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## CONSTITUTIONAL CRISIS AND CONSTITUTIONAL ROT

JACK M. BALKIN\*

No one could accuse Donald Trump's presidency of being boring. The first hundred days have careened wildly through scandals, revelations, outrages, and fracturing of political norms. Because Donald Trump is very unpopular, and because he regularly does things that his opponents consider outrageous, his critics have begun to describe his actions as creating or precipitating a "constitutional crisis," especially following his first executive order limiting entry into the United States,<sup>1</sup> and again after his firing of FBI director James Comey.<sup>2</sup>

In 2009, Sandy Levinson and I wrote an article about constitutional crises.<sup>3</sup> We argued that the term is overused; people apply it to many situations that are worrisome but that are not really constitutional crises at all. In this Essay, I offer a brief explanation of the term and why it is so likely to be misused. I also introduce a second idea, "constitutional rot," and explain how it relates to Levinson's and my theory of constitutional crisis. Many claims of constitutional crisis about Trump's presidency, I argue, reflect a growing recognition of the constitutional rot in our nation's political institutions.

### I. WHAT IS A CONSTITUTIONAL CRISIS?

A constitutional crisis occurs when there is a serious danger that the Constitution is about to fail at its central task. The central task of constitutions is to keep disagreement within the boundaries of ordinary politics ra-

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1. See, e.g., Jessica Schulberg & Sam Levine, *Trump Inches the U.S. Closer to Constitutional Crisis*, HUFFPOST (Feb. 5, 2017), [http://www.huffingtonpost.com/entry/trump-constitutional-crisis-judge-robart\\_us\\_58964292e4b09bd304bba74f](http://www.huffingtonpost.com/entry/trump-constitutional-crisis-judge-robart_us_58964292e4b09bd304bba74f) (quoting Senator Patrick Leahy's statement that President Trump "seems intent on precipitating a constitutional crisis").

2. See, e.g., David Cole, *Trump's Constitutional Crisis*, N.Y. REV. BOOKS (May 10, 2017), <http://www.nybooks.com/daily/2017/05/10/trumps-constitutional-crisis-james-comey/> ("This is a constitutional crisis."); Alexandra Wilts, *Comey Fired: America Is Witnessing a Constitutional Crisis, Says Leading Democrat*, INDEPENDENT (May 10, 2017), <http://www.independent.co.uk/news/world/americas/us-politics/james-comey-fired-donald-trump-constitutional-crisis-fbi-director-russian-investigation-latest-news-a7727341.html> (quoting Representative Keith Ellison's remark that "[w]e are witnessing a constitutional crisis unfold before our very eyes").

3. Sanford Levinson & Jack M. Balkin, *Constitutional Crises*, 157 U. PA. L. REV. 707 (2009).

ther than breaking down into anarchy, violence, or civil war.<sup>4</sup> To be sure, constitutions are also valuable because they protect civil liberties and divide and restrain power; but their first job is to keep the peace and make people struggle with each other within politics rather than outside of it.

Constitutional crises come in three types. In Type One crises, politicians (or military officials) publicly announce that they won't obey the Constitution.<sup>5</sup> In our system of government, government officials are supposed to obey judicial orders specifically directed to them. (This is true even if they believe that the judge has interpreted the law incorrectly.) Therefore defying a direct judicial order would also be tantamount to precipitating a constitutional crisis. When government officials (or the military) publicly announce that they will no longer play by the rules of the Constitution, the Constitution has failed. Constitutional crises of this type are very rare in American history.

Second, the Constitution might fail because it keeps political actors from preventing a looming disaster.<sup>6</sup> We call these Type Two Crises.<sup>7</sup> These situations are even rarer because political actors (and the courts) usually conclude that the Constitution allows them to escape disaster.<sup>8</sup>

Third, a constitution might fail because lots of people refuse to obey it—there are riots in the streets, states secede from the Union, the army refuses to obey civilian control, and so on.<sup>9</sup> Type Three crises involve “situations where publicly articulated disagreements about the Constitution lead political actors to engage in extraordinary forms of protest beyond mere legal disagreements and political protests: people take to the streets, armies mobilize, and brute force is used or threatened in order to prevail.”<sup>10</sup>

When people are upset at what government officials have done, they often call these actions constitutional crises. However, most of these situations aren't really constitutional crises, because there is no real danger that the Constitution is about to break down. The vast majority of uses of the term “constitutional crisis” are hyperbole.<sup>11</sup>

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4. *Id.* at 711, 714–15.

5. *Id.* at 714, 721–29 (describing Type One crises).

6. *Id.* at 714.

7. *Id.* at 729–38 (describing Type Two crises).

