The Review of Politics 73 (2011), 145–153.
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doi:10.1017/S0034670510000926

Doing What Needs to Be Done

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Clement Fatovic: *Outside the Law: Emergency and Executive Power.* (Baltimore: Johns Hopkins University Press, 2009. Pp. 368. $55.00.)

I

If the end of a legal system is the well-being of its people, as Madison claims in *Federalist*, No. 45, and if it is irrational to sacrifice means to ends, as Madison says in *Federalist*, No. 40, then Cicero was right to conclude that *salus populi suprema lex*, that the people's welfare is supreme law—that the people's welfare should prevail over conflicting legal arrangements.

Cicero's maxim is well represented in American constitutional history, including the action of the Philadelphia Convention and Lincoln's conduct of the Civil War. With Washington presiding, the Convention disregarded Congress's charge to propose an adequate government for the union via amendments to the Articles of Confederation. The delegates knew that no adequate government could attract the unanimous vote of the states that the Articles required for amendments, so the Convention ignored the Articles and proposed a new ratification process. Though he never quite admitted it, Lincoln treated numerous constitutional provisions (regarding habeas corpus, appropriations, private property, etc.) as barriers to his duty to defend the union. Bypassing those provisions, he acted as he thought best for the nation. In *Outside the Law,* Clement Fatovic defends such actions and argues for openly acknowledging the limits of positive law and the need for extralegal executive action in grave emergencies that are beyond the reach of established legal provisions.

One of Fatovic's aims is to rebut Carl Schmitt and other antiliberals who claim that rule-of-law ideology disables liberalism from dealing with contingencies; another is both to open and to close the door to extralegal executive acts. Fatovic knows that when a George Washington or an Abraham Lincoln steps outside the law he opens the door to extralegal acts by a George W. Bush. At a time of division over presidential power in emergencies, Fatovic would admit extralegal acts by the Washingtons and Lincolns and exclude or at least inhibit constitutional violations by lesser figures in crises that remain constitutionally manageable. Though Fatovic's peripheral arguments fall short in some respects, his central argument succeeds, against heavy odds, and in a manner that should establish him as a major voice in contemporary constitutional debate.

https://doi.org/10.1017/S0034670510000926 Published online by Cambridge University Press

II

The American Constitution cannot reasonably be read to say that virtuous presidents can suspend the writ of habeas corpus on their own, or raise armies on their own, or obligate the treasury on their own, while nonvirtuous presidents have to wait for Congress. Though the Framers of the Constitution's electoral and appointment provisions did aim for virtue and talent, the Constitution doesn't suggest that the personal qualities of duly elected or appointed officials augment or diminish what they are authorized to do. Yet Fatovic claims that liberal constitutionalism (i.e., the philosophy behind the Constitution) (1) acknowledges the limits of positive law in the face of contingencies; (2) places the chief executive in a strategic position to address contingencies in ways outside or even contrary to the law if need be; and (3) relies, where law runs out, on the personal virtues of the president to place "the interests of the public above competing interests of self, family, sect, or party" (265). Fatovic claims further, as a peripheral matter, that (4) good character enhances and dubious character diminishes a president's power (267–68). Regarding this last claim, Fatovic holds that the public is more likely to tolerate extralegal actions by a president it admires, and (mentioning Bill Clinton's failure to pursue embassy bombers after the Lewinsky scandal) that a president with a bad reputation is less likely to act in ways that might be seen as attempts to distract from his personal problems (264–65, 270–71).

Fatovic's first three propositions can claim support from the constitutional text, the tradition of constitutional thought, and the principles of practical reason. Fatovic's fourth proposition seems essentially a behavioral generalization, and, as such, it is hard to defend. Happily, the fourth proposition is independent of the others; I discuss it first.

