Davis, 301 U.S. 548, 598 (1937); *Helvering v. Davis*, 301 U.S. 619, 645 (1937).

⁸² *See, e.g.*, JOSEPH ALSOP & TURNER CATLEDGE, *THE 168 DAYS* (1938); MERLO J. PUSEY, *THE SUPREME COURT CRISIS* (1937).

⁸³ 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 105–30 (First Harv. Univ. Press 1993).

⁸⁴ *See generally* CUSHMAN, *supra* note 1.

⁸⁵ *Id.* at 18.

⁸⁶ *See, e.g.*, Adrian Vermeule, *Political Constraints on Supreme Court Reform*, 90 MINN. L. REV. 1154, 1159 (2005–2006); Leuchtenburg, *supra* note 53, at 379.

and another sharp recession in 1938 stalled FDR's domestic agenda for the rest of his presidency.

Nonetheless, if FDR is considered a great president because of the New Deal, critical to his success was his willingness to advance his own understanding of the Constitution. FDR never accepted the Court's right to define the powers of the federal government to regulate the economy. While FDR did not join Lincoln's blatant defiance in declining to obey a judicial order, his administration regularly proposed laws that ran counter to Supreme Court precedent, and FDR openly questioned the competence of the judiciary to review the New Deal.⁸⁷ He sought to change the Court's composition and size as a means to pressure it to change its rulings. With the retirement of the Four Horsemen, Roosevelt would appoint Hugo Black, Stanley Reed, Felix Frankfurter, and William O. Douglas to the Court, and by 1941, eight of the nine Justices were his appointees. While they would fight about the application of the Bill of Rights against the states, among other issues, they would unanimously agree that Congress's powers to regulate the economy were almost without limit.⁸⁸

In its call for a peacetime state of emergency, the New Deal went beyond changes to the balance of powers between the federal and state governments. Times of war inevitably shift Constitutional power and responsibility to the president as commander and chief. FDR and the New Deal Congress created an administrative state that had the same effect in times of peace, but which would be permanent, rather than temporary. Laws enacted in the first 100 days and in the years after vested sweeping legislative powers in the executive branch. The executive branch, in turn, became the fount of legislative proposals. FDR's bills to cut federal spending and veterans' benefits to balance the budget passed with alacrity.

The effort to engage in rational administration made the executive branch the locus of regulation—issued through agency rulemaking, rather than acts of Congress—as the federal government took on the job of regulating the securities markets, banks, labor unions, industrial working conditions, and production standards. Victory, in the context of the Depression, was all the more difficult because, whereas war requires the rationing of scarce resources in favor of military production,

⁸⁷ President Franklin D. Roosevelt, 46 – Fireside Chat, THE AMERICAN PRESIDENCY PROJECT (Mar. 9, 1937), <http://www.presidency.ucsb.edu/ws/?pid=15381> [<http://perma.cc/9SVA-LHFJ>].

⁸⁸ *See, e.g.*, *United States v. Darby*, 312 U.S. 100 (1941).

ending the Depression required stimulating demand and production of all manner of goods, essentially altering millions of market decisions made every day.

The New Deal's resemblance to mobilization relied upon a government bureaucracy more typical of wartime. America's administrative state had grown in ebbs and flows, with the early Hamiltonian vision of a state centered around the Treasury Department and the Bank, Jefferson's embargo machinery, and the massive departments of the Civil War representing the high-water marks. With the creation of the Interstate Commerce Commission in 1887, the American administrative state started to grow in earnest. Progressive-era efforts to create national administration to manage discrete economic and social issues culminated in the World War I mobilization effort, which included everything from production quotas to press censorship.⁸⁹ Between 1887 and 1932, Congress created a few new agencies to oversee aspects of the economy, such as railroad rates, business competition, and the money supply.⁹⁰ These early examples set the precedent of delegating lawmaking authority to the executive branch to set the actual rules governing private conduct.

FDR supplemented the New Deal's delegation of legislative authority to the executive branch by further enshrining the presidency as the focal point of political life. Even before his election, FDR had made clear that the candidate, not the party, would be the center of the campaign by renting a small plane to fly to Chicago to accept his nomination in person—the first nominee of either major party to do so.⁹¹ Once in office, he used new technology to reach over the heads of Congress and the media. Radio allowed the President to forge a direct relationship with the American electorate that went unfiltered by the newspapers. His famous “fireside chats,” the first delivered on the day before the government reopened the banks on March 13, 1933, allowed FDR to campaign for his policies directly with the people. Roosevelt did not neglect the press either; he held twice-a-week, off-the-record press conferences in the Oval Office, where

⁸⁹ See, e.g., DAVID M. KENNEDY, *OVER HERE: THE FIRST WORLD WAR AND AMERICAN SOCIETY* (1980); STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES 1877–1920* (1982); ROBERT H. WIEBE, *THE SEARCH FOR ORDER, 1877–1920* (1966).

⁹⁰ Following the creation of the Interstate Commerce Commission in 1887, Congress authorized the creation of the Department of Labor and Commerce, the Food and Drug Administration, The Bureau of Investigation (later the Federal Bureau of Investigation), the Federal Reserve, and the Federal Trade Commission.

⁹¹ Thomas Hardy, *FDR's Nomination*, CHICAGO TRIBUNE, <http://www.chicagotribune.com/news/nationworld/politics/chi-chicagodays-fdrnomination-story-story.html> [<http://perma.cc/5ZAE-JFC2>] (last visited Nov. 19, 2017).

reporters could ask him any question they liked.⁹² He employed his ample charm to win over the reporters, who burst out in applause after the first press conference on March 8, 1933.⁹³

FDR used these tools to marshal support for his legislative program and to change the political culture. Under Roosevelt, the president became the driving force for positive government, rather than the leader of a political system where power was dispersed among the branches of government, the states, and the political parties.⁹⁴ If the presidency were to play this leading role, it had to strengthen its control over the executive branch itself. In order to fulfill the promise of economic stability, the President wanted full command over the varied programs and policies of the government. This challenge was compounded by the New Deal's blizzard of new commissions and agencies, such as the National Recovery Administration, the Securities and Exchange Commission, and the Federal Communications Commission, as well as the lack of a rational government structure that matched form to function. When Congress enacted New Deal legislation, it rarely reduced the size or shape of federal agencies, often simply creating an additional agency or layer of bureaucracy on top of the existing ones.

Roosevelt sought to master the executive branch in various ways, with limited success. He expanded the use of aides attached to the White House to develop and implement policy instead of governing through the cabinet. FDR brought in a "Brain Trust," many of them academics who had advised him during the 1932 campaign to develop legislation, draft speeches, and manage policy. Some were located in the White House, and others were spread in appointed positions in the agencies, but they all worked for the President.

Cabinet meetings became primarily ceremonial occasions. Rather, policy development evolved into the form familiar today, with meetings between the president and chosen advisors—be they White House staff, cabinet officers, agency staff, or special committees including some combination of the former—assuming a central role.⁹⁵ The cabinet as a whole no longer represented leaders of important factions within the president's party, nor did there seem to be a guiding principle behind individual appointments. As James MacGregor Burns has observed, "[t]he

⁹² Jean Edward Smith, *Obama, F.D.R. and Taming the Press*, N.Y. TIMES (Feb. 2, 2009, 6:15 PM), <https://100days.blogs.nytimes.com/2009/02/02/obama-fdr-and-taming-the-press/>.

⁹³ *Id.*

⁹⁴ MARC LANDY & SIDNEY MILKIS, PRESIDENTIAL GREATNESS 153–54 (2000).

⁹⁵ BURNS, *supra* note 1, at 174.

real significance of the cabinet lay in Roosevelt's leadership role. He could count on loyalty from his associates; almost everyone was 'FRBC'—for Roosevelt before Chicago" (where the Democratic Party nominated FDR in 1932).⁹⁶ The declining importance of the cabinet, both in its corporeal form and in its individual members, naturally enhanced the control of the White House over the government.

FDR used his removal power to direct policy, following the examples set by Lincoln, Jackson, and Washington. He fired the head of the Federal Power Commission, whom Hoover had appointed, and replaced him with his own man, even though legislation appeared to give the Commission itself the authority to choose the chairman.⁹⁷ As the United States came closer to entry into World War II, he summarily dismissed his Secretaries of War and Navy and replaced them with internationalist Republicans without serious opposition from Congress or his own party.

FDR also used his removal power to seek control over the independent agencies. Unlike the core departments, such as State, War, Treasury, and Justice, independent agencies were designed by Congress to be less amenable to presidential direction.⁹⁸ Their organizing statutes usually create a multi-member commission at the top with a required balance between the political parties. In some cases, Congress shields the commission members from presidential removal except for cause (for malfeasance in office or for violating the law). Congress uses these devices to delegate the power to make legislative rules, while keeping the ability to influence its exercise and preventing its direct transfer to presidential control. Until FDR, presidents were generally understood to have the constitutional ability to freely remove commissioners even in the presence of these "for cause" protections against removal, though it is unclear to what extent previous presidents, in fact, used this authority.⁹⁹

Upon taking office, FDR decided to replace the head of the Federal Trade Commission ("FTC"), William Humphrey, a

⁹⁶ *Id.* at 150.

⁹⁷ Christopher Yoo, Steven Calabresi & Laurence Nee, *The Unitary Executive During the Third Half-Century, 1889–1945*, 80 NOTRE DAME L. REV. 1, 83–84 (2004).

⁹⁸ The classic work on the origins of the independent agencies remains ROBERT E. CUSHMAN, *THE INDEPENDENT REGULATORY COMMISSIONS* (1941). For more recent analysis, see Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41 (1986); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984); Paul R. Verkuil, *The Status of Independent Agencies after Bowsher v. Synar*, 1986 DUKE L.J. 779 (1986).

⁹⁹ STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* 284–88 (2008).

Hoover administration appointee. The FTC had a potential role in overseeing important New Deal programs due to its responsibility to investigate “unfair methods of competition in commerce,”¹⁰⁰ a broad jurisdictional grant of authority that allowed it to sue companies for monopolistic activity. The statute establishing the FTC allowed removal of a commissioner only in cases of “inefficiency, neglect of duty, or malfeasance in office.”¹⁰¹ FDR decided to remove Humphrey only because he wanted to have his own man in the job. FDR wrote Humphrey: “You will, I know, realize that I do not feel that your mind and my mind go along together on either the policies or the administering of the Federal Trade Commission[.]”¹⁰² When Humphrey refused to leave, FDR fired him. Congress did not complain, and instead promptly confirmed FDR’s nomination of a new FTC chairman. Humphrey, however, remained undaunted and sued to recover his pay for the rest of his term.

Four years later, Humphrey’s estate eventually took his case to the Supreme Court, which dealt Roosevelt and the presidency a serious blow.¹⁰³ The Justice Department argued that the FTC statute was an unconstitutional infringement on the president’s removal power and his constitutional duty to faithfully execute the laws.¹⁰⁴ Roosevelt’s lawyers relied on *Myers v. United States*, a nine-year-old case that had struck down a law requiring Senate consent before a president could fire a postmaster.¹⁰⁵ In *Myers*, Chief Justice (and former president) William Howard Taft wrote: “The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates.”¹⁰⁶ Taft concluded that the president’s duty to implement the laws required that “he should select those who were to act for him under his direction” and that he must also have the “power of removing those for whom he cannot continue to be responsible.”¹⁰⁷ Based on this precedent, FDR seemed on safe ground.

¹⁰⁰ Robert E. Freer, The Work of the Federal Trade Commission, FEDERAL TRADE COMMISSION (Mar. 23, 1936), https://www.ftc.gov/system/files/documents/public_statements/675261/19360323_freer_the_work_of_the_ftc.pdf.

¹⁰¹ *Humphrey’s Executor v. United States*, 295 U.S. 602, 620 (1935).

¹⁰² *Id.* at 619.

¹⁰³ *See generally id.*

¹⁰⁴ Yoo, Calabresi & Nee, *supra* note 97, at 85.

¹⁰⁵ *Myers v. United States*, 272 U.S. 52, 176 (1926).

¹⁰⁶ *Id.* at 117.

¹⁰⁷ *Id.*

On the same day that it decided *Schechter Poultry*, May 27, 1935, the Court substantially revised its removal jurisprudence. With Justice Sutherland writing, the majority held that the FTC “cannot in any proper sense be characterized as an arm or an eye of the executive.”¹⁰⁸ Creating a wholly new category of government, Sutherland described the FTC’s functions as “quasi legislative or quasi judicial” because it investigated and reported to Congress and conducted initial adjudications on claims of anti-competitive violations before a case went to federal court.¹⁰⁹ The FTC acted “as an agency of the legislative or judicial departments,” and was “wholly disconnected from the executive department[.]”¹¹⁰ *Myers*, and the president’s discretionary removal authority, only applied to “purely executive” officers such as the Secretary of State or a postmaster.¹¹¹

The decision has long been puzzling, especially its recognition of a fourth branch of government that falls outside the three mentioned in the Constitution. Further, the reasoning in *Humphrey’s Executor* has shriveled on the vine. Recent cases continue to recognize Congress’s authority to shield certain government agents (such as the independent counsel) from removal even when they fall within the executive branch, not because they perform quasi legislative or judicial functions, but because their independence is critical to their functions.¹¹² Another oddity is that FDR’s loss in *Humphrey’s Executor* came at the hands of Justice Sutherland and the conservatives on the Court, who were (as we shall see), otherwise strong supporters of executive power, albeit in foreign affairs.

As they demonstrated in other decisions, the Justices were concerned with the New Deal’s great expansion of federal power. They may have believed that one way to blunt the progressive centralization of power in the national government was to force the executive to disperse that power once at the federal level.¹¹³ Not surprisingly, Congress found the Court’s approach quite congenial. It could delegate authority to the executive branch while preventing the president from exercising direct control over the agency. With the executive branch thus defanged, independent agencies naturally became more responsive to congressional wishes, which controlled their funding and held

¹⁰⁸ *Humphrey’s Executor*, 295 U.S. at 628.

¹⁰⁹ *Id.* at 628–29.

¹¹⁰ *Id.* at 628.

¹¹¹ *Id.* at 632.

¹¹² See, e.g., *Morrison v. Olson*, 487 U.S. 654 (1988); *Mistretta v. United States*, 488 U.S. 361 (1989).