8. *Id.* at 729–31 (giving the example of President Abraham Lincoln taking a different view of the power to respond to rebellion than his predecessor, President James Buchanan).

9. *Id.* at 714, 738–46 (describing Type Three crises).

10. *Id.* at 714.

11. Cf. Jack M. Balkin, *Constitutional Hardball and Constitutional Crises*, 26 QUINNIAC L. REV. 579, 590 (2008) (“[M]any so-called ‘constitutional crises’ are not real crises at all, but rather heated disagreements about the Constitution in which people fear (whether reasonably or unreasonably) that the system will spin out of control . . .”).

Sometimes when people call something a constitutional crisis, they really mean that there is a heated dispute about the best interpretation of the law or the Constitution, and that their political opponents are interpreting the law or the Constitution in the wrong way. That in itself, however, is not a constitutional crisis, because disputes about the best interpretation of the law and of the Constitution are a normal feature of American politics. Many, but not all, of those disputes are eventually settled in the courts. Others are settled through politics. Settlement of serious disputes through the courts or politics is not a constitutional crisis. On the contrary, it is how a constitution is supposed to work.<sup>12</sup>

Sometimes what people call constitutional crises are really what Mark Tushnet has called “constitutional hardball.”<sup>13</sup> Constitutional hardball occurs when political actors stretch or defy political conventions that were previously considered unspoken rules of fair play in politics but were not clearly legally required.<sup>14</sup> People who engage in hardball tactics deliberately violate old norms in order to create new ones and gain a political advantage.<sup>15</sup> This often causes outrage and leads to reprisals in politics. The Republican-controlled Senate’s refusal to hold a hearing for anyone President Obama nominated to the Supreme Court in his last year in office was an example of constitutional hardball.<sup>16</sup> The Republican strategy violated what Democrats believed were unspoken norms of political fair play, and it will likely shape how Democrats behave in the future. What happened was not, however, a constitutional crisis.

A more accurate use of the term “constitutional crisis” involves situations in which people reasonably fear that the Constitution will fail in one of the three ways I’ve just described, even though the breaking point hasn’t

12. Levinson & Balkin, *supra* note 3, at 714 (“Disagreement and conflict are natural features of politics. The goal of constitutions is to manage them within acceptable boundaries.”).

13. Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 523 (2004).

14. *Id.*

15. *See id.* (“[P]ractitioners [of constitutional hardball] see themselves as playing for keeps in a special kind of way; they believe the stakes of the political controversy their actions provoke are quite high . . .”).

16. Michael Dorf, *Hardball, Structural Forces, Ineptitude, and Chaos on the Road to Trump and Beyond*, DORF ON L. (Nov. 15, 2016, 11:34 AM), <http://www.dorfonlaw.org/2016/11/hardball-structural-forces-ineptitude.html> (offering “the Republican Senate’s successful intransigence in denying Judge Merrick Garland confirmation hearings or a vote” as an example of constitutional hardball); Paul Rosenberg, *The Year Democracy Broke—and How We Got Here*, SALON (Nov. 8, 2016, 7:00 PM), <http://www.salon.com/2016/11/08/the-year-democracy-broke-and-how-we-got-here/> (“[W]hen Republican senators staunchly refused to let President Barack Obama appoint a new justice to the Supreme Court . . . [t]his was an example of . . . ‘constitutional hardball’ . . .”).

yet occurred. A constitution that is on the brink of failure is a constitution in crisis.<sup>17</sup>

If President Richard Nixon had refused to obey the Supreme Court's order to surrender the Watergate tapes in 1974, he would have precipitated a constitutional crisis of the first type.<sup>18</sup> People feared that Nixon wouldn't obey, and so one could say that this was a moment of constitutional crisis. Ultimately, however, he did obey the judicial order, and the potential crisis was averted.

Probably the most important constitutional crisis in the nation's history was the secession of the southern states and the resulting Civil War. This was a crisis of the first type and the third type.<sup>19</sup> Politicians and military officials openly stated that they would refuse to play by the rules of the Constitution; states seceded from the Union, and then they resisted through violence. That constitutional crisis resulted in enormous bloodshed and suffering, and required the Constitution to be reconstructed with three new amendments.

A constitutional crisis is a very serious thing, because if we were in the middle of a genuine constitutional crisis, there would be a real and serious danger that the Constitution would fail at its central task. But, as noted above, most things that people call constitutional crises don't involve serious threats of constitutional failure. In general, one should not confuse heated constitutional disputes with constitutional crises. Similarly, one should not confuse political crises—in which people struggle for power within the limits of the Constitution—with constitutional crises, in which the Constitution itself fails or is on the verge of failing.