III

No doubt, virtue and a reputation for virtue *can* enhance a president's power, and vice and its appearance *can* diminish a president's power, but such outcomes depend on circumstances (such as the level of party discipline and the scope of party control), and there is no evidence that either prospect is *generally* the case. At one point Fatovic himself indicates that it is not generally the case. Though Fatovic chooses his words carefully to minimize offense, he goes into so much detail about the public's disappointments with George W. Bush (much more so than with Bill Clinton) that one can fairly say that Bush is Fatovic's example of a nonvirtuous president (see 271–74; cf. 270–71). Yet Fatovic recognizes that despite the public's doubt about Bush's character and motives, Bush "was able to push the limits of executive power to unprecedented heights." This fact, he says, "may suggest that executive power—emergency or otherwise—is unrelated to the real or perceived

https://doi.org/10.1017/S0034670510000926 Published online by Cambridge University Press

character of the president" (272–73). Having raised this challenge to his own position, Fatovic responds. Citing a defector from the Bush administration and the Supreme Court's "partial rebukes" of the president's policies on military detainees, Fatovic offers, equivocally, that Bush's excesses "may have left the presidency weaker" and "may actually have hampered [the administration's] ability to combat ... terrorism as effectively as possible" (273). He adds that "further expansions of presidential power" did not happen for Bush after the Democrats took Congress in the midterm election of 2006, and that Bush's disregard of constitutional limits and public opinion eventually "called into question the president's commitment to the principles of liberal constitutionalism"(273–74).

To all this, a critic can reply: Yes, Bush *may* have diminished the power of his office, and then again he *may* have done the opposite—that is, "push[ed] executive power to unprecedented heights." By asserting both possibilities, Fatovic opens the question; he does not answer it. Secondly, though a nonvirtuous president might weaken her own ability to govern, it's not clear how she could weaken her *office*—the office she momentarily occupies. Fatovic can't mean that an old occupant can destroy the possibility of future occupants' achieving aims beyond those of the old occupant. If the potential for heightened achievements were destroyed, a virtuous executive could achieve no more than a previously vicious one, and Fatovic's empirical generalization (virtue enhances power) would no longer hold. Thirdly, that Bush could have done better against terrorism is true. But few will deny that he could have done worse, and one president can perform better than others without acting "as effectively as possible." Finally, doubting Bush's commitment to liberal constitutionalism is nonresponsive to the question of what part character played in his strength or weakness as president. Bush could have been a strong and great president (even the strongest and greatest) while committed to liberal constitutionalism only as a pedestal for himself.[1] After all, "strong president" doesn't entail "commitment to liberal constitutionalism."

Lincoln serves as Fatovic's evidence that virtue enhances presidential power. "Though Lincoln faced bitter opposition to virtually every aspect of his handling of the Civil War from a variety of quarters, his perceived virtue did make it easier for some to accept his extraordinary actions," says Fatovic. As evidence he cites praise for Lincoln's "practical wisdom, ... unselfish patriotism and ... unswerving fidelity to the Constitution and the principles of American liberty.'" This tribute appears in the Republican Party Platform of 1864 (264). The problem with this part of Fatovic's argument, of course, is that a politician's party platform is hardly evidence for what the

[1]For the application of this possibility to Lincoln, see Harry V. Jaffa, *Crisis of the House Divided: An Interpretation of the Lincoln-Douglas Debates* (Chicago: University of Chicago Press, 1982), 191–225.

https://doi.org/10.1017/S0034670510000926 Published online by Cambridge University Press

general public believes. Nor does Lincoln's reelection prove that the public shared the party's view of Lincoln's character, for Lincoln himself said that the voters cared only about military success, and historians generally credit Lincoln's reelection to timely military breakthroughs by Generals Sherman and Grant.[2] True, ultimate credit for the successes of Grant and Sherman should go to Lincoln's combined virtues as a judge of military talent, a military strategist in his own right, a political strategist, and a moral person or thinker (for seeing and acting on the reasons why the nation should pay the heavy price of fighting Grant and Sherman's way).[3] But this conclusion could prove no more than that moral rectitude combined with political and military skills won *for Lincoln*, or perhaps that virtue will prevail *if and when* other factors permit, propositions few will deny.

