

## ARTICLE

### THE PRESIDENT'S TWO BODIES

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*The President has “two bodies.” One body is personal, temporary, and singular. The other is impersonal, continuous, and composite. American public law reveals different perspectives on how to manage—but cannot escape—this central paradox. Our major disagreements and confusions about presidential power track what we might think of as the fault lines between these two bodies. An array of seemingly disparate debates on topics ranging from presidential impeachment, to the ownership of presidential papers, to the availability of executive privilege, to a presidential duty to defend statutes in court, to the legal status of presidential tweets, to the role of the White House counsel, to the nature of presidential intent, to the legal remedies available for presidential misconduct reflect this longstanding, ongoing ambivalence about the nature of the presidential office.*

*The goal of this Article is to make the President’s two bodies central to American public law. Recognizing the two bodies provides analytical coherence to the structure of presidential power. It elucidates both our contestations over and the constituted reality of the constitutional presidency. The President’s duality brings into view traces of a personal,*

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*charismatic authority simultaneously in deep tension with and fundamentally constitutive of the institutional presidency. It reconstructs seemingly far-flung aspects of American public law (ranging in form from Founding-era debates, to judicial decisions, to statutory enactments, to presidential norms) as a shared effort to negotiate the President's two bodies. And it illuminates what is at stake—for presidential legitimacy, for governmental capacity, for checks and balances, and for our substantive constitutional commitments—in how public law handles this defining ambiguity. Ultimately, the legal lines connecting the two bodies cannot emerge from the duality itself. Rather, it is a normative project of public law to construct them—and to do so in furtherance of articulated substantive commitments. Even as the two-bodies prism reveals a crucial role for public law in constituting the office of the President, it shows as well the limits of law and legal methods in managing its central tension. Presidential charisma is both inseparable from American constitutionalism and itself governed—incompletely and provisionally—by choices that lawyers and jurists make about how to construct the President's duality.*

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## INTRODUCTION

*“For the King has in him two bodies, viz., a body natural, and a body politic. His Body natural (if it be considered in itself) is a body mortal, subject to all infirmities that come by nature or accident . . . . But his body politic is a body that cannot be seen or handled, consisting of policy and government, and constituted for the . . . management of the public-weal . . . .”*<sup>1</sup>

*“If I take the two phases, the President and the Presidency, the Man and the Institution, together, it is because, as I see it, while they are distinguishable at certain times and in the light of certain events, they are nevertheless inseparable.”*<sup>2</sup>

Our Constitution creates an office of “the President” to which a person is elected every four years. In parsimonious terms, Article II vests the executive power in the President.<sup>3</sup> But just what is the relationship between the person of the president and the office or institution of the presidency? The question is at the core of cases throughout the Article II canon. It is also at the crux of current debates about presidential power. Take a look:

- Are the personal motives of the president relevant to the constitutional exercise of the powers of the presidency?<sup>4</sup>
- Does the institution of the presidency necessitate immunity—from criminal indictment, injunctive relief, or civil damages—for the person of the president?<sup>5</sup>
- Can the institution of the presidency pardon the person of the president?<sup>6</sup>
- Who may assert executive privilege: only the sitting president or also his predecessors in office?<sup>7</sup> And to what materials does the

1. Case of the Duchy of Lancaster (1561) 75 Eng. Rep. 325, 326; 1 Plowd. 212, 213; see also Ernst H. Kantorowicz, *The King's Two Bodies: A Study in Mediaeval Political Theology* 7–9 (Princeton Classics Ed. 2016).

2. Louis Brownlow, *The President and the Presidency* 2 (1949).

3. U.S. Const. art. II, § 1, cl. 1.

4. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2417–18 (2018); cf. *Nixon v. Fitzgerald*, 457 U.S. 731, 755–56 (1982) (recognizing absolute immunity from damages liability in part so as not to have to investigate the president's motive).

5. See *Clinton v. Jones*, 520 U.S. 681, 701–06 (1997); *Fitzgerald*, 457 U.S. at 751; *United States v. Nixon*, 418 U.S. 683, 707–13 (1974); *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 498 (1866); *United States v. Burr*, 25 F. Cas. 30, 34–35 (C.C.D. Va. 1807) (No. 14,692d).

6. See Jack Goldsmith, *A Smorgasbord of Views on Self-Pardoning*, *Lawfare* (June 5, 2018), <https://www.lawfareblog.com/smorgasbord-views-self-pardoning> [<https://perma.cc/6ZS7-UZQQ>] (collecting competing views).

7. See *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 448–50 (1977).

presidential privilege extend?<sup>8</sup>

- Can the sitting president acquiesce to legal constraints on the presidency, thereby restraining the powers of the office?<sup>9</sup>
- Do orders made at the whim of the incumbent constitute binding presidential policy, or is some process of the institutional presidency required?<sup>10</sup>

We cannot really answer these questions without some understanding of the relationship or relationships between the individual and the institution at the center of Article II. Yet legal doctrine has alluded to that nexus mostly in passing, leaving the constitutional concept of the President underdeveloped. Even within the same doctrine or case, the Court's separate opinions often proceed from incommensurable (and often unarticulated) starting points relating to the president/presidency.

This Article offers a more systematic account of “the President” as a constitutional concept. Two distinct understandings emerge from the case law and commentary. On one view, there is no conceptual space between the individual elected to office and the office itself. Rather, the office is a repository of formal powers that the *person* possesses fully. The individual arrives in office with—indeed, is elected because of—particular ideological, political, and moral commitments, and he is to execute this vision of policy and governance. His personal leadership is the signal, albeit ephemeral, characteristic of the office. As a legal construct, “the President” is a *he* (perhaps one day a *she*).

On the other view, the presidential office is an *institution*. It is comprised of certain features—deliberative practices, substantive commitments, and institutional constraints—that are not fully within the control of any individual occupant. The characteristics of the office are more stable, the exercise of presidential power more continuous. The institution is a composite; the incumbent is not alone. These other actors protect and even augment presidential power, even as they entrench limits on the will of the sitting president. Presidential commitments—expressed through

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8. This question is at least as old as the trials of Aaron Burr, see *United States v. Burr*, 25 F. Cas. 187, 192 (C.C.D. Va. 1807) (No. 14,694) (“Letters to the president in his private character, are often written to him in consequence of his public character, and may relate to public concerns.”), and has recurred in current debates. For an illuminating account that applies Ernst Kantorowicz’s framework of the body natural/body politic to President Trump’s two twitter accounts (@POTUS and @realDonaldTrump), see Quinta Jurecic, *Body Double: What Medieval Executive Theory Tells Us About Trump’s Twitter Accounts*, *Lawfare* (Apr. 24, 2017), <https://www.lawfareblog.com/body-double-what-medieval-executive-theory-tells-us-about-trumps-twitter-accounts> [<https://perma.cc/RP3A-XG9N>].

9. See, e.g., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 495–98 (2010); *Morrison v. Olson*, 487 U.S. 654, 685–93 (1988); *INS v. Chadha*, 462 U.S. 919, 954–59 (1983).

10. See Daphna Renan, *Presidential Norms and Article II*, 131 *Harv. L. Rev.* 2187, 2221–30 (2018) [hereinafter Renan, *Presidential Norms*] (documenting a “deliberative presidency” norm and its institutional characteristics).

norm-governed practices, executive precedents, statutes, regulations, even litigation settlements—give structure and content to a more impersonal and indefinite office. As a legal construct, “the President,” if not quite a *they*, is at least an *it*.<sup>11</sup>

This ambivalence dates to the Founding, when the powers of the institution were created with the person of George Washington firmly in view. It is made only starker by political developments of the intervening centuries.<sup>12</sup> Our major disagreements and confusions about presidential power are disagreements that track what we might think of as the fault lines between the President’s “two bodies.”

My central claim is conceptual and analytic. As a constitutional conception, “the President” is an amalgamation of the individual president and the institutional presidency. Public law reveals different perspectives on how to manage—but cannot escape—this central tension. Rather, this duality *is* the constitutional office of the President. An array of seemingly disparate debates, both longstanding and quite current, on topics ranging from presidential impeachment, to the ownership of presidential papers, to the availability of executive privilege, to a presidential duty to defend statutes in court, to the legal status of presidential tweets, to the role of the White House counsel, to the nature of presidential intent, to the criminal indictability of a sitting president are elucidated through this prism.

Either “body,” on its own, misses something foundational about the nature of presidential power. Yet there is an overly personal thread in our Article II jurisprudence, a fixation with the individual notwithstanding the rise of the institutional presidency as a source of capacity, accountability, and legitimacy for the office. We see this, for example, in theories of an illimitable presidential prerogative and in some of the doctrine and advocacy around presidential immunities. These aspects of our law misconstrue how the presidency has accreted real or effective power. As a result, they offer a distorted view of the presidency as it has come to exist. We do not have a “one-man branch” of government (if we ever truly did), and such a president would not have the scope of power and discretion that the American presidency has developed.

Our current constitutional and political moment, however, helps to crystalize the risk from the other end as well. A public law that erases the incumbent’s influence from the decisions of the presidency risks sanitizing arbitrary and animus-inflected power. It also understates the role for

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11. Cf. Kenneth A. Shepsle, Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron, 12 *Int’l Rev. L. & Econ.* 239, 239 (1992).

12. Aspects of this duality have long been a focus of political science, in which a central disagreement among those who study the presidency has been whether personal and particularistic or impersonal (institutional and structural) perspectives better account for presidential power in American politics, or better predict presidential decisionmaking. See *infra* notes 170–181 and accompanying text (discussing these debates and some of the efforts toward synthesis).

individual judgment and charismatic leadership that our constitutional culture has come to expect and desire. There is a person at the heart of the presidency. He has agency and he has will. His moral and political clout—and his personal power, for good and ill—is a defining feature of the American constitutional experience.

There is a fundamental interdependence between the President's two bodies. To be tolerably responsive to problems of legitimate authority, governance, and legal accountability—that is, to core occupations of public law—a theory of presidential power must recognize the role that both bodies are playing. The President's duality is inescapable, and it is even in some respects desirable. But it poses a recurring dilemma for how public law engages questions of presidential power. Lawyers and jurists must negotiate this tension context by context, and they should do so with reference to the substantive constitutional values at stake. But a crucial first step, and the goal of this Article, is to make the duality central to American public law.

The argument proceeds as follows. Part I builds the two-bodies framework. It first uses the construct of the king's two bodies, at a formative moment in its development, as a way into the presidency. A set of functional axes or fault lines comprise the king's duality: One body is personal, temporary, and singular; the other is impersonal, continuous, and composite. Part I then sketches stylized accounts of what presidential power under either "body," standing alone, might look like. These single-body stories bring into view what each perspective offers—and also what it obscures—about the nature of presidential power. Part II grounds the two-bodies framework in some historical and political context. It shows as well the absence of any overarching theory of the president/presidency in the scholarship. Constitutional and political science accounts have oscillated between president- and presidency-based perspectives. Yet the relationship between the two bodies remains undertheorized, including—and perhaps especially—as a matter of public law.

