

# CONSTITUTIONAL NECESSITY AND PRESIDENTIAL PREROGATIVE: DOES PRESIDENTIAL DISCRETION UNDERGIRD OR UNDERMINE THE CONSTITUTION?

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Peter M. Shane, *Madison's Nightmare: How Executive Power Threatens American Democracy* (U. Chi. Press 2009). Pp. 258. \$27.00.

Benjamin A. Kleinerman, *The Discretionary President: The Promise and Peril of Executive Power* (U. Press Kan. 2009). Pp. 322. \$34.95.

For those with freedom of action and a corresponding disposition, crises - whether real or contrived - reflect opportunities. Few better examples of this exist than in the constitutional station of President of the United States. Duty bound to “take Care that the Laws be faithfully executed,”<sup>1</sup> presidents throughout constitutional history have acted in times of crisis to interpret, bend, circumvent, and even disregard the law based on appeals to supposedly higher values. It will little surprise that these actions trend toward enrichment of executive power. In aggregate, they amply support Edward Corwin’s summary in the last century that “[t]aken by and large, the history of the Presidency is a history of aggrandizement.”<sup>2</sup>

In the quarter century since this observation, the platform for unilateral executive action has only expanded, perhaps markedly so. The reasons are multiple and diverse, but significant among them are the ever-increasing significance of foreign affairs for the United States, the lethality of modern terrorism, and broad societal and technological trends that increasingly empower expeditious, unilateral decision making (e.g., access to information, communications, travel). With this greatly enhanced freedom of action, advocates of unilateral executive power found their true champion in a president with an appropriate disposition, George W. Bush. Propelled by the events of September 11, 2001, and the resultant national security concerns, President Bush advanced claims of unilateral executive power that were extravagant even against the high bar set by some of his most aggressive predecessors. The lines of legitimate argumentation were then further distorted by unserious government lawyers willing to sew cloaks of legality to fit expected conclusions.

These developments provide the material for two recent books that make valuable

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1. U.S. Const. art. II, § 3.

2. Edward S. Corwin, *The President: Office and Powers, 1787-1984* (Randall W. Bland, Theodore T. Hindson & Jack W. Peltason eds., 5th rev. ed., N.Y.U. Press 1984).

contributions to a rich body of existing scholarship of which Edward Corwin's work provides a prominent example on the expansion of executive power in the modern state: Peter M. Shane, *Madison's Nightmare: How Executive Power Threatens American Democracy*,<sup>3</sup> and Benjamin A. Kleinerman, *The Discretionary President: The Promise and Peril of Executive Power*.<sup>4</sup> These two works represent quite different intellectual traditions (Professor Shane is a legal academic, Professor Kleinerman a political scientist) and offer starkly different prescriptions. But it is precisely because of the insights that emerge from contrast that we may profitably treat them in the same review.

Peter Shane's project in *Madison's Nightmare* is to return the legal and political discourse over presidential power to a Madisonian view of checks and balances. With, especially, the stark backdrop of the Bush administration, he argues that extravagant modern assertions of unilateral executive powers (which he terms "presidentialism") have resulted in an "unchecked and unbalanced"<sup>5</sup> system. Shane instead advances a "pluralistic" view of presidential power - and of separation of powers in general - that is truer to the founders' vision and thus more likely to produce legitimate outcomes. The "fundamental insight" of the pluralist approach to executive power, Shane argues toward the end of *Madison's Nightmare*, "is that governmental legitimacy . . . demands a complex network of competing, but interdependent sources of authority."<sup>6</sup> He emphasizes, however, that this legitimacy depends decisively on robust understandings of the electoral accountability of the political branches not only the executive and, significantly, on a variety of complex processes that require "bargaining and deliberation"<sup>7</sup> in the making of public policy.<sup>8</sup> Stated in brief, the modern Madisonian "nightmare" is that these conceptions of accountability, interdependence, and deliberation have withered, in both a political and legal sense, under the assault of unilateral executive power.

*Madison's Nightmare* begins with two chapters that set a theoretical context for the more focused analysis to follow. In the first chapter, Professor Shane provides a valuable review of the "special genius" of the framers in structuring "a multiplicity of legitimating mechanisms" for the making of public policy.<sup>9</sup> We find here an excellent discussion of the factors of self-restraint by the three independent branches that historically have ensured a "constitutional culture,"<sup>10</sup> founded both on norms of mutual respect and a deep sense of the rule of law. Professor Shane then contrasts these historical norms with an "escalating institutional conflict between President and Congress,"<sup>11</sup> which, he argues, has generated "a level of mutual disregard that would have been essentially unthinkable

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3. Peter M. Shane, *Madison's Nightmare: How Executive Power Threatens American Democracy* (U. Chi. Press 2009).

4. Benjamin A. Kleinerman, *The Discretionary President: The Promise and Peril of Executive Power* (U. Press Kan. 2009).

5. Shane, *supra* n. 3, at 1.

6. *Id.* at 180.

7. *Id.* at 181.

8. *Id.* at 180-181.

9. *Id.* at 8.

10. Shane, *supra* n. 3, at 9.

11. *Id.* at 12-13.

at any prior moment in modern times.”<sup>12</sup> One might wonder whether this is a bit of rhetorical excess, for we have experienced quite nasty episodes of interbranch conflicts in the past.<sup>13</sup> But the early portions of the first chapter nonetheless provide an excellent distillation of the factors in our constitutional system that have “produce[d] [a] culture of self-restraint that averts any serious breakdown of government.”<sup>14</sup>

Later in this important first chapter, Professor Shane begins the real focus of *Madison's Nightmare* with the observation that in modern times the president “poses the most profound threat to our checks and balances system.”<sup>15</sup> He convincingly explains here how the institutional advantages of the presidency - especially the ability to act unilaterally and with dispatch and secrecy - and the institutional impediments to effective congressional and judicial control have created a context for dangerous unilateralism.<sup>16</sup> Unfortunately, these insights also are intermixed with broader attacks on the Republican Party that leave a bit of a taste of partisan politics.<sup>17</sup> In specific, the book here makes a number of contestable factual assertions about the structure of the party, nature of its agenda, voting patterns of its supporters, and character of its members in all branches of government (executive, legislative, and judicial alike),<sup>18</sup> some of which strike a quite discordant tone following the elections of 2008.<sup>19</sup> My point here is not that these issues are unworthy of scholarly analysis (for indeed they provide rich material for political scientists). It is, rather, that they risk injecting a partisan distraction - at least a rhetorical one - from the valuable contributions in the remainder of the book about the modern dangers of unbridled “presidentialism,” no matter which party controls the office.