¹¹³ See HADLEY ARKES, *THE RETURN OF GEORGE SUTHERLAND: RESTORING A JURISPRUDENCE OF NATURAL RIGHTS* 37 (1994).

oversight hearings into their activities. And since the agencies were still formally within the executive branch, Congress could have its cake and eat it too, disclaiming any official responsibility for unpopular regulatory decisions. After *Humphrey's Executor*, Congress added "for cause" limitations on removal for members of the National Labor Relations Board, the Civil Aeronautics Board, and the Federal Reserve Board.¹¹⁴

Creation of the permanent administrative state strained the presidency. With the Supreme Court and Congress limiting the main constitutional tool of executive control, independent agencies might be able to pursue policies at odds with the president's understanding of federal law. Or they might press policy mandates in a way that caused conflict with other agencies, created redundancies, or ran counter to other federal policies. A number of methods for taming the behemoth were possible. Presidents could impose order by forcing the menagerie of departments, commissions, and agencies to act according to a common plan, and thereby coordinate the activities of the government rationally; the administrative state could be freed of direct control by either the president or Congress, and instead be subject to a variety of checks and balances by all three branches; or the agencies could work closely with private business and interest groups, which would raise objections to agency action with the courts, Congress, and the White House.

FDR rejected the idea that the administrative state should float outside the Constitution's traditional structure, and he continued to fire the heads of agencies even when Congress had arguably limited his power of removal. FDR, for example, removed the chairman of the Tennessee Valley Authority in 1938, even though Congress had established that he could only be fired for applying political tests or any other standards but "merit and efficiency" in running the agency.¹¹⁵ The chairman had attacked his Tennessee Valley Authority colleagues and had declared that he took orders from Congress, not the president. FDR removed him on the ground that the Executive Power and Take Care Clauses of the Constitution required that he control his subordinates.¹¹⁶ FDR established various super-cabinet

¹¹⁴ Yoo, Calabresi & Nee, *supra* note 97, at 88–89.

¹¹⁵ Franklin D. Roosevelt, *The President Transmits to the Congress the Record of the Removal of the Chairman of the Tennessee Valley Authority* (Mar. 23, 1938), in 7 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 151–53, 162–63 (Samuel I. Rosenman ed., 1942).

¹¹⁶ The federal courts upheld FDR's decision, ultimately holding that Congress had failed to clearly prevent the President from firing on other grounds in addition to criteria it listed. See *Morgan v. Tenn. Valley Auth.*, 28 F. Supp. 732, 737 (E.D. Tenn. 1939), *aff'd*, 115 F.2d 990 (6th Cir. 1940); see also Yoo, Calabresi & Nee, *supra* note 97, at 89–90.

entities with names like the Executive Council, the National Emergency Council, and the Industrial Emergency Committee, composed of cabinet officers, commission heads, and White House staff.¹¹⁷ None of these improvisations provided a structural solution to the challenge posed by the administrative state, as these various bodies proved a poor forum for rational planning and control over the varied arms of the federal government.

FDR's last thrust to control the administrative state required the cooperation of Congress. In 1936, the President asked a commission, headed by administration expert Louis Brownlow, to recommend institutional changes for the improved governance of the administrative state.¹¹⁸ A year later, it reported: "the President needs help."¹¹⁹ Its bottom line was clear. "[M]anagerial direction and control of all departments and agencies of the Executive Branch," Brownlow wrote, "should be centered in the President[.]"¹²⁰

According to Brownlow, the President's political responsibilities dwarfed his formal authorities. "[W]hile he now has popular responsibility for this direction," the committee reported, "he is not equipped with adequate legal authority or administrative machinery to enable him to exercise it[.]"¹²¹ Brownlow and FDR, who approved the report, held the usual concern that the administrative state was wasteful, redundant, and contradictory, but more importantly, they worried that it would become so independent as to lose touch with the people.¹²² The administrative state suffered from a democracy deficit.

The Brownlow Committee concluded that Congress must give the president more management resources, while keeping the chief executive at the center of decision-making. It advised that to make "our Government an up-to-date, efficient, and effective instrument for carrying out the will of the Nation," presidential control must be enhanced.¹²³ It recommended the creation of a new entity, the Executive Office of the President (which would house the Bureau of the Budget), six new White House assistants to the president, centralization of the government's budgets and planning, and the merger of

¹¹⁷ See Exec. Order No. 6202-A, Appointing the Executive Council (July 11, 1933); Exec. Order No. 6433-A, Creation of the National Emergency Council (Nov. 17, 1933); Exec. Order No. 6770, Creating the Industrial Emergency Committee (June 30, 1934).

¹¹⁸ PERI ARNOLD, MAKING THE MANAGERIAL PRESIDENCY: COMPREHENSIVE REORGANIZATION PLANNING, 1905–1996, at 94 (1986).

¹¹⁹ *Id.* at 81.

¹²⁰ *Id.* at 103.

¹²¹ *Id.*

¹²² *Id.* at 104–07.

¹²³ *Id.* at 104.

independent agencies into the cabinet departments.¹²⁴ Brownlow's report did not call for a professional secretariat that would supervise the activities of the government, as existed in Great Britain. Rather, the new assistants to the president and the Bureau of the Budget would provide information to the president and carry out his orders, with Roosevelt still making all critical policy decisions.¹²⁵ By centralizing the administrative state under the presidency, it would become directly accountable to Congress and the American people. "Strong executive leadership is essential to democratic government today," the report concluded.¹²⁶ "Our choice is not between power and no power, but between responsible but capable popular government and irresponsible autocracy."¹²⁷

FDR had the report's recommendations distilled into a bill he presented to the congressional leadership in January 1937. In a four-hour presentation, FDR personally laid out the plan and declared: "The President's task has become impossible for me or any other man. A man in this position will not be able to survive White House service unless it is simplified. I need executive assistants with a 'passion for anonymity' to be my legs."¹²⁸ Even though the 75th Congress began with a two-thirds Democratic majority, it was wary of FDR's plans and less than thrilled at the prospect of greater presidential influence over the New Deal state. Roosevelt's plan undermined the benefits to Congress of delegation because it would weaken Congress's influence over agency decisions while expanding the president's authority over what was essentially lawmaking.

Brownlow's report landed before Congress at the same time as FDR's court-packing plan. While the two plans addressed different problems, they fed the same fear of presidential aggrandizement at the expense of the other branches. Key congressional leaders had not been consulted or briefed on the reorganization plan, which they proceeded to attack as another step toward despotism, or a power grab by the university intellectuals who no doubt would run the new agencies. At a time when totalitarianism was raising its ugly head in Europe, fears of consolidated executive power were particularly salient. In 1938, the bill failed in the House and was replaced by a more

¹²⁴ *Id.*

¹²⁵ See MATTHEW DICKINSON, BITTER HARVEST: FDR, PRESIDENTIAL POWER, AND THE GROWTH OF THE PRESIDENTIAL BRANCH 104–10 (1996).

¹²⁶ THE OXFORD HANDBOOK OF AMERICAN DEMOCRACY 106 (Robert F. Durant ed., 2010).

¹²⁷ *Id.*

¹²⁸ DICKINSON, *supra* note 125, at 111.

modest bill that gave FDR a limited ability to reorganize government.¹²⁹ Under that authority, FDR still managed to locate the Bureau of the Budget within a new Executive Office of the President. As the Office of Management and Budget, it today exercises central review over the economic costs and benefits of all federal regulation, one of the president's most powerful tools for rationalizing the activities of the administrative state.¹³⁰

FDR also expanded the resources within the White House, an institution now separate from the Executive Office of the President, which enabled him to gain more information and control over the cabinet agencies. Still, the independent agencies remained outside the cabinet departments. FDR never successfully established any single entity to coordinate the activities of the entire administrative state, and his failed bill demonstrates the enduring constitutional checks on the presidency. Despite FDR's growing power, only Congress could pass the laws needed to reorganize the cabinet departments, reshape the jurisdiction and structure of the independent agencies, and provide the funds and positions in a new, revitalized White House.¹³¹

While FDR suffered defeats at the hands of Congress, he continued to claim and exercise inherent executive authority that went beyond mere control of personnel. He signed statements to object to riders inserted into needed spending bills, which he believed to be unconstitutional. Congress, for example, attempted to force the President to fire three bureaucrats it believed were "subversives" by specifically barring any federal funds to pay their salaries.¹³² Roosevelt signed the bill but objected to its unconstitutional end run around the president's power over the removal of executive branch officials. Ultimately, the officials left within months, but they sued for their back pay all the way to the Supreme Court, which agreed that Congress had violated the Constitution.¹³³

¹²⁹ LEUCHTENBURG, *supra* note 1, at 277–80.

¹³⁰ See, e.g., Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Decisionmaking*, 99 HARV. L. REV. 1075 (1986); Alan B. Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059 (1986); TERRY EASTLAND, ENERGY IN THE EXECUTIVE: THE CASE FOR THE STRONG PRESIDENCY 163 (1992); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

¹³¹ On the way that presidents today manage policy development through the White House and the Executive Office of the President, see ANDREW RUDALEVIGE, MANAGING THE PRESIDENT'S PROGRAM: PRESIDENTIAL LEADERSHIP AND LEGISLATIVE POLICY FORMATION 18–62 (2002).

¹³² See Urgent Deficiency Appropriation Act, ch. 218, §304, 57 Stat. 431, 450 (1943).

¹³³ *United States v. Lovett*, 328 U.S. 303, 315 (1946).

President Roosevelt also followed Lincoln's example in using his executive power to fight racial discrimination. Although Lincoln had relied on his power as Commander-in-Chief to free the slaves, the southern states imposed racial segregation in the years after the Civil War, ultimately with the approval of the Supreme Court.¹³⁴ While FDR did not take segregation head on, he issued an executive order in 1941 to prohibit racial discrimination in employment on federal defense contracts.¹³⁵ Roosevelt had no statutory authority to order the federal government to provide fair treatment in employment to all, regardless of race. He could rely only upon his constitutional authority as president to oversee the management of federal programs. Once war began, President Roosevelt could clarify that his orders were taken under his power as both Chief Executive and Commander-in-Chief in wartime.¹³⁶ FDR's orders would not be the first time, nor the last time, that the cause of racial equality would depend on a broad understanding of presidential power.

The New Deal depended upon broad theories of the presidency and the role of the federal government in national life. What remains less clear is whether FDR's fundamental re-orientation of the government into a positive, active instrument of national policy was worthwhile. Contemporary critics of the modern presidency question whether chief executives, acting alone, have led the nation into disastrous wars.¹³⁷ We need also ask, but rarely do, whether the expansion of executive power domestically has benefited the nation. To the extent we debate the desirability of the administrative state, most American scholars today bemoan the fact that the New Deal did not go far enough. They argue that the New Deal failed because it did not achieve a full-fledged European welfare state, or that FDR's coalition fragmented and failed to follow through on the promise of liberal reform.¹³⁸ These critics, often the most vocal detractors of the muscular executive action in foreign affairs, cry out for more executive power domestically.

¹³⁴ *Plessy v. Ferguson*, 163 U.S. 537, 543, 548 (1896).

¹³⁵ Exec. Order No. 8802, 6 Fed. Reg. 3109 (June 27, 1941).

¹³⁶ Exec. Order No. 9346, 8 Fed. Reg. 7183 (May 27, 1943).

¹³⁷ See, e.g., Barry D. Karl, *Constitution and Central Planning: The Third New Deal Revisited*, 1988 SUP. CT. REV. 163, 188 (1988); Margaret Weir & Theda Skocpol, *State Structures and the Possibilities for "Keynesian" Responses to the Great Depression in Sweden, Britain, and the United States*, in BRINGING THE STATE BACK IN 107-08 (Peter B. Evans et al. eds., 1985); THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* 5 (1995).

¹³⁸ See RUDALEVIGE, *supra* note 131.

Vesting the president with more authority to control the government's regulation of the economy may make sense during an emergency, but it did not work in solving the Great Depression. Economists recognize today that the New Deal neither put an end to high rates of unemployment nor restored consistent economic growth.¹³⁹ FDR's monetary and fiscal policy were often counterproductive. Full employment would return only with American rearmament in the first years of World War II. Other New Deal policies were similarly confused, such as allowing industry to set production quotas, reduce production to raise prices, and restrict employment by raising minimum wages. Economists similarly doubt whether the creation of national regulation of the securities markets and other industries contributed to the eventual economic recovery, even though it was certainly valuable for postwar prosperity. If, as Milton Friedman argues, the Great Depression would have proven to be only a normal recession with some deft monetary policy from the Federal Reserve,¹⁴⁰ it bears asking whether the expansive, permanent bureaucracy was needed at all.

Decades later, American presidents would campaign against the burdensome regulations made possible by the New Deal. The administrative state we have today failed to end the Great Depression. There is little doubt that the explosion in the size and power of the administrative state has transformed the nature of American politics. Considering this, was the administrative state worth the price?

The federal government has dramatically expanded the scope of regulation to include not only national economic activity, such as workplace conditions and minimum wages and hours, but also the environment and endangered species, educational standards, state and local corruption, consumer product safety, communications technology and ownership, illegal narcotics and gun crimes, and corporate governance. It has produced less deliberation in Congress, which now delegates sweeping powers to the agencies, and has placed the initial authority to issue federal law affecting private individuals in administrative agencies. Those agencies are not directly accountable to the people through elections, except for the thin layer of presidential appointees at the very top. Special-interest groups have come to

¹³⁹ See, e.g., David M. Kennedy, *What the New Deal Did*, 124 *POLITICAL SCIENCE QUARTERLY* 251, 252 (2009); Harold L. Cole & Lee E. Ohanian, *New Deal Policies and the Persistence of the Great Depression: A General Equilibrium Analysis*, 112 *J. POL. ECON.* 779, 813 (2004); BERNANKE, *supra* note 9; ARTHUR I. BLOOMFIELD, *CAPITAL IMPORTS AND THE AMERICAN BALANCE OF PAYMENTS 1934-39* (1950).

¹⁴⁰ See FRIEDMAN & SCHWARTZ, *supra* note 7.

play a significant role in influencing both congressional committees and agencies, gaining economic “rents” for their members at the expense of the broader public.