Parts III–V establish the President's duality as the central tension of the presidential office. This is an encompassing claim, and it requires extensive substantiation. Organized around the duality's personal/impersonal, temporary/continuous, and singular/composite dimensions, these Parts show how the two-bodies prism illuminates our major confusions and disagreements about presidential power. Approaching the constitutional presidency in this way brings into view traces of a personal, charismatic authority simultaneously in deep tension with and fundamentally constitutive of the institutional presidency. It reconstructs seemingly far-flung aspects of American public law—ranging in form from Founding-era debates, to judicial decisions, to statutory enactments, to presidential norms—as a shared effort to manage the President's duality. And it helps us to unpack what is at stake—for presidential legitimacy, governmental capacity, checks and balances, and our substantive constitutional commitments—in how public law handles this defining ambiguity.

Part VI synthesizes the patterns and themes that emerge. It argues that the President's "two bodies" is the conception on which our understandings of presidential power rest.<sup>13</sup> The duality enables public law to equivocate on the constitutional idea of "the President": It *obscures* the ways in which each body creates anxieties about presidential power by emphasizing attributes that inhere in the other body and implying that those attributes pertain to the President as a whole. Yet the duality is also *constitutive* of a presidential office that embodies aspects of each; it orients practice toward these two intractable but ever-present impulses for what the constitutional office should actually entail.

Public law theory cannot solve or somehow move beyond the two-bodies paradox. But it can get the nature of the problems right. Recognizing the President's duality provides analytical coherence to the structure of presidential power. It elucidates both our contestations over and the constituted reality of the constitutional presidency. And it suggests that presidential charisma is both inseparable from American constitutionalism and itself governed—incompletely and provisionally—by choices that lawyers and jurists make about how to construct the President's duality.

Before beginning, a note on the project's scope: My focus is the American presidency. In a sense, the presidency is one application of a more endemic feature of constitutional government—and of constitutional culture more generally. A duality of roles is inherent in the concept of office. And a cult of personality—from Shakespeare's King Henry V, "twin-born with greatness,"<sup>14</sup> to our Madisonian separation of powers, to the Great Chief Justice, to the lions of the Senate, to the Notorious RBG—has always shaped how we think about institutional power and its relationship to personal leadership. There are meaningful continuities between the president/presidency and these other constitutional offices,<sup>15</sup> as well

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13. Cf. Martin Loughlin, *The Constitutional Imagination*, 78 *Mod. L. Rev.* 1, 12 (2015) [hereinafter Loughlin, *Constitutional Imagination*] ("[I]deology not only has a distortive or legitimacy role: it also has a constitutive function . . . . Ideology becomes the central concept of the constitutional imagination, the concept on which our understanding of the constitution rests.").

14. William Shakespeare, *King Henry the Fifth* act 4, sc. 1. An extensive literature explores Shakespeare's use of the king's two bodies, as well as Kantorowicz's own treatment of the two bodies in Shakespeare and other fiction. See, e.g., Victoria Kahn, *Political Theology and Fiction in The King's Two Bodies*, 106 *Representations* 77, 79 (2009) (positing that Kantorowicz's work presents two central arguments: the "Christological origin of secular constitutionalism in Shakespeare's England," and "the secular religion of humanity best articulated by Dante").

15. Legislative standing, for instance, illuminates both continuities and discontinuities with the presidency. At the crux of cases like *Raines v. Byrd*, 521 U.S. 811 (1977), is the question of how to understand the Members' injury: Is it an institutional injury (as the majority suggests, see *id.* at 821), a personal injury, or is it impossible to fully pry the two apart (as Justice Breyer argues in dissent, see *id.* at 841 (Breyer, J., dissenting))? If the conceptual and legal challenge points to a similarity with the President's two bodies, the available doctrinal solutions illuminate an important difference. In the legislative context,

as between the president and leaders more generally—whether corporate, nonprofit, social movement, or governmental—for whom a duality of identities poses ongoing conceptual, normative, and even legal difficulties.<sup>16</sup> The phenomenon might be extended further still, from the role of jurors (who straddle expectations of a relatively mechanical law-follower and a personal expositor of local mores) to the meaning of citizenship itself.

Yet the relationship between individual presidents and the presidency is also distinctive. The idea that the person of the president, by virtue of his election, becomes the singular representative of “the people” as a whole figures prominently in American constitutionalism. Our prevailing theories of legitimacy—of the administrative state and of American democracy, at least at the national level—rely on an idea of a presidential “mandate” that is almost mystical given its cultural and constitutional force combined with the paucity of its empirical and theoretical support.<sup>17</sup> And while the “anthropomorphization of the branches” is routine in constitutional theory,<sup>18</sup> its single head makes the executive branch different.<sup>19</sup> The nature of presidential power and the means of exercising it also are less delineated than the nature and means of exercising legislative or judicial power.<sup>20</sup> If a judge or senator tweets, we do not wonder whether she has

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the collective institutional body provides a way out of the two-bodies problem by looking to group action as indicia of institutional power.

The two-bodies framework can also be extended inside the agencies, for example, with respect to the question of when, or under what conditions, the reason-giving of the Department of Commerce, as an institution, impermissibly diverges (and “distract[s]”) from the reasons of the Secretary as an individual. See *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2572–76 (2019).

16. This duality is especially stark in connection to tech companies like Facebook, which have come to play a sweeping role in American life but still operate under the close control and personality-driven vision of a particular founder. See, e.g., Chris Hughes, *It’s Time to Break Up Facebook*, N.Y. Times (May 9, 2019), <https://www.nytimes.com/2019/05/09/opinion/sunday/chris-hughes-facebook-zuckerberg.html> (on file with the *Columbia Law Review*) (arguing that too much power is wrapped up in the person of Mark Zuckerberg).

17. See Robert A. Dahl, *Myth of the Presidential Mandate*, 105 *Pol. Sci. Q.* 355, 356 (1990); Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 *UCLA L. Rev.* 1217, 1231–46 (2006); see also B. Dan Wood, *The Myth of Presidential Representation* 21–26 (2009).

18. David E. Pozen, *Self-Help and the Separation of Powers*, 124 *Yale L.J.* 2, 13 (2014).

19. The debate over a “unitary” executive is one instantiation of this more pervasive tension, and it is a disagreement itself illuminated by the two-bodies framework. Inconsistencies and confusions about the relationship between the president’s individual control over administration and the role of his personal rhetoric in the adjudication of presidential authority, for example, are discussed in section V.B. See also *infra* notes 413–422 and accompanying text (discussing the question of how the president binds the presidency).

20. See Edward S. Corwin, *The President: Office and Powers, 1787–1948: History and Analysis of Practice and Opinions* 1 (3d ed. 1948) (“[W]hereas ‘legislative power’ and ‘judicial power’ today denote fairly definable functions of government as well as fairly



issued a judicial opinion or enacted legislation. But the question whether the president's tweets establish U.S. legal policy is unsettled and genuinely contested.<sup>21</sup> If a judge or senator takes decision memos home, we are left with a judicial opinion resolving the case or a congressional record and the resulting legislation. But when individual presidents leave office with their records, they take with them an institutional precedent of the presidency. If a judge or senator suffers a stroke or other such disability, we do not require a constitutional amendment to continue the work of government. Yet the question of how to handle presidential inability poses profound constitutional uncertainty, culminating in (and not fully resolved by) the Twenty-Fifth Amendment. As these examples suggest, the President's duality comprises a central paradox in the structure of American constitutional government—a paradox foreshadowed in the doctrine of the king's two bodies.

## I. THE "TWO BODIES" FRAMEWORK

### A. *Defining the (King's) Two Bodies*

Medieval historian Thomas Bisson argues that an "accountability of office" emerged from the experience of power without government in the twelfth century.<sup>22</sup> Feudal lords exercised immense power—arbitrary, violent, and comprehensive—with little to no accountability and only limited capacity for governance. From this "crisis of the twelfth century," Bisson traces a trajectory—piecemeal, nonlinear, at times accidental—toward a more public-interested understanding of authority, a felt need for competence and capacity in governance, and the development of mechanisms to restrain the exercise of raw power and hold it to account.<sup>23</sup> The construct of "the King's Two Bodies," whose medieval roots are recounted in Professor Ernst Kantorowicz's classic work, provides another building block in the development of the modern state.<sup>24</sup> Derived from theological

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constant methods for their discharge, 'executive power' is still indefinite as to function and retains, particularly when it is exercised by a single individual, much of its original plasticity as regards method.").

21. See, e.g., Jim Baker, Donald Trump, Twitter and Presidential Power to Interpret the Law for the Executive Branch, *Lawfare* (Aug. 24, 2018), <https://www.lawfareblog.com/donald-trump-twitter-and-presidential-power-interpret-law-executive-branch> [<https://perma.cc/KLM3-LKC8>]; see also Katherine Shaw, Speech, Intent, and the President, 104 *Cornell L. Rev.* 1337, 1384–85 (2019).

22. See Thomas N. Bisson, *The Crisis of the Twelfth Century: Power, Lordship, and the Origins of European Government 16–19* (2015).

23. See *id.* Bisson was writing against earlier portrayals of the twelfth century, such as Joseph R. Strayer, *On the Medieval Origins of the Modern State* 34 (2005) (arguing that it was "between 1000 and 1300 [that] some of the essential elements of the modern state began to appear"). See also Charles Homer Haskins, *The Renaissance of the Twelfth Century* 193–222 (1927).

24. See, e.g., Martin Loughlin, *The State, the Crown and the Law*, in *The Nature of the Crown: A Legal and Political Analysis* 33, 42 (Maurice Sunkin & Sebastian Payne eds.,

understandings of Christ as both man and god, the king's duality established the individual king as "inseparable, though distinct" from the kingship.<sup>25</sup>

This section elaborates the construct of the king's two bodies along three dimensions: (i) the person of the king versus the impersonal qualities of office; (ii) temporary kings versus continuity in royal governance; and (iii) individual rulers versus the "composite" institution of the Crown.<sup>26</sup> I focus on these three dimensions because they capture, in combination, a recurring dilemma in the structure of executive power. The king's duality, as we will see, is reenacted in different terms in the context of the American presidency.

1. *Personal/impersonal.* — The doctrine of the king's two bodies offered a bridge between medieval understandings of personal kingship and the more "impersonal concepts of [modern] government."<sup>27</sup> Sixteenth- and early seventeenth-century lawyers developed the doctrine to resolve practical problems of capacity and authority as they arose with respect to individual monarchs. In so doing, however, the "two bodies" created—or rather, the lawyers created—an opening for constitutionalism as a restraint on divine right.<sup>28</sup>

Kantorowicz opens with the sixteenth-century *Case of the Duchy of Lancaster*, which found that Edward VI, an underage minor incapable of transferring land in his "body natural (if it be considered in itself)," nevertheless lawfully alienated land as a result of his ageless "body politic."<sup>29</sup> The two bodies are indivisible, though their capacities are distinct.<sup>30</sup> By *Calvin's Case*, decided in 1608, the king has two bodies "but one

1999) [hereinafter Loughlin, *The State*] ("[T]he idea of the State as an apparatus of government distinct from those who happen to have control of it [provides] the first stage in the development of the modern conception of the State.").