*Madison's Nightmare* reasserts its focus in an excellent second chapter, “Checks and Balances in Law and History.” Professor Shane here provides a concise and very effective summary of the two major claims by modern apologists for unilateral executive power. The first is the theory of the “unitary executive.” At issue here (principally) is the broad assertion that “the President is constitutionally in charge of the exercise of any or

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12. *Id.* at 13.

13. One might cite as a prominent example the acrimony between the Republican Congress and President Andrew Johnson over his efforts to disregard Reconstruction statutes, which resulted among other things in the 1867 Tenure of Office Act and, ultimately, impeachment proceedings.

14. Shane, *supra* n. 3, at 10. *See also id.* at 10-12.

15. *Id.* at 20.

16. *Id.* at 20-21.

17. *See e.g. id.* at 3 (referring to a “relentless campaign of the right wing of the Republican Party since 1981 to steer the capacities of our national government toward the fulfillment of a conservative social, economic, and foreign policy agenda”); Shane, *supra* n. 3, at 18 (citing with reference to the Reagan administration a “political agenda of a zealous political faction”); *id.* at 23 (arguing that “conservative thought leaders[]” oppose “constitutional views that embrace dissent, deliberation, pluralism, and accommodation”).

18. *Id.* at 22-25.

19. To choose one example, we find in the middle of chapter one an assertion that in the 1995 budget showdown with President Clinton the Republican Congress “could hardly argue that its position was in service of democracy.” *Id.* at 14. The reason given is that public polls at the time showed a majority of the populace in favor of the “President’s position.” *Id.* But is this how we are to measure whether one branch of government is dangerously undermining the constitutional structure? One can confidently assume that the Republican members of Congress at the time - who were of course popularly elected through democratic processes - saw their actions as perfectly consonant with the values of representative democracy. Moreover, the criticism of congressional Republicans at this point in the book runs contrary to later insights of the author on the nature of a republican form of government. As Professor Shane notes much later in the book, “our dispassionately determined ‘public interest’ may or may not coincide with the desires of voters as those desires get expressed on a single election day” (or presumably in a single political poll). Shane, *supra* n. 3, at 183.

all policy making discretion that Congress may delegate to anyone within the executive branch.”<sup>20</sup> The second major claim relates to “the degree to which the President enjoys constitutionally inherent powers in foreign and military affairs that are completely beyond congressional control,”<sup>21</sup> which is what the modern controversy over domestic warrantless surveillance “is really about.”<sup>22</sup> Through the explanatory vehicles of President George Washington’s Neutrality Proclamation and Justice Robert Jackson’s opinion in *The Steel Seizure Case*,<sup>23</sup> Professor Shane exposes the significant issues at stake in choosing between “presidentialist” and “pluralist” conceptions of our constitutional structure.<sup>24</sup> Valuable on its own, this analysis also sets the context for the more focused chapters to follow.

But the best of *Madison’s Nightmare* is to be found in the four substantive chapters that represent the core of the book. In each, Professor Shane applies his initial insights to a prominent modern controversy and in the process convincingly demonstrates the perils of executive unilateralism. It is here, in short, that Professor Shane most effectively makes his case. The first, chapter three, “Iraq and the (Unlearned) Lessons of Vietnam: Presidentialism and the Pathologies of Unilateral Policy Making,” in fact frames the essential question for the remainder of the book: “[W]hether the President is likely to make better decisions against a background understanding that the executive branch is constitutionally entitled to policy making autonomy” with or without congressional and judicial oversight.<sup>25</sup> We also find here the ultimate insight of *Madison’s Nightmare*: that decision makers “who have internalized the notion of ‘accountability’ – the idea that arguments, premises, and conclusions may all have to be justified to others whose agreement cannot be taken for granted – will simply work harder in analyzing the options before them.”<sup>26</sup> In specific, through the examples of the Vietnam War, the Cambodia bombing campaign, and the Iraq War, Professor Shane makes the compelling case that a background norm of required congressional approval – or at least long-standing acquiescence – is not only more faithful to the Madisonian vision of required checks and balances; for pragmatic reasons, it is also more likely to produce more deliberate, accurate, and substantively better outcomes.<sup>27</sup>

Chapter four derives similar insights from “the breakdown of government lawyering”<sup>28</sup> in recent national security debates. A variety of modern instances of

20. *Id.* at 34.

21. *Id.* at 31.

22. *Id.* at 42.

23. *Youngstown Sheet & Tube Co. v. Sawyer (The Steel Seizure Case)*, 343 U.S. 579 (1952) (Jackson, J., concurring).

24. Shane, *supra* n. 3, at 42-49.

25. *Id.* at 57.

26. *Id.* at 61.

27. *Id.* at 61-81. The references to the insights of a chief architect of the Vietnam War strategy, Robert McNamara, were particularly compelling. *Id.* at 76-81. Entirely consistent with the overall thrust of *Madison’s Nightmare*, McNamara noted that six principal features of unilateral executive decision making reflect serious impediments to clear-headed analysis: a sense of crisis overload, an unwillingness to examine core assumptions, a press for consensus, enforced secrecy, intolerance of dissent, and, ultimately, the absence of a felt need for accountability to others. See generally Robert S. McNamara, *In Retrospect: The Tragedy and Lessons of Vietnam* (Vintage Bks. 1995).

28. Shane, *supra* n. 3, at 82.

questionable, or entirely absent, legal analysis by government lawyers provides the context. Among others, Professor Shane examines the legal reasoning that justified the Bush administration's program of warrantless electronic surveillance of U.S. citizens<sup>29</sup> and aggressive interrogation practices.<sup>30</sup> He also provides a valuable factual summary of the internal machinations in the Bush administration to ensure favorable legal opinions for executive branch authority.<sup>31</sup>

Professor Shane then connects each of these lapses with prior themes, including the risks that flow from predetermination and intimidation,<sup>32</sup> from the absence of multiple voices in decision making,<sup>33</sup> and from stifling or even punishing dissent.<sup>34</sup> The real value of the analysis here, however, arises from the insight that, notwithstanding their essential role, government lawyers are subject to little or no external oversight. "[M]ost government decisions," Professor Shane observes, "are simply too low in visibility or too diffuse in impact to elicit judicial review or congressional oversight as ways of monitoring legal compliance."<sup>35</sup> The solution, therefore, is less about legal prescriptions than about the need for government lawyers to internalize deep norms of a law-bound government. One might have wanted deeper substantive engagement here and there.<sup>36</sup> But ultimately Professor Shane tells a compelling story here that true legal accountability must be "buttressed by a set of norms, conventional expectations, and routine behaviors" that lead government actors to behave according to the law "even when the prospects of sanction are remote."<sup>37</sup>

The remaining two substantive chapters are in the same vein. Chapter five contains a valuable chronicle of the shockingly expansive claims by the most recent Bush administration (in particular) to executive privilege as well as of the astonishing 1,400 constitutional objections in presidential signing statements.<sup>38</sup> At the foundation of these actions, Professor Shane asserts, is the "formalist"<sup>39</sup> view that presidential acts are

29. *Id.* at 89-97.