IV

Fatovic's chief concern is what can restrain officials when contingencies force them to step outside legally permissible courses. As a matter of abstract practical reason, the actors are restrained by the limits of their resources relative to their institutional and material environments *and* their commitment to some good or principle that is either connected to or wholly disconnected from the old law. Constitution makers can avoid officials aggrandizing themselves when law runs out only if the officials value restoring the social conditions favorable either to the old institutions or to the public ends envisioned by the old institutions (see 259). In other words, a regime can meet and survive constitutional emergencies only if its officials are virtuous as the regime defines virtue—in terms of the Republican platform of 1864, only if the officials display "practical wisdom, … unselfish patriotism and … unswerving fidelity to the Constitution and the principles of American liberty'" (264–65). Fatovic follows suit: when constitutional means fail constitutional ends, as they have in the past and will again, he would restrain the resulting and unavoidable extralegal discretion of officials by relying on their personal virtue (4–12, 51–52, 160–64, 207–13, 233, 263, 274).

If practical reason governed constitutional theory, Fatovic would need little more to establish his central thesis. But reason competes with other authorities in constitutional commentary, and Fatovic turns to the history of political thought. Here he finds that the Framers of the American Constitution and their leading philosophic precursors in fact recognized that law can't handle some contingencies and that constitutional maintenance and survival

[2]See Richard Hofstadter, *The American Political Tradition* (New York: Vintage Books, 1974), 165.

[3]See James M. McPherson, "Lincoln and the Strategy of Unconditional Surrender," in *The Best American History Essays on Lincoln*, ed. Sean Wilentz (New York: Palgrave Macmillan, 2009), 207–27.

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depends ultimately on public-spirited and competent leadership. Fatovic begins with Machiavelli, whom he credits with persuading subsequent thinkers that ungovernable chance ("*fortuna*") controls "half of our actions." Machiavelli's understanding of this problem led him to propose rule by princes freed from all but prudential restraints, whether legal, moral, or religious. Though repulsed by Machiavelli's amoralism, according to Fatovic, Locke, Hume, Blackstone, and the authors of *The Federalist* agreed with Machiavelli on the limits of established legal forms (10–16). Fatovic devotes five of the book's seven chapters to this proposition.

Many rewards await readers of these pages. Highlights include an account of Locke's famous "executive prerogative"—that is, power to act either outside the law or contrary to law as contingencies require. Fatovic succeeds in rendering Locke an ends-oriented rather than a rights-oriented thinker (45, 48–49, 66, 76), a feat that should inspire much discussion because it compromises the conventional distinction between ancient and modern constitutionalism (64, 76, 78). Important also is Fatovic's finding that Locke distinguishes between a power that inheres in the office simply and a power that accrues to the individual who occupies an office best situated to exercise the power (65; see also 190–91, 263–64). Locke's prerogative is power of the latter kind, and its irreducibility to rule or formula makes exercises of the power depend on case-by-case determinations of the material situation and the intellectual and moral competence of the person occupying the executive office. Because all exercises of prerogative would be outside the law, none could count as a legal precedent (64–66). Thus, Lincoln's violations of due process and freedom of the press in Maryland (my example) could not serve as legal precedents for Bush's acts against Iraq. If Fatovic is right about Locke (a matter to be addressed), liberalism's preeminent thinker installs a monarchic, public-spirited, and heroic figure as the ultimate guardian of liberal institutions—a most unliberal prospect, and a major amendment to the conventional view of liberalism's nature and conditions.

