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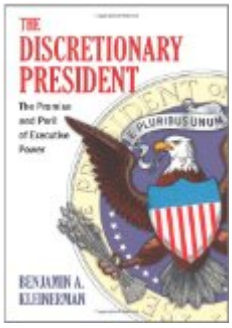
Benjamin A. Kleinerman. *The Discretionary President: The Promise and Peril of Executive Power.* Lawrence: University Press of Kansas, 2009. xv + 322 pp. $34.95 (cloth), ISBN 978-0-7006-1665-7.



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Siemers on Kleinerman

Reading Benjamin A. Kleinerman's *The Discretionary President* is like gaining admission to a very special room in a wax museum. Preserved in utterly life-like fashion in the "gallery of executive power" are Thomas Hobbes, John Locke, Thomas Jefferson, Alexander Hamilton, James Madison, Abraham Lincoln, Robert H. Jackson, John Yoo, and others. Kleinerman is an active curator, working before our eyes, one moment placing Hamilton and Hobbes together in "conversation" and in the next trying out a juxtaposition of Locke and Yoo, before moving on to some other display. This exhibition acquaints us with these figures' hopes and fears, their justifications and their reasoning on the subject of executive discretion, in hopes of finding the best approach. Such an ambitious project could easily go wrong, but in Kleinerman's deft hands, it has resulted in the most thought-provoking book about executive power written in a decade filled with important work on the subject.

Kleinerman intentionally deemphasizes a legal approach to the question of executive discretionary power, moving the discussion toward political theory. The reason, he explains, is that the proper extent of government power is theoretical at its core, rooted in the great Lincolnian question "must a government, of necessity, be too strong for the liberties of its own people, or too weak to maintain its own existence? " Kleinerman views this question as the fundamental challenge of any modern regime. Can we preserve order, especially during emergencies, and simultaneously maintain a meaningful constitutionalism that effectively wards off tyrannical actions by government? Or do constitutional republics live on a razor's edge, off of which they will inevitably slip, one way or the other?

Focusing on political theory has the advantage of reducing precedential clutter. We need not deeply explore all the implications and nuances of *Hamdan v. Rumsfeld* (2006), for instance, to work out a generalizable approach to the proper extent of executive power. This effort could easily turn pedantic or offer only vague abstractions. *The Discretionary President* succumbs to neither of these pitfalls. It is a thoughtful tour through the major approaches one can take to the dilemma of preserving both security and constitutionalism, with frequent practical references to the issues of the day. The book does not ignore constitutional practice as we have come to know it, but for very specific reasons which I describe below, Kleinerman's own preferred answer to his stated dilemma cannot come from the Supreme Court.

Kleinerman asserts that there are occasional emergencies during which a government has to act outside of the law in order to protect public safety. These situations "should be understood as extraordinary," with "the constitutional Union itself … at risk" (p. 184). Rarely can they be anticipated, and the kind of action required during them is executive by its very nature. Motivated by a solemn duty to keep the peace, the executive can be justified in acting without the color of law–even to do such

startling things as suspending habeas corpus, torturing a suspect who has particularly timely or relevant information, or ordering the destruction of a civilian airliner that has been hijacked.

Congress should not be expected or asked to validate such discretionary actions through the law. This is partly for functional reasons. Security would be compromised if Congress had to act beforehand because legislation often could not be produced in time. Validating executive prerogative through law retroactively carries the grave disadvantage of stretching the law beyond what is acceptable in a constitutional republic. Kleinerman says we should not legislate with an eye to the extraordinary because the extraordinary will then become ordinary. He supplements these observations with an intriguing addendum. Since the action taken was executive in nature, the legislature does not have the authority to validate it retroactively. Doing so would violate the separation of powers. The legislature's only valid judgment of prerogative is defined by the Constitution: the president may be impeached and removed for acting outside the bounds of the law. If the president is removed from office for exercising discretionary power, then the action is unconstitutional as well as illegal. If the president is not removed, the action is considered constitutional, but only during the crisis and it is still not legal.

If this sounds somewhat reminiscent of Lincoln's position during the Civil War, it is intended to be. Lincoln was driven by an existential threat to the Union; understood that his actions did not change what a president could do under normal circumstances; and justified what he did by citing his duty as president, rather than his personal beliefs. One of Kleinerman's key insights is that Lincoln became more comfortable with prerogative as the war progressed. At first he submitted his actions to Congress for retroactive approval. By the time he issued the Emancipation Proclamation, Lincoln cited no statutory authority and did not ask for congressional approval, acknowledging that an executive could take emergency actions unilaterally and outside the law, with the understanding that he would be judged politically. Kleinerman touts this development as Lincoln coming to the most mature, workable, and reasonable balance between constitutionalism and public safety ever devised for crisis situations.

Where does this leave the judiciary? Apparently, it leaves it to expanding the "political questions doctrine" to eschew weighing in on such matters. To Kleinerman the Supreme Court "can only interpret the Constitution as it is ordinarily understood," not its elastic emergency version (p. 243). Thus Justice Jackson's dissent in *Korematsu v. United States* (1944) is probably "our best guide to judicial duty in these matters" because in it Jackson states that the " 'courts can never have any real alternative to accepting the mere declaration of the authority that issued the order that it was reasonably necessary from a military standpoint' " (p. 242). Lest one think that this cedes the field to executive discretion, Kleinerman reasons otherwise. If the Court were expected to rule on discretionary behaviors in exceptional circumstances, it would almost inevitably validate them. Removing the Court from the process is a way to keep discretionary action from gaining a kind of validity it would not otherwise have. The bounds of prerogative are not to be defined by the Supreme Court but by political contestation.