25. See Kantorowicz, *supra* note 1, at 382 (internal quotation marks omitted) (quoting Francis Bacon, *Post-Nati*, in *Works of Sir Francis Bacon* at VII, 670 (J. Spedding & D. D. Heath eds., 1892)).

26. These dimensions emerge from Kantorowicz's account, though he did not organize his study around them. See *id.* at 5 (observing how the king's two bodies seeks to reconcile "the personal with the more impersonal concepts of government"); *id.* at 273 (arguing that "the concept of the 'king's two bodies' camouflaged a problem of continuity" in governance); *id.* at 363 (contrasting the individual of the king with the "composite character" of the Crown).

27. *Id.* at 5; see also 3 W.S. Holdsworth, *A History of English Law* 351–61 (1909) [hereinafter 3 Holdsworth, *History of English Law*]; Guy I. Seidman, *The Origins of Accountability: Everything I Know About the Sovereign's Immunity, I Learned from King Henry III*, 49 *St. Louis U. L.J.* 393, 431–45 (2005).

28. Cf. Kantorowicz, *supra* note 1, at 18–23 (emphasizing "the Puritan cry of 'fight[ing] the *king* to defend the *King*'").

29. *Case of the Duchy of Lancaster* (1561) 75 Eng. Rep. 325, 326; 1 *Plowd.* 212, 213; see also Frederic Maitland, *The Crown as Corporation*, 17 *L.Q. Rev.* 131, 134 (1901).

30. Kantorowicz, *supra* note 1, at 9–12.

person.”<sup>31</sup> Pursuant to this logic, individuals born in Scotland after the king of Scotland also became King James I of England were understood to be subjects of the person of the king and, as a result, entitled to the protections of English law.<sup>32</sup> The king’s duality thus justified James’s royal proclamation recognizing mutual subjectship, notwithstanding parliamentary opposition to recognizing the *postnati* as English subjects capable of holding English land and suing in the royal courts.<sup>33</sup>

Even as it enhanced the authority of individual kings, the two-bodies construct also made it possible for law (or crown lawyers) to begin to separate “the will of the Crown . . . [from] what the king wants.”<sup>34</sup> In both emphasizing their unity and recognizing their difference, the construct paved the way for public law to operate as a constraint on royal power. Sixteenth-century lawyers drew a distinction between “prerogatives which were inseparable from the person of the king” and “prerogatives which were not . . . .”<sup>35</sup> As to those prerogatives that the lawyers deemed inseparable (like the pardon power), the king had “unfettered discretion”; for other acts, such as “the issue of proclamations, the making of grants, or the seizure of property,” the law could impose conditions.<sup>36</sup> The legal contours of an “inseparable” prerogative are inherently indeterminate and, as a result, subject to development *by* the lawyers.<sup>37</sup> Contestation over its scope and source led toward the indefeasible prerogative’s collapse.<sup>38</sup>

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31. Calvin’s Case (1608) 77 Eng. Rep. 377, 389; 7 Co. Rep. 1 a, 10 b.

32. See Loughlin, *The State*, supra note 24, at 57 (discussing the significance of *Calvin’s Case* for the development of the king’s two bodies).

33. See Daniel J. Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664–1830*, at 22–23 (2005) (“The decision seems limited today, amid claims of human rights and calls for universal jurisdiction . . . [but it] was radical for its time because it encouraged mobility throughout the king’s composite monarchy.”).

34. Kantorowicz, supra note 1, at 18.

35. W.S. Holdsworth, *The Prerogative in the Sixteenth Century*, 21 Colum. L. Rev. 554, 557 (1921) [hereinafter Holdsworth, *Prerogative in the Sixteenth Century*].

36. *Id.* at 560–61.

37. *Id.* at 560.

38. See Julian Davis Mortenson, *Article II Vests Executive Power, Not the Royal Prerogative*, 119 Colum. L. Rev. 1169, 1196–1200 (2019) (arguing that the 1701 Act of Settlement marked a “seismic [shift whereby] . . . earlier generations’ search for a theory to justify and describe some essential core of indefeasible royal authority simply ended” and all of the king’s prerogatives were made subject to the rule of law and parliamentary supremacy); see also Glenn Burgess, *The Politics of the Ancient Constitution: An Introduction to English Political Thought, 1603–1642*, at 153–67 (1992) (discussing contestation over the sources and scope of “absolute” and “ordinary” prerogatives in the 1600s).

2. *Temporary/continuous*. — The duality enabled English constitutionalism to distinguish, however incompletely, between the “king’s temporariness” and the “King’s sempiternity.”<sup>39</sup> Kantorowicz traced, for example, the medieval origins of the fisc, separated “as something for the common utility” from the person of the monarch and inalienable by him.<sup>40</sup> Underlining the interdependence of the two bodies, however, the continuity of the fisc was enforced by the promise of individual kings, through their coronation oaths, not to alienate the rights and possessions of the Crown.<sup>41</sup>

Though incarnated in a particular king, the King represented “the long file of predecessors and the long file of future . . . successors” coinciding with the incumbent;<sup>42</sup> it was in this sense that “the King never dies.”<sup>43</sup> Sixteenth-century jurists recast the king’s “demise” as “a Removal of the Body politic of the King of this Realm from one Body natural to another.”<sup>44</sup> Conceptually, this made possible the move away from transient governance, whereby delegation from the king to judges and other officials expired with each king’s death, thus requiring litigation and a range of government processes to begin anew under the next monarch. It would take statutory incursions on the mystical Crown, however, to implement this shift as law.<sup>45</sup>

Indeed, legislation ultimately specified even royal succession itself. What had previously been determined by the accidents of fertility and birth order was now ordained by statute.<sup>46</sup> In this way, English constitutionalism

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39. Kantorowicz, *supra* note 1, at 20; see also *id.* at 316 (attributing the continuity of the King to “the interplay of three factors: the perpetuity of the Dynasty, the corporate character of the Crown, and the immortality of the royal Dignity”).

40. *Id.* at 343 (internal quotation marks omitted) (quoting Gaines Post, *The Two Laws and the Statute of York*, 29 *Speculum* 417, 423 (1954)).

41. See *id.* at 342–46.

42. *Id.* at 312.

43. *Id.* at 314.

44. *Id.* at 13 (quoting *Willion v. Berkley* (1562) 75 Eng. Rep. 339, 356; 1 Plowd. 223, 234); see also Marc L. Roark, *Retelling English Sovereignty*, 4 *Brit. J. Am. Legal Stud.* 81, 106–09 (2015) (discussing *Hill v. Grange* (1556) 75 Eng. Rep. 253, 273; 1 Plowd. 164, 178, in which “the court calls the name of the king ‘the body politic,’ a name of ‘continuance, which shall always endure as the head and governor of the people as the law presumes’”).

45. See Maitland, *supra* note 29, at 136 (observing that “[t]he consequences of the old principle had to be picked off one after another by statute,” and lamenting that “[w]hen on a demise of the Crown we see all the wheels of the State stopping . . . it seems an idle jest to say that the king never dies”).

46. See Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* 159–61 (1999) (“For extreme royalists before 1689, the law governing the royal succession was by far the most important example of a law that could never be changed.”); Mark Kishlansky, *A Monarchy Transformed: Britain 1603–1714*, at 293 (1996) (discussing two statutory principles established in 1689, “that no Catholic could rule and . . . no ruler could be married to a Catholic,” and observing that the latter so greatly encroached “upon royal prerogative that Queen Elizabeth . . . once dissolved a parliament and imprisoned her own counsellors at its suggestion”).

managed vexing problems involving the stability of royal government—problems created by the king's "dynastic continuity"<sup>47</sup>—through the fragmentation of political power.<sup>48</sup>

3. *Singular/composite*. — The foregoing suggests two senses in which the institution relates to the individual. Even if we think about the kingship as inhabited by only one person, we might say that the institution imposes certain conditions (for instance, public-regarding commitments) on the person.<sup>49</sup> Understanding the individual as conceptually distinct from the institution, in turn, creates the possibility that others inhabit the institution as well—that even though the king is one, the Crown is not.<sup>50</sup> Feudal understandings that the king, like any lord, could not be sued in his own courts contributed to the rise of a system of ministerial accountability.<sup>51</sup> The king could act only *through* others, and these officers or ministers could be held responsible.<sup>52</sup> Impeachment became the "edifice" through which Parliament held royal power to account by way of the composite.<sup>53</sup>

Even as it helped to reconcile the competing pulls of royal authority and constitutional accountability, the ambiguity inherent in the king's duality made it possible, if not likely, that the same construct would be used

47. Kantorowicz, *supra* note 1, at 317.

48. These problems ranged from the continuity of a national religious identity and approaches to religious tolerance to the nature of "foreign entanglements," also utterly dependent on "[t]he different personalities and circumstances of the ruler." Kishlansky, *supra* note 46, at 39.

49. Cf. Lorna Hutson, *Imagining Justice: Kantorowicz and Shakespeare*, 106 *Representations* 118, 123–24 (2009) ("[W]hat emerges perhaps most powerfully from [Kantorowicz's account] . . . is a sense of how the ingenuity of juristic reasoning . . . transformed theological expressions and ideas into ways of conceptualizing . . . a perpetual public good.").

50. See Kantorowicz, *supra* note 1, at 381 (observing that the Crown in some ways "coincide[d] with the king" but in other ways "appeared . . . as a composite body, an aggregate" that included but was not coextensive with the king).

51. See 3 Holdsworth, *History of English Law*, *supra* note 27, at 465–66; see also Seidman, *supra* note 27, at 431.

52. See, e.g., Edward Bagshaw, *The Rights of the Crown of England as It Is Established by Law* 105–06 (London, A.M. 1660) ("For the King doth nothing in his own Person . . . which is the reason why it is said in our Law, that the King can do no wrong; for if the Subject . . . be wronged, it is by some Judge, Officer, or Minister . . ." (emphasis omitted)); cf. Joel T. Rosenthal, *The King's "Wicked Advisers" and Medieval Baronial Rebellions*, 82 *Pol. Sci. Q.* 595, 597 (1967) (arguing that accusing the "wicked advisers" enabled medieval barons to "oppose[] the king and yet avoid[] a decisive clash with the theoretical basis of . . . kingship").