Fatovic's treatment of the American Founding is equally provocative. In chapter 5, he gives an uncompromisingly Hamiltonian account of the Founding, presidential power, and the Constitution as a whole. He says that "the key to the Federalists' theory of executive power is the idea that a constitution is a purposive and flexible instrument of government," and that "government exists for general rather than particular interests." Moreover, the content of the general interest is "defined by the laws of nature, the principles of justice, or other notions of higher law" (182–83). The Constitution's innate public purposefulness favors a Burkean theory of representation that distinguishes the common good from "the aggregate preferences of discrete individuals" (243; cf. 224). A publicly purposeful constitution also favors a theory of leadership that distinguishes followers from leaders and conceives the latter's function as essentially educative (leading the public away from its momentary inclinations and toward an appreciation of its true interests) and, because educative, "elitist" (213–15, 242–43). In

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Fatovic's hands, these tandem theories of constitutional function and constitutional leadership effectively favor presidential over congressional government (172–75, 179, 190–92, 213, 219–22, 235–38, 249). He describes the movement that led to Philadelphia in the summer of 1787 as one away from legislative government, in both the states and Congress, toward a central government and a strong executive (158–60). Where the Antifederalists saw republican hopes swallowed by a looming monarchy, the Federalists saw an escape from demagoguery and special-interest politics led by "the single executive." Answering the Antifederalist charge that this single executive was the least republican institution, Fatovic quotes Gouverneur Morris: "it is necessary … that the Executive Magistrate should be the guardian of the people, even of the lower classes, agst. Legislative tyranny" (175).[4] Applying the "lesson" of the Founding to contemporary politics, Fatovic notes in chapter 6 that Hamilton would have seen "the pitiable preoccupation of present-day presidents with public approval and public opinion polls … as a contemptible debasement of statesmanship" (248).

Virtue in the executive and beyond is the principal theme of chapter 6, a logical sequel to chapter 5, since a publicly purposeful constitution would seem to suppose—and in Fatovic's view was intended to provide—for publicly purposeful leadership. This chapter reiterates the consensus view of Washington as both the model and the enabler of the presidential office that the Framers wanted, together with their hopes that the electoral college would elevate individuals who approximated Washington's character (214, 217). Fatovic describes the Federalists' argument that the visibility of a single president would enhance his responsibility to the electorate (220–21). He locates the president atop what the Framers hoped would be "a pyramidal structure of virtue among elected officials in the federal government" (226; see also 228–29). And he quotes with approval Madison's response, in *Federalist*, No. 57, to Antifederalist fears of elitism that "the aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of society; and in the next place to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust" (233, Fatovic's emphasis omitted).

By the final segment of the book (a "Conclusion" that for some reason Fatovic elected not to number as a chapter), Fatovic's treatise on emergency power and the virtue of one official broaches the broader subject of virtue and popular government in general. Despite some contrary indications in the presidential election of 2008 (now obscured), the partisan nature of the presidential nominating process causes Fatovic to doubt the likelihood that

[4]Quoting Max Farrand, ed., *The Records of the Federal Convention of 1787* (New Haven: Yale University Press, 1937), 2:52.

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George Washington's nonpartisanship is likely to reappear as part of the public's view of virtuous leadership (266). He laments the ultimate triumph of the Antifederalist "mirror theory of representation" over the Federalist's view of leadership that educates the public to its true interest (275). Fatovic closes with the thought that "improvements in the quality of leaders ultimately depend on improvements in the quality of followers" (275). This depressing conclusion condemns the very species of liberal thought that Fatovic tries to save from the assault of antiliberals like Schmitt, for Fatovic recognizes that the Framers who provided for a president virtuous enough to step outside the law deliberately rejected a strategy for insuring a virtuous electorate (251–52). Thanks to Fatovic, we may know how to justify the extralegal actions of a Washington or a Lincoln without inviting like actions by lesser characters. But Fatovic himself seems to feel that whether or not characters like Washington and Lincoln are any longer possible, their presidencies are phenomena of the past.

V

Part of Fatovic's depressing conclusion is a call for "improvements in the quality of civic education," and "public education more broadly," in an effort to "develop those critical faculties and intellectual powers that liberals have always prized" and on which, "in the final analysis, the fate of free government depends" (275–76). What vitiates this thought is its prescriptive character, for *ought* implies *can*, and the very partisan divisions that Fatovic describes preclude any workable agreement (much less a consensus) on what might count as "improvements in the quality of civic education." The final sentence of Fatovic's book falls more in the category of diagnosis than prescription, and its practical value lies in its import as a cautionary tale for future constitution makers, as opposed to a prescription for present-day constitutional reformers. Fatovic says: "The ultimate paradox may be that only virtue can make up for the failures of institutions that have been specifically designed to compensate for the fallibility of virtue" (276). Fatovic could have substituted the word "tragedy" for "paradox" in this sentence.