This is not a plea to return to the laissez-faire capitalism of the nineteenth century variety. The modern administrative state no doubt has produced social benefits, and there are important areas where the greater information and expertise held by the executive agencies improves government policy, but it remains an open question whether the centralization of economic and social regulation in the national government has been, on balance, a success. It is undeniable that the requirement of minimum national standards, most especially in the area of civil rights, was a necessary and long-overdue change. Equality under law should not have been a matter of legislative or executive discretion, but a requirement of the Reconstruction Amendments to the Constitution. National control of other economic and social issues, however, may not have been worth the cost in increased government spending, larger budget deficits, a permanent government apparatus of unprecedented size (at least in the American experience), the rise of interest-group politics, and interference with efficient market mechanisms.

Federal agencies may impose uniform rules, but they may not impose the best rules. In the absence of broad national regulation, states could enact a diversity of policies on issues such as the economy, environment, education, crime, and social policy. People could vote with their feet by moving to states that adopt their preferred package of policies, while experimentation could identify the most effective solutions to economic and social problems. The New Deal’s concentration of regulatory authority in Washington, D.C. sapped the vitality of the states, whose powers are only a pale imitation of those they held in the nineteenth century.¹⁴¹ FDR certainly deserves credit for restoring Americans’ optimism and faith in government, and for alleviating the suffering inflicted by the Depression, but it remains doubtful whether the great wrenching in the fabric of our federal system of government and the expansion in the president’s constitutional powers in the domestic realm can be justified by any limited advance in triggering a recovery. Despite its revolution in domestic presidential power and government structure, the New Deal appears to have had little impact on ending the worst economic collapse in American history.

¹⁴¹ For a more extensive discussion of the transformation of American politics wrought by the New Deal, see MILKIS, *supra* note 1, at 21–51, 149–83; and THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* 273–74 (2d ed. 1979).

II. THE GATHERING STORM

FDR's claim to greatness lies not in the New Deal, but in his defeat of one of the greatest external threats our nation has faced: fascist Germany and imperial Japan. FDR exercised farsighted vision in preparing the nation for a necessary war unwanted by a large minority, and at times a majority, of Congress and the American people. In the process, the President skirted, stretched, and broke a series of neutrality laws designed to prevent American entry into World War II. Sometimes he went to Congress and the American people to seek support for his actions. Other times he did not. But, regardless of the where, or if, FDR sought support for his actions in the lead up to war, FDR firmly established that the power to make national security policy resided in the Oval Office.¹⁴²

Debate has raged for decades over whether the Japanese attack on Pearl Harbor was a surprise, or whether FDR or the American government had advance knowledge of the attack. Some have suspected that FDR believed the only way to rouse a reluctant American public to war was for the United States to be attacked first. In this respect, FDR had the same instincts as Lincoln. The conventional wisdom today attributes more of the blame for Pearl Harbor to incompetence by the field commanders and complacency in Washington, and has put to rest the idea that FDR actually knew that the Japanese would attack Pearl Harbor.¹⁴³

Recent scholarly work suggests that FDR managed events to maneuver the Japanese into a corner, with a strong possibility that the Japanese would attack American interests somewhere in the Pacific, most likely the Philippines. Roosevelt's imposition of

¹⁴² See ROBERT DALLEK, *FRANKLIN D. ROOSEVELT AND AMERICAN FOREIGN POLICY, 1932–1945*, at 530–31 (1979). Important historical works on FDR and American entry into World War II include: ROBERT DIVINE, *THE ILLUSION OF NEUTRALITY* (1962); WALDO HEINRICH, *THRESHOLD OF WAR: FRANKLIN D. ROOSEVELT AND AMERICAN ENTRY INTO WORLD WAR II* (1988); PATRICK HEARDEN, *ROOSEVELT CONFRONTS HITLER: AMERICA'S ENTRY INTO WORLD WAR II* (1987); WARREN F. KIMBALL, *THE JUGGLER: FRANKLIN ROOSEVELT AS WARTIME STATESMAN* (1991); FREDERICK W. MARKS III, *WIND OVER SAND: THE DIPLOMACY OF FRANKLIN ROOSEVELT* (1988); DAVID REYNOLDS, *THE CREATION OF THE ANGLO-AMERICAN ALLIANCE 1937–1941: A STUDY IN COMPETITIVE CO-OPERATION* (1982); and AKIRA IRIYE, *THE ORIGINS OF THE SECOND WORLD WAR IN ASIA AND THE PACIFIC* (1987). The day-to-day events of American entry into World War II are traced in WILLIAM L. LANGER & S. EVERETT GLEASON, *THE UNDECLARED WAR: 1940–1941* (1953), and the events leading up to World War II are described in DONALD C. WATT, *HOW WAR CAME: THE IMMEDIATE ORIGINS OF THE SECOND WORLD WAR, 1938–1939* (1990); and JOHN KEEGAN, *THE SECOND WORLD WAR* (2005). U.S. diplomacy in the war itself is discussed by AKIRA IRIYE, *3 THE CAMBRIDGE HISTORY OF AMERICAN FOREIGN RELATIONS: THE GLOBALIZING OF AMERICA, 1913–1945* (1993).

¹⁴³ For a summary of these debates, see GORDON PRANGE, ET. AL., *AT DAWN WE SLEPT: THE UNTOLD STORY OF PEARL HARBOR* 474–76 (2001).

an arms, steel, and oil embargo against the Japanese Empire was designed to force Tokyo to either withdraw from China or attack American, British, and Dutch possessions in Asia for natural resources.¹⁴⁴ FDR pressed Japan in order to bring the United States to bear against the greater threat of Germany.¹⁴⁵ FDR could not have walked the United States to the brink of war without an expansive interpretation of the president's constitutional powers and the willingness to exercise them.

Roosevelt had laid claim to sweeping executive authority in foreign affairs even before war with Germany and Japan looked certain. He was assisted, at times, from an unlikely source: Justice Sutherland. While Sutherland believed the New Deal state unconstitutionally trampled on the natural rights of individuals, as Hadley Arkes has argued, he still strongly supported presidential power in foreign affairs.¹⁴⁶ This became clear in the case *United States v. Curtiss-Wright Export Corp.*¹⁴⁷

In 1934, Congress had delegated to the president the authority to cut off all U.S. arms sales to Bolivia and Paraguay, which were fighting a nasty border war, if he found the ban would advance peace in the region.¹⁴⁸ FDR proclaimed an arms embargo in effect on the same day Congress passed the law,¹⁴⁹ and the next day the Justice Department prosecuted four executives of the Curtiss-Wright Export Corporation for trying to sell fifteen machine guns to Bolivia.¹⁵⁰ Curtiss-Wright, which traced its roots to the Wright brothers, would supply the engines for the DC-3 air transport and the B-17 Flying Fortress and build the P-40 fighter.¹⁵¹ Taking its case all the way to the Supreme Court, the company argued that the law had delegated unconstitutional authority over international commerce to the president.¹⁵² If Congress wanted to impose an arms embargo, it would have to do it itself, not just hand the authority to FDR.

In a remarkable and controversial opinion, Justice Sutherland declared that the constitutional standards that ruled the government's actions domestically did not apply in the same

¹⁴⁴ See MARC TRACHTENBERG, *THE CRAFT OF INTERNATIONAL HISTORY: A GUIDE TO METHOD* 79–139 (2006).

¹⁴⁵ See MARKS III, *supra* note 142, at 163.

¹⁴⁶ See ARKES, *supra* note 113, at 198–99.

¹⁴⁷ 299 U.S. 304, 319–20 (1936).

¹⁴⁸ *Id.* at 312.

¹⁴⁹ *Id.* at 313.

¹⁵⁰ *Id.* at 311.

¹⁵¹ History, CURTISS-WRIGHT CORPORATION, <http://www.curtisswright.com/company/history/> [<http://perma.cc/SB9A-XC8W>] (last visited Sept. 14, 2017).

¹⁵² *Curtiss-Wright Export Corp.*, 299 U.S. at 314–15.

way to foreign affairs.¹⁵³ The Constitution's careful limitation of the national government's powers, so as to preserve the general authority of the states, did not extend beyond the water's edge. In the arena of foreign affairs, Sutherland maintained, the American Revolution had directly transferred the full powers of national sovereignty from Great Britain to the Union. "The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties," Sutherland wrote, "if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality."¹⁵⁴ In words that could have been cribbed from Abraham Lincoln, the Court declared that the "Union existed before the Constitution," and therefore the Union could exercise the same powers over war and peace as any other nation.¹⁵⁵

An argument in favor of exclusive federal power over national security and international relations, however, does not dictate which branch should exercise it. Sutherland located that authority in the president for inherently practical considerations. The dangers posed by foreign nations required the structural ability to act swiftly and secretly, unique to the executive branch. "In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation."¹⁵⁶ Echoing Hamilton and Jefferson, and quoting then Congressman John Marshall, Sutherland declared, "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."¹⁵⁷

Justice Sutherland notably eschewed the opportunity for a narrow holding in conferring wide latitude to the executive branch. It did not matter that, on the facts of *Curtiss-Wright*, FDR was acting pursuant to congressional delegation. "We are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President," which does not "require as a basis for its exercise an

¹⁵³ See *id.* at 315–22.

¹⁵⁴ *Id.* at 318. Scholars have not been kind to Justice Sutherland's analysis. For a critical discussion of *Curtiss-Wright*, see generally David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467 (1946); Charles A. Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 YALE L.J. 1 (1973); and LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 19–20 (2d ed. 1996).

¹⁵⁵ *Curtiss-Wright Export Corp.*, 299 U.S. at 316.

¹⁵⁶ *Id.* at 319.

¹⁵⁷ *Id.*

act of Congress.”¹⁵⁸ Sutherland found great advantages to the United States in vesting these powers in the executive, rather than the legislature. The president, not Congress, “has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has confidential sources of information.”¹⁵⁹

Another case gave Justice Sutherland the opportunity to deliver a second blessing to FDR’s vigorous use of his presidential powers. In 1933, Roosevelt ended American efforts to isolate the Soviet Union and unilaterally recognized its communist government. As part of an executive agreement with the Soviets, the United States took on all rights and claims of the USSR against American citizens, such as those involving the expropriation of property.¹⁶⁰ The federal government sued to recover money and property held by Russians in the United States, which were allegedly owed to the Soviet government.¹⁶¹ What made the recognition of the Soviet Union so remarkable was that FDR not only had set the policy of the United States and entered into an international agreement on his own, but the government used that unilateral agreement to set aside state property and contract rules previously considered sacrosanct—all without any action of Congress or the Senate.

Property owners resisted. Augustus Belmont, a New York City banker, refused to turn over deposits held on behalf of the Petrograd Metal Works after the nationalization of all Russian corporations in 1918.¹⁶² FDR’s executive agreement with the Soviets required that legal ownership of the profits transferred to the United States government. Belmont’s estate refused to turn the money over because, it claimed, the property law of New York state protected it.¹⁶³

In *United States v. Belmont*, the Supreme Court again sided with the executive. It found that the recognition of the USSR, the international agreement, and the pre-emption of state law all fell within the president’s constitutional powers to the exclusion of the states.¹⁶⁴ “In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state

¹⁵⁸ *Id.* at 319–20.

¹⁵⁹ *Id.* at 320.

¹⁶⁰ See *United States v. Belmont*, 301 U.S. 324, 326 (1937).

¹⁶¹ *Id.*

¹⁶² *Id.* at 326.

¹⁶³ *Id.* at 326–27; see also Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 CAL. L. REV. 671, 693 (1998); Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. REV. 133, 146 (1998).

¹⁶⁴ *Belmont*, 301 U.S. at 330.

lines disappear. As to such purposes the State of New York does not exist.”¹⁶⁵ Presidents since have used this power to make literally thousands of international agreements with other countries without the Senate’s advice and consent—from 1939 to 1989, the United States entered into 11,698 executive agreements and only 702 treaties.¹⁶⁶ The courts have upheld sole executive agreements several times since, including an agreement ending the Iranian hostage crisis and another preempting the state law claims of Holocaust survivors against German companies.¹⁶⁷

The Supreme Court did not grant the president these powers in foreign affairs; only the Constitution could do that. Presidents from Washington onward had interpreted the Constitution’s vesting of the executive and Commander-in-Chief authorities to give them the initiative to protect the national security, set foreign policy, and negotiate with other nations. Sutherland’s opinions gave judicial recognition to decades of presidential practice; what had been the product of presidential enterprise and congressional acquiescence became formal constitutional law. Roosevelt would draw on these authorities as he maneuvered to send aid to the Allies and bring the United States into the war against the fascist powers.

Facing existential threats in the combination of a looming global conflict and domestic isolationism, FDR drew deeply from his well of presidential powers. As early as 1935, Roosevelt had concluded that Hitler’s Germany posed a threat to the United States.¹⁶⁸ As the Axis powers increased the size, strength, and quality of their militaries while launching offensives against their neighbors, the President became convinced that military force would be necessary to protect American interests. Neutrality offered a false promise of safety. FDR’s approach represented something of a revolution in American strategic thought. No longer would American national security depend on the safety provided by two oceans and control of the Western Hemisphere, where it had felt no reluctance to launch wars of its own.¹⁶⁹ German defeat of Great Britain would remove a valuable buffer that had prevented European nations from naval and air

¹⁶⁵ *Id.* at 331.

¹⁶⁶ CONG. RESEARCH SERV., 106TH CONG., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE, S. PRT. 106–71, at 39 (2001).

¹⁶⁷ *Dames & Moore v. Regan*, 453 U.S. 654, 672–74 (1981); *American Ins. Assoc. v. Garamendi*, 539 U.S. 396, 414–15 (2003).

¹⁶⁸ DALLEK, *supra* note 142, at 102–03.