The most remarkable part of Kleinerman's book is that in nearly every chapter individual character portraits break new ground. It is this rare interpretive skill that leads me to my wax museum metaphor. There is a fascination in being able to place one's face a foot from Marilyn Monroe's, despite the ubiquity of her image; likewise, even those well versed with the ideas of Locke and Yoo will gain new insight through the close-up examinations offered here.

One of the essential reinterpretations here is of Hobbes, who is often thought of as an ancient curiosity. Kleinerman makes a very effective case that he is relevant. He writes that Hobbes correctly asserted that in difficult times, governments are to be judged primarily by their ability to provide security. Hobbes's ideas simultaneously challenge us to wonder if a separated system and liberal constitutionalism is actually up to the task of protecting its citizens.

Other sketches deserve mention. The problem with George W. Bush, as he was defended by Yoo, is not that he used extraordinary measures to combat terrorism, but that he insisted that these measures were both legal and unchallangeable. In short, he attempted to make the extraordinary ordinary. Kleinerman adds a new wrinkle to our familiar understanding of Locke: he believed that the people would be easily taken in by an executive's claim of necessity and that they would support most assertions of prerogative an executive might offer. Given the events of the last decade, that seems to be a prescient view, one that should inform our approach to the subject. And Kleinerman articulately locates one of the reasons why Madison and Hamilton, seemingly on the same page as Publius, would part with such vehemence in subsequent years.

Madison's thinking was dominated by a legal formalism that countenanced no discretionary executive power in a constituted regime. Hamilton felt that necessity justified any exercise of prerogative. In short, *The Discretionary President* is a tour de force of interpretive political theory.

Kleinerman's defense of his own preferred approach is somewhat less satisfying but still very valuable. Like Kleinerman, I am partial to Lincoln's approach to discretionary power. The problem in suggesting that Lincoln's approach should be our standard is that it requires a Lincoln to work. In addition to clearly discerning what actions are required by necessity, Kleinerman's executive needs to be enough of a Whig to understand that emergency actions cannot have the sanction of legality and should not be normalized. This is desirable, but when did we last have such a president? When did we even last have a viable candidate with this attitude? Perhaps a sophisticated public could force a president to act like Lincoln, but as Kleinerman himself suggests, the level of sophistication required to accomplish this seems implausible.

So while Kleinerman's solution is desirable, it also seems out of reach. Perhaps recognizing this, the judiciary has stepped into the breach, exercising power unthinkable during Lincoln's time. The judiciary has often validated presidential discretion–but it has also been used to create boundaries on it. Relying on the judiciary to check presidential discretion seems to be a much more likely bet than relying on Congress or on the public. The performance of the Supreme Court in the last six years indicates that it is not as easily overawed by the executive as are the public and Congress.

Kleinerman's solution prompted an eagerness in me to hear more. What happens if a president is impeached for exercising extralegal authority but not convicted? Presumably the discretionary action is still validated as constitutional, but is it less legitimate in some way? Are constitutional precedents set through this process, or is each incident to be considered sui generis? Kleinerman might argue that it is safer not to have any of these incidents set precedents, but that seems unrealistic. If validated examples of discretionary power do set precedents, this would give us a repertoire of unwritten but acceptable prerogative actions, which threaten Kleinerman's hope to make any validation of them extraordinary. Given the potential use of impeachment as a political weapon, is the Constitution more elastic under unified government than under divided government? How can this be if the standard for validating discretionary power is to be pragmatic, judged solely by whether it effectively safeguards the populace in a time of crisis? Does the "war on terror" really constitute an existential crisis to the constitutional Union? Though the terrorist threats we now face are very serious, I doubt the answer to the last question can be yes. If the answer is no, then we need a clearer standard for when the use of discretionary power is warranted.

A significant theme of *The Discretionary President* is that successful constitutionalism requires recapturing the founders' understanding of the separation of powers. Their vision was of a powerful government whose potential to tyrannize was checked by the division of functions between three branches. Kleinerman argues that in modern American politics the president is so active in persuading the public and cajoling legislation from Congress that the separation of functions has been obscured. If Congress recaptures its independent responsibility to make the law and the courts focus on protecting citizen rights, then the executive may occasionally exercise discretionary power without ruining our constitutional heritage. This is Kleinerman's answer to the darkly powerful unitary vision of Hobbes. And it is a compelling statement about how a separated system can be better at producing security and prosperity than the Leviathan.

The founders did have a better sense than we do of the division of functions between branches. Yet the particular role for each branch outlined in *The Discretionary President* is Kleinerman's own, based on pragmatic considerations rather than on an acceptance of the founders' conception of role differentiation. There is thus some unacknowledged slippage between asking us to return to the founders' vision, while presenting a version of the separation of powers not expressly argued for by them. I am convinced that Madison, for instance, would be shocked to hear that it is the court's job to safeguard rights rather than being the concern of all three branches–even in a crisis. Others will suggest that Congress is to have a much more proactive role in a crisis than Kleinerman gives them. Regardless, this book should set the stage for conversations about discretionary power for years to come.

The style of *The Discretionary President* is discursive for a scholarly book. The occasional meanderings which result are an indulgence that Kleinerman's editors were wise to afford him, as it results in brilliant commentary and a fascinating, thought-provoking book.