## II. CONSTITUTIONAL ROT

We should distinguish constitutional crises from another, related phenomenon, which we might call “constitutional rot.”<sup>20</sup> Constitutional crisis could, in theory, happen to any constitution; constitutional rot is a specific malady of constitutions of representative democracies—that is, republics. Constitutional crisis occurs during relatively brief periods of time; constitu-

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17. See Levinson & Balkin, *supra* note 3, at 745 (“People may have regarded Watergate, the 2000 election, and the *Steel Seizure Case* as crises not because they were crises in the sense we describe, but because they feared that they would become that sort of crisis.”).

18. *Id.* at 742 (arguing that failure to comply with an order from the Supreme Court would have precipitated a Type One crisis).

19. *Id.* at 740 (noting that secession was a Type Three crisis). Because the rebel states publicly stated that they were no longer bound by the 1787 Constitution, it was also a Type One crisis.

20. Jack M. Balkin, *Constitutional Rot*, in *CAN IT HAPPEN HERE?: AUTHORITARIANISM IN AMERICA* 19 (Cass R. Sunstein, ed., forthcoming 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2992961](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2992961).

tional rot is a degradation of constitutional norms that may operate over long periods of time.

What is constitutional rot? Democratic constitutions depend on more than obedience to law. They depend on well-functioning institutions that balance and check power and ambition. They depend on the public's trust that government officials will exercise power in the public interest and not for their own personal benefit or for the benefit of private interests and cronies. Democracies also depend on forbearance on the part of public officials in their assertions of power and obedience to norms of fair political competition. These norms prevent ambitious politicians from overreaching, entrenching themselves and their ideological allies, and undermining public trust. These norms help to promote cooperation between political opponents and factions even when they disagree strongly about how to govern the country. Finally, these norms prevent politicians from privileging short-term political gains over long-term injuries to the health of the constitutional system.

When politicians disregard norms of fair political competition, undermine public trust, and repeatedly overreach by using constitutional hardball to rig the system in their favor and keep themselves (or their allies) in power, they cause the system of democratic (and republican) constitutionalism to decay. This is an example of constitutional rot.

More generally, constitutional rot is a process of decay in the features of our system of government that maintain it as a healthy democratic republic.<sup>21</sup> As constitutional rot occurs, our system becomes simultaneously less democratic and less republican. The political system becomes less democratic because the power of the state becomes less responsive to popular opinion and popular will. The political system becomes less republican because representatives are no longer devoted to promoting the public good; instead, they seek to maintain themselves in power and please a relatively small set of powerful individuals and groups. When this happens, the republican system of representation fails—even if the system remains formally representative in the sense that we still have elections—and the result is oligarchy.<sup>22</sup>

Governments become oligarchical when political leaders become increasingly beholden to relatively small groups of backers who keep them in power. Because members of the public feel that their leaders are not responsive to them—and indeed, feel abandoned by the very people who are supposed to serve their interests—they lose faith in the political system.<sup>23</sup>

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21. *Id.* at 19–20.

22. *Id.* at 20–21.

23. *Id.* at 21.

When constitutional rot becomes advanced, and the public's trust in government is thoroughly undermined, people turn to demagogues, who flatter the public, and who stoke division, anger and resentment.<sup>24</sup> Demagogues promise that they will restore lost glories and make everything right again. They divert the public's attention to enemies and scapegoats within and without the republic. They divide the public in order to conquer it. They play on people's fears of loss of status. They use divisive rhetoric to distract attention, maintain a loyal set of supporters, and keep themselves in power. There are always potential demagogues in a republic, but healthy republics restrain their emergence and ascension. When demagogues manage to take power and lead the nation, however, constitutional rot has become serious indeed.

Four factors may hasten constitutional rot.<sup>25</sup> The first factor is loss of trust, both in government and in one's fellow citizens.<sup>26</sup> The second factor is polarization, which causes members of the public to regard their fellow citizens as implacable enemies rather than members of a common enterprise; it also leads members of the public to waste their attention and energies on symbolic conflicts and zero-sum conflicts over social status.<sup>27</sup>

A third factor is increasing economic inequality, which creates anger and resentment, and leads the public to look for scapegoats and enemies who are the cause of its misfortunes.<sup>28</sup> The fourth factor is policy disasters, a term coined by Stephen Griffin.<sup>29</sup> Policy disasters are serious failures in decisionmaking by the public's representatives, which cause the public to lose faith in government. Examples of policy disasters in recent American history include the Iraq War and the 2008 financial crisis.<sup>30</sup> Policy disasters lead people to feel that their leaders are incompetent, untrustworthy, and unrepresentative. People increasingly feel that they have been abandoned by their leaders, who care only for themselves and not for the public they represent.