¹⁶⁹ *See, e.g.*, ROBERT KAGAN, DANGEROUS NATION: AMERICA’S FOREIGN POLICY FROM ITS EARLIEST DAYS TO THE DAWN OF THE TWENTIETH CENTURY 3 (2007); JOHN LEWIS GADDIS, SURPRISE, SECURITY, AND THE AMERICAN EXPERIENCE 45 (2005).

access to the Americas. And if Hitler succeeded in gaining complete control of the resources of the European continent, Germany would become a superpower with the means to threaten the United States.¹⁷⁰ A central objective of American strategy was to maintain a balance of power in Europe and Asia to contain expansionist Germany and Japan, but if war came, FDR and his advisors identified Hitler as the primary threat.¹⁷¹

By December 1940, FDR could be relatively open with the public about his broader goals. In his famous “Arsenal of Democracy” speech, he accused the fascist powers of conquering Europe as a prelude to larger aims that threatened the United States. Never since “Jamestown and Plymouth Rock has our American civilization been in such danger as now,” FDR warned.¹⁷² “The Nazi masters of Germany have made it clear that they intend not only to dominate all life and thought in their own country,” FDR told the nation by radio, “but also to enslave the whole of Europe, and then to use the resources of Europe to dominate the rest of the world.”¹⁷³ He rejected the idea that the “broad expanse of the Atlantic and of the Pacific” would protect the United States.¹⁷⁴ It was only the British navy that protected the oceans from the Nazis. The United States had to begin massive rearmament and provide arms and assistance to the free nations that were bearing the brunt of the fighting. FDR did not tell the public that he was already taking action to bring the nation closer to war, first against Europe to stop Hitler, while holding off Japanese expansion in Asia.

FDR’s strategic vision required several elements to succeed. The United States had to send military and financial aid to Britain and France, help those supplies cross the Atlantic Ocean, and build up the United States military (especially the Navy and Army Air Corps). If the Allies’ fortunes fell far enough, the nation would have to be prepared to intervene militarily. Resistance to these steps was widespread. Many Americans believed that President Wilson had erred in entering World War I; they wanted to avoid American involvement in another internecine squabble in Europe. Between 1939 and 1941, a majority of Americans grew to support aid to the Allies, but that was as far as they would go. As late as May 1941, almost eighty percent of

¹⁷⁰ TRACHTENBERG, *supra* note 144, at 118.

¹⁷¹ *Id.* at 118–19.

¹⁷² Franklin D. Roosevelt, Fireside Chat 16: On the “Arsenal of Democracy,” MILLER CENTER UNIVERSITY OF VIRGINIA (Dec. 29, 1940), <https://millercenter.org/the-presidency/presidential-speeches/december-29-1940-fireside-chat-16-arsenal-democracy> [<http://perma.cc/U3JM-3JGJ>].

¹⁷³ *Id.*

¹⁷⁴ *Id.*

the public wanted the United States to stay out of the conflict.¹⁷⁵ Seventy percent felt that FDR had gone too far or had helped Britain enough.¹⁷⁶ Isolationists blamed American entry into World War I on President Wilson's use of his executive powers to tilt American neutrality toward Britain and France.¹⁷⁷ Worried about a re-run, they pressed for strict limitations on presidential power to keep the United States out of the European war.¹⁷⁸

Opposition to American intervention took more concrete form than public opinion polls. Congress enacted Neutrality Acts in 1935, 1936, 1937, and 1939 to prevent the United States from aiding either side. Congress passed the 1935 Act after Germany repudiated the disarmament requirements of the Treaty of Versailles and Italy threatened to invade Ethiopia in defiance of the League of Nations. It required the president to proclaim, after the outbreak of war between two or more nations, an embargo of all arms, ammunition or "implements of war" against the belligerents.¹⁷⁹ It gave FDR the authority to decide when to terminate the embargo, but it left him little choice as to when to begin one.

The Act prohibited the United States from helping a victim nation and punishing the aggressor, instead requiring a complete cut-off for both. FDR had privately opposed the law's mandatory terms, fought to keep his discretionary control over foreign affairs, and in signing the bill predicted that its "inflexible provisions might drag us into war instead of keeping us out."¹⁸⁰ Later acts prohibited the extension of loans or financial assistance to belligerents,¹⁸¹ extended the embargo to civil wars,¹⁸² and allowed the ban to cover only arms and munitions, but not raw materials. In 1939, Congress enacted an even tougher prohibition that sought to prevent belligerents from "cash-and-carry" transactions for raw materials by prohibiting American vessels from transporting anything to nations at war.

Domestic resistance required FDR to adopt an approach that gave the appearance that the United States was being dragged into the war. By 1941, with Hitler in control of Europe and Japan

¹⁷⁵ DALLEK, *supra* note 142, at 267.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 109.

¹⁷⁸ *Id.*

¹⁷⁹ Neutrality Act of 1935, ch. 837, 49 Stat. 1081 (repealed by Lend-Lease Act of 1941, Ch. 11, 55 Stat. 31, 33).

¹⁸⁰ DALLEK, *supra* note 142, at 110.

¹⁸¹ Neutrality Act of 1936, ch. 106, 49 Stat. 1152 (repealed by Lend-Lease Act of 1941, Ch. 11, 55 Stat. 31, 33).

¹⁸² Neutrality Act of 1937, ch. 146, 50 Stat. 121 (repealed by Lend-Lease Act of 1941, Ch. 11, 55 Stat. 31, 33).

occupying large parts of China, FDR wanted to find a way for the United States to enter the war on the side of Britain. In August 1941, for example, FDR told Prime Minister Winston Churchill that he could not rely on Congress to declare war against Germany.¹⁸³ Instead, FDR “would wage war, but not declare it.”¹⁸⁴ According to Churchill’s account of their conversation at the Atlantic Conference, FDR said “he would become more and more provocative” and promised that “everything would be done to force an incident” that would “justify him in opening hostilities.”¹⁸⁵

Roosevelt’s plans to move the United States toward war depended in part on Congress. The Constitution gives Congress control over international and domestic interstate commerce, as well as the money and property of the United States. FDR could lay little claim to constitutional authority to dictate arms-export policies or to provide financial and material aid to the Allies. FDR initially hoped that the United States could provide enough assistance to Britain and France—the United States would prove the “great Arsenal of Democracy,”¹⁸⁶ in his famous words—to postpone the need for American military intervention in Europe. After the fall of France, FDR realized that Great Britain could not hold off the Nazis on its own, but he hoped to send enough aid to keep Britain alive while he prepared the American public for war.

FDR pressed Congress for several changes to the Neutrality Acts that would send more help to the Allies. In the 1936 and 1937 Acts, for example, the administration won more presidential discretion to determine when a foreign war had broken out.¹⁸⁷ By 1939, it succeeded in changing the law to allow the president to put off a proclamation of neutrality if necessary to protect American peace and security.¹⁸⁸ This effectively allowed Britain and France, which controlled the sea routes to the Americas, to continue to receive aid.

FDR used this flexibility to continue supplying arms and money to China by declining to find a war to exist there, even

¹⁸³ DALLEK, *supra* note 142, at 285.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ Franklin Delano Roosevelt, The Great Arsenal of Democracy, AMERICAN RHETORIC, <http://www.americanrhetoric.com/speeches/fdrarsenalofdemocracy.html> [<http://perma.cc/6Z6S-RLAF>] (last updated Mar. 15, 2017).

¹⁸⁷ See Neutrality Act of 1936, ch. 106, 49 Stat. 1152 (repealed by Lend-Lease Act of 1941, Ch. 11, 55 Stat. 31, 33); Neutrality Act of 1937.

¹⁸⁸ Neutrality Act of 1939, ch. 2, 54 Stat. 4 (repealed by Lend-Lease Act of 1941, Ch. 11, 55 Stat. 31, 33).

after Japan had attacked Beijing and Nanjing.¹⁸⁹ Similarly, Roosevelt refused to invoke the Neutrality Acts when Germany invaded Czechoslovakia in 1939, or Russia in 1941, because a blanket embargo would have prevented American aid from flowing to the Allies.¹⁹⁰ Manipulating the embargo rules to affirmatively support one side of various conflicts, FDR showed little respect for the spirit of the Neutrality Acts. But Congress would not allow him to go farther. FDR's proposals throughout 1939 and 1940 to reform the Neutrality Acts to allow for direct military aid to the Allies repeatedly failed.

As his efforts to modify the Neutrality Acts flagged, FDR became more aggressive in invoking his inherent constitutional authority. He asked Attorney General Robert Jackson, "How far do you think I can go in ignoring the existing act—even though I did sign it?"¹⁹¹ Vice President John Nance Garner and Secretary of the Interior Harold Ickes argued that the President's constitutional authority in foreign affairs allowed him to act beyond the Acts.¹⁹² Instead of overriding them, however, Roosevelt simply became more creative in interpreting them. On May 22, 1940, as German armies swept through France, FDR ordered the sale of World War I-era equipment to the Allies; on June 3rd, he ordered the transfer of \$38 million in weapons to U.S. Steel, which promptly sold them at no profit to the British and French.¹⁹³ The administration argued that these sales did not violate the Neutrality Acts because the arms were "surplus."¹⁹⁴ Three days later (just after the British had evacuated 300,000 soldiers from the German noose around Dunkirk), the Navy sold fifty Hell Diver bombers, which had been introduced to service only in 1938, to Britain because they were "temporarily in excess of requirements."¹⁹⁵ The sales occurred at a time when the United States army could field only 80,000 combat troops in five divisions, while the German army in western Europe deployed two million men in 140 divisions.¹⁹⁶ The U.S. Army Air Corps had only 160 fighter planes and fifty-two heavy bombers.¹⁹⁷ Announcing the decision on June 8th, FDR told a news conference that "a plane can get out of date darned

¹⁸⁹ Aaron X. Fellmeth, *A Divorce Waiting to Happen: Franklin Roosevelt and the Law of Neutrality, 1935–1941*, 3 *BUFF. J. INT'L L.* 414, 451 (1996–97).

¹⁹⁰ *Id.* at 457–59.

¹⁹¹ DALLEK, *supra* note 142, at 190.

¹⁹² *Id.*

¹⁹³ *Id.* at 222, 227.

¹⁹⁴ *Id.* at 222–23.

¹⁹⁵ Fellmeth, *supra* note 189, at 464.

¹⁹⁶ DALLEK, *supra* note 142, at 221.

¹⁹⁷ *Id.* at 222.

fast.”¹⁹⁸ Two days later, in a speech at the University of Virginia, FDR declared isolationism an “obvious delusion” and called for an allied victory over “the gods of force and hate” to prevent a world run by totalitarian governments.¹⁹⁹

American aid came too little, too late; France requested an armistice on June 17, 1940.²⁰⁰ In the midst of a presidential campaign for an unprecedented third term, FDR sought bipartisan support for his policies and replaced isolationists in his cabinet with two internationalist Republicans: Henry Stimson as Secretary of War and Frank Knox as Secretary of the Navy.²⁰¹ Both favored repealing the neutrality laws, boosting the U.S. military through a draft, and sending large amounts of aid to Great Britain.²⁰² Britain’s destroyer fleet, which had suffered almost fifty percent losses, needed reinforcements to block a German invasion force and safeguard its trade lifelines.²⁰³ Churchill wrote to Roosevelt that acquiring American destroyers was “a matter of life and death.”²⁰⁴ FDR reacted by planning to send two-dozen PT-boats immediately, and said that Navy lawyers who thought the sale illegal should follow orders or go on vacation.²⁰⁵ After word of FDR’s plans leaked, Congress enacted a law forbidding the sale of any military equipment “essential to the defense of the United States” as certified by the Chief of Naval Operations or the Army Chief of Staff, and reasserted a World War I ban on sending any “vessel of war” to a belligerent.²⁰⁶

Congress’s tightening of neutrality delayed FDR for two months. While the Battle of Britain raged in the skies, Churchill begged FDR for additional destroyers. “The whole fate of the war,” the Prime Minister wrote in July, “may be decided by this minor and easily remediable factor,” and he urged that “this is the thing to do now.”²⁰⁷ FDR and his advisors planned a transfer to Britain of fifty World War I destroyers declared to be “surplus,” even though similar warships from the same era were

¹⁹⁸ *Id.*

¹⁹⁹ Franklin D. Roosevelt, Address at University of Virginia (June 10, 1940), in *THE PUBLIC PAPERS OF THE PRESIDENTS OF FRANKLIN D. ROOSEVELT* 259, 261–62 (MacMillan ed., 1941).

²⁰⁰ DALLEK, *supra* note 142, at 232.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* at 243.

²⁰⁴ *Id.*

²⁰⁵ Fellmeth, *supra*, note 189, at 467–68.

²⁰⁶ Act of June 28, 1940, § 14, 54 Stat. 676, 681 (requiring additional approval prior to sale of military equipment); Espionage Act of 1917, ch. 30, 40 Stat. 222 (codified as amended in scattered sections of 18 U.S.C.).

²⁰⁷ DALLEK, *supra* note 142, at 244.

being activated for Navy service.²⁰⁸ In exchange, Britain would provide basing rights in its Western Hemisphere territories to the United States. In August, the President concluded an executive agreement with Britain, kept secret at first and without congressional approval, to make the trade.²⁰⁹

FDR's advisors divided over the deal's legality. One legal advisor believed it violated the June 28th statute and the Espionage Act of 1917, which forbade sending an armed vessel to any belligerent while the United States remained neutral; State Department and Justice Department lawyers agreed.²¹⁰ But Dean Acheson, then Undersecretary of the Treasury, argued that the June 28th law implicitly recognized the president's constitutional power to transfer any military asset in order to improve national security, while others recommended that the government first sell the destroyers to private companies that could then resell them to the British.²¹¹ Acheson even went further. He argued that the 1917 law applied only to ships that were built specifically on order for a belligerent and not to existing ships originally built or used for the Navy.²¹²

Attorney General Jackson drew on these ideas in his legal opinion blessing the deal, but also relied on the president's Commander-in-Chief power. "Happily there has been little occasion in our history for the interpretation of the powers of the President as Commander-in-Chief," Jackson wrote to FDR.²¹³ "I do not find it necessary to rest upon that power alone."²¹⁴ Nevertheless, "it will hardly be open to controversy that the vesting of such a function in the President also places upon him a responsibility to use all constitutional authority which he may possess to provide adequate bases and stations" for the most effective use of the armed forces.²¹⁵ The perilous circumstances facing the United States reinforced the Commander-in-Chief's power. "It seems equally beyond doubt that present world conditions forbid him to risk any delay that is constitutionally avoidable."²¹⁶ Any statutory effort by Congress to prevent the

²⁰⁸ *Id.* at 222.

²⁰⁹ *Id.* at 245.

²¹⁰ Fellmeth, *supra* note 189, at 473.