30. *Id.* at 97-103.

31. *Id.* at 104-109. Professor Shane also nicely highlights the courageous efforts of some – e.g., Navy General Counsel Alberto Mora and, later, Office of Legal Counsel ("OLC") head Jack Goldsmith – to control the more outlandish claims of executive authority. *Id.* at 106-107.

32. Shane, *supra* n. 3, at 96.

33. *Id.* at 103.

34. *Id.* at 110.

35. *Id.* at 83.

36. For instance, Professor Shane cites the OLC's conclusion that the president had a unilateral authority to categorize Taliban detainees for purposes of the Third Geneva Convention. *Id.* at 98-100. See generally *Geneva Convention Relative to the Treatment of Prisoners of War* (Aug. 12, 1949), <http://www.icrc.org/ihl.nsf/FULL/375?OpenDocument>. One might also have emphasized here the significance of the initial finding of the OLC that the president had sole authority, as a matter of domestic law, to interpret treaty obligations. The author's point about misconstruing the Third Geneva Convention as a matter of international law is valuable. But ultimately, the OLC's position is founded on a deeply flawed assertion that the president has the authority to interpret treaty obligations more generally.

37. Shane, *supra* n. 3, at 116.

38. *Id.* at 135.

39. *Id.* at 112. The use of the term "formalism" in this context may actually give too much credit to the executive branch activists Professor Shane criticizes. Formalism is a jurisprudential doctrine, and crediting it to the Bush administration enthusiasts suggests a veneer of deliberation. But formalism does not equate with unilateralism. At its most basic, formalism holds that once created through appropriate processes by empowered lawmakers, legal norms exist, and have at least a determinable content, independent of the legal institutions that execute or apply them. Whatever "formal" arguments presidentialists advance about the

legitimate, “so long as executive officials can point, literally, to some formal source of law.”<sup>40</sup> He then examines the risks inherent in accretion of this form of “faux law.”<sup>41</sup>

Chapter six, “The President’s Personal Bureaucracy: Administrative Accountability and the Unitary Executive,” directly and effectively engages with the core claim of presidentialists on executive control over all policy decisions within the executive branch, including agencies expressly designated by Congress as independent. It begins by thoughtfully distinguishing between the more limited “overseer” and the virtually unlimited “decider” models of presidential control over executive agencies.<sup>42</sup> What is particularly valuable is the discussion of how modern presidents have followed a policy that parallels a full-blown theory of the “unitary executive” and how this “impedes administrative accountability.”<sup>43</sup> With this perspective, Professor Shane then compellingly takes apart the principal arguments in favor of a unitary executive.<sup>44</sup> He is at his best when he connects the assertions of exclusive presidential control over policy making with the consequences that would flow from a recognition of a broad notion of executive privilege.<sup>45</sup>

The penultimate chapter of *Madison’s Nightmare*, “Recovering the Madisonian Dream: Visions of Democracy, Steps to Reform,” develops the prescriptions for the accumulated excesses of presidentialism. Here, Professor Shane weaves together the threads from the four substantive chapters to advocate for an express legal principle subject to legal enforcement by the courts, but also to political enforcement by Congress and other constituents in our polity - that presidents must account for their actions. From this express legal limitation on presidential power will flow significant derivative benefits for the quality of decision making. “Legal awareness that executive authority is significantly at the sufferance of Congress and the courts,” Professor Shane concludes, “should lead a President to act with greater prudence and integrity.”<sup>46</sup>

This connection between executive accountability and improving the quality of decision making is the most significant contribution of *Madison’s Nightmare*. A rejection of unbridled presidentialism also will not unduly hamstring the functioning of the executive branch. To the contrary, on matters of high delicacy and in times of true emergency, Congress is likely to delegate the necessary policy latitude, and the courts are likely to afford wide deference in any event. Professor Shane even supports “a readiness to accept fairly regular congressional acquiescence.”<sup>47</sup> Thus, even under the pluralist view, “the President is likely to find himself frequently vested with sufficient

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authority the Constitution confers on the executive branch, they are orthogonal to the issue of which institution has the final authority to answer the question that is, to determine the content of the law. Indeed, notwithstanding the interpretive arguments about the breadth of the Vesting and the Take Care Clauses, presidentialists, as Professor Shane notes later in his book, in large measure rely on institutional and normative - not legal - claims about which institution is better situated to create and implement sound public policy, especially on national security matters. *Id.* at 120-121.

40. *Id.* at 112-113.

41. Shane, *supra* n. 3, at 132-142.

42. *Id.* at 143-158.

43. *Id.* at 158.

44. *Id.* at 158-167.

45. *Id.* at 159-161.

46. Shane, *supra* n. 3, at 185.

47. *Id.*

power to act independently in many key areas.”<sup>48</sup>

But, in contrast with presidentialism, the twin requirements of *ex ante* dialogue and *ex post* accountability will improve access to information, enhance transparency, and ultimately support more thoughtful decision making. To propel a move toward this notion of pluralism, Professor Shane offers a number of general policy prescriptions.<sup>49</sup> Some of these are at a quite high level of abstraction (e.g., the president should “seek to promote pluralist dialogue and executive branch accountability by returning to an ethos of open government”<sup>50</sup> and should “broaden consultation with Congress in the making of national policy within areas of shared constitutional responsibility”<sup>51</sup>; “the members of the Senate Judiciary Committee should commit themselves to a merit-centered focus”<sup>52</sup> on lower court judicial nominees). Others, in contrast, have a more directed focus (such as that the Office of Management and Budget should shift from cost reduction to interagency coordination<sup>53</sup> and that Congress should adopt legislation to resolve claims of state-secrets-privilege claims in civil litigation<sup>54</sup>). But each is worthy of further consideration, especially for subsequent presidents who may be more interested in broader themes of good governance than in accumulating unilateral powers.