53. Mary L. Volcansek, *British Antecedents for U.S. Impeachment Practices: Continuity and Change*, 14 *Just. Sys. J.* 40, 42 (1990) ("The process dated from medieval England and was essentially a consequence of legal folklore, around which lawyers structured an elaborate edifice."); see also Raoul Berger, *Impeachment: The Constitutional Problems* 1–2 (1973) [hereinafter *Berger, Impeachment*] ("The follies of James I led Parliament once more . . . to revive impeachment after a lapse of about 160 years, in order to bring corrupt and oppressive ministers to heel.").

instrumentally to advance opposing interests. James I invoked the unity of the two bodies to argue that rebellion against the ruling king was not only unlawful but “monstrous and unnatural.”<sup>54</sup> By the English Civil War, revolutionaries in parliament argued that they were opposing the person of the monarch—impeaching Charles Stuart, the man, for high treason and ultimately beheading him—in order to preserve the monarchy.<sup>55</sup> That the idea of the king’s two bodies contained within it this central ambiguity—that the same conception could be used to advance two inherently conflicting understandings of power—is a recurring theme of Kantorowicz’s exegesis.<sup>56</sup>

The king’s “two bodies” is a story not of hidden truths but of the creativity of constitutional argument—its obscuring and constitutive potential—and the role of lawyers and public law in constituting kingship.<sup>57</sup> It does not transfer to the presidency in its specifics. But it illuminates the analytic structure of a duality that endures and, it turns out, permeates our disagreements and confusions about presidential power.<sup>58</sup> Indeed, the sixteenth-century construct was itself foreshadowed in different terms in the medieval *gemina persona*. Exposing how the patterns, concepts, and conflicts inherent in the earlier duality “were not simply wiped out” but instead “translated” into new modes of thinking and institution building was Kantorowicz’s central aim.<sup>59</sup> There is an inherent instability to the duality, and a stubborn translucence to the two bodies. A respect for the charismatic is not “wiped out” in the American experience. It is there in the

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54. James I, *The Trew Law of Free Monarchies*, in *The Political Works of James I*, at 53, 65 (Harvard Univ. Press 1918) (1616). The idea of divine right propounded by James I, and the corporeal metaphor he used to develop it—of the king as “head of a bodie composed of divers members,” *id.* at 64—was itself a source of both authority and constraint on the king, see Edmund S. Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* 18 (1988) (“[T]he fiction . . . gave to the many a measure of control over the man to whom the fiction seemed to subject them so absolutely.”).

55. Kantorowicz, *supra* note 1, at 23. Kantorowicz argued that Parliament “succeeded . . . in executing solely the king’s body natural without . . . doing irreparable harm to the King’s body politic.” *Id.* Others contend that “irreparable harm” did occur “if not to monarchy itself, then precisely to the king’s body politic.” Michael Walzer, *Regicide and Revolution*, 40 *Soc. Res.* 617, 632 (1973); see also Katherine Bootle Attie, *Remembering the Body Politic: Hobbes and the Construction of Civic Immortality*, 75 *ELH* 497, 498 (2008) (“[With] the beheading of Charles I . . . both of the king’s bodies died on the scaffold.”).

56. See, e.g., Kantorowicz, *supra* note 1, at 369–72 (discussing the diametrically opposed uses of the duality in the deposition of Richard II and its aftermath).

57. The conflictual implications of the king’s two bodies continue to be debated in current times. See, e.g., Loughlin, *The State*, *supra* note 24, at 33–34.

58. Political scientist Michael Rogin draws an analogy to the king’s two bodies in his work on American political “demonology,” focusing in particular on the presidency. See Michael Rogin, *Ronald Reagan, the Movie: And Other Episodes in Political Demonology* 82 (1988) (“[T]he doctrine of the king’s two bodies offers us a language in which confusions between person, power, office, and state become accessible.”).

59. Kantorowicz, *supra* note 1, at 115.

very structure of the chief executive. But it is again combined through new modes of thinking and institution building—the work of lawyers and public law—with a more impersonal and continuous composite. The constitutional conception of “the President” is the amalgamation of these two ever-present and conflicting impulses.

B. *The President and the Presidency*

The President has two bodies; these are two distinct frames for understanding presidential power.<sup>60</sup> Each body suggests a set of responses to the problems of legitimate authority, governance, and legal accountability—that is, to interconnected elements of presidential power. The scope of power and discretion that presidents exercise demands a theory of legitimate authority, or the source of power underspecified if not unimagined in a Founding text.<sup>61</sup> A public law theory of presidential power must also justify how the president governs. And it must respond to the question of whether and how it is appropriate for courts and lawyers to hold the chief executive to legal account. This section sketches a stylized (and thus not wholly realistic) account of how each body, standing alone, would address these preoccupations of public law. When we try to imagine such “single body” stories, we can begin to see what each leaves out or misconstrues about the nature of presidential power.

1. *The president.* — What would it mean to understand the presidency solely as an individual? On this telling, the president is a charismatic leader.<sup>62</sup> His authority is justified by his personal connection to the people through election. He is their chosen leader, selected because of a set of ideological, political, or moral qualities and commitments. Public law facilitates the individual’s charismatic legitimacy by ensuring, for example, that his vision is not undermined by the decisions or precommitments of

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60. Cf. Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 *Stan. L. Rev.* 591, 593 (1981) (“Legal argument can be made only *after* a fact pattern is characterized by interpretive constructs [including timing ‘frames’].”); Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 *Yale L.J.* 1311, 1314 (2002) (“The results of constitutional cases turn on . . . often-invisible transactional frames.”).

61. See Stephen Skowronek, *Presidential Leadership in Political Time: Reprise and Reappraisal* 10 (2008) (defining authority as the “warrants for change that presidents bring to the exercise of . . . power”); see also Daniel Carpenter, *Reputation and Power* 17–19 (2010); Frank I. Michelman, *Ida’s Way: Constructing the Respect-Worthy Governmental System*, 72 *Fordham L. Rev.* 345, 346–47 (2003).

62. See Max Weber, *The Spirit of Work and Vocation* Second Lecture: *Politics as Vocation* (1919), in *Weber’s Rationalism and Modern Society* 133, 137–39 (Dagmar Waters, Benjamin Elbers & Tony Waters eds. & trans., 2015) (developing a conception of “charismatic authority” and arguing that this basis for the legitimacy of political authority depends on “traits characteristic of a Leader,” whether a “chosen warlord, . . . [a] popularly elected ‘Ruler,’ [or] the Leader of political parties”).

prior presidents—that he can effectuate his individual will as the office of the presidency.<sup>63</sup>

The characteristics of presidential governance are contingent on the incumbent. The policy commitments of the presidential office are ephemeral; they reflect the ideological and programmatic preferences of this singular individual. Presidential discretion is an exercise of his sole fiat. Edicts made at the whim of the individual, however informally, comprise the binding orders of the presidency. But they are also time limited. The president's orders are binding only during his term in office. They lack constitutional significance, or any legal relevance for the incumbent's successors.

Since the incumbent alone *is* the presidency, the purpose of any presidential decision is his intention or motive. If he is motivated by impermissible animus, so is the policy or action itself. There is no conceptual daylight between the incumbent's judgment and the decisions of his presidency. This means, for example, that unfiltered presidential speech, even tweets, may be especially probative of presidential purpose. Note that this is a normative idea, not a predictive claim, though the two are related. Political scientists have long debated whether the personal qualities or institutional features of the presidency better explain presidential decisionmaking.<sup>64</sup> The legal question whether presidential intent refers to the incumbent or the institution, however, is not entirely, perhaps not primarily, empirical. It entails “some value judgment about what *should* count” as the presidency's “intended decision and why.”<sup>65</sup> If we understand constitutional authority and legitimacy in governance to turn on the will of the individual—his words, his motives—then we might think that rights infringement requires a sniffing out of his impermissible purpose and that the legal interpretation of presidential instruments is an exercise in implementing this one individual's avowed intent.

And yet, on the exclusively individual account, the president's legal liability poses a special kind of concern. If executive governance is a “one-man show,” legal process (such as the issuance of subpoenas or other exposure to judicial review) might dangerously intrude on the work of this one individual and his symbolic power as the embodiment of executive government. Some forms of legal accountability present an additional concern: If department heads are his alter egos, there to do his bidding, then the president, in effect, would be investigating himself. This body thus presents something of a contradiction for public law; it arguably necessitates robust immunity for the incumbent, even as his motives and his

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63. Cf. Jacob E. Gersen, *Unbundled Powers*, 96 Va. L. Rev. 301, 324–28 (2010) (arguing that accountability requires institutional clarity and control).

64. See *infra* section II.B.

65. John F. Manning, *Without the Pretense of Legislative Intent*, 130 Harv. L. Rev. 2397, 2431 (2017).



judgment would appear central to a system that holds presidential power to legal account.

2. *The presidency.* — What would it mean to have an exclusively institutional presidency—one that fully eclipses the individual? As a matter of constitutional authority, presidential power would stem from the accumulated understandings and practices of the presidency over time—in ways that both empower and bind the current occupant. The scope and sweep of presidential authority, on this account, turn largely on historical practice. This means that the precedent of the presidency has legal and moral consequence; it is a source of practice-based legitimacy.<sup>66</sup>

With respect to questions of governance, the presidential office would be comprised of certain features—deliberative practices, substantive commitments, norms, and institutions—that are not within the incumbent's control. The orders or directives of the president might require some sort of institutional process or interagency input to be treated as the binding and legitimate directives of the presidency. Governance, on this view, is more processual and pluralistic; we might call it “deliberative.”<sup>67</sup>

On this account, the means of institutional continuity become a core concern of public law. Presidential orders outlast the issuer; they continue to bind actors inside the executive branch—at least until formally revised or rescinded. Presidential papers become a form of institutional precedent. And presidential commitments, whether made in litigation settlements or administrative regulation, comprise the ongoing and consistent obligations of a continuous body.

Legal accountability for the person of the president no longer poses a special kind of concern. It begins to look like ordinary legal oversight. This is in part because the president is not investigating himself. But it is more fundamentally because the presidency, as an institution, routinely operates under legal scrutiny. This has implications for both the president's personal exposure to the criminal process and the legal remedies available for his misuse of presidential power. If the presidency is a continuing office separate from the individual, then the institution is permanent and largely indestructible through investigations of the incumbent. A president who is indicted might be personally disabled (perhaps implicating the Twenty-Fifth Amendment). But the president's individual exposure does not pose a risk to the institution. Rather, the presidency is more resilient and more durable than is any temporary occupant. With respect to the president's official conduct, it raises no special concern to enjoin the individual. Doing so is identical to enjoining the institution of the

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66. This conception is closest to Weber's idea of rational or bureaucratic authority, see Weber, *supra* note 62, at 138, though it incorporates elements of custom and practice (which arguably straddle Weber's traditional source of authority as well, see *id.* at 137).

67. Cf. Renan, *Presidential Norms*, *supra* note 10, at 2221–30 (documenting a family of norms that comprise the “deliberative presidency”).

presidency, holding it to legal account for the exercise of presidential power.

In adjudicating presidential power, moreover, public law would understand the intent of the presidency as an institutional inquiry involving a collective body—more akin to “legislative intent” than to an individual’s reasons for action.<sup>68</sup> If the legal concept of presidential intent concerns a composite institution, not an individual, then the positions of the presidency that have undergone a more regularized institutional process are more probative of presidential purpose, and more normatively desirable as a source of legal meaning.<sup>69</sup>

Finally, the presidency necessitates a different form of law. Rather than criminal law or tort law, the presidency requires a legal regime addressed to institutional executive governance; it necessitates “administrative law.”<sup>70</sup>

3. *The President’s duality.* — The President’s two bodies thus provide distinct and, in important respects, competing accounts of presidential power. Representative elements of this duality are collected in the figure below.