²¹¹ *Id.* at 475–77.

²¹² *Id.*

²¹³ Opinion on Exchange for Over-Age Destroyers, 39 OP. ATT'Y GEN. 484 (1940), reprinted in H. JEFFERSON POWELL ED., *THE CONSTITUTION AND THE ATTORNEYS GENERAL* 307–08 (1999) [hereinafter Opinion on Exchange for Over-Age Destroyers].

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.* at 307–08.

president from transferring military equipment to help American national security would be of “questionable constitutionality.”²¹⁷

Jackson defended the exclusion of Congress. He thought that the deal could take the form of an executive agreement because it required neither the appropriation of funds nor an obligation to act in the future.²¹⁸ Justice Sutherland’s opinion in *Curtiss-Wright*, which the Attorney General extensively quoted, supported the argument.²¹⁹ Jackson had a more difficult time with the Neutrality Acts. He read the June 28th law to recognize the president’s authority to transfer naval vessels to Britain, subject only to the requirement that they be surplus or obsolete. It did not prohibit the transfer of property “merely because it is still used or usable or of possible value for future use,” but only if the transfer weakened the national defense.²²⁰ The “over-age” destroyers, as he called them, could be found to fall outside the statute and hence within the president’s authority, which must have derived from the Commander-in-Chief power, to exchange them for valuable military bases.²²¹ Jackson, however, advised that transferring brand-new mosquito boats would violate Congress’s ban on sending ships to a belligerent.

Jackson issued an even broader reading of the Commander-in-Chief power in May 1941, when FDR allowed British pilots to train in American military schools. Under the Commander-in-Chief power, the president “has supreme command over the land and naval forces of the country and may order them to perform such military duties as, in his opinion, are necessary or appropriate for the defense of the United States.”²²² The president could “command and direct the armed forces in their immediate movements and operations” and “dispose of troops and equipment” to promote the national security.²²³ Jackson read the passage of Lend-Lease as support for FDR’s judgment that helping Britain was important to the national defense.²²⁴ If the president had full constitutional authority to use the armed forces, even to use military force, to protect the nation by helping Britain, then he must also have the lesser power to train British airmen. “I have no doubt of the President’s lawful authority to

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *See id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² Training of British Flying Students in the United States, 40 OP. ATT’Y GEN. 58 (1941), reprinted in H. JEFFERSON POWELL ED., THE CONSTITUTION AND THE ATTORNEYS GENERAL 316–17 (1999).

²²³ *Id.*

²²⁴ *Id.*

utilize forces under his command to instruct others in matters of defense which are vital to the security of the United States.”²²⁵ It “would be anomalous indeed,” Jackson observed, if the military could provide Britain with arms but could not train the British how to use them.²²⁶

Reaction to the destroyers-for-bases deal, announced in early August, attacked FDR’s methods more than his goals. Roosevelt worried that his energetic use of executive power would feed fears that he was becoming an autocrat, worries punctuated by his nomination that summer for an unprecedented third term as president. Leaks of secret Anglo-American staff talks and announcement of a joint U.S.–Canadian defense board already had isolationists attacking FDR for pushing the United States towards war.²²⁷ FDR predicted that revelation of the executive agreement would “raise hell with Congress” and lead to accusations he was a “warmonger” and “dictator,” and might torpedo his re-election hopes.²²⁸

FDR’s first two predictions quickly came true. His Republican opponent, Wendell Willkie, supported the policy but declared that FDR’s unilateral action was “the most dictatorial and arbitrary act of any president in the history of the United States.”²²⁹ Edwin Borchard, a Yale professor of international law, argued that Roosevelt had assumed dictatorial powers, placed himself above the law, and threatened to “break down constitutional safeguards.”²³⁰ The Constitution, Borchard wrote, “does not give the President *carte blanche* to do anything he pleases in foreign affairs.”²³¹ The nation’s leading scholar of constitutional law, Edward Corwin of Princeton, attacked Jackson’s opinion as “an endorsement of unrestrained autocracy in the field of our foreign relations, neither more nor less.”²³² In *The New York Times*, Corwin asked “why may not any and all of Congress’s specifically delegated powers be set aside by the President’s ‘executive power’ and the country be put on a totalitarian basis without further ado?”²³³

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ DALLEK, *supra* note 142, at 245.

²²⁸ *Id.*

²²⁹ KENNETH S. DAVIS, *FDR: INTO THE STORM 1937–1940*, at 611 (1993).

²³⁰ Edwin Borchard, *The Attorney General’s Opinion on the Exchange of Destroyers for Naval Bases*, 34 AM. J. INT’L L. 690, 691 (1940).

²³¹ *Id.*

²³² Edward S. Corwin, *Executive Authority Held Exceeded in Destroyer Deal*, N.Y. TIMES (Oct. 13, 1940).

²³³ *Id.*

Despite these ringing attacks on presidential power, the destroyers-for-bases deal proved remarkably popular—Gallup polls showed sixty-two percent in favor—encouraging even bolder steps.²³⁴ By October 1940, FDR asked for and received appropriations of \$17.7 billion for national defense—his administration’s original estimate for the year had been \$1.84 billion—and defense spending doubled the following year.²³⁵ In June 1940, he called for the first peacetime draft in American history, which Congress enacted in September only after Willkie publicly agreed. A Wall Street lawyer and former Democrat, Willkie was a dark-horse candidate who had won the nomination without ever having occupied public office. His attacks on the New Deal had gained little traction during the campaign, so Willkie pivoted, painting FDR as a “warmonger” and dictator who had made “secret agreements” to enter a war that would kill thousands of young Americans. “If [Roosevelt’s] promise to keep our boys out of foreign wars is no better than his promise to balance the budget,” Willkie said on the stump, “they’re already almost on the transports.”²³⁶ By the end of October, Willkie came within four points of the President, and Roosevelt went on a speaking tour to reassure mothers in a speech at Boston Garden on October 30, 1940, that “[y]our boys are not going to be sent into any foreign wars.”²³⁷ Though the polls showed the election close, FDR prevailed by twenty-seven million to Willkie’s twenty-two million and an Electoral College majority of 449–82.

After the election, FDR redoubled his efforts to send aid to Britain. He authorized secret staff talks between American and British military planners, who recommended a grand strategy of defeating Germany first while holding Japan to a stalemate.²³⁸ In November, FDR ordered the army to make B-17 bombers immediately available to the British, to be replaced by British planes on order in American factories, and he discussed making half of all American arms production available to the British. British finances collapsed in late November; the country could no longer pay for the material it needed to continue the war. Britain’s ambassador to the United States, Lord Lothian, appealed to the American public on November 23rd by saying to

²³⁴ DAVIS, *supra* note 229, at 608.

²³⁵ *Id.* at 603–04.

²³⁶ *Id.* at 614.

²³⁷ Franklin Delano Roosevelt, Campaign Address at Boston, Massachusetts (Oct. 30, 1940), in 9 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 514, 517 (Haddon Craftsman, Inc. ed., 1941).

²³⁸ HEARDEN, *supra* note 142, at 192.

a group of journalists, “[w]ell, boys, Britain’s broke; it’s your money we want.”²³⁹

Lothian’s report of Britain’s functional bankruptcy shocked the White House into action. FDR approved the sale of \$2.1 billion in weapons that the British could not pay for, as well as the diversion of \$700 million in Reconstruction Finance Corporation funds to underwrite the factory expansions needed for the increased arms sales.²⁴⁰ The President hit upon one of his most artful evasions of neutrality, Lend-Lease, which would “get away from the dollar sign,” as he told reporters at a December 17, 1940, press conference.²⁴¹ The United States would “lend” Britain weapons and munitions and, rather than demand immediate payment, would expect their return after the war’s end. Of course, the idea was a complete fiction; war would consume the arms. Ever canny in his presentations to the public, FDR deployed a homey analogy: If a house were on fire, a neighbor would lend a garden hose with the expectation that it would be returned later, rather than demanding \$15 for the cost of the hose.²⁴²

Lend-Lease required congressional action. In his famous “Arsenal of Democracy” speech on December 29th, Roosevelt defended Lend-Lease and broader aid to the allies with his most stirring language.²⁴³ FDR declared that the Nazis posed the most direct threat to the security of the United States since its founding.²⁴⁴ To avoid war, the United States would have to become the great “arsenal of democracy” for the free nations carrying on the fight.²⁴⁵ The United States would be less likely to get into war “if we do all we can now to support the nations defending themselves against attack by the Axis,” rather than “if we acquiesce in their defeat.”²⁴⁶

Disclaiming any intention to send a new “American Expeditionary Force” outside the United States, FDR declared that “the people of Europe who are defending themselves do not ask us to do their fighting.”²⁴⁷ All they sought were “the

²³⁹ KENNETH S. DAVIS, *FDR: THE WAR PRESIDENT, 1940–43*, at 63 (2000).

²⁴⁰ *Id.* at 65.

²⁴¹ See Franklin Delano Roosevelt, The Seven Hundred and Second Press Conference (Dec. 17, 1940), in 9 *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT* 604, 607–08 (Haddon Craftsman, Inc. ed., 1941).

²⁴² *Id.*

²⁴³ See Franklin Delano Roosevelt, Fireside Chat on National Security (Dec. 29, 1940), in 9 *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT* 633 (Haddon Craftsman, Inc. ed., 1941).

²⁴⁴ *Id.* at 634.

²⁴⁵ *Id.* at 643.

²⁴⁶ *Id.* at 640.

²⁴⁷ *Id.*

implements of war.”²⁴⁸ Increasing national defense production and sending it to Britain would “keep war away from our country and our people.”²⁴⁹ It was one of the most popular speeches of FDR’s presidency: roughly eighty percent of the public agreed.²⁵⁰ Congress waited until March 1941 to give its approval to Lend-Lease,²⁵¹ but FDR decided to move forward during that critical time anyway. He authorized British purchase of 23,000 airplanes in November 1940, and rifles and ammunition in February 1941. He ordered the U.S. military to purchase munitions factories but diverted the production to Britain.²⁵²

In spring 1941, FDR turned to the protection of the supplies that would begin to flow across the Atlantic, and took unilateral action that provoked the Nazis and drew the United States ever closer to war. In March, FDR moved to place Greenland under American military protection, and in April he gave orders to the Navy to extend its security zone as far as Greenland and the Azores, and to begin locating German submarines and reporting their positions to the Royal Navy. In May, he transferred one-quarter of the Pacific fleet to the Atlantic to deter any German effort to seize Atlantic islands for bases. He declared an “unlimited national emergency” at the end of the month and told the nation that helping Britain win the battle of the Atlantic was critical to keeping the Nazis out of the Western Hemisphere.²⁵³ “[I]t would be suicide to wait until they are in our front yard,” Roosevelt argued.²⁵⁴ He followed his speech with a June deployment of a Marine brigade to occupy Iceland (which is about 1200 miles from London and 2800 miles from Washington, D.C.), which freed up a British division and extended the American security zone even further. In July, he announced that the Navy would begin escorting ships between the United States and Iceland.

FDR did not seek or receive congressional approval for any of these deployments, which made clear, if earlier aid had not, that the United States was no longer a true neutral. Still, Congress retained ample checks on presidential power. FDR could send

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ See DALLEK, *supra* note 142, at 257.

²⁵¹ See 55 Stat. 31 (1941); see generally DAVIS, *supra* note 239, at 92–136 (providing lengthy congressional discussions on Lend-Lease).

²⁵² See Fellmeth, *supra* note 189, at 485–86.

²⁵³ Franklin Delano Roosevelt, “We Choose Human Freedom” — A Radio Address Announcing the Proclamation of an Unlimited National Emergency (May 27, 1941), in 10 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 181, 193 (Samuel I. Rosenman ed., 1950).

²⁵⁴ *Id.* at 189.

only 4000 Marines to Iceland because of the small size of the regular armed forces, and he could not send any of the new draftees because Congress had attached a provision to the conscription act forbidding their deployment outside the Western Hemisphere.²⁵⁵ Congress had also limited the terms of service of the 900,000 draftees to one year, requiring FDR to go to Congress to win an extension.²⁵⁶ Even with America occupying Iceland and Greenland and escorting ships in the North Atlantic, only fifty-one percent of Americans supported the draft extension, and Congress narrowly approved it.²⁵⁷

Meanwhile, FDR pursued measures to check Japan's expansion and perhaps provoke it into a conflict. Japan had been waging war in China since the 1931 Manchuria crisis and had launched an invasion to conquer the whole nation in 1937. Japanese military and civilian leaders sought to create a "Greater East Asia Co-Prosperity Sphere" that would supply the raw materials for the Japanese economy and the war in China.²⁵⁸ In 1940, Japan had intensified its attacks in China and had moved into Indochina. In September 1940, it entered into the Axis agreement with Germany and Italy.²⁵⁹

Roosevelt launched a campaign of economic warfare, without reliance on legal authority. In July 1940, for example, FDR blocked aviation gasoline exports to Japan.²⁶⁰ Chiang Kai-shek had sent an urgent message to Roosevelt that without more aid, the Nationalist Chinese resistance to Japan would fail.²⁶¹ FDR responded by banning the export of iron and steel to Japan. In November, he sent \$100 million and 100 warplanes to the Chinese Nationalist government, and in the Spring he authorized volunteers—Colonel Chennault's Flying Tigers—to fly fighters for China.²⁶² FDR had never found China and Japan to be at war under the 1939 Neutrality Act, so he had no statutory authority to impose the materials embargo on Japan or to send money and arms to China.²⁶³ Roosevelt simply undertook the actions as president in order to protect the national security.

²⁵⁵ See DALLEK, *supra* note 142, at 276.

²⁵⁶ *Id.* at 277.

²⁵⁷ *Id.* at 275–77.

²⁵⁸ See, e.g., William L. Swan, *Japan's Intentions for Its Greater East Asia Co-Prosperity Sphere as Indicated in Its Policy Plans for Thailand*, in 27 JOURNAL OF SOUTHEAST ASIAN STUDIES 139–49 (Mar. 1996); JOHN TOLAND, *THE RISING SUN: THE DECLINE AND FALL OF THE JAPANESE EMPIRE, 1936–1945*, at 447 (1970).

²⁵⁹ See DALLEK, *supra* note 142, at 277.

²⁶⁰ See Fellmeth, *supra* note 189, at 466.