*Madison's Nightmare* concludes in a general final chapter with a number of suggested systemic changes that flow well beyond the subject of the presidential power. Here, we find nine comprehensive initiatives - “structural reforms in our systems of politics and political communication”<sup>55</sup> - that range from advancing universal suffrage to increasing the competitiveness of congressional elections to reducing media costs for candidates and even to “mak[ing] broadband universal and affordable.”<sup>56</sup> Each of these may make good sense and may well be worthy of more detailed analysis in other scholarly projects. Skeptics may also question how these broad political observations fit at the end of a book that otherwise so valuably focuses on the immoderate claims of unilateral powers by modern presidents. But these kinds of deep societal and political-cultural changes are indeed the goal of Professor Shane’s fundamental project. For like most suggestions for a more engaged and knowledgeable electorate, they may also feed into longer-term values of increased transparency and accountability in government.

In any event, *Madison's Nightmare's* more focused insights on the excesses of modern presidentialism make it a valuable and timely work. Through a convincing review of the Madisonian model of robust checks and balances, Professor Shane reminds us that the founders designed a system of separation of powers not only to control abuses by the individual branches of government. By requiring “bargaining and deliberation”<sup>57</sup> among the branches, the system also functions to enhance the quality of decision making

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48. *Id.* at 184.

49. *Id.* at 186-195.

50. *Id.* at 188.

51. Shane, *supra* n. 3, at 189.

52. *Id.* at 190.

53. *Id.* at 187-188.

54. *Id.* at 191.

55. *Id.* at 195.

56. Shane, *supra* n. 3, at 205. For a complete discussion of all of Professor Shane’s proposed reforms, see *id.* at 195-207.

57. *Id.* at 181.

by each. And with the backdrop of the extravagant claims of unilateral power by the recent Bush administration, *Madison's Nightmare* persuasively demonstrates the importance of this "pluralist" perspective for a law-bound and well-functioning executive branch as well.

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Professor Benjamin Kleinerman tackles essentially the same subject in *The Discretionary President*, but he offers strikingly different intuitions about the proper function of law itself. At bottom, the focus of *The Discretionary President* likewise is the consequence of limited accountability for the exercise of unilateral executive powers. A political scientist, Professor Kleinerman's concern, however, is about an excessive focus on legal norms, instead of ultimate political accountability. Thus, as he writes in the introduction, the problem in the recent controversies over the holding and treatment of detainees in Guantánomo was the exclusive reliance on legal arguments for inherent executive authority instead of on substantive justification: "By refusing to engage these questions politically, justifying them to an inquiring Congress or courts, the Bush administration allowed itself never to engage these questions at all."<sup>58</sup>

Professor Kleinerman thus sees a required space for "extralegal" executive discretion in times of true national crisis. He maps the broad boundaries of this argument in a quite detailed introductory chapter. With the backdrop of a "new ordinary, where vast and unthinkable destruction remains a constant possibility,"<sup>59</sup> Professor Kleinerman's project is to highlight the "promise" of discretionary executive action, even in contravention of the law, while at the same time reminding of the "peril" of the same phenomenon. The solution is a requirement of robust political, not legal, justification, but interestingly one that plays out through a process that ultimately returns the analysis to a constitutional frame. Professor Kleinerman captures this essential point in a concise passage early in *The Discretionary President*: To defend the constitutionality of unilateral action, he writes, "the president must now show the absolute necessity of executive discretion. In doing so, this power that originates outside the Constitution comes into the Constitution; it becomes constitutionalized."<sup>60</sup>

To fulfill the "promise" of executive discretion, we must not measure this "absolute necessity"<sup>61</sup> against legal norms,<sup>62</sup> whether advance congressional authorization or subsequent judicial rationalization. Where the question is the essential national security entrusted to the executive, the ultimate audience is, rather, the people.

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58. Kleinerman, *supra* n. 4, at 6.

59. *Id.* at 12.

60. *Id.* at 10.

61. *Id.* at xi.

62. Professor Kleinerman thus criticizes legal scholars both for an "excessively legalistic interpretation of rules and norms" in this context and for the "assumption that the exercise of power can only be judged legally." *Id.* at 18. Citing, for example, the arguments of David Barron and Martin Lederman in David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb: Framing the Problem, Doctrine, and Original Understanding*, 121 Harv. L. Rev. 689 (2008), that neither constitutional text nor precedent permits the president to disregard clear mandates of Congress, he argues that "these authors are mistaken if they think . . . that presidents can never justifiably act against the laws." Kleinerman, *supra* n. 4, at 12.



But Professor Kleinerman also is well aware of the challenge he has set for himself in locating the control over excessive discretion in the power of political reactions or the self-interest of the populace: as he notes early in a chapter on Thomas Hobbes, “one of the central problems with which this book wrestles [is] how to constrain executive power given a public that is neither naturally disposed to distrust far-reaching executive power nor made so by a certain crude understanding of the foundational aims of liberalism itself.”<sup>63</sup> The answer to this potential failure of the political market is vigilance by the people’s constitutional agents in the legislature and elsewhere in civil society. Professor Kleinerman thus ultimately endorses, even for times of true national crisis, a Lockean conception of separation of powers in which legislative elites must “signal the people regarding executive malfeasance and usurpation.”<sup>64</sup>

With this overview, *The Discretionary President* appropriately begins with an intellectual history of executive power in the Anglo-American tradition. Chapter one first provides a helpful review of the basic political theory of Thomas Hobbes, and, in particular, of Hobbes’s twin insights about the people’s primitive desire for security and their default tendency to political apathy. In this, Professor Kleinerman sets a theme that will recur throughout the work. That is, he pairs Hobbes’s “inexorable logic of security” with the insight that, as long as their leaders can promise the people security and prosperity, “the political apathy bred by liberalism itself creates a trust in an overweening state power.”<sup>65</sup>

The succeeding chapter, “Locke’s Attempt at Taming the Prince,” skillfully connects this discussion with John Locke’s recognition of the necessity for some degree of executive “prerogative.” Even in a politically mature state with primary power in a representative legislature, Locke recognized “the political flux inherent in the modern world” may require a “prerogative power” able to react quickly to unforeseeable future events.<sup>66</sup> Because “legislatures cannot predict all future exigencies,”<sup>67</sup> Professor Kleinerman offers the quotable observation that “executive power is merely the constitutional solution to the insufficiencies of constitutionalism.”<sup>68</sup> But he also sees in this a deeper insight for modern controversies: “What we can learn from Locke,” Professor Kleinerman concludes, “is that discretionary executive power rightfully exists only when the laws themselves cannot or should not provide for the situation.”<sup>69</sup>

The challenge for Locke in parallel with the insight, but not the conclusion, of Hobbes is the ability of a docile populace preoccupied with their selfish concerns to police executive excess.<sup>70</sup> The solution for Locke is an “original constitution,”<sup>71</sup> founded on separation of powers: because of the complexity of the modern world and the

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63. *Id.* at 27.