VI

Fatovic's book will attract two kinds of criticism. The first kind is that of the constitutional historian who refuses to admit that "history" cannot speak for itself—that "history" has no interesting message that is not refracted through some ethical lens. Sure, one can give Locke and the others readings different from Fatovic's. But Fatovic's readings fall within the range of reasonable interpretive options, and it would take a moral argument to render Fatovic's readings unserviceable to constitutional theory, a practical discipline. Specifically, Fatovic's critics would have to argue that Fatovic's ends-oriented readings of

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Locke and the Federalists, while within interpretive possibilities, are wrong on ethical grounds. Fatovic has a right to such an argument and the ensuing debate before abandoning his interpretations.

The second critic is the practitioner (the lawyer, the administrator, the politician, even the law-abiding citizen) who values only those insights that have prescriptive value within current legal establishments. Answering this critic poses a dilemma because Fatovic's perspective on acts outside the law is itself outside the law and the practitioner-critic cannot step outside the law. Fatovic can tell this critic that because law cannot guarantee its own conditions, acts outside the law are sometime necessary to restore the law—that stepping outside the law can sometimes be an imperative of fidelity to the law (see 66). But, true to form, the practitioner-critic will resist moving from law to unstructured discretion. He will demand to know what defines an emergency and when it is proper to step outside. And Fatovic can only answer that theoretical attempts to define emergencies are "maddeningly vague and incompletely theorized" precisely because of "the uncertain and unpredictable nature of emergencies themselves" (255).

That the practitioner will resist this uncertainty is indicated by what Fatovic calls "the legalization of emergency powers"—congressional attempts to anticipate and authorize executive actions in emergencies. These attempts began shortly after the Founding (the Enforcement Act of 1795 and the Alien and Sedition Acts of 1798). They include the Emergency Banking Act of 1933, the Economic Stabilization Act of 1970, and the National Emergencies Act of 1976. Most recently, they include the USA PATRIOT Act of 2001 and the Authorization for Use of Military Force Against Terrorists Resolution of 2001 (255–58). Fatovic criticizes this "trend" (255) without explaining how a practice of at least two centuries and counting can be a mere trend. Fatovic's fear is that formal recognition of emergencies may create the illusion of competence to deal with them by law and thereby depreciate the inescapable need for virtues outside the law (254). He may also assume that legislative attempts to anticipate and authorize executive actions in an emergency effectively "prohibit the exercise of prerogative to prevent the emergency from spiraling even further out of control" (257).

Fatovic worries unnecessarily here, and he should reconsider this part of his position. The Lockean prerogative is a power to act outside and even against the law. By its very claim to supremacy, therefore, the law itself cannot authorize exercises of the prerogative. The Constitution thus puts the president in a position to exercise the prerogative, and Fatovic is convincing that the Framers did so deliberately, yet the written Constitution fails formally to authorize exercises of prerogative power. That is why exercises of the prerogative must depend on the nature and gravity of the circumstances, the character of the claimant and the public's perception thereof, and the standards (the principles of practical reason and the substantive goods that constitute the general welfare) that the public recognizes or can be brought to

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recognize as embodied in the law and therefore higher in status than the formal means thereto. Though legislative attempts to authorize executive discretion also limit it in a formal sense, those limits are mere forms, and exceeding them in the name of the *salus populi* differs naught from exceeding any other law for the same cause.

As unsettling as the practitioner-critic might find this answer, there is no escape from the fact that law will run out and that when it does, a regime's survival depends on the case for its restoration and on leadership whose virtues are up to the task. If this places rule-of-law liberalism on an aristocratic platform—which is what Fatovic's persuasive argument amounts to—then that is where it belongs.

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