²⁶¹ *Id.* at 467.

²⁶² *Id.*

²⁶³ See *id.* at 466–67.

Japan's expansion south toward Indochina and Thailand increased the potential for conflict. On July 26, 1941, FDR ordered a freeze of Japanese assets in the United States, reduced U.S. oil exports to pre-war levels, and prohibited the sale of high-octane aircraft gasoline to Japan.²⁶⁴ By mistake, administrators executed a complete oil embargo against Japan, which FDR did nothing to correct. FDR opened negotiations to reach a settlement with the Japanese government, though he knew because of American code-breaking success that Tokyo was, at the least, considering an attack on American, British, and Dutch possessions in Asia.

Some historians believe that FDR's goal was to hold off Japan while resources could be devoted against the dire challenge in Europe—a view held by many of his military and civilian advisors. Marc Trachtenberg, however, has convincingly argued that FDR deliberately painted the Japanese into a corner.²⁶⁵ In the course of negotiations, Roosevelt demanded that Tokyo end its war in China in exchange for a resumption of U.S. oil and steel exports, yet FDR and his advisors knew that Japan would not willingly give up its territorial gains in China. “[T]he United States had been waging preventive economic warfare against Imperial Japan for at least 18 months prior to Pearl Harbor,” Colin Gray writes.²⁶⁶ “U.S. measures of economic blockade left Japan with no alternative to war consistent with its sense of national honor. The oil embargo eventually would literally immobilize the Japanese Navy. So Washington confronted Tokyo with the unenviable choice between de facto complete political surrender of its ambitions in China, or war.”²⁶⁷

As FDR squeezed Japan, he expanded political and military assistance to the British. On August 9th, he met Churchill in Placentia Bay, off Newfoundland, where the two leaders issued the Atlantic Charter.²⁶⁸ It declared Anglo-American principles in the war to be: no Anglo-American aggrandizement, opposition to undemocratic changes in territory, self-government for all peoples, equal access to trade and natural resources, international economic cooperation, a guarantee of security and

²⁶⁴ See *id.* at 413.

²⁶⁵ See TRACHTENBERG, *supra* note 144, at 80–139.

²⁶⁶ COLIN S. GRAY, THE IMPLICATIONS OF PREEMPTIVE AND PREVENTIVE WAR DOCTRINES: A RECONSIDERATION 23 (2007), <https://ssi.armywarcollege.edu/pdffiles/PUB789.pdf> [<http://perma.cc/436B-SSS6>].

²⁶⁷ *Id.*; see also Hew Strachan, *Preemption and Prevention in Historical Perspective*, in PREEMPTION: MILITARY ACTION AND MORAL JUSTIFICATION 23 (Henry Shue & David Rodin eds., 2007) (“For Japan itself the choices by 1941 seemed to be economic strangulation and geopolitical imprisonment on the one hand, or war on the other.”).

²⁶⁸ See DALLEK, *supra* note 142, at 281.

freedom to all nations, freedom of the seas, disarmament of aggressors and reduction in armaments, and plans for a collective system of international security.²⁶⁹ During the discussions, FDR made clear to Churchill his desire to bring the United States into the war by forcing an incident with Germany,²⁷⁰ and set out to make his wish come true by ordering full naval escorts for British convoys between the United States and Iceland, which put the Germans in the position of either firing on U.S. warships or conceding the Battle of the Atlantic. Without input from Congress, FDR had joined together the fates of the United States and Britain.

An undeclared shooting war soon broke out. On September 4th, a German submarine fired on the destroyer USS *Greer*, which FDR used to publicly justify “shoot-on-sight” orders for naval escorts in the Atlantic.²⁷¹ Only later did Congress learn that the *Greer* had been hunting the submarine with British airplanes and had dropped depth charges on the Germans. FDR declared the Nazis to be the equivalent of modern-day pirates and compared German subs and commerce raiders to “rattlesnakes of the Atlantic.”²⁷² As he put it, “when you see a rattlesnake poised to strike, you do not wait until he has struck before you crush him.”²⁷³

FDR won broad support for the Navy’s new rules of engagement in the Atlantic, but at the price of deliberately deceiving the public about the facts.²⁷⁴ He followed with an October speech claiming that captured Nazi plans envisioned the division of North and South America into five dependent states and the abolition of the freedom of religion.²⁷⁵ The shooting war led to German submarine attacks on two American destroyers, the USS *Kearny* and the USS *Reuben James*, with the deaths of eleven and 115 sailors, respectively.²⁷⁶ FDR responded by seeking amendment of the neutrality laws to allow merchantmen to arm and carry goods directly to British ports.

²⁶⁹ See Franklin Delano Roosevelt, The Atlantic Charter (Aug. 14, 1941), in 10 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 314 (Samuel I. Rosenman ed., 1950).

²⁷⁰ See DALLEK, *supra* note 142, at 285.

²⁷¹ *Id.* at 287.

²⁷² Franklin Delano Roosevelt, Fireside Chat to the Nation (Sept. 11, 1941), in 10 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 384, 390 (Samuel I. Rosenman ed., 1950).

²⁷³ *Id.*

²⁷⁴ See DALLEK, *supra* note 142, at 288–89.

²⁷⁵ See FRANKLIN DELANO ROOSEVELT, Navy and Total Defense Day Address (Oct. 27, 1941), in 10 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 438, 439 (Samuel I. Rosenman ed., 1950).

²⁷⁶ See DALLEK, *supra* note 142, at 291.

The changes passed Congress by small majorities because about seventy percent of the public told pollsters they opposed American entry into the war.²⁷⁷ FDR concluded that the public, influenced by the memory of the way Wilson had led the country into World War I, would not rally behind a war waged in response to these isolated incidents. Rising tensions with Japan, however, provided other opportunities. After the Atlantic Conference, FDR informed the Japanese ambassador that any further expansion in Southeast Asia would force him to take any and all measures necessary “toward insuring the safety and security of the United States.”²⁷⁸ FDR’s attempts at a negotiated solution were, perhaps, less than genuine. He offered to undertake formal negotiations with Prince Konoye, the Japanese Prime Minister, only if Japan suspended its “expansionist activities” and openly declared its intentions in the Pacific.²⁷⁹ FDR asked that Japan terminate the Axis alliance, withdraw from China, and open up its trading system. He consciously demanded terms he knew that the Japanese were unlikely to accept.

Japanese cabinet meetings on September 3rd through 6th concluded that unless the government reached a settlement with the United States by October, its military would attack American, British, and Dutch possessions in Asia.²⁸⁰ Tokyo decided its terms must include the freedom to conclude matters in China, an end to Anglo-American military action in the Pacific, and secure access to raw materials for the economy. FDR refused to negotiate on these conditions and instead ordered the reinforcement of the Philippines. By October 15th, FDR and his advisors believed that they needed more “diplomatic fencing” to create the image “that Japan was put into the wrong and made the first bad move—overt move.”²⁸¹

Thanks to electronic intercepts of Japanese communications, FDR knew that the Japanese would attack if no settlement were reached, and he tried to string out negotiations to give the armed forces time to strengthen its position in the Philippines. On November 24, 1941, FDR discussed with his advisors the chances of a Japanese sneak attack and asked “how we should maneuver them into the position of firing the first shot without allowing too much danger to ourselves.”²⁸² He also told the British that he

²⁷⁷ *Id.* at 285.

²⁷⁸ *Id.* at 300.

²⁷⁹ *Id.* at 301.

²⁸⁰ *Id.* at 302.

²⁸¹ *Id.* at 303–04.

²⁸² *Id.* at 307.

would respond to any attack on their possessions in Asia. Still, FDR realized that without an enemy attack on the United States, his other measures would not convince the American people to support entry into World War II.

On December 7, 1941, the Japanese solved FDR's conundrum.²⁸³ No evidence supports the theories that FDR knew that Pearl Harbor was the target, nor that he willfully ignored the possibility of devastating losses to the Pacific Fleet. FDR did not consciously know about any specific attack on the United States—rather, he placed the Japanese in the position of choosing between war and giving up their imperial ambitions in China and the rest of the Pacific. The most that can be said is that if war were to come, FDR had tried for more than a year to maneuver the Axis powers into firing a first shot, while preparing the armed forces and American public for that eventuality. Pearl Harbor guaranteed the unity of the American people, just as Fort Sumter had eight decades before. As FDR told the American people the next day, December 7th was a “day which would live in infamy,” and he asked Congress for a declaration of war, which it promptly granted.²⁸⁴

Hitler further obliged by declaring war on the United States three days later. FDR exercised foresighted leadership in recognizing the Axis threat to the United States and the free nations of the West. But faced with a recalcitrant Congress and a reluctant public, FDR had to use his constitutional powers to move the nation into a war that he knew, as perhaps no one else did, was in the country's best interests. If he had faithfully obeyed the Neutrality Acts, American entry into the war might have been delayed by months, if not years. A president who viewed his constitutional authorities as narrowed to executing the will of Congress might well have lost World War II.

III. WARTIME CIVIL LIBERTIES

It is commonplace today to read the argument that war reduces civil liberties too much. We can gain a useful perspective on the question by examining Roosevelt's wartime measures. FDR responded to the devastating Pearl Harbor attack with domestic policies, such as the use of military commissions, the internment of Japanese-Americans, and the widespread use of electronic surveillance. As in the Civil War, the federal courts deferred to the political branches until the war ended, and Congress went along with the president for the most part.

²⁸³ *Id.* at 311.

²⁸⁴ *Id.* at 312.

A. Military Commissions

Military commissions are a form of tribunal used to try captured members of the enemy for violations of the laws of war. American generals have used them from the Revolutionary War through World War II, and as we have seen, the Lincoln administration deployed them during the Civil War to try Confederate spies, irregular guerrillas, and sympathizers. Military commissions are neither created nor regulated by the Uniform Code of Military Justice, which is enacted by Congress and governs courts-martial; instead, they were established by presidents as Commander-in-Chief and by military commanders in the field.²⁸⁵

World War II witnessed the use of military commissions on a par with the Civil War, but primarily for the administration of postwar justice. While the Nuremberg trials were the most well-known, military commissions heard charges of war crimes against many former German and Japanese leaders at the end of the war. But the first commission was set up well before those, more famous examples, to hear the case of “The Nazi Saboteurs.” In June 1942, eight German agents covertly landed in Long Island and Florida with plans to attack factories, transportation facilities, and utility plants.²⁸⁶ All had lived in the United States before the war, and two were American citizens. One of them turned informer; after initially dismissing his story, the FBI arrested the plotters and revealed their capture by the end of June.²⁸⁷ Members of Congress and the media demanded the death penalty, even though no statutory provision established capital punishment for non-U.S. citizens.²⁸⁸

Roosevelt wanted a trial outside the civilian judicial system. On June 30th, he wrote to his Attorney General, Francis Biddle (Jackson having been elevated to the Supreme Court), supporting the idea of using military courts because “[t]he death penalty is called for by usage and by the extreme gravity of the war aim and the very existence of our American Government.”²⁸⁹ Roosevelt already thought they were guilty, and the punishment was not in doubt: “Surely they are just as guilty as it is possible to be . . . and it seems to me that the death penalty is almost

²⁸⁵ For a critical review of the history, compare JOHN YOO, WAR BY OTHER MEANS: AN INSIDER’S ACCOUNT OF THE WAR ON Terror 204–30 (2006), with LOUIS FISHER, MILITARY TRIBUNALS & PRESIDENTIAL POWER: AMERICAN REVOLUTION TO THE WAR ON TERRORISM 253–56 (2005).

²⁸⁶ See David J. Danelski, *The Saboteurs’ Case*, 1 J. SUP. CT. HIST. 61, 61 (1996).

²⁸⁷ See *id.* at 65.

²⁸⁸ *Id.* at 61–65.

²⁸⁹ *Id.* at 65.

obligatory.”²⁹⁰ Two days earlier, Biddle and Secretary of War Henry Stimson had worried that the plot was not far enough along to win a conviction with a significant sentence—perhaps two years at most. Stimson was surprised that Biddle was “quite ready to turn them over to a military court” and learned that Justice Felix Frankfurter also believed a military court preferable.²⁹¹

On June 30th, Biddle wrote to Roosevelt summarizing the advantages of a military commission.²⁹² It would be speedier and easier to prove violations of the laws of war, and the death penalty would be available. Biddle also believed that using a military commission would prevent the defendants from seeking a writ of habeas corpus. “All the prisoners . . . can thus be denied access to our courts.”²⁹³ He did not commit to writing another important consideration: secrecy. According to Stimson, Biddle favored a military commission because the evidence would not become public, particularly that the Nazis had infiltrated U.S. lines with ease and had been captured only with the help of an informant.²⁹⁴ Biddle recommended that FDR issue executive orders establishing the commission, defining the crimes, appointing its members, and excluding judicial review.²⁹⁵

On July 2, 1942, Roosevelt issued two executive orders.²⁹⁶ The first created the commission and gave it the authority to try any “subjects, citizens, or residents of any nation at war with the United States,” who attempt to “enter the United States or any territory or possession thereof, through coastal or boundary defenses,” with an effort to “commit sabotage, espionage, hostile or warlike acts, or violations of the law or war.”²⁹⁷ The commission would try the defendants for violations of the laws of war, which mostly took the form of unwritten custom. FDR prohibited any appeals to the civilian courts, unless the Secretary of War and the Attorney General consented.²⁹⁸ His second order, in one paragraph, established the rules of procedure. The military judges were to hold a “full and fair trial” and could admit any evidence that would “have probative value to a

²⁹⁰ *Id.*

²⁹¹ *Id.* at 65–66.

²⁹² *Id.* at 66.

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.* at 66–67.

²⁹⁶ *Id.* at 67.

²⁹⁷ Proclamation No. 2561, 7 Fed. Reg. 5101 (July 7, 1942).

²⁹⁸ *See id.*; *see also* FISHER, *supra* note 285, at 98–99.

reasonable man.”²⁹⁹ The concurrence of two-thirds of the judges was required for sentencing, and any appeals had to run directly to the President himself.³⁰⁰

As structured by FDR, the commissions subjected the Nazi saboteurs to a form of justice very different from that normally applied in civilian courts. The most striking departure was the absence of a jury, as guaranteed by the Sixth Amendment to the Constitution. Neither civilian criminal procedure nor the normal rules of evidence applied, and FDR made no allowances for a right to legal counsel, a right to remain silent, or a right of appeal. Another important difference was that the laws of war, which at that time remained mostly unwritten, would define the crimes. Unlike the civilian system, which requires that the government prosecute defendants for crimes that are clearly defined and written, the saboteurs would be charged with war crimes upon which even legal experts would struggle to agree.