64. *Id.* at 16.

65. *Id.* at 47.

66. *Id.* at 58.

67. Kleinerman, *supra* n. 4, at 59.

68. *Id.* at 60.

69. *Id.* at 61.

70. As Professor Kleinerman elaborates, “[f]or Locke, the necessary power of the executive combined with the people’s natural docility creates a serious threat to the security of many individuals within society.” *Id.* at 67.

71. *Id.* at 50.

people's tendency toward apathy, Professor Kleinerman writes, a mature polity needs "a constitutional frame within which executive actions that usurp legislative authority come to light as such and can be used by legislators to show the people this usurpation."<sup>72</sup> He then weaves together these themes with an emphasis on Locke's vision of peaceful political contestation "both within the people toward the actions of their government and within the government between the various branches"<sup>73</sup> for resolving interbranch disputes over power. Indeed, Professor Kleinerman concludes, "[b]y separating functions and powers within the government, Locke both creates the room for this contestation and encourages it."<sup>74</sup>

The four next chapters of *The Discretionary President* trace early American thought on and experience with its form of an "original constitution." In a brief introductory chapter on this theme, "The Federalist Constitution," we find general observations about early controversies between the federalist and anti-federalist factions over how best to balance security with liberty. What is particularly valuable in this chapter is the critical discussion of Woodrow Wilson's reconceptualization of the presidency as the center point of national political legitimacy.<sup>75</sup> In response, Professor Kleinerman returns to the importance of the Lockean view of the oversight that results from a separation of functions. Through its division of expertise between (especially) legislative and executive branches, this separation, Professor Kleinerman observes, ultimately "gives each branch an incentive to reveal the usurpations of the other."<sup>76</sup>

The theoretical analyses of the early chapters provide a backdrop for the essential question on the ultimate source of executive discretion in times of crisis. Professor Kleinerman poses it directly at the beginning of the chapter, "Hamilton's Executive Government": Does the Constitution "provid[e] for all necessary powers in the constitutional clauses themselves," or does its broader energy instead reflect a "constitutionalization" of the insight that constitutions are inherently insufficient for the maintenance of a secure society in unforeseen situations in the future?"<sup>77</sup> In this chapter, we find a valuable distillation of Alexander Hamilton's view that the Constitution of necessity includes all powers required to secure "public peace against foreign or domestic violence."<sup>78</sup> This is so precisely because all future contingencies that threaten the peace are "illimitable in their nature, so it is impossible safely to limit [the] capacity"<sup>79</sup> of the government to respond to them. The problem here, as Professor Kleinerman notes, is both that Hamilton fails to explain the structure by which the Constitution accomplishes that end and that Hamilton's perspective is "so unbounded"<sup>80</sup>

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72. Kleinerman, *supra* n. 4, at 75.

73. *Id.* at 75.

74. *Id.*

75. *Id.* at 81-90.

76. *Id.* at 87.

77. Kleinerman, *supra* n. 4, at 92.

78. *Id.* at 96 (quoting Alexander Hamilton, *Federalist No. 31*, in Alexander Hamilton, John Jay & James Madison, *The Federalist* 188, 190 (Edward Mead Earle ed., Modern Lib. 1937)).

79. *Id.* (quoting Alexander Hamilton, *Federalist No. 34*, in Alexander Hamilton, John Jay & James Madison, *The Federalist* 203, 205 (Edward Mead Earle ed., Modern Lib. 1937)).

80. *Id.*

as to preclude any serious assessment of what might reflect a usurpation of power.<sup>81</sup> Interestingly, Professor Kleinerman also faults Hamilton - the commonly understood champion of executive power - for insufficiently endorsing the need for executive discretion in this context. "The problem with Hamilton's argument," Kleinerman writes, "is that he appears to connect this unbounded power to congressional lawmaking power rather than to discretionary executive power."<sup>82</sup>

The remainder of the chapter contains a valuable discussion of separation of powers in terms of functions - a kind of constitutional division of authority according to functional expertise.<sup>83</sup> As relevant for our purposes, the functional expertise of the executive highlighted by Hamilton is the ability to act with secrecy and dispatch and to marshal the force of the state to respond to security threats, both internal and external. In contrast, the functional expertise of the legislature - deliberation - better situates that institution for decisions on declarations of war. Professor Kleinerman thus observes that when the executive, functionally unsuited to the task, has instead decided to initiate hostilities on its own, "it should not surprise us that these wars often evince insufficient forethought and planning."<sup>84</sup>

Professor Kleinerman is at his best in a thoughtful chapter, "Madison's Landmarks of Power."<sup>85</sup> He explains here how James Madison, writing as Helvidius concerning President Washington's Neutrality Proclamation, "puts into practice Locke's advice"<sup>86</sup> on the need for political contestation over executive power in order to compensate for an inattentive populace.<sup>87</sup> Madison's vision, Kleinerman explains, was that "[u]nconstitutional actions can be contested through the process of constitutional politics; unconstitutional principles advanced on behalf of the Constitution must not only be contested but vigorously attacked."<sup>88</sup> But what was most striking from the analysis in this chapter is Madison's insight about the dangers of executive usurpation from a permanent state of crisis.<sup>89</sup> Conscious of the risks of usurpation from an "actual war," Madison also worried with astonishing prescience that "[t]he executive, whose power increases most in crises, can also benefit from 'real or pretended apprehensions of it.'"<sup>90</sup> Beyond the episodic risk of executive excesses in times of war, Madison foresaw the risk that manufactured crises by the executive could "grow[] into a kind of system."<sup>91</sup>

Madison's Lockean solution, Professor Kleinerman convincingly explains, was a powerful norm of accountability enforced by the people's legislative representatives.

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81. *Id.* at 96-98.

82. Kleinerman, *supra* n. 4, at 98.

83. *Id.* at 102-107.

84. *Id.* at 104. Professor Kleinerman in part blames these misguided wars on the corrupting influence of the perspective - propelled in a significant intellectual sense by Woodrow Wilson - that the president is the only true representative of the wishes of the entire nation. *Id.* at 106-107.

