MALPRACTICE!
Essay by Charles R. Keeler

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constitution, in other words, would enable civil society to have it both ways—prerogative to deal with unforeseen contingencies, and the rule of law to ensure that its exercise would not be abused. The United States Constitution seeks to strike the proper balance. But, Klenerman argues, Hamilton’s reading of Article II, especially in his Paciﬁcus essays (written in 1793 to defend President Washington’s Proclamation of Neutrality), tilts the balance too far in the direction of executive prerogative. It was Madison, he says, who, by questioning the thrust of Hamilton’s argument for implied powers, got the balance right.

Fatovic would generally agree, although for slightly different reasons. His main theme concerns the irreducible necessity for virtue in a republic—in the people no less than in their chief executive. He argues that modern political theory’s emphasis on creating institutional safeguards for the want of character will not avail. Government of appeal. This means—indeed Hamilton and although some institutional solutions are better than others, constitutional structures can accomplish only so much. At the same time, he agrees with Klenerman that a well-constructed constitution will induce habits of mind and heart that are conducive to individual liberty and responsibility. Constitutional structures can accomplish only so much. At the same time, he agrees with Klenerman that a well-constructed constitution will induce habits of mind and heart that are conducive to individual liberty and responsibility. He looks to Lincoln as the proper model for emulation because Lincoln understood that extraordinary (and temporary) exigencies justiﬁed departure from the law; but by seeking and obtaining subsequent ratification from the people, he secured the supremacy of law and reminded the people that the Constitution was only the temporary steadying of a larger edifice. Though his defense of Lincoln is powerful, the line Klenerman says that Lincoln sought to draw may disappear under the press of modern exigencies. The line “Law, on a regular basis. But this may be, as they imply, merely a consequence of Bush’s misguided understanding of the nature of his powers. Islamism-inspired terrorism presents dangers of a sort quite unlike any we have had to confront in the past, and they are likely to continue for a very long time. And they may not be easily amenable to defeat in the form of actual, veritable encounters. Modern weapons and communications technology, for example, enable the enemy (who neither recognizes the rules of war nor adheres to the conventions of state actors) to strike from a distance with deadly effects.

The right policy for dealing with this threat is properly a matter for public debate, in which the people should be involved. But, operationally, only a president has the knowledge and the capacity to act quickly against the accidents and necessities that now confront us. That fact will very likely cause him to push the envelope of his discretionary power to the limit, not for reasons of self-aggrandizement but for public safety’s sake. Whether and how Congress should be informed of, or otherwise involved in, these operational details are again, matters for debate; but it is not immediately clear (other than on a high level of abstraction) how the lessons taught by Madison or Lincoln should apply to many features of the war against terror.

Klenerman and Fatovic argue, for example, that President Bush acted too often without consulting Congress. Despite Bush’s occasional extravagant claims to unilateral power, the charge will not withstand much scrutiny. The record will show that Congress was reasonably well informed on most, if not all, of the larger issues, and that it either formally authorized, or acquiesced in, virtually everything he did. All of which may simply be to say that the tradition of devoting attention to a problem and may not yield much in the way of practical results. As Locke, Madison, Jefferson, and Lincoln all recognized, albeit in different ways, self-preservation is the first law of liberal constitutionalism. One can only speculate about the advice they might have given President Bush under circumstances they could scarcely have imagined—whether our constitutional order would be necessarily better off if he had listened. Michael M. Uehliman is visiting professor of political science at Claremont Graduate University.
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