**FIGURE 1. THE PRESIDENT’S TWO BODIES**

<i>Personal president</i>	<i>Institutional presidency</i>
Charismatic legitimacy	Practice-based legitimacy
Governance by edict	Deliberative governance
Transient ideological and policy commitments	Stable and consistent administration
Robust legal immunity	Ordinary legal oversight
Criminal and tort law	Administrative law

68. Cf. Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 *Chi.-Kent L. Rev.* 123, 134 (1989) (“Statutes are . . . the vector sum of political forces expressed through some institutional matrix which has had profound, but probably unpredictable and non-traceable, effects on the policies actually expressed.”); Shepsle, *supra* note 11, at 248 (“[W]e have only a limited capacity to distinguish between what [individual] legislators want and what various procedural elements have foreordained.”).

69. Cf. Shaw, *supra* note 21, at 1384–86 (arguing that “the values of process and rigor suggest that [Justice Department briefs and similar documents] . . . should be treated as containing the authoritative statements of the position of the executive branch,” in contrast to “isolated presidential statements”).

70. By administrative law, I do not mean the Administrative Procedure Act (APA). Rather, I use the term administrative law expansively to capture a body of law that “builds and binds” the presidency as an institution of executive governance. See Jerry L. Mashaw, *Creating the Administrative Constitution* 16 (2012) [hereinafter Mashaw, *Administrative Constitution*].

Neither body, on its own, fully captures our constitutional understandings of “the President.” Rather, the constitutional presidency is *both* bodies simultaneously. American public law reveals an ongoing struggle with this duality.<sup>71</sup>

The foregoing points to a final conceptual question: What is the presidency? The term is often used and rarely defined. One way to define the presidency is *organizationally*. If we imagine concentric circles around the incumbent, different boundaries suggest greater conceptual and organizational distance from the person. The presidency might be limited to close informal advisers or, more formally, to the White House Office. Expanding out, it could include the entire Executive Office of the President (EOP).<sup>72</sup> We might even say that the presidency includes all of the Cabinet Departments or, broader still, the executive branch as a whole. In discussing the presidency, political scientists generally focus on the EOP. Lawyers and legal scholars tend to shift among these units of analysis, sometimes for convenient shorthand, sometimes because of fundamental (if obscured) normative disagreements about where and how to draw the line.<sup>73</sup>

Another way to define the presidency would be *from the perspective of public law*. That is, we might define the presidency in terms of the legal and quasi-legal rules (both substantive and procedural) that constitute the institution. Some of these rules are contained in the constitutional text itself. For example, the president serves a four-year term and is selected through the Electoral College. Some of these rules are contained in statutes and judicial precedent. Most of these rules exist as the policies, norms, and institutional practices of the presidency—what we might collectively call “presidential practice.”

Adapting a familiar schematic from the field of statutory interpretation, we can conceptualize this “public law” design of the presidency in terms of a funnel.<sup>74</sup> The text of Article II comprises the narrow bottom, which opens up into the more sizeable (in scope and reach) category of presidential practice at the top (with statutes and judicial precedent as

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71. For clarity of exposition, I will refer to either body alone as the *president* or *presidency*, and to both bodies together as the *President*.

72. Identifying the size of the EOP is notoriously difficult. See John Hart, *The Presidential Branch* 43–44 (1987). To give a rough sense of size and scale, the fiscal year 2018 budget estimate for all components within the EOP was \$754,917,000 or 1932 full-time employees (FTEs), and for the White House Office it was \$55,000,000 or 450 FTEs. Exec. Office of the President, *Fiscal Year 2018 Congressional Budget Submission EOP-3–4, EOP-8* (2017), <https://www.whitehouse.gov/sites/whitehouse.gov/files/docs/EOP-FY18-Budget.pdf> [<https://perma.cc/JY9G-EJVV>]. This may significantly understate the resources of the EOP, however, because it does not appear to include “detailees” from other agencies. On the “prodigious growth” of the EOP, see Stephen Hess & James P. Pfiffner, *Organizing the Presidency* 5 (3d ed. 2002).

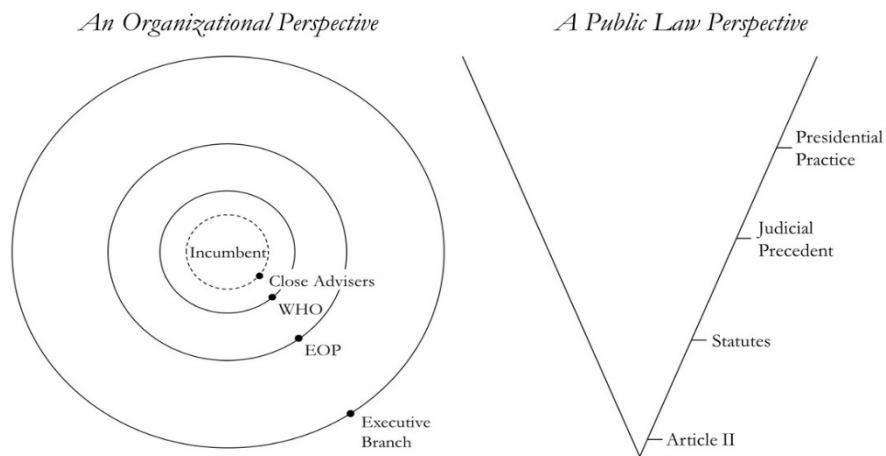
73. See *infra* sections V.B–C.

74. See William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 *Stan. L. Rev.* 321, 353 (1990) (proposing the “funnel of abstraction” to illuminate how jurists engage in statutory interpretation).

intermediate points along the funnel). Meaning flows in both directions:<sup>75</sup> Presidential electors, for example, are specified in the constitutional text, but they are given different meanings over time through the conventions that govern the Electoral College.<sup>76</sup> The statutory creation of the National Security Council gained (and changed) meaning over time as a result of the norms that govern national security decisionmaking.<sup>77</sup> And the status of presidential precedent, including the practice of individual presidents with respect to their papers, changed as a result of both statutes and judicial precedent.<sup>78</sup> The schematic of a funnel thus helps to visualize the presidency as a product of public law, a term this Article uses expansively to include both formal and informal sources.

These coexisting meanings of the presidency—one rooted in organizational structure, the other in a public law perspective—are captured in the following visualization.

**FIGURE 2. WHAT IS THE PRESIDENCY?**



These are two ways of identifying an institution of the presidency distinct but inseparable from the individual president. They are also interconnected. Statutes, judicial precedent, and presidential practice structure the organizational units that comprise the presidency and set the terms of the relationships between the incumbent and these other actors. Meanwhile,

75. Cf. *id.* at 354 (“[T]he interpreter will move up and down the diagram, evaluating and comparing the different considerations represented by each source.”).

76. See Keith E. Whittington, *The Status of Unwritten Constitutional Conventions in the United States*, 2013 U. Ill. L. Rev. 1847, 1857–58.

77. See Renan, *Presidential Norms*, *supra* note 10, at 2224–28.

78. See *infra* section III.C.2.

the existence of close advisers, a robust EOP, and some offices of the executive branch more generally (such as the Office of Legal Counsel) makes possible the decisional and epistemic environment necessary to entrench norms and regularize practice.

These understandings of the presidency also underscore an irreducible interdependence between the two bodies. The president's "team," for instance, blurs the boundary between the personal and the institutional: It is forged through personal relationships, but it serves institutional interests in a deliberative and coordinated presidency.

## II. CONSTRUCTING THE PRESIDENCY: A DEFINING AMBIGUITY

The uneasy relationship between individual presidents and the presidency is as old as the presidency itself. Pierce Butler, a delegate at the Constitutional Convention, famously remarked that the Framers probably would not have designed such a powerful President had they not "cast their eyes towards General Washington . . . and shaped their ideas of the powers to be given to a president by their opinions of his virtue."<sup>79</sup> The President's duality is at once intrinsic in the structure of the office, and mediated or constructed in distinct (but layered) ways by different actors over time. This Part uses the two-bodies prism to illuminate three moments in the development of the presidential office, beginning with the Constitutional Convention. The inseparability of the two bodies is a core ambivalence in these efforts to create (and revise) the presidency, and their interdependence has only grown as a result of these designs.

### A. *Ambivalence at the Founding*

Coming off of a monarchic tradition, the delegates resolved some of the specific problems that the king's two bodies had created. They provided for presidential selection through the Electoral College for a set term, for example, and they made the president personally impeachable. In this way, they rejected heredity as a central mechanism of the chief

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79. Michael Klarman, *The Framers' Coup* 238 (2016) (quoting Letter from Pierce Butler to Weeden Butler Mary-ville Plantation (excerpt) (May 5, 1788), in 27 *The Documentary History of the Ratification of the Constitution* (John P. Kaminski et al. eds., digital ed. 2009)). Historians debate Washington's significance to the design of Article II. Compare Judith A. Best, *The Presidency and the Executive Power*, in *The Framing and Ratification of the Constitution* 209, 215 (Leonard W. Levy & Dennis J. Mahoney eds., 1987) ("Washington was the president of the convention by unanimous choice and a man so respected and admired that many historians are convinced that without his constant presence before them, the delegates would not have created a powerful executive office."), with Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 244 (1996) ("Butler's observation hardly squares with the tangled record of proposals, tentative decisions, reconsiderations, and reversals from which the presidency finally, and belatedly, emerged.").

magistrate's sempiternity and a source of legitimacy for the incumbent.<sup>80</sup> Even as they moved beyond the king's two bodies in its particulars, however, the delegates reintroduced the duality in another form. By creating a singular chief magistrate, the Framers reenacted its core conceptual enigma in the structure of the presidential office.<sup>81</sup>

The delegates recognized that a singular executive inescapably personalizes power and yet encapsulates methods of responsibility and dispatch not otherwise available. They continuously revisited the question of how to make the individual faithful to the institution and how to design an institution that is stable and resilient to the fallibilities of individual presidents. This section shows how the delegates grappled with what they took to be intrinsic features of the President's duality and how they used public law (here, constitutionalism) to construct it. In so doing, I do not attempt to make an originalist argument for a specific meaning of Article II. Rather, I aim to expose an ambiguity in the emergent presidential structure.<sup>82</sup>

1. *Personal/impersonal: the debate over presidential impeachment.* — The idea that the presidential office imposes institutional restraints on the person—that the president should be held accountable for acting *ultra vires*—developed in the context of impeachment.<sup>83</sup> “Shall any man be above Justice?,” pressed George Mason.<sup>84</sup> “Above all shall that man be above it, who can commit the most extensive injustice?”<sup>85</sup> Elections offered an inadequate restraint, Mason argued, for “the man who has practiced corruption & by that means procured his appointment in the first instance”

80. Cf. Kantorowicz, *supra* note 1, at 330 (“[T]he king’s true legitimation was dynastical, independent of approval or consecration on the part of the Church and independent also of election by the people.”).