85. *Id.* at 119.

86. Kleinerman, *supra* n. 4, at 129.

87. *Id.* at 129-131.

88. *Id.* at 130.

89. *Id.* at 130-137.

90. *Id.* at 137 (quoting James Madison, *Political Reflections*, in *The Papers of James Madison, Congressional Series* vol. 17, 237, 241 (R.A. Rutland et al. eds., U. Va. Press 1991)).

91. Kleinerman, *supra* n. 4, at 137 (quoting James Madison, *Political Reflections*, in *The Papers of James Madison, Congressional Series* vol. 17, 237, 241 (R.A. Rutland et al. eds., U. Va. Press 1991)).

Here again, Professor Kleinerman returns to his theme of the need for ultimate political, though not necessarily legal, accountability. He relates Madison's conception that when necessity compels extraordinary unilateral measures, presidents must immediately justify their actions to Congress: "Necessity is not simply a trump card by which executives can cover over their departures from the law,"<sup>92</sup> Professor Kleinerman explains. "Instead, they must immediately show the legislature why these particular measures were in fact necessary."<sup>93</sup>

Similar to his observations about Hamilton, however, Professor Kleinerman criticizes Madison for "claiming that the power to authorize discretionary action belongs ultimately to the legislature."<sup>94</sup> He argues that with such a necessity of advance legislative sanction, "we are led inexorably to an invitation by the legislature for the executive to usurp its power."<sup>95</sup> I will have more to say about this below. It will suffice at this point to observe that a formal requirement of legislative authorization does not mean if the ultimate forum for testing legitimacy is political contestation that the executive must or will await such authorization before responding to true national crises.

A brief chapter, "Jefferson's Prerogative," reviews Thomas Jefferson's recognition of the rare need for an executive "prerogative" to act beyond constitutional authority. But with a belief in the ultimate power and ability of the people, Jefferson argued that the executive prerogative would be controlled by a requirement of the executive promptly "throw[ing] himself"<sup>96</sup> on the public for their approval. As Professor Kleinerman explains, however, Jefferson's executive prerogative ultimately is entirely lawless, for he locates it in a power beyond the Constitution itself.<sup>97</sup>

Two final historical chapters address the significant constitutional moment reflected by the Civil War. Although essential to any serious analysis of executive power, Professor Kleinerman commendably confronts directly the fundamental challenge with the subject of the Civil War: whether, and if so how, we can distill constitutional extract from an event that is essentially unique in our constitutional history. During the Civil War, the country's very existence was in the balance. With the exception of the War of 1812, no event is even remotely of the same species, family, or genus. Few would credibly question the power of our constitutional Commander-in-Chief - whether the Constitution expressly or impliedly recognizes it or simply presupposes it - to act beyond or even contrary to law where the alternative is the loss of the country itself (and thus of the Constitution). In significant measure, in short, the challenge is that the Civil War is a singularity.

To his credit, Professor Kleinerman recognizes this. Early in the chapter "Lincoln's Example," he observes with reference to Lincoln's exercise of extralegal power, "[p]recisely in its being extraordinary, it establishes no precedent beyond

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92. *Id.* at 142.

93. *Id.*

94. *Id.* at 147.

95. *Id.*

96. Kleinerman, *supra* n. 4, at 152 (alluding to Thomas Jefferson, *Ltr. to John B. Colvin*, in *The Writings of Thomas Jefferson, 1807-1815* vol. 9, 279, 282 (Paul Leicester Ford ed., G.P. Putnam's Sons 1898)).

97. *Id.* at 163-164.

itself.”<sup>98</sup> President Lincoln undoubtedly took actions unsupported by the constitutional powers where necessary to secure a potentially disintegrating union. But as Professor Kleinerman notes, Lincoln had an exceedingly narrow understanding of “necessity,” one that was limited to the very preservation of the Constitution.<sup>99</sup> In the most famous of quotes, Lincoln thus stated, “I felt that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the Constitution, through the preservation of the nation.”<sup>100</sup>

Professor Kleinerman ultimately distills three important principles from Lincoln’s words and actions by which we may judge extra- or contra-constitutional executive acts: First, “action outside of and especially against the Constitution is only constitutional when the constitutional Union itself is at risk.”<sup>101</sup> Second, “discretionary prerogative that violates the laws or the Constitution should only take place in extraordinary circumstances and should be understood as extraordinary.”<sup>102</sup> Finally, “a line must separate the executive’s personal feelings and official duty.”<sup>103</sup> One might understand this latter point as precluding a claim that, once the union itself is threatened, the president immediately becomes a dictator for all purposes (or as Kleinerman observes, that in such a case “all bets are off”<sup>104</sup>).

Professor Kleinerman then extends these principles in a more specific chapter, “The Civil War Confiscation Debate.” He first provides here a very interesting examination of the extravagant claims of some legislators at the time that Congress was, in all cases and for all purposes, the supreme branch of government and that its powers even extended to the confiscation of private property founded on military necessity. Some also argued that, in addition or instead, Congress could delegate such powers to the president. In either case, as Professor Kleinerman explains, the ultimate repository of emergency powers, even in disregard of the Constitution, was Congress by virtue, ironically, of the Necessary and Proper Clause in the Constitution.<sup>105</sup>

Lincoln’s view of the subject was unclear, was influenced by political considerations, and likely evolved during the war.<sup>106</sup> In any event, Professor Kleinerman sees a serious problem in a conclusion that Congress always has final control over emergency powers, even through the option of delegation to the president. The risk of such an approach is that Congress “would be supreme not only to the executive but also

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98. *Id.* at 169. In some later passages, however, we find what appears to be rhetorical backsliding. *See id.* at 173 (“One can imagine innumerable situations in which this discretionary [executive] power is truly necessary for the preservation of a society.”); *id.* at 174 (raising the possibility of other “situations in which, as in the Civil War, the threats are real and immense discretionary power is essential”).

99. Kleinerman, *supra* n. 4, at 178.

100. Abraham Lincoln, *Ltr. to Albert G. Hodges*, in *The Collected Works of Abraham Lincoln* vol. 7, 281, 281 (Roy P. Basle ed., Rutgers U. Press 1953).

101. Kleinerman, *supra* n. 4, at 184.

102. *Id.* As Professor Kleinerman thus observes with reference to Lincoln’s revocation of General John Fremont’s emancipation proclamation for Missouri, “Lincoln draws a bright line between that which the survival of the Constitution mandates and that which his personal moral feelings might desire.” *Id.* at 182.