FDR’s order was of uncertain constitutionality under the law of the day. At that time, the governing case was still *Ex parte Milligan*. *Milligan* held that the government had to use civilian courts when the defendant was not a member of the enemy armed forces and the courts were “open to hear criminal accusations and redress grievances.”³⁰¹ FDR created military commissions to avoid *Milligan*, to charge the defendants with violations of the laws of war, and to preclude any form of judicial review. Military counsel for the Nazi saboteurs challenged the constitutionality of the trial on the ground that courts were open, the defendants were not in a war zone, violations of the laws of war were not subject to prosecution under federal law. Military commissions, they argued, violated the Articles of War enacted by Congress.³⁰²

FDR was undeterred when the Supreme Court agreed to hear the defendants’ case. As the Justices gathered in conference before oral argument, Justice Roberts reported that Biddle was worried that FDR would order the execution of the saboteurs regardless of the Court’s decision. Chief Justice Stone, whose son was working on the defense team, said “[t]hat would be a dreadful thing.”³⁰³ While Stone did not recuse himself, Justice Murphy—who was in uniform as a member of the army reserve—

²⁹⁹ Commander in Chief of the Army and Navy: Appointment of a Military Commission, 7 Fed. Reg. 5103 (July 7, 1942).

³⁰⁰ *See id.*; *see also* FISHER, *supra* note 285, at 99–100.

³⁰¹ *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 121–22 (1866).

³⁰² Danelski, *supra* note 288, at 68–69.

³⁰³ *Id.* at 69.

did.³⁰⁴ Justice Byrnes, who had been serving as an informal advisor to the administration, did not. Biddle himself argued the case and urged the Court to overrule *Milligan*, but after two days of oral argument, the Justices decided to uphold the military commission.³⁰⁵ The great pressure on the Court is reflected in its decision to deliver a brief *per curiam* opinion the day after oral argument, with an opinion to follow months later.

Commission proceedings began the day after the Supreme Court issued its order. The commission convicted and sentenced the defendants to death in three days.³⁰⁶ Five days later, FDR approved the verdict but commuted the sentences of two defendants.³⁰⁷ Roosevelt's two executive orders remained the only guidance for the commission on the rules of procedures and the definition of the substantive crimes. There was no written explanation, for example, of the elements of the violations of the laws of war, nor were procedures given, aside from the votes required for conviction and the admission of evidence.

When the Supreme Court finally issued its opinion, it carefully distinguished *Milligan*.³⁰⁸ Chief Justice Stone's unanimous opinion for the Court found that *Milligan* applied to a civilian who had never associated himself with the enemy.³⁰⁹ The Nazi saboteurs, by contrast, had clearly joined the German armed forces. Neither the Bill of Rights nor the separation of powers barred FDR from using military courts during wartime to try enemy combatants. Congressional creation of the courts-martial system and the absence of any criminal provisions to punish violations of the laws of war presented no serious obstacle. Chief Justice Stone read the Article of War recognizing the concurrent jurisdiction of military commissions as congressional blessing for their existence.³¹⁰ The Justices decided not to address the issue that had divided them behind the scenes—whether Congress could require the president to provide the saboteurs with any trial at all, civilian or military—because they did not read any congressional enactment as prohibiting military commissions.³¹¹ If the United States was at war, and it captured members of the enemy armed forces, it could try the prisoners for war crimes outside the civilian or court-martial systems.

³⁰⁴ *Id.*

³⁰⁵ *Id.* at 70–71.

³⁰⁶ *Id.* at 71.

³⁰⁷ *Id.* at 72.

³⁰⁸ *See id.* at 73–75.

³⁰⁹ *Id.* at 72–73.

³¹⁰ *Id.* at 73.

³¹¹ *Id.* at 72.

B. Detention

In the wake of Pearl Harbor, President Roosevelt ordered sweeping military detentions that, in absolute numbers, far eclipsed Lincoln's policies in the Civil War. After the Japanese attack and the German and Italian declarations of war, FDR authorized the Departments of War and Justice to intern German, Japanese, and Italian citizens in the United States. In February 1942, for example, the government detained approximately 3000 Japanese aliens.³¹² Detention of the citizens of an enemy nation had long been a normal aspect of the rules of war, and was authorized by the Alien Enemies Act (on the books since 1798).³¹³ That same month, FDR went even further and authorized the detention of American citizens suspected of disloyalty. On February 19, 1942, FDR signed Executive Order 9066, allowing the Secretary of War to designate parts of the country as military zones "from which any or all persons may be excluded."³¹⁴ By the end of 1942, the government moved 110,000 Japanese-Americans to ten internment camps because of the possibility that they might provide aid to the enemy.³¹⁵ Recent historical work suggests that Roosevelt took a far more active role in the detention decision than has been commonly understood.³¹⁶

There was substantial disagreement within the military and the administration on the internments.³¹⁷ General John DeWitt, commander of the Fourth Army on the West Coast, initially opposed the mass evacuations of Japanese-Americans, as did officials in the Justice Department and several prominent White House aides, but by late January 1942, thinking had changed.³¹⁸ A popular movement on the West Coast demanded removal of the Japanese-Americans to the nation's interior. This sentiment gathered momentum as the United States suffered a string of military defeats in the Pacific. The precipitating factor in the eventual internment decision appears to be the release of the Roberts Commission report on the Pearl Harbor attacks.³¹⁹ While the commission only briefly mentioned that some Japanese in the

³¹² See PETER IRONS, *JUSTICE AT WAR: THE HISTORY OF THE JAPANESE AMERICAN INTERNMENT CASES* 19 (1983).

³¹³ See Alien Enemies Act, c. 66, §1, 1 Stat. 577 (July 6, 1978).

³¹⁴ Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942).

³¹⁵ IRONS, *supra* note 312, at vii.

³¹⁶ See GREG ROBINSON, *BY ORDER OF THE PRESIDENT: FDR AND THE INTERNMENT OF JAPANESE AMERICANS* 79, 92–95, 98–99, 104, 106–07, 127 (2003).

³¹⁷ See, e.g., IRONS, *supra* note 312, at 29–30, 33–35; ROBINSON, *supra* note 316, at 76–78, 85–86; ERIK YAMAMOTO ET AL., *RACE, RIGHTS & REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT* 100 (Richard A. Epstein et al. eds., 2001).

³¹⁸ See ROBINSON, *supra* note 316, at 3.

³¹⁹ *Id.* at 95.

Hawaiian Islands, along with Japanese consular officials, had provided intelligence on military installations before the attacks, the public response was tremendous. The Roberts Commission report “attracted national attention and transformed public opinion on Japanese Americans.”³²⁰ Newspapers, California political leaders, and military officials demanded that the Roosevelt administration intern Japanese-Americans out of fear of further sabotage and espionage.³²¹ Some in the War Department discounted the effect of espionage on the West Coast, and FBI Director J. Edgar Hoover dismissed claims of disloyalty.

Cabinet members raised the issue twice with the President before the final executive order. Biddle met FDR for lunch in early February 1942 to express doubts about the need for internment. While FDR did not make a decision at that time, he concluded the lunch by saying he was “fully aware of the dreadful risk of Fifth Column retaliation in case of a raid.”³²² A few days later, Stimson called Roosevelt after learning that General DeWitt would recommend removal of Japanese-Americans on the West Coast.³²³ News that Singapore had fallen arrived the day before Stimson’s call, making it unlikely that FDR would second-guess claims of military necessity. Nonetheless, Stimson—who had his own doubts about the necessity and legality of the evacuations—proposed three options: massive evacuation, evacuation from major cities, or evacuation from areas surrounding military facilities.³²⁴ Roosevelt responded that Stimson should do what he thought best, and that he would sign an executive order giving the War Department the authority to carry out the removals.³²⁵ DeWitt soon found the evacuations necessary on security grounds, and Stimson and Biddle agreed on a draft of the executive order based on Roosevelt’s constitutional authorities as Chief Executive and Commander-in-Chief.³²⁶ It appears that FDR’s decision rested solely on the military’s claim of wartime necessity.

Several scholars have observed that Roosevelt was not vigilant in protecting civil liberties, and in this case, according to one biographer, the decision was easy for him.³²⁷ FDR believed that the military “had primary direct responsibility for the achievement of war victory, the achievement of war victory had

³²⁰ ROBINSON, *supra* note 316, at 95.

³²¹ *Id.* at 95–96.

³²² *Id.* at 104.

³²³ *Id.* at 106.

³²⁴ *Id.* at 100–01.

³²⁵ *Id.* at 106.

³²⁶ *Id.*

³²⁷ *See* DAVIS, *supra* note 239, at 424.

top priority, and ‘victory’ had for him a single simple meaning” of defeating Germany and Japan; victory, for Roosevelt, “was prerequisite to all else.”³²⁸ There was no great outcry from liberal leaders, there was no cabinet meeting or forum for debate within the administration, and the Attorney General came to agree with the War Department that the measure was legal. Recent historical work argues that the internment decision did not arise solely because of misinformation about Japanese-Americans or the pressure of events early in the war.³²⁹ The internments happened, in part, because FDR was ready to believe the worst about the potential disloyalty of Japanese-Americans.³³⁰

Presidential consultation with Congress did not improve national security decision-making. Both Congress and the Court approved FDR’s actions. In March 1942, Congress passed a bill establishing criminal penalties for those who refused to obey the evacuation orders.³³¹ Support for the law was so broad that it was approved in both the House and Senate by voice vote with only a single speech, by Republican Senator Robert Taft of Ohio, in opposition.

The Supreme Court did not directly address the constitutionality of the detentions until *Korematsu v. United States*, decided on December 18, 1944.³³² According to the Court, the mass evacuation triggered “strict” scrutiny under the Equal Protection Clause because it discriminated on the basis of race.³³³ Nonetheless, the Court agreed that these wartime security measures advanced a compelling government interest, and the Court deferred to the military’s judgment of necessity. According to Justice Black’s 6–3 majority opinion, “[the court was] unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did.”³³⁴ While not disputing the deprivation of individual liberty involved, the majority recognized that “the military authorities, charged with the primary responsibility of defending our shores, concluded that curfew provided inadequate protection and ordered exclusion.”³³⁵ As with an earlier case upholding a nighttime curfew on Japanese-Americans in the western military region, the Court concluded, “we cannot reject as unfounded the judgment of the

³²⁸ *Id.*

³²⁹ ROBINSON, *supra* note 316, at 118.

³³⁰ *Id.*

³³¹ 56 Stat. 173, 77 Cong. Ch. 191 (Mar. 21, 1942).

³³² See *Korematsu v. United States*, 323 U.S. 214 (1944).

³³³ *Id.* at 216.

³³⁴ *Id.* at 217–18.

³³⁵ *Id.* at 218.

military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained.”³³⁶

The Court’s majority stressed that the Constitution afforded leeway to the executive branch during time of emergency.³³⁷ Justice Black agreed that while the government generally could not detain citizens based solely on their race, such motivation was not present in the instant case. The exclusion order was necessary, Black wrote, because “the properly constituted military authorities feared an invasion of our West Coast,” and their judgment was that “the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily[.]”³³⁸ Although it observed that Congress supported the military’s power “as inevitably it must” during wartime, the Court attached no special importance to the authorization.³³⁹

The press of circumstances required deference to military judgment. “There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short.”³⁴⁰ Perhaps most important, Justice Black concluded that decisions taken during the emergency itself had to be understood in light of the information known at the time. “We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified.”³⁴¹

Korematsu remains one of the most criticized decisions in American history, considered second only to *Dred Scott* on the list of the Court’s biggest mistakes. The three dissenters believed that the Constitution clearly protected Japanese-American citizens from what we today would call racial profiling. The government, Justice Roberts wrote, was “convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States.”³⁴² The dissenters did not challenge the proposition that “sudden danger” might require the suspension of a citizen’s right to free movement, or that the Court owed the military broad deference

³³⁶ *Id.* (quoting *Hirabayashi v. United States*, 320 U.S. 81, 99 (1943)).

³³⁷ *Id.* at 220.

³³⁸ *Id.* at 223.

³³⁹ *Id.*

³⁴⁰ *Id.* at 223–24.

³⁴¹ *Id.*

³⁴² *Id.* at 226 (Roberts, J., dissenting).

during wartime, but that the chosen hypothetical did not represent the true facts of the case. Any “immediate, imminent, and impending” threat to public safety was absent.³⁴³ Justice Murphy wrote in dissent that “this forced exclusion was the result in good measure of [an] erroneous assumption of racial guilt rather than bona fide military necessity.”³⁴⁴ The dissenters pointed out that the government presented no reliable evidence that Japanese-Americans were generally disloyal or had done anything that made them a threat to the national defense. The exclusion order relied simply on unproven racial and sociological stereotypes.

Justice Jackson used his dissent to harmonize the role of the executive and the courts during wartime. “It would be impracticable and dangerous idealism to expect or insist that each specific military command in an area of probable operations will conform to conventional tests of constitutionality.”³⁴⁵ For a Commander-in-Chief and the military, “the paramount consideration is that its measures be successful, rather than legal.”³⁴⁶ In words that echoed Lincoln and Jefferson, Jackson declared that the “armed services must protect a society, not merely its Constitution,” and observed that “defense measures will not, and often should not, be held within the limits that bind civil authority in peace.”³⁴⁷ That said, Jackson did not want to provide constitutional legitimacy to the exclusion order. There might be no limit to what military necessity would allow when courts are institutionally incapable of second-guessing the decisions of military authorities. “But if we cannot confine military expedients by the Constitution, neither would I distort the Constitution to approve all that the military may deem expedient.”³⁴⁸ Upholding the Japanese-American internment would create a dangerous precedent for the future. “The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.”³⁴⁹ A one-time-only action is only an “incident,” but once upheld by the Court, it becomes “the doctrine of the Constitution.”³⁵⁰ In a solution many have found unsatisfying, Jackson wanted the Court neither to bless nor block the military’s enforcement of the exclusion.