81. Scholars debate whether, in designing the chief magistrate, the Framers sought to embrace or repudiate aspects of monarchic rule. Compare, e.g., Eric Nelson, *The Royalist Revolution* 185 (2014), and Saikrishna Bangalore Prakash, *Imperial from the Beginning: The Constitution of the Original Executive* 12–25 (2015), with Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 *Harv. L. Rev.* 2111, 2184 (2019), and Mortenson, *supra* note 38, at 1181–88. The argument developed in the text interprets the constitutional presidency to contain both the pull of—and resistance to—a sort of personal or charismatic authority suggested by kingship.

82. The discussion is intended to be illustrative, not exhaustive, of the ways in which the President’s duality figured into the debates at the Convention.

83. See Berger, *Impeachment*, *supra* note 53, at 4 (“[T]he eyes of the Framers were fixed . . . on the seventeenth century, the great period when Parliament struggled to curb ministers who were the tools of royal oppression”). The Framers were especially influenced by the contemporaneous impeachment trial of Warren Hastings, the Governor General of India. See, e.g., Volcansek, *supra* note 53, at 53–55 (“Hastings was formally impeached for ‘high crimes and misdemeanors,’ . . . but the articles of impeachment against him . . . included implicit allegations that he had failed to fulfill his oath of office. The charges . . . were not criminal in nature . . . [and his trial] was parallel to medieval attempts to curb the king’s ministers . . .”).

84. 2 *The Records of the Federal Convention of 1787*, at 65 (Max Farrand ed., 1911) [hereinafter 2 Farrand].

85. *Id.*

could then escape punishment “by repeating his guilt.”<sup>86</sup> James Madison agreed that politics was not enough to guard against abuse of power, especially “[i]n the case of the Executive Magistracy which was to be administered by a single man, [for] loss of capacity or corruption was more within the compass of probable events, and either of them might be fatal to the Republic.”<sup>87</sup> Gouverneur Morris, one of the few delegates who initially opposed making the president personally impeachable, was ultimately convinced by the discussion: The chief magistrate “may be bribed by a greater interest to betray his trust,” and he might himself try to “[c]orrupt[] his electors”; impeachment was necessary to punish the president “not as a man, but as an officer.”<sup>88</sup>

The debate at the Convention thus suggests a nascent conception of public law—that is, the need for a framework to hold the exercise of presidential authority to legal account in order to prevent the incumbent’s abuse of office.<sup>89</sup> The technology of accountability imagined by the delegates was impeachment. Suggested fora included jurists, for Hamilton, of the state courts and, as reported from the Committee of Detail, by conviction in the Supreme Court.<sup>90</sup> But some delegates worried that the Supreme Court would not be sufficiently impartial—in contrast, they believed, to the Senate—initially because “the first judge was [also to serve on a] privy Council,”<sup>91</sup> and later because the justices would be appointed by the president and because the Court, given its small size, “might be warped or corrupted.”<sup>92</sup> A “conclusive reason for making the Senate instead of the Supreme Court the Judge of impeachments,” argued Gouverneur Morris,

86. *Id.*

87. *Id.* at 66.

88. *Id.* at 68–69.

89. The delegates debated how to delineate the category of impeachable offenses. Treason and bribery were too narrow. Mason proposed “maladministration” to suggest a broader sweep, but Madison worried this term was too vague. Mason then withdrew maladministration and proposed “other high crimes & misdemeanors,” *id.* at 550, a term with deep roots in English law and practice, see Berger, *Impeachment*, *supra* note 53, at 53–73; Charles L. Black, Jr., *Impeachment: A Handbook* 49–50 (1998).

90. See 1 *The Records of the Federal Convention of 1787*, at 292–93 (Max Farrand ed., 1911) [hereinafter 1 Farrand] (discussing Hamilton’s proposal that the forum include state judges); 2 Farrand, *supra* note 84, at 66–67 (same); see also *id.* at 185–86 (including the Committee of Detail draft in which the President would be “remov[able] from his office on impeachment by the House of Representatives, and conviction in the supreme Court”); *id.* at 551 (recording Madison’s preference for the “supreme Court for the trial of impeachments”).

91. 2 Farrand, *supra* note 84, at 427.

92. *Id.* at 551 (attributing the statement to Gouverneur Morris); *id.* (“Sherman regarded the Supreme Court as improper to try the President, because the Judges would be appointed by him.”); see also *The Federalist* No. 65, at 439–45 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (“What other body [than the Senate] would be likely to feel *confidence enough in its own situation*, to preserve, unawed and uninfluenced, the necessary impartiality between an *individual* accused, and the *representatives of the people, his accusers?*”).

“was that the latter was to [criminally] try the President after the trial of the impeachment.”<sup>93</sup>

It is incomplete, then, to suggest that no person is above the law. The President’s two bodies required *two* forms of law: criminal law (or tort or contract) to govern the citizen, and impeachment to govern the presidency as an institution of constitutional governance.<sup>94</sup>

2. *Temporary/continuous: term limits and re-eligibility.* — Throughout their discussions, the delegates implicitly recognized two senses of the “personal” president. On one meaning, the focus is the individual—his will, his judgment. But personal might also mark the individual’s motives for action; the person might act for purely self-interested reasons or self-dealing. The delegates sought to tease apart these two understandings. They wanted individual responsibility, but public-interested governance. They sought to make the temporary occupant faithful to the commitments of an indefinite institution. These concerns permeated the discussion over term limits and reelection.<sup>95</sup>

Hamilton initially argued that, in order to align the interests of the person with those of the institution, the Executive should serve during good behavior.<sup>96</sup> In England, the interest of “the King was so interwoven with that of the Nation, and his personal emoluments so great, that he was placed above the danger of being corrupted from abroad—and at the same time was both sufficiently independent and sufficiently controuled, to answer the purpose of the institution at home.”<sup>97</sup> Hamilton urged the delegates “to go as far in order to attain stability and permanency” toward the English model “as republican principles will admit.”<sup>98</sup> Others, however, feared that the absence of term limits would turn the president into an elected monarch and that, because of the difficulty of carrying out an impeachment, an Executive during good behavior was but “a softer name . . . for an Executive for life.”<sup>99</sup>

A sufficiently lengthy term and opportunity for reelection were nevertheless necessary to create in the person a sense of fidelity to the office. If the president’s tenure were too short, his personal interest would pull

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93. 2 Farrand, *supra* note 84, at 500.

94. Cf. 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 480 (Jonathan Elliot ed., 2d ed., J.B. Lippincott & Co. 1941) (providing James Wilson’s argument that “not a *single privilege* is annexed to [the President’s] character; far from being above the laws, he is amenable to them in his private character as a citizen, and in his public character by *impeachment*”).

95. The delegates considered multiple approaches, including a three-year term with re-eligibility and a seven-year term without. See 1 Farrand, *supra* note 90, at 68–69.

96. *Id.* at 289–92.

97. *Id.* at 289.

98. *Id.*

99. 2 Farrand, *supra* note 84, at 35.



against the duties of the institution.<sup>100</sup> Ineligibility for reelection, argued Gouverneur Morris, would “tempt him to make the most of the Short space of time allotted him, to accumulate wealth and provide for his friends.”<sup>101</sup> It was precisely this fear that a temporary magistrate would be insufficiently loyal to the office that led some delegates to support the availability of impeachment for the president.<sup>102</sup>

3. *Singular/composite: the design of presidential decisionmaking.* — The Framers recognized that a singular executive inescapably personalizes power, and yet institutionalizes methods of responsibility and dispatch not otherwise available.<sup>103</sup> Competing desires for a chief executive who would be personally accountable and for an individual checked by a more composite institution permeate the debates over how to structure the national executive. Some initially favored a truly plural executive, and proposals for some sort of privy council to constrain even a singular magistrate were repeatedly revisited.<sup>104</sup> The debate played out against the backdrop of experimentation in the states with various plural executive models.<sup>105</sup>

The problem, argued Madison, “arose from the nature of Republican [Government itself] which could not give to an individual citizen that settled pre-eminence in the eyes of the rest, . . . [nor] that personal interest [against] betraying the National interest, which appertain to an hereditary magistrate.”<sup>106</sup> Revisiting the issue quite late in the proceedings, Benjamin Franklin pressed that the delegates had “too much . . . fear [in] cabals in appointments by a number, and . . . too much confidence in those of single persons.”<sup>107</sup> A council, he argued, “would not only be a

100. See Best, *supra* note 79, at 214.

101. 2 Farrand, *supra* note 84, at 53.

102. See Nelson, *supra* note 81, at 203; see also Rakove, *supra* note 79, at 273.

103. James Wilson, probably the presidency’s most influential architect, argued during the Convention that a “single magistrate . . . [would] giv[e] . . . energy[,] dispatch and responsibility to the office.” 1 Farrand, *supra* note 90, at 65–66; see also Klarman, *supra* note 79, at 215.

104. See 1 Farrand, *supra* note 90, at 21; *id.* at 93–99; 2 Farrand, *supra* note 84, at 342–44; *id.* at 367; see also Rakove, *supra* note 79, at 261–79.

105. See Charles C. Thach, Jr., *The Creation of the Presidency, 1775–1789*, at 25–54 (1923); Gordon S. Wood, *The Creation of the American Republic, 1776–1787*, at 431–35 (1998). These state constitutions generally rejected executive unitariness: “In at least two states, the executive was a council, meaning that a council majority decided how to exercise all or almost all executive powers.” Prakash, *supra* note 81, at 33 (emphasis omitted). And in other states the form and powers of the privy council varied. See Thach, *supra*, at 27–28. New York stood out as the exception: “There was no privy council of the kind set up elsewhere in America, the sole remnants of the idea being found in the senatorial council of appointment and the council of revision.” *Id.* at 35 (internal footnotes omitted); see also Prakash, *supra*, at 33 (“The Massachusetts governor [under the 1780 state constitution] was another exemplar of strength.”).

106. 1 Farrand, *supra* note 90, at 138.

107. 2 Farrand, *supra* note 84, at 542.

check on a bad President but . . . a relief to a good one.”<sup>108</sup> John Dickinson agreed that it would “be a singular thing if the measures of the Executive were not to undergo some previous discussion before the President.”<sup>109</sup> A final motion to add such a council was defeated.<sup>110</sup> But the Opinion Clause, which passed the same day, retains a version of this advisory function, authorizing the president to “require the Opinion, in writing, of the principal officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices.”<sup>111</sup>

Competing images of the chief executive as an individual—acting on his will—and an institution—with the markings of stability, continuity, and expert counsel—thus pervaded the discussions at the Convention, and they carried through in Hamilton’s defense of the presidency in *The Federalist*. Hamilton emphasized the benevolent “power of a single man,” with “a due dependence on the people.”<sup>112</sup> And yet, he stressed “the intimate connection between the duration of the executive magistrate in office and the stability of the system of administration.”<sup>113</sup> As political scientist Jeremy Bailey argues, Hamilton demonstrated the “need for not one, but two executives . . . . [O]ne would use elections to make republican theory work with the requirements of energy. The other would be staffed by qualified men who would be attracted by the permanence of the office as well as its insulation from public opinion.”<sup>114</sup>

108. *Id.*

109. *Id.*; see also *id.* at 541 (“Mason said that in rejecting a Council to the President we were about to try an experiment on which the most despotic Governments had never ventured.”).

110. *Id.* at 542.

111. U.S. Const. art. II, § 2; cf. Akhil Reed Amar, Some Opinions on the Opinion Clause, 82 Va. L. Rev. 647, 654–55 (1996) (arguing that the Opinion Clause reflects an “anti-royalty principle,” which requires a separation between the president’s private and public business). Scholars debate the implications of the Opinion Clause for presidential control over the administrative state. See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, The President’s Power to Execute the Laws, 104 Yale L.J. 541, 584–85, 626–34 (1994); Lawrence Lessig & Cass R. Sunstein, The President and the Administration, 94 Colum. L. Rev. 1, 32–38 (1994); Peter L. Strauss, Overseer, or “The Decider”? The President in Administrative Law, 74 Geo. Wash. L. Rev. 696, 727–28 (2007).

112. *The Federalist* No. 70, at 471–72 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); see also *The Federalist* No. 74, at 501 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (arguing with respect to the pardon power that “one man” is a better “dispenser of the mercy of government”).

113. *The Federalist* No. 72, at 487 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); see also *The Federalist* No. 71, at 481 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (“[A] man acting in the capacity of chief magistrate, under a consciousness that in a very short time he must lay down his office, will be apt to feel himself too little interested in it . . . .” (emphasis omitted)).

114. Jeremy D. Bailey, The New Unitary Executive and Democratic Theory: The Problem of Alexander Hamilton, 102 Am. Pol. Sci. Rev. 453, 464 (2008).

B. *Growing Interdependence*

Though the President's "two bodies" creates an inescapable tension, the story of the American presidency is one of interdependence. The presidency gained personal and institutional power together, and these developments in important respects reinforced each other.<sup>115</sup>

Nineteenth-century presidents "fluctuated violently in influence and power."<sup>116</sup> Though presidents like Andrew Jackson, James Polk, and Abraham Lincoln stand out as exceptions, scholars describe a succession of weak incumbents inhabiting an impoverished office, legally and politically subservient to Congress.<sup>117</sup> In *The American Commonwealth*, first published in 1888, James Bryce dedicated a full chapter to the question why "great men are not chosen president."<sup>118</sup> Bryce argued that party politics and congressional dominance meant that, "in quiet times," American presidents did not need to be great; the office simply did not require it.<sup>119</sup> Then-professor of political science Woodrow Wilson, still focused on "Congressional Government," described the president as titular head of an "Executive," the constitutional contours of which remained "very difficult to lay down . . . . Those elements can be determined exactly of only one administration at a time, and of that only after it has closed and some one who knows its secrets has come forward to tell them."<sup>120</sup> Nineteenth-century presidents occupied a small and relatively private institutional structure.<sup>121</sup> They regularly hired family members and close relatives to

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115. See Theodore J. Lowi, *The Personal President: Power Invested, Promise Unfulfilled* 57 (1985) ("The presidency grew because it had become the center of a new governmental theory, and it became the center of a governmental theory by virtue of a whole variety of [efforts] . . . to build some kind of consonance between the new, positive state and American democratic values.").

116. Leonard D. White, *The Jacksonians: A Study in Administrative History, 1829–1861*, at 20 (1954).

117. See Leonard D. White & Jean Schneider, *The Republican Era 1869–1901: A Study in Administrative History* 20–28 (1958); Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 *Yale L.J.* 1362, 1392 (2010); see also Robert A. Dahl, *The Tanner Lectures on Human Values: The Pseudodemocratization of the American Presidency* 40 (Apr. 11–12, 1988), [https://tannerlectures.utah.edu/\\_documents/a-to-z/d/dahl89.pdf](https://tannerlectures.utah.edu/_documents/a-to-z/d/dahl89.pdf) [<https://perma.cc/E8FU-ZMT2>].

118. James Bryce, *The American Commonwealth* 69 (1888). Bryce's argument is resuscitated in the work of Theodore J. Lowi, *supra* note 115, at 40, and Gene Healy, see Gene Healy, *The Cult of the Presidency* 235 (2008), among others.

119. Bryce, *supra* note 118, at 70–75; see also Lowi, *supra* note 115, at 40.

120. Woodrow Wilson, *Congressional Government: A Study in American Politics* 257–60 (1901); see also Woodrow Wilson, *Constitutional Government in the United States* 57 (1908) [hereinafter Wilson, *Constitutional Government*] ("[I]t is easier to write of the President than of the presidency. The presidency has been one thing at one time, another at another, varying with the man who occupied the office and with the circumstances that surrounded him.").

121. See John P. Burke, *The Institutional Presidency* 4–5 (1992).

serve as their clerks and private secretaries,<sup>122</sup> and they paid these small staffs out of pocket.<sup>123</sup> The intellectual underpinnings and institutional supports of a more robust presidency developed in patchwork fashion.<sup>124</sup>

Building on historical and political science accounts, this section focuses on two specific moments of revision: the presidential “mandate,” which political scientists generally trace to President Andrew Jackson, and the Executive Office of the President created under FDR. The presidential mandate is widely embraced as a marker of the personal president, while the EOP is often discussed as the emblem of the institutional presidency.<sup>125</sup> Yet each reveals a variant on the same struggle for public law: the question of how to integrate the President’s two bodies. These developments are also interconnected; the Jacksonian presidential mandate is reformulated by Progressive-era thinkers into an argument for the institutionalization of the presidency.<sup>126</sup>

1. *The presidential “mandate.”*—Political scientists trace the origins of a democratic (or “pseudo-democratic”) theory of presidential power to Andrew Jackson.<sup>127</sup> A confluence of factors—including ideology, party

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122. See Hart, *supra* note 72, at 14–21. President McKinley would change the title from private secretary to secretary to the president in an effort to “give the office new dignity.” *Id.* at 20.

123. See Burke, *supra* note 121, at 4–5, 13–17. Political scientist John Hart recounts how these private relationships affected the public functioning of the presidency. By way of example, Andrew Johnson’s son, “an incurable alcoholic and womanizer,” secured presidential pardons in return for sex with a woman, Lucy Cobb, who developed a reputation as Washington’s “pardon broker.” Hart, *supra* note 72, at 16–17.

124. Some, like the civil service reforms of the late nineteenth century, altered conceptions of public office more generally. See Mashaw, *Administrative Constitution*, *supra* note 70, at 231–33; Stephen Skowronek, *Building a New American State* 54–55 (1982). Similarly, if more diffusely, the “salary revolution” of the nineteenth and early twentieth centuries reinforced understandings of public office that repudiated pecuniary self-dealing. Nicholas R. Parrillo, *Against the Profit Motive: The Salary Revolution in American Government, 1780–1940*, at 359 (2013).

125. See, e.g., Burke, *supra* note 121, at 1–24.

126. On the reformulation of ideas in American politics, see generally John A. Dearborn, *The “Proper Organs” for Presidential Representation: A Fresh Look at the Budget and Accounting Act of 1921*, 31 *J. Pol’y Hist.* 1 (2019); Stephen Skowronek, *The Reassociation of Ideas and Purposes: Racism, Liberalism, and the American Political Tradition*, 100 *Am. Pol. Sci. Rev.* 385 (2006).

127. See Henry Jones Ford, *The Rise and Growth of American Politics, a Sketch of Constitutional Development* 219 (London, Macmillan & Co. 1911) (arguing that, after Jackson, “[t]he presidential office . . . experienced a democratic transformation, making it a representative institution—the organ of the will of the nation”); see also Dahl, *supra* note 17, at 356. Many have written about Jackson’s role in the “democratization” of the presidency. My discussion is especially informed by Jerry L. Mashaw, *Administration and “The Democracy”*: Administrative Law from Jackson to Lincoln, 1829–1861, 117 *Yale L.J.* 1568 (2008) [hereinafter Mashaw, *Administration and “The Democracy”*]; Robert V. Remini, *Andrew Jackson and the Bank War* (1967) [hereinafter Remini, *Bank War*]; and White, *supra* note 116, at 22–49.

politics,<sup>128</sup> and changes in the state rules governing white male suffrage<sup>129</sup>—contributed to the Jacksonian construction of the incumbent as “the direct representative of the American people.”<sup>130</sup> Jackson’s war with the Bank of the United States became a key battleground over the nature of the presidency and the institutional powers of a popular or democratic leader. Jackson regarded the Bank as a personal threat and a danger to American democracy,<sup>131</sup> as well as an ideological enemy to “the humble members of society—the farmers, mechanics, and laborers.”<sup>132</sup> As Professor Robert Remini recounts, to destroy the Bank, Jackson “stretched the veto power and claimed the right to block legislation for reasons of policy or expediency rather than constitutionality.”<sup>133</sup> Following his veto of legislation to recharter the Bank—hotly contested during his reelection campaign—Jackson interpreted his reelection as a mandate to kill the Bank, an interpretation of the election contested by contemporaries.<sup>134</sup>

Jackson embraced a muscular understanding of the removal power as the institutional instrument through which the president could implement his popular mandate to redirect government policy. Yet Jackson also observed an important institutional restraint on the incumbent’s power. The president could not step into the shoes of the Secretary of the Treasury and act in his place (to remove the government’s deposits from the Bank); where authority was delegated by Congress to the Secretary of

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128. See Stephen Skowronek, *The Politics Presidents Make* 54 (1993) [hereinafter Skowronek, *Politics Presidents Make*]; White, *supra* note 116, at 44–49.

129. See Mashaw, *Administration and “The Democracy”*, *supra* note 127, at 1573 (describing how the “rules and practices of politics were changing,” with the states shifting “from restrictive, property-based voting regimes to eligibility rules that promoted universal white male suffrage”). Of course, suffrage remained unavailable to a “public” beyond white males. *Id.*

130. 3 Robert V. Remini, *Andrew Jackson and the Course of American Democracy, 1833–1845*, at 154 (1984) [hereinafter Remini, *Course of American Democracy*] (quoting Andrew Jackson, *Protest of April 15, 1834*) (transcript available at <https://millercenter.org/the-presidency/presidential-speeches/april-15-1834-protest-senate-censure> [<https://perma.cc/JWG5-XY33>]).

131. Remini, *Bank War*, *supra* note 127, at 44–45 (“[T]he President heard stories that . . . the [Bank] had employed its funds in 1828 to defeat his election and the election of other Democrats,” and focused on this political threat to himself and, in the President’s words, to “the purity of the right of suffrage.”).

132. Andrew Jackson, *Veto Message, July 10, 1832*, in 3 *A Compilation of the Messages and Papers of the Presidents* 1139, 1153 (James D. Richardson, ed., Bureau of Nat’l Literature 1897); see also Mashaw, *Administration and “The Democracy”*, *supra* note 127, at 1589.

133. Remini, *Bank War*, *supra* note 127, at 176–78. The vetoes (and veto messages) of prior presidents, which collectively totaled only nine (with just three relating to “important legislation”), had been directed to the constitutional issue alone, whereas Jackson’s message “for the first time invoked political, social and economic, as well as strictly legal, arguments.” *Id.* at 81.

134. See Mashaw, *Administration and “The Democracy”*, *supra* note 127, at 1590.

the Treasury, it had to be exercised *by* the Secretary and not the president.<sup>135</sup>

Following Jackson, the idea that the president is accountable to a national electorate and uniquely situated to represent a national interest developed sporadically during the nineteenth century.<sup>136</sup> Political scientist Jeffrey Tulis argues that the rhetorical practices of the presidency changed in the early twentieth century—with significant interventions from Presidents Theodore Roosevelt and Woodrow Wilson—from formal and written communications directed to Congress to a more popular or “public” president communicating directly to the mass public.<sup>137</sup> Wilson also reestablished the practice, abandoned by Thomas Jefferson, of presidents appearing personally before Congress.<sup>138</sup> In defending this shift, Wilson spoke directly to the President’s two bodies. By personally “address[ing] the two Houses,” Wilson urged, he was able “to verify . . . that the President of the United States is a person, not a mere department of Government hailing Congress from some isolated island of jealous power, sending messages, not speaking naturally and with his own voice.”<sup>139</sup> Though their causes are contested, these developments helped to entrench a culture of presidential leadership rooted in the individual—but supported by a burgeoning institutional apparatus.<sup>140</sup>

The idea of the president as the singular representative of “the people” has had a dramatic effect on the institutional powers of the office, even as its theoretical and empirical underpinnings have long been questioned.<sup>141</sup> In his classic *Myth of the Presidential Mandate*, political scientist Robert Dahl underscored the vulnerability of this theory of American

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135. See *id.* at 1590, 1597.

136. See White, *supra* note 116, at 23–25.

137. See Jeffrey Tulis, *The Rhetorical Presidency* 4 (1987). Scholars debate the origins of the “rhetorical” or “public” presidency and the extent to which it constitutes a break from nineteenth-century practice. See, e.g., Renan, *Presidential Norms*, *supra* note 10, at 2231–34 (collecting sources and discussing the scholarly disagreements).

138. For a description of this change and a discussion of the competing theories to explain it in the political science literature, see generally Anne C. Pluta, *Reassessing the Assumptions Behind the Evolution of Popular Presidential Communications*, 45 *Presidential Stud. Q.* 70 (2015).

139. Woodrow Wilson, *Address to a Joint Session of Congress on Tariff Reform* (Apr. 8, 1913), Am. Presidency Project, <https://www.presidency.ucsb.edu/documents/address-joint-session-congress-tariff-reform> [<https://perma.cc/Y9FD-4VKM>] (last visited Jan. 28, 2020).

140. See Martha J. Kumar, *Managing the President’s Message*, at xxii–xxvi (2007) (describing the development of the White House communications apparatus); see also Tulis, *supra* note 137, at 185.

141. Indeed, they were questioned in Jackson’s time. See Remini, *Course of American Democracy*, *supra* note 130, at 157 (writing that Senator Daniel Webster “expressed the feelings of a majority of his colleagues who feared . . . the beginning of presidential despotism, or, as Webster put it: ‘ONE RESPONSIBILITY, ONE DISCRETION, ONE WILL!’”).

democracy.<sup>142</sup> Dahl argued that “no elected leader, including the president, is uniquely privileged to say what an election means—nor to claim that the election has conferred on the president a mandate to enact the particular policies the president supports.”<sup>143</sup> Even as the mechanisms of a presidential mandate remain conceptually elusive and empirically gaunt—perhaps all the more so in times of deep polarization—this construction of the presidency has had a firm grip on constitutional culture and public law.<sup>144</sup> The constitutional legitimacy of the administrative state is increasingly framed in terms of the incumbent and his singular connection to the people.<sup>145</sup> Meanwhile, the idea that the president is uniquely situated to represent the national interest has shaped the “institutional entailments” of the office, such as the presidency’s statutory power over the budget process.<sup>146</sup> Proponents of a robust presidency reformulated the presidential mandate into an argument for the institutionalization of the office.<sup>147</sup>

2. *The Executive Office of the President.* — President Franklin Roosevelt put Louis Brownlow at the helm of a small committee established by the president to study the administrative management of the presidency and to make the case for closer presidential management of the agencies.<sup>148</sup> The Brownlow committee delivered with a detailed proposal to reorganize the machinery of government.<sup>149</sup> The core purpose, the committee wrote, is “to make democracy work today in our National Government; that is, to make our Government an up-to-date, efficient, and effective instrument for carrying out the will of the Nation.”<sup>150</sup>

The Brownlow report offered an interpretation of the President’s two bodies, though it is not framed as such. It presented a framework to

142. See generally Dahl, *supra* note 17.

143. *Id.* at 366.

144. For critiques of this theory of presidential control in current legal scholarship, see, e.g., Jessica Bulman-Pozen, *Administrative States: Beyond Presidential Administration*, 98 *Tex. L. Rev.* 265, 315–22 (2019); Aziz Huq, *Removal as a Political Question*, 65 *Stan. L. Rev.* 1, 63–66 (2013); Nzelibe, *supra* note 17, at 1231–46; Matthew Stephenson, *Optimal Political Control of the Bureaucracy*, 107 *Mich. L. Rev.* 53, 54–55 (2008) [hereinafter Stephenson, *Optimal Political Control*].

145. See generally Nzelibe, *supra* note 17, at 1242 (collecting such accounts).

146. See Dearborn, *supra* note 126, at 2 (“The [Budget and Accounting Act of 1921 (BAA)] was the first instance in which Congress passed a law that relied upon the idea of presidential representation as its core design assumption.”).

147. See, e.g., Ford, *supra* note 127, at 215 (“While the presidential office has been transformed into a representative institution, it lacks proper organs for the exercise of that function . . . and the body-politic suffers acutely from its irregularity.”).

148. Clinton L. Rossiter, *The Constitutional Significance of the Executive Office of the President*, 43 *Am. Pol. Sci. Rev.* 1206, 1207 (1949).

149. President’s Comm. on Admin. Mgmt., *Administrative Management in the Government of the United States* 3 (1937) [hereinafter *Brownlow Report*]; see also Hart, *supra* note 72, at 24 (“The modern staff system [took] off with the publication of the Brownlow report in 1937.”).

150. *Brownlow Report*, *supra* note 149, at 3.

organize an institutional presidency related to, but distinct from, the personal president. Brownlow grappled with, but ultimately left unresolved, the question of how to understand their interdependence—an ambivalence heightened by the political and moral impulse to distinguish the American presidency from the fascist models of executive power then looming abroad.<sup>151</sup> The Brownlow report argued that the president should have a small “immediate staff”; these “assistants, probably not exceeding six in number” in addition to his current secretaries, would be channels from the incumbent to the institution.<sup>152</sup> The Brownlow report elaborated: “These aides would have no power to make decisions or issue instructions in their own right. They would not be interposed between the President and the heads of his departments . . . . They would remain in the background, issue no orders, make no decisions, emit no public statements.”<sup>153</sup> If the president’s immediate staff would tend to the person, a separate institutional and organizational apparatus would implement the policy, organization, and budget planning of the presidency. Specifically, three managerial agencies would become “part and parcel of the Executive Office”—the Bureau of the Budget, the Civil Service Administration, and the National Resources Board—and the president would be given “immediate responsibility” for their work.<sup>154</sup>

The Brownlow report reflects a deep ambivalence among progressive thinkers about the President’s duality. The two-bodies problem is implicit in these reformers’ efforts to construct an office amenable to the incumbent’s policy and political leadership but not wholly contingent on his personal attributes. These reformers celebrated the policy achievements of individual presidents but feared a “quality of leadership” that is overly dependent on the whim of the sitting president; as one scholar urged, “[t]he point is that we have leadership by *presidents* at times, but the *presidency* is not yet an institution. It has traditions; but it lacks essential organization and supporting personnel. Traditions alone are not enough.”<sup>155</sup> Instead, the presidency should be the “channel through which the thinking and experience of the entire executive side of government

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151. See Noah Rosenblum, *The Antifascist Roots of Presidential Administration* 36–38 (unpublished manuscript) (on file with the *Columbia Law Review*); see also Peri E. Arnold, *Making the Managerial Presidency: Comprehensive Reorganization Planning 1905–1996*, at 99–103 (2d ed. 1998) (describing how visiting Europe influenced Louis Brownlow’s and Charles Merriam’s normative foundation for the report, as they observed “the fragility of [European] democracies” and perceived that “features of fascism were more sharply etched on the [European] continent”).

152. Brownlow Report, *supra* note 149, at 5.

153. *Id.* In words that would quickly become both famous and infamous, Brownlow argued that these aides “should be possessed of high competence, great physical vigor, and a passion for anonymity.” *Id.*

154. *Id.* at 5–6.

155. George A. Graham, *Reorganization—A Question of Executive Institutions*, 32 *Am. Pol. Sci. Rev.* 708, 710 (1938).



are pooled and brought to bear upon the problems of government. The President must be the spokesman for the 'administration' in the real sense of the word, not merely the interpreter of his own fancies."<sup>156</sup> Brownlow himself would later reflect on this uneasy interconnection: "If I take the two phases, the President and the Presidency, the Man and the Institution, together," he wrote, "it is because as I see it, while they are distinguishable at certain times and in light of certain events, they are nevertheless inseparable."<sup>157</sup>

The Brownlow report was hailed by some and impugned as a dictatorial power grab by others.<sup>158</sup> Congress eventually granted presidential authority to reorganize executive government and bolster the presidential staff in the Reorganization Act of 1939.<sup>159</sup> Pursuant to this new authority, President Roosevelt submitted a reorganization plan to Congress and issued an Executive Order that would redesign the structure of the presidency.<sup>160</sup> Executive Order 8248 implemented the basic framework proposed by Brownlow. The Order created a White House Office "to serve the President in an intimate capacity in the performance of the many detailed activities incident to his immediate office."<sup>161</sup> The Order then specified the components of the EOP that would serve as the "principal management arms of the Government."<sup>162</sup> This distinction between the institutional body (the EOP) and the incumbent's personal staff has since "eroded."<sup>163</sup> Political scientists argue that "[t]he White House Office is now the directing force of the presidential branch, and the important units within the EOP are very much satellite agencies of the White House Office."<sup>164</sup>

As the "institutional capstone of the progressive presidency," the EOP enabled closer presidential management of executive policy, law, and budget processes.<sup>165</sup> But the EOP also injected professional judgment, interdisciplinary expertise, and procedural rules into the methods of presidential

156. *