103. *Id.* at 184.

104. *Id.*

105. Kleinerman, *supra* n. 4, at 197-204.

106. *See id.* at 214-216.

to the Constitution.”<sup>107</sup> Professor Kleinerman instead sees virtue in the president taking the constitutional first-mover risk. That is, if the president exercises questionable emergency powers on his own with an appeal to constitutional necessity, he is subject to the ultimate and, thus, constitutional oversight of the people and their constitutional representatives in Congress.<sup>108</sup>

The discussion of the Civil War nonetheless would have benefitted from a review of the Supreme Court’s important role in recognizing the war powers of the president. As the Supreme Court found in *The Prize Cases*,<sup>109</sup> the precise extent of the president’s power to wage war depended decisively on the existence of a legally defined “war.” The Court there noted the important role of Congress in triggering presidential war power through a declaration of war. But it also held, in light of the clear belligerency initiated by an organized army, that the absence of a formal declaration did not mean that the Civil War was anything less than a constitutionally relevant war.<sup>110</sup> As a result, it properly fell to the president to wage the war within the constitutional and internationally recognized laws of war to confiscate property in furtherance of valid war aims.

In the final substantive chapter, “The Discretionary Executive and the Separation of Powers,” Professor Kleinerman extends his defense of executive discretion to formal advice for the other two branches of government against the backdrop of a presidential power to act in defense of the Constitution in times of emergency. He thus observes that if “members of both Congress and the Supreme Court know that the presidency has an independent source of discretionary power that supplements the laws . . . they can comport themselves in an entirely different manner than they would if they thought their decisions as to the extent of executive authority were final.”<sup>111</sup> By “comport themselves” here Professor Kleinerman means that Congress should not undertake to authorize emergency powers and the Supreme Court should not attempt to make binding declarations about the constitutionality of any exercise thereof. The worry is that both institutions are more likely to encourage executive excess than control it. “As long as we view discretionary executive power as in need of statutory support or judicial rationalization,” he reasons, “Congress and the Supreme Court must necessarily become enablers rather than questioners.”<sup>112</sup>

With specific reference to Congress, Professor Kleinerman argues that any attempt to define in advance the extent of executive discretionary power in times of emergency transfers a proprietary function of the legislature - the power of deliberation in ordinary times - to the executive. This would only enhance powers that presidents claim anyway. Professor Kleinerman thus cites John Yoo’s argument that the Foreign Intelligence

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107. *Id.* at 217.

108. *Id.* at 216-217.

109. *The Prize Cases*, 67 U.S. 635 (1862).

110. *Id.* at 666-667 (“When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a *war*.” (emphasis in original)).

111. Kleinerman, *supra* n. 4, at 218.

112. *Id.* at 219.

Surveillance Act<sup>113</sup> (“FISA”) did not create executive power, but rather only enhanced that power with a specific “safe harbor.”<sup>114</sup> Professor Kleinerman concludes from this that the oversight of presidential claims of emergency powers is best left to an *ex post* political judgment of our polity: “By removing the necessity of statutory authority for the exercise of executive discretion, we force that discretion to stand naked before the bar of political and constitutional judgment.”<sup>115</sup>

One might ask here, however, whether it is “necessarily” so that Congress becomes an “enabler” if it deliberates and legislates in advance of national crises.<sup>116</sup> Professor Kleinerman has a valid point for situations in which Congress solely empowers the president, as the 2001 Authorization for Use of Military Force<sup>117</sup> demonstrates. Yet even if one were to accept John Yoo’s extravagant claims, Congress may fulfill its oversight function by identifying express limits on executive power. Congress may thus circumscribe by authorizing within specific limits. For executive assertions of power beyond those expressly prescribed limits, the political contestation championed by Professor Kleinerman remains with full vigor.

Professor Kleinerman also paints on a very large canvas, for he seemingly addresses only presidential actions for emergencies of the highest order. The problem as, interestingly, Professor Shane highlights in *Madison’s Nightmare* - is the corruption that may result from an internalization of a crisis mentality at lower levels of government. As Professor Shane thus explains, “[M]ost government decisions are simply too low in visibility or too diffuse in impact to elicit judicial review or congressional oversight as ways of monitoring legal compliance.”<sup>118</sup>

Professor Kleinerman’s concerns about the Supreme Court are multifaceted, but largely distill into two points: that it lacks the institutional capacity to make judgments about abuses of power in emergencies<sup>119</sup> and that its actions in fact will tend to interfere with the political contestation that is necessary ultimately to resolve executive abuses of power.<sup>120</sup> His advice for the Court is that it should offer only advisory views when it confronts a claim of “unconstitutional or illegal action by the executive.”<sup>121</sup> He thus reasons that

it would be better for the Court simply to decide the case as it thinks the Constitution requires and thereby force the executive to defend himself or herself politically and

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113. 50 U.S.C. §§ 1801-1871 (2006).

114. John Yoo, *War by Other Means: An Insider’s Account of the War on Terror* 85 (A. Mthly. Press 2006) (“FISA does not create the power to authorize national security searches. Rather, it describes a safe harbor by which searches that obtain a warrant will be deemed reasonable under the Fourth Amendment.”). For Professor Kleinerman’s discussion of this theory, see Kleinerman, *supra* n. 4, at 224-225.

115. Kleinerman, *supra* n. 4, at 222.

116. *Id.* at 219.

117. Pub. L. No. 107-40, 115 Stat. 224 (2001).

118. Shane, *supra* n. 3, at 83.

119. Kleinerman, *supra* n. 4, at 235 (“[T]he courts are simply not equipped to determine the gravity of any given situation, and thus they are not equipped to determine if the president ha[s] independent power to act.”).

120. *Id.* at 232 (“The Supreme Court’s adjudications inevitably create the very sorts of precedents that impair the people’s ability to engage in political contestation over the exercise of power by either Congress or the president.”).

121. *Id.* at 239.

constitutionally. This will only be possible, however, if the Court is willing to contemplate the possibility that it will not have the last word.<sup>122</sup>

Not surprisingly, therefore, Professor Kleinerman endorses “coordinate construction,”<sup>123</sup> under which the three branches—not the Supreme Court alone—bear the joint responsibility for constitutional interpretation.