³⁴³ *Id.* at 234 (Murphy, J., dissenting).

³⁴⁴ *Id.* at 235–36 (Murphy, J., dissenting).

³⁴⁵ *Id.* at 244 (Jackson, J., dissenting).

³⁴⁶ *Id.* (Jackson, J., dissenting).

³⁴⁷ *Id.* (Jackson, J., dissenting).

³⁴⁸ *Id.* (Jackson, J., dissenting).

³⁴⁹ *Id.* at 246 (Jackson, J., dissenting).

³⁵⁰ *Id.* (Jackson, J., dissenting).

Historical research has revealed that some government officials doubted whether any real security threat justified the exclusion order. Nonetheless, the Justice Department chose in *Korematsu* to assert that military authorities believed the evacuations necessary because of an alleged threat against the West Coast. A companion case, *Ex parte Endo*, however, found that the government could not detain a Japanese-American citizen whom the government had conceded was “loyal and law-abiding.”³⁵¹ To this day, the debate over the necessity of the measures continues, but regardless of which side one falls on in that debate, it seems clear that the internment of the Japanese-Americans in *Korematsu* represents a far more serious infringement of civil liberties than that which occurred in the Civil War. The first and most obvious difference is one of magnitude. FDR interned—without trial—about 110,000 Japanese-Americans on suspicion of disloyalty to the United States.³⁵² Lincoln ordered the detention of about 12,600.³⁵³

The second difference is one of justification. FDR ordered the detention of the Japanese-Americans not because any had been found to be enemy combatants. They were interned because of their *potential* threat due to loyalty to an enemy nation imputed from their ethnic ancestry. FDR could have pursued a narrower policy that detained individuals based on their individual ties to a nation with which the United States was at war. The citizens of Japan, Germany, and Italy could be interned as a matter of course, and anyone fighting or working for the enemy, regardless of citizenship, could be detained. With regard to aliens, FDR could have relied upon the Alien Enemies Act to detain natives or citizens of a hostile nation during wartime.³⁵⁴ FDR’s internment policy did neither—instead, it presumed disloyalty, sweeping in 110,000 American’s of Japanese ancestry based solely on their ethnicity.

³⁵¹ *Ex Parte Endo*, 323 U.S. 283, 294 (1944); *see also* *Korematsu v. United States*, 323 U.S. 214 (1944), *reprinted in* PHILLIP B. KURLAND AND GERHARD CASPER, *LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW* 197 (Univ. Pub. of America ed., 1975); ROBINSON *supra* note 316, at 210.

³⁵² IRONS, *supra* note 312, at vii.

³⁵³ MARK E. NEELY JR., *THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES* 10 (1991).

³⁵⁴ Act of July 6, 1798, ch. 66, §1, 1 Stat. 577 (codified at 50 U.S.C. § 21); *see also* *Ludecke v. Watkins*, 335 U.S. 160, 173 (1948) (upholding the use of the Alien Enemies Act during World War II in the case of a German national detained in the United States).

C. Electronic Surveillance

Roosevelt has been described by one historian as the president most interested in covert activity other than Washington, who personally managed spies and directed the interception of British communications. During World War I, Roosevelt had served as assistant secretary of the Navy, with responsibility for intelligence. During World War II, his interest in covert operations led to the establishment of the Office of Strategic Services, the forerunner of the Central Intelligence Agency.³⁵⁵

Less well known are Roosevelt's actions with regard to the interception of electronic communications. The Administration initially had not engaged in any wiretapping for national security purposes, as Attorney General Jackson believed that electronic surveillance without a warrant violated the Federal Communications Act of 1934.³⁵⁶ In March 1940, he issued an order prohibiting the FBI from intercepting electronic communications without a warrant. As Europe plunged into war, however, J. Edgar Hoover grew increasingly concerned about the possibility of Axis spies within the United States. Aware of Jackson's order, Hoover went to Treasury Secretary Henry Morgenthau and asked him to speak to Roosevelt to authorize the interception of the communications of potential foreign agents who might sympathize with Germany.³⁵⁷

Roosevelt had long been concerned with the potential threat of a "fifth column" inside the United States. The spectacular 1916 sabotage of an American munitions plant remained vivid in his memory. As early as 1936, Roosevelt authorized the FBI to investigate "subversive activities in this country, including communism and fascism."³⁵⁸ When World War II broke out, Roosevelt ordered the Bureau to "take charge of investigative work in matters relating to espionage, sabotage, and violations of neutrality regulations," and commanded state and local law enforcement officers to "promptly turn over" to the FBI any information "relating to espionage, counterespionage, sabotage,

³⁵⁵ CHRISTOPHER ANDREW, *FOR THE PRESIDENT'S EYES ONLY: SECRET INTELLIGENCE AND THE AMERICAN PRESIDENCY FROM WASHINGTON TO BUSH 6-9*, 76 (1996).

³⁵⁶ Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C.).

³⁵⁷ See Richard Caplan & Neal Katyal, *The Surprisingly Stronger Case for the Legality of the NSA Surveillance Program: The FDR Precedent*, 60 *STANFORD L. REV.* 1023, 1049-50 (2008).

³⁵⁸ ANDREW, *supra* note 355, at 89.

subversive activities and violations of the neutrality laws.”³⁵⁹ What “subversive activities” meant was left undefined.

France’s collapse in May 1940 had a profound effect. At the time, Germany’s smashing victory seemed inexplicable as a feat of arms alone, lending credence to the theory that collaborators and spies were also responsible. Roosevelt increasingly spoke of his concern that the United States, too, might suffer from Axis sympathizers or covert agents’ intent on undermining its war preparations. Even before Hoover came to make his request, FDR had encouraged amateur surveillance efforts. His friend, publisher, and real estate developer, Vincent Astor, had set up a private group he had called “the Room,” which included leading figures in New York City.³⁶⁰ As a director of the Western Union Telegraph Company, Astor ordered the covert interception of telegrams.³⁶¹ He and his friends also arranged for the monitoring of radio transmissions in New York. Using its connections, the group gathered the private banking records of companies connected to foreign nations to determine whether they were supporting espionage within the United States.³⁶² While there is no direct record of a presidential order authorizing this surveillance, historical evidence suggests that the group was acting in response to a request by Roosevelt.³⁶³

Given his suspicions, Roosevelt quickly agreed with Morgenthau and Hoover that the wiretapping of suspected Axis agents or collaborators was necessary to protect national security. The next day, he issued a memorandum to Jackson to allow the FBI to wiretap individuals who posed a potential threat to the national security.³⁶⁴ After Pearl Harbor, FDR released the handbrake and authorized the interception of *all* international communications. Even though some Justices had criticized wiretapping, the Court held in 1928 in *Olmstead v. United States*, that the Fourth Amendment did not require a warrant to intercept electronic communications.³⁶⁵ It would not be until 1967, in *Katz v. United States*, that the Supreme Court would hold that electronic communications were entitled to Fourth Amendment privacy protections.³⁶⁶

³⁵⁹ *Id.* at 91.

³⁶⁰ *Id.* at 83.

³⁶¹ *Id.*

³⁶² *Id.* at 92.

³⁶³ *See id.*

³⁶⁴ *United States v. U.S. District Court*, 444 F.2d 651, 669–70 (6th Cir. 1971).

³⁶⁵ *Olmstead v. United States*, 277 U.S. 438, 469 (1928).

³⁶⁶ *Katz v. United States*, 389 U.S. 347, 359 (1967).

Congress, however, appeared to have prohibited the interception of electronic communications in the Federal Communications Act of 1934. It declared that “no person” who receives or transmits “any interstate or foreign communication by wire or radio” can “divulge or publish” its contents except through “authorized channels of transmission” or to the recipient.³⁶⁷ In *United States v. Nardone*, decided in 1937, the Supreme Court interpreted this language to prohibit wiretapping by the government as well as by private individuals.³⁶⁸ In a second *Nardone* case, the Court made clear that the government could not introduce in court any evidence gathered from wiretapping.³⁶⁹

FDR recognized that his wiretapping order of May 1940 violated the text of the statute, or at least the Supreme Court’s reading of it, but the President claimed that the Supreme Court could not have intended “any dictum in the particular case which it decided to apply to grave matters involving the defense of the nation.”³⁷⁰ Administration supporters in Congress introduced legislation to legalize wiretapping, but the House rejected the bill 154–147.³⁷¹ FDR continued the interception program throughout the war despite the Federal Communications Act and *Nardone*. FDR’s pre-war interception order applied to anyone “suspected of subversive activities” against the U.S. government, which included individuals who might be sympathetic to, or even working for, Germany and Japan.³⁷² At that time, however, the United States was not yet at war. While FDR wanted the FBI to limit the interceptions to the calls of aliens, his order did not exclude citizens. Most importantly, it was not limited only to international calls or telegrams, but included communications that took place wholly within the United States.

IV. Conclusions

War and emergency demand that presidents exercise their constitutional powers far more broadly than in peacetime. That was never more true than under President Franklin Roosevelt. FDR tackled the Great Depression by treating it as a domestic emergency that called for the centralization of power in the federal government and the presidency. But he could not act

³⁶⁷ Communications Act of 1934, 47 U.S.C. § 151 (1934).

³⁶⁸ See *United States v. Nardone*, 302 U.S. 379, 384 (1937).

³⁶⁹ *Id.* at 338.

³⁷⁰ ROBERT H. JACKSON, *THAT MAN: AN INSIDER’S PORTRAIT OF FRANKLIN D. ROOSEVELT* 68–69 (2003).

³⁷¹ See Caplan & Katyal, *supra* note 357, at 1060.

³⁷² *United States v. U.S. District Court*, 444 F.2d 651, 670 (6th Cir. 1971).

alone, because the Constitution gives Congress the authority to regulate the economy and create the federal agencies. Under Roosevelt's direction, Congress enacted sweeping legislation vesting almost complete power over industry and agriculture in the executive branch, which repeatedly sought to centralize power over the plethora of New Deal agencies in the presidency.

Roosevelt responded to the looming threat of fascism by bringing the United States into World War II, and he made all the significant decisions of foreign and domestic policy once the war began. Historians rarely, if ever, mention any role for Congress in the prosecution of the war against Germany and Japan, aside from the provision of money and arms. It was the President, for example, who decided that the United States would allocate its resources to seek victory in Europe first, and Roosevelt alone who declared that the Allies would demand unconditional surrender as the only way to end the war.

FDR, not Congress, made the critical decisions about the shape of the postwar world. He wanted a world policed by four major countries: the United States, Great Britain, China, and the Soviet Union. He agreed with Great Britain and the Soviet Union to divide Germany—the “German question” was the fundamental strategic problem at the root of both World Wars. At Yalta, FDR agreed that the Soviet Union would control a sphere of influence extending over Eastern Europe, and in return, those nations would be allowed to hold democratic elections.

While some believe that Stalin had hoodwinked him, FDR may have recognized the reality of the balance of power in Europe after the war. He may have hoped that his reasonableness in agreeing to Stalin's demands would win, in exchange, Soviet support of the United Nations. Roosevelt also demanded that Britain and France give up their colonies. FDR wanted to forestall a return to both the isolationism and the international disorder of the interwar period. Historians argue today whether Roosevelt truly believed in collective security, or whether he was a realist who accepted the balance of power at the end of World War II. Either way, it was the President who took the initiative to set the policy, although it was one where he could not act alone. Without the Senate's approval, the United Nations would have gone the way of the League of Nations.

Too often, we focus on mistakes of commission—a decision to go to war gone bad, or a law that has unintended consequences—known as *Type I* errors. FDR showed that the presidency may be far more effective than the other branches in preventing a failure to take action—errors of omission, or *Type II* errors. Left to its own devices, Congress would have blocked aid to the Allies and

delayed American entry into World War II by several months, if not years. This may be a result of the internal structure of Congress, which suffers from, at times crippling, collective action problems. The passage of legislation through both Houses with many members is fraught with such difficulty that the Constitution can be understood to favor inaction and, therefore, maintenance of the status quo. The status quo may be best for a nation when it enjoys peace and prosperity, where threats come more often from ill-advised efforts at reform or revolutionary change. But maintaining the status quo may harm the nation when long-term threats are approaching, or unanticipated opportunities present themselves and must be seized rapidly before vanishing.

In the area of domestic affairs, whether the New Deal or internal security programs, Roosevelt worked hand-in-hand with Congress. He had to: the Great Depression's economic nature brought it squarely within the enumerated powers of Congress. Nevertheless, the emergency of the Depression illuminated the natural advantages of presidential leadership in the legislative process. A complex economy beset by a mysterious, but dangerous, ailment required administrative expertise for a cure, and Congress willingly cooperated by transferring massive legislative authority to the agencies.

FDR deserves praise for trying every reasonable idea, including this transformation of executive-legislative relations, to reverse the sickening drop in economic activity. Crucially, neither he, nor anyone else, affirmatively knew how to end the Depression. Only now do we know that the New Deal, combined with the Federal Reserve's tight monetary policy and the government's restrictive fiscal policies, prolonged the Great Depression itself. Rather, it was World War II, not the New Deal, which ended the persistent unemployment levels of the 1930s. When the smoke cleared in 1945, the New Deal's true legacy endured in the form of bloated, independent bureaucracies that future presidents would struggle to control. Plainly, presidential cooperation with Congress provides no guarantee of success, and, in fact, can prove quite malignant.

Throughout FDR's astounding presidency, a theme unites both his success in foreign policy and the appearance of such in domestic policy. FDR believed deeply in the independence of the presidency and a vigorous use of its constitutional authorities. He did not shrink from constitutional confrontations with the other branches. To pursue the policies he believed to be in the national interest such confrontation was often required. He openly disagreed with the Supreme Court's limitations on the New Deal

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and publicly sought to manipulate its membership. He pushed his powers as Commander-in-Chief beyond their perceived limits, refusing to abide by the spirit, and sometimes the letter, of the Neutrality Acts in order to involve the United States in a war that neither Congress nor a clear majority of Americans favored. FDR correctly judged the threat to the nation's existence posed by the rise of fascism. The nation and the world are better off today because he pushed a reluctant nation into war. His broad understanding of his executive powers created the foundation for policies that secured freedom in the twentieth century.