These four factors often exacerbate each other.<sup>31</sup> Rising economic inequality can increase polarization. Polarization diverts public attention to symbolic conflicts and zero-sum conflicts over status; this allows powerful interests to pursue policies that enhance inequality and entrench oligarchy.

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24. *Id.*

25. *Id.* at 22 (describing the "Four Horsemen of Constitutional Rot").

26. *Id.* at 22, 26–27.

27. *Id.*

28. *Id.* at 22–23.

29. *Id.* at 22; STEPHEN M. GRIFFIN, *BROKEN TRUST: DYSFUNCTIONAL GOVERNMENT AND CONSTITUTIONAL REFORM* 20–21 (2015) (defining policy disasters as "government outcomes that are in no one's interests").

30. GRIFFIN, *supra* note 29, at 20–21; Balkin, *supra* note 20, at 22.

31. Balkin, *supra* note 20, at 22–23.

Increasing economic inequality and lack of responsiveness to the public's needs, in turn, undermine public confidence in the system and faith in one's fellow citizens, which may increase polarization. Polarization and oligarchy insulate representatives from the public, produce overconfidence, and insulate decisionmakers from criticism, which leads to policy disasters. Policy disasters, in turn, undermine trust in government, and so on.<sup>32</sup>

The idea of constitutional rot is very old. The political theory of republicanism familiar to the Constitution's founders asserted that republics were delicate institutions that were always susceptible to decay and corruption over time.<sup>33</sup> Time was the great enemy of republics, because ever-changing circumstances, and the driving force of people's ambitions and desire for power would open the door to—if not encourage—multiple forms of institutional corruption.<sup>34</sup> In modern democratic republics, this institutional corruption is constitutional rot.

Constitutional rot creates two serious risks to democratic politics. First, by playing too much hardball, enhancing political polarization, demonizing their opposition, and attempting to crush those who stand in their way, political actors risk increasing and widening cycles of retribution from their opponents. This may lead to deadlock and a political system that is increasingly unable to govern effectively. This, in turn, can cause even greater loss of confidence in government, distrust, and polarization, hastening constitutional rot.

Second, undermining or destroying norms of political fair play and using hardball tactics to preempt political competition may produce a gradual descent into authoritarian or autocratic politics.<sup>35</sup> Such states may preserve

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32. *Id.*

33. See PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* 210 (1997) (explaining that in the republican tradition corruption occurs when people “make their decisions by reference not to considerations of the common good but rather to more sectional or private concerns”); J.G.A. POCKOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* 527 (1975) (“Virtue can develop only in time, but is always threatened with corruption by time.”); GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 105 (1991) (“Precisely because republics required civic virtue and disinterestedness among their citizens, they were very fragile polities, extremely liable to corruption.”).

34. PETTIT, *supra* note 33, at 210–11 (arguing that the basic problem of republics is to promote resilience and stability in the face of continual sources of temptation and corruption); Jack M. Balkin, *Republicanism and the Constitution of Opportunity*, 94 *TEX. L. REV.* 1427, 1444 (2016) (“[T]ime is the great enemy of republics, because as time goes on and circumstances change, corruption finds ever-new ways of entering the system, weakening the institutions and practices that ensure republican government.”).

35. See Nancy Bermeo, *On Democratic Backsliding*, 27 *J. DEMOCRACY* 5 (2016) (explaining democratic backsliding as “the state-led debilitation or elimination of any of the political institutions that sustain an existing democracy”). “Competitive authoritarianism” is another way of describing the general phenomenon. See STEVEN LEVITSKY & LUCAN A. WAY, *COMPETITIVE AUTHORITARIANISM: HYBRID REGIMES AFTER THE COLD WAR* 5 (2010) (defining competitive



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the empty form of representative democracy—they may have written constitutions and regular elections; and they may adhere for the most part to the rule of law formalities. But power is increasingly concentrated and unaccountable; the press, civil society, political opponents, civil servants, and the judiciary no longer serve as independent checks on the power of the people in charge. Indeed, political leaders may systematically seek to weaken or co-opt each of these possible sources of opposition.

These features of constitutional rot are likely to lead to increasing corruption, overreaching, and suppression of basic liberties. Regimes that slide into autocracy or authoritarianism may not suffer constitutional crises to the extent that they remain politically stable and successfully avoid civil unrest or civil war, but they have failed as *democratic* constitutional systems. Increasingly they are democracies in name only.

Obviously, these two risks—deadlock and descent into autocracy—are related. A system that has become so deadlocked that politics seems futile may lead to the election of demagogues and authoritarian-minded politicians who undermine democratic norms and lead a nation toward autocracy.

What is the relationship between constitutional crisis and constitutional rot? The two phenomena are not identical. As noted above, the question of constitutional crisis concerns whether the constitutional system can perform its central function of making politics possible—keeping struggles for power within politics and preventing violence, insurrection, and civil war. The three types of constitutional crises listed above can occur in many different kinds of systems, whether democratic or not. Constitutional rot, by contrast, is a feature of constitutional democracies and republics—it concerns how these systems degrade into deadlock and despair on the one hand, or into authoritarianism and autocracy on the other.

There is another important distinction. The idea of “crisis” refers to a crucial moment in time—usually rather brief in duration—in which the constitutional system will adequately respond to a challenge, be undermined, or be successfully reconstituted. Constitutional rot, by contrast, is often a long and slow process of change and debilitation, which may be the work of many hands over many years. Crisis seems to come upon us suddenly—it focuses everyone’s attention on the spectacle. Rot develops slowly and gradually and may be imperceptible in its earliest stages; sometimes features of constitutional rot are obvious, but sometimes they operate quietly in the background.

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authoritarian regimes as “civil regimes in which formal democratic institutions exist . . . but in which incumbents’ abuse of the state places them at a significant advantage”). Competitive authoritarianism applies to regimes that never fully transitioned to democracy, as well as to fully democratic regimes in which democracy gradually decays into autocracy or authoritarianism.

Even so, the two phenomena are connected. Continued constitutional rot in a democratic system may be the harbinger of a constitutional crisis years later. Stephen Griffin has argued that the most important source of constitutional dysfunction in the United States is increasing loss of public trust among citizens.<sup>36</sup> This loss of trust did not occur overnight; it is the result of decades of fateful decisions by political actors seeking short-term political success, stoking political polarization to win elections, and playing political hardball to lock in greater power and reduced accountability. Griffin regards this as a sort of “slow-motion” constitutional crisis.<sup>37</sup> I would say that it is a description of constitutional rot.

Constitutional rot in a democracy need not always lead to constitutional crisis. It might simply lead to a less just and less democratic system of government. This is what happens when a democracy effectively becomes an oligarchy, or when a political system slides into autocracy. Nevertheless, constitutional rot, if unchecked, can lead to a constitutional crisis, just as placing increasing weight on a rotten tree branch can eventually cause it to snap. Indeed, constitutional rot can lead to any one of the three types of constitutional crisis that Levinson and I described.

Politicians may publicly reject constitutional obligations (Type One). The system may suffer severe crises of governance in which the state is unable to perform basic functions (Type Two). Finally, loss of public trust, combined with the rise of political opportunists and demagogues who stoke anger and resentment in their followers (or in their opponents), may produce cycles of political violence, or even insurrection (Type Three).

Constitutional rot, in other words, can eventually cause a democratic constitution to fail both as a *democratic* constitution—because the system degenerates into an oligarchy or autocracy; and as a democratic *constitution*—because the constitution no longer can keep political disagreement within the bounds of law and peaceful political dispute.

### III. ARE WE IN A PERIOD OF CONSTITUTIONAL CRISIS?

We are not currently in a period of constitutional crisis. But for some time we have been in a period of increasing constitutional rot. The election of a demagogue like Trump is evidence that our institutions have decayed, and judging by his presidential campaign and his first several months in office, Trump promises to accelerate the corruption.

When people talk about constitutional crisis in the Trump Administration, they might point to the executive orders on immigration that began Trump’s presidency or the decision to fire FBI director James Comey.

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36. GRIFFIN, *supra* note 29, at 31, 38–39.

37. Personal communication with author, March 22, 2017.

Trump's first two executive orders on immigration were very unjust, and there are plausible arguments that both versions were unconstitutional.<sup>38</sup> But the orders did not precipitate a constitutional crisis. The courts often find that the Executive Branch of the United States government has violated the law or the Constitution, but that doesn't make each of these situations a constitutional crisis.

On the other hand, if President Trump ordered executive branch officials to defy judicial orders, and they did so, not merely in isolated instances out of confusion, but deliberately and consistently, that could precipitate a constitutional crisis. Isolated acts of recalcitrance by a few low-level DHS officials, however, do not constitute a genuine constitutional crisis. On the other hand, if President Trump announced that he would not follow the Constitution, if he arrested members of the Supreme Court, or if he defied a direct judicial order, that would mark a constitutional crisis.

Similarly, Trump's firing of James Comey was not in itself a constitutional crisis, because the President legally has the authority to fire the FBI Director.<sup>39</sup> It happened once before, when Bill Clinton fired Director William Sessions because of ethics violations. Comey's firing did not constitute a constitutional crisis. Trump did not assert, for example, that he was deliberately acting outside the Constitution. Rather, Comey's firing is a symptom of constitutional rot, as I will explain momentarily.

As Sandy Levinson and I pointed out in our original 2009 article on constitutional crises, American politicians almost never announce that they will go outside the Constitution or the law. Instead, they argue that they are

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38. Federal courts issued injunctions against the two executive orders, which the Supreme Court modified pending a hearing on the merits. These orders expired before the Court could hold a hearing. *Washington v. Trump*, 847 F.3d 1151, 1166 (9th Cir. 2017) (upholding preliminary injunction against first executive order); *Int'l Refugee Assistance Project v. Trump*, No. TOC-17-0361, 2017 WL 1018235, at \*18 (D. Md. Mar. 16, 2017), *aff'd*, 857 F.3d 554 (4th Cir. 2017), *cert. granted* 137 S. Ct. 2080 (2017) (upholding preliminary injunction against second executive order), *vacated*, No. 16-1436, 2017 WL 4518553 (Oct. 10, 2017) (vacating and remanding after order expired); *Hawaii v. Trump*, No. 17-00050 DKW-KSC, 2017 WL 1167383, at \*9 (D. Haw. Mar. 29, 2017), *aff'd*, 859 F.3d 741 (9th Cir. 2017), *cert. granted sub nom. Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080 (2017) (upholding preliminary injunction against second executive order), *vacated*, No. 16-1436, 2017 WL 4518553 (Oct. 10, 2017) (vacating and remanding after order expired). Trump subsequently issued a third executive order, which is currently being litigated.

39. See, e.g., Memorandum on the Constitutionality of Legislation Extending the Term of the FBI Director, Caroline D. Krass, Principal Deputy Assistant Attorney Gen., to Office of Legal Counsel (June 20, 2011), [https://www.justice.gov/sites/default/files/olc/opinions/2011/06/31/fbi-director-term\\_0.pdf](https://www.justice.gov/sites/default/files/olc/opinions/2011/06/31/fbi-director-term_0.pdf) (“[T]he FBI Director is removable at the will of the President . . . . No statute purports to restrict the President’s power to remove the Director.”); Robert Chesney, *Background-er: The Power to Appoint & Remove the FBI Director*, LAWFARE (May 10, 2017, 11:55 AM), <https://www.lawfareblog.com/background-er-power-appoint-remove-fbi-director> (“Congress at no point has attempted to constrain the president’s removal power.”).

complying with the law based on their interpretation of it.<sup>40</sup> One might object that this allows politicians to violate the Constitution if they just lie about their motivations or if their legal positions are objectively unreasonable. But there is a reason why forcing politicians to state their positions in terms of legality and constitutionality is important to constitutional government. This means that they are still publicly adhering to a political norm that everyone must obey the law and the Constitution. When politicians obey this norm, it drives controversies back into the courts or into ordinary politics for resolution. Achieving this result is what constitutions are supposed to do. To be sure, when people argue about what the law means or what the Constitution means, it is often very upsetting, because politicians often have incentives to make specious or disingenuous claims to justify their actions. But as long as the courts are open and are obeyed, this by itself does not produce a constitutional crisis.

Crisis is not the same thing as injustice. There are a lot of unjust things that happen in a constitutional system without precipitating a constitutional crisis. Constitutions make politics possible, and politics is often unjust. You can tell if you are in a constitutional crisis when politicians stop saying that they will comply with the law, with judicial orders, or with the Constitution. Or you can tell that you are in a constitutional crisis when there is widespread civil unrest or rebellion. Until that happens, you are not in a constitutional crisis, and for that, at least, you can be grateful.

#### IV. ARE WE EXPERIENCING CONSTITUTIONAL ROT?

Although America is not currently in the middle of a constitutional crisis, the country is experiencing constitutional rot, and people have been employing the language of constitutional crisis to describe it. This problem, I think, is what Griffin meant when he suggested that we are in a “slow motion” constitutional crisis caused by lack of public trust in government.<sup>41</sup>

Many Americans no longer trust government to act in the public interest, and many politicians act in ways that encourage their lack of trust.<sup>42</sup> We have also experienced severe political polarization, unwise policies have exacerbated economic inequality, and American politicians have produced a series of policy disasters—including, most recently, the global fi-

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40. Levinson & Balkin, *supra* note 3, at 722–23 (noting that American presidents have never asserted prerogative powers to act outside the Constitution; instead they offer controversial interpretations that justify their actions).

41. *See supra* note 37.

42. *See* PEW RES. CTR., PUBLIC TRUST IN GOVERNMENT: 1958–2017 (May 3, 2017), <http://www.people-press.org/2017/05/03/public-trust-in-government-1958-2017/> (“Public trust in the government remains near historic lows.”).

nancial crisis of 2008. Thus, each of what I have called the “four horsemen” of constitutional rot<sup>43</sup> have been on the march for some time.

President Trump has only made matters worse; he has violated many preexisting political norms and governed through strategies of exacerbating division and polarization.<sup>44</sup> The Congressional wing of his party has cast aside customary legislative practices as it tries to push through major legislation on health care and taxation with only Republican votes.<sup>45</sup> Trump’s Administration has generated repeated accusations of corruption and conflict of interest,<sup>46</sup> and Trump himself seems to regard political office as a device for enriching himself and his family.<sup>47</sup> When people in power no longer hesitate to use their power to enrich themselves, and when norms of

43. Balkin, *supra* note 20, at 22.

44. *Id.* at 28–29 (describing Trump’s strategy of deliberate polarization and division in order to maintain the loyalty of his supporters); Peter Baker, *A Divider, Not a Uniter, Trump Widens the Breach*, N.Y. TIMES (Sept. 24, 2017), <https://www.nytimes.com/2017/09/24/us/politics/trump-divisiveness.html> (“Relentlessly pugnacious, energized by a fight, unwilling to let any slight go unanswered, Mr. Trump has made himself America’s apostle of anger, its deacon of divisiveness.”); Cathleen Decker, *Back into the Trump Vortex America Goes, Where the President Fuels a Divisive Debate*, L.A. TIMES (Sept. 26, 2017), <http://www.latimes.com/politics/la-na-pol-trump-strategy-20170926-story.html> (“America once again finds itself . . . pulled into the vortex of partisanship as a master publicist plays notes of division and dispute.”).

45. Congressional attempts to repeal and replace Obamacare are exemplary. See, e.g., Seung Min Kim, *Frustrated Republicans Try to Rewrite Congress’ Rules*, POLITICO (May 22, 2017), <http://www.politico.com/story/2017/05/22/republicans-rewrite-congress-rules-agenda-238336> (“Long-standing norms are being swept aside in the GOP’s haste to enact its agenda.”); Elise Viebeck, *Seven Ways the Latest Republican Health-Care Effort Is Impulsive and Chaotic*, WASH. POST (Sept. 25, 2017), [https://www.washingtonpost.com/powerpost/seven-ways-the-latest-republican-health-care-effort-is-impulsive-and-chaotic/2017/09/24/4451aaf4-9fa1-11e7-8ea1-ed975285475e\\_story.html](https://www.washingtonpost.com/powerpost/seven-ways-the-latest-republican-health-care-effort-is-impulsive-and-chaotic/2017/09/24/4451aaf4-9fa1-11e7-8ea1-ed975285475e_story.html) (describing how Congress has abandoned traditional legislative practices to pass health care reform).

46. Patrick Radden Keefe, *Carl Icahn’s Failed Raid on Washington*, NEW YORKER (Aug. 28, 2017), <https://www.newyorker.com/magazine/2017/08/28/carl-icahn-failed-raid-on-washington> (“Conflicts of interest have been a defining trait of the Trump Administration.”); Citizens for Responsibility & Ethics in Washington, *Trump Inc: A Chronicle Of Presidential Conflicts*, <https://www.citizensforethics.org/trump-timeline/> (cataloguing presidential conflicts of interest); Eric Lipton, Ben Protess & Andrew W. Lehren, *With Trump Appointees, a Raft of Potential Conflicts and ‘No Transparency’*, N.Y. TIMES (Apr. 15, 2017), <https://www.nytimes.com/2017/04/15/us/politics/trump-appointees-potential-conflicts.html> (describing the Trump Administration’s ethics problems).

47. *How Donald Trump Is Monetising His Presidency*, ECONOMIST (July 20, 2017), <https://www.economist.com/news/business/21725303-six-months-mr-trumps-conflicts-interest-look-even-worse-how-donald-trump-monetising> (“Mr Trump already appears to be monetising the presidency.”); Kate Brannen, *Trump Family’s Endless Conflicts of Interest: Chapter and Verse*, NEWSWEEK (July 3, 2017), <http://www.newsweek.com/trump-family-endless-conflicts-interest-chapter-and-verse-631216> (offering a list of examples “of the vast number of issues that require oversight and scrutiny during this presidency.”); Jeremy Venook, *Trump’s Interests vs. America’s, Dubai Edition*, ATLANTIC (Aug. 9, 2017), <https://www.theatlantic.com/business/archive/2017/08/donald-trump-conflicts-of-interests/508382/> (offering “an attempt to catalogue the more clear-cut examples of conflicts of interest that have emerged so far”).

fair political competition are pushed aside, the viability of our democratic constitutional system is threatened.

The real concern about James Comey's firing as FBI Director is best understood in terms of constitutional rot. The FBI director serves for a ten-year term that is designed to span across presidential terms in office. The goal is to insulate the head of the nation's investigative service from political pressure by politicians—and especially the President, who always retains the power to remove the director. Thus, the technical legal rule that the President can fire the director is accompanied by a more amorphous democratic norm; namely, the norm that the President should hesitate to remove a director except for very good reasons, and that the President should not remove a director in circumstances in which it might appear that the President is pressuring the FBI to compromise its investigative authority for political reasons.

The Comey firing violates these democratic norms. The circumstances of the firing, as well as Trump's own shifting explanations for it, suggest that Trump acted out of corrupt motives. The concern is that Trump fired Comey because Trump sought to hinder ongoing investigations into connections between the 2016 Trump presidential campaign and the Russian government,<sup>48</sup> or between criminal enterprises (like money laundering) involving Russian oligarchs and Trump's businesses.<sup>49</sup> Democratic norms exist to prevent even the appearance of political corruption. The worry is that Trump violated democratic norms in circumstances that scream conflict of interest and create the appearance of corrupt motivations—that Trump used his powers as President to obstruct an ongoing criminal investigation. If one could prove Trump's intent to obstruct the FBI's investigations, this would constitute a violation of federal obstruction of justice laws, and very likely would constitute an impeachable offense to boot.<sup>50</sup>

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48. President Trump explained in a May 11, 2017, interview with Lester Holt of NBC News that he was determined to fire Comey even before receiving advice from Attorney General Jeffrey Sessions and Deputy Attorney General Rod Rosenstein because he was angry with Comey's continued investigative focus on Russia. James Griffiths, *Trump Says He Considered 'This Russia Thing' Before Firing FBI Director Comey*, CNN (May 12, 2017), <http://www.cnn.com/2017/05/12/politics/trump-comey-russia-thing/> (“And in fact when I decided to just do it, I said to myself, I said ‘you know, this Russia thing with Trump and Russia is a made-up story.’”). Immediately after the firing, however, the White House's official explanation had been that Trump acted on the advice of Deputy Attorney General Rosenstein, “who sharply criticized the handling of the investigation into Hillary Clinton's use of a private email server as secretary of state.” *Id.*

49. See Matthew Rosenberg & Matt Apuzzo, *Days Before Firing, Comey Asked for More Resources for Russia Inquiry*, N.Y. TIMES (May 10, 2017), [https://www.nytimes.com/2017/05/10/us/politics/comey-russia-investigation-fbi.html?\\_r=0](https://www.nytimes.com/2017/05/10/us/politics/comey-russia-investigation-fbi.html?_r=0) (noting a recent shift in the Senate investigation to focus on illegal money-laundering operations).

50. See, e.g., David G. Savage, *Trump's Statements Linking Russia Investigation to Comey Firing Could Lead to Legal Problems*, L.A. TIMES (May 12, 2017),

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Constitutional rot does not occur all at once; it is a gradual process. The constitutional system in the United States may well be able to survive even Donald Trump's misadventures. But Trump's demagogic rise to power, his conduct of the presidency, and the inability (or unwillingness) of members of Congress to stop him, are signs that all is not well in American constitutional democracy. To paraphrase Shakespeare, something is rotten in the state of America. The limbs of the great tree of state are decaying. At some point, if we put too much weight on our democratic institutions, they will snap. Then we really will be in a constitutional crisis.

The language of constitutional rot is a better way to understand people's recurrent use of "constitutional crisis" in describing the Trump Administration. There is currently no actual constitutional crisis in the United States. But if constitutional rot continues, we are living on borrowed time.

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<http://www.latimes.com/politics/la-na-pol-trump-obstruction-legal-20170512-story.html> (noting potential legal dangers for President Trump as a result of his interview with Lester Holt); Laurence H. Tribe, *Trump Must Be Impeached. Here's Why.*, WASH. POST (May 13, 2017), [https://www.washingtonpost.com/opinions/trump-must-be-impeached-heres-why/2017/05/13/82ce2ea4-374d-11e7-b4ee-434b6d506b37\\_story.html?utm\\_term=.fbfb7cd7c931](https://www.washingtonpost.com/opinions/trump-must-be-impeached-heres-why/2017/05/13/82ce2ea4-374d-11e7-b4ee-434b6d506b37_story.html?utm_term=.fbfb7cd7c931) (arguing that there is sufficient evidence in the public record "for Congress to launch an impeachment investigation of President Trump for obstruction of justice").