Coordinate construction does not require judicial abdication, however. If the true standard is Lincolnian necessity, why should the Supreme Court not put the president to the test? Where the president seeks to employ extralegal powers, in other words, the burden should be a high one: to prove, through the very political contestation Professor Kleinerman champions, that the extreme necessity of a situation justified a departure from even a final, binding judgment of the Supreme Court on the force of the Constitution. And if one were to accept some diluted notion of necessity, how is the Supreme Court to discern which executive acts fall within the protected zone for “nonfinal” judicial interpretations of executive power? Moreover, the resultant uncertainty may well encourage executive branch officials to pick and choose which judgments of the Supreme Court are constitutionally “final” to fit the president’s fancy from time to time (a form of all-purpose “necessity” trump card).

Professor Kleinerman nonetheless worries that adherence to a policy of final judicial authority over constitutional meaning will either invite congressional or public apathy or force the Court “to rationalize and constitutionalize”<sup>124</sup> presidential actions in true times of emergency. He then properly cites cases in which the Supreme Court was indeed quite compliant to executive branch desires.<sup>125</sup> Thus, for example, he cites the erroneous conflation of executive and national power made by Justice George Sutherland in *Curtiss-Wright*<sup>126</sup> as well as similar rhetorical lapses in *In re Neagle*<sup>127</sup> and *In re Debs*.<sup>128</sup> Professor Kleinerman’s basic concern is a valid one, as Justice Sutherland’s extravagant rhetoric in *Curtiss-Wright* amply demonstrates. But episodic missteps and rhetorical excesses do not a jurisprudence make.<sup>129</sup> And without a review of the great

122. *Id.*

123. *Id.*

124. Kleinerman, *supra* n. 4, at 241.

125. *Id.* at 235-237.

126. *U.S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (suggesting that the president possesses “delicate, plenary and exclusive power as the sole organ of the federal government in the field of international relations”).

127. *In re Neagle*, 135 U.S. 1, 59 (1890) (“We do not believe that the government of the United States is thus inefficient, or that its Constitution and laws have left the high officers of the government so defenceless and unprotected.”).

128. *In re Debs*, 158 U.S. 564, 582 (1895) (“If the emergency arises, the army of the Nation, and all its militia, are at the service of the Nation to compel obedience to its laws.”).

129. Thus, for example, Professor Kleinerman cites *Dames & Moore v. Regan*, 453 U.S. 654 (1981), as foundation for a concern that the kind of congressional acquiescence recognized there simply will serve as an invitation for ever more sweeping claims of executive power in the future. Although the prediction of executive extrapolation is justified, that of judicial compliance is not. Indeed, when the executive recently sought to extend *Dames & Moore* to a much broader power to transform international obligations into domestic law, the Supreme Court forcefully reminded in *Medellin v. Texas*—quoting *Dames & Moore* itself—that “the limitations on this source of executive power are clearly set forth and the Court has been careful to note that ‘[p]ast practice does not, by itself, create power.’” *Medellin*, 552 U.S. 491, 531-532 (2008) (quoting *Dames & Moore*, 453 U.S. at 686). Because the claim of independent executive power at issue there was “not supported by a



sweep of Supreme Court cases on executive power, the risk to flip the well-known metaphor on the use of legislative history is an impression of “looking over a crowd and picking out your enemies.”<sup>130</sup>

Professor Kleinerman nonetheless offers here a valuable admonition about the need for a special modesty by the Supreme Court on the subject of emergency powers. Even more than usual, its proper role is not to fence off and survey the field, but rather merely to put down an occasional outer-boundary post when confronted with executive excesses. In this, the Supreme Court both fulfills its rightful constitutional role and acts fully within its functional expertise. Fairly interpreted, that is precisely what the Supreme Court has done in its string of cases on the broad claims of unilateral, unreviewable executive power by the recent Bush administration. In its significant opinions in *Hamdan*,<sup>131</sup> *Boumediene*,<sup>132</sup> and, especially, *Medellin v. Texas*,<sup>133</sup> the Court in fact spoke boldly in defining the outer limits of executive power, even in the face of claimed congressional support.

The Supreme Court also has ample tools to avoid straying beyond its institutional competence.<sup>134</sup> The Court has ultimate control over its docket. Even when unavoidable, it may take shelter in a variety of abstention principles - including, most prominently, the political question doctrine - to defer or evade particularly sensitive issues. It thus has at its disposal the means to avoid injecting itself into issues that in fact are best left to political contestation or for which it has not yet accumulated sufficient information or experience. With appropriate judicial modesty, in other words, the Court can - and in the field of emergency powers should - limit its (final) declarations to clear instances of executive excess.

The distilled essence of *The Discretionary President* is that true controversies over executive discretion in times of national emergency are best left to political contestation driven, ultimately, by “we the people.” Citing the infamous example of the Japanese internment in World War II, Professor Kleinerman sums up his argument nicely at the very end of the work:

As I have argued throughout this book, as citizens of a constitutional polity in which the Constitution belongs, in the first and last place, to us, we can make a political judgment about this sort of military order in which we decide whether it is ultimately constitutional: even if we think it a departure from the constitutional order, we might grant its constitutionality by concluding that it was, in fact, necessary.<sup>135</sup>

But there is no compelling reason why law, objectively determined by the courts and in

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‘particularly longstanding practice’ of congressional acquiescence,” the Court refused to recognize extraordinary executive powers. *Medellin*, 552 U.S. at 532 (quoting *Am. Ins. Assn. v. Garamendi*, 539 U.S. 396, 415 (2003)).

130. See Abner Mikva, *Statutory Interpretation: Getting the Law to Be Less Common*, 50 Ohio St. L.J. 979, 982 (1989) (equating the use of statutory history with “looking over a crowd and picking out your friends”).

131. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

132. *Boumediene v. Bush*, 553 U.S. 723 (2008).

133. *Medellin*, 552 U.S. 491.

134. Professor Kleinerman phrases his concern here this way: “[T]he courts are simply not equipped to determine the gravity of any given situation, and thus they are not equipped to determine if the president ha[s] independent power to act.” Kleinerman, *supra* n. 4, at 235.

135. *Id.* at 243.

part promulgated by the legislature, may not play a role in our national deliberations. In a polity founded in its essence on the rule of law, we do not ask too much for the president to demonstrate, through that very political contestation, that true not merely manufactured or feigned - necessity justified a departure from binding, final, and even constitutional law.

These questions aside, Professor Kleinerman advances a provocative theory, one founded on thorough research and thoughtful analysis. He deftly straddles the worlds of both political and legal science. As a result, *The Discretionary President* provides a rich source of information and insight for academics from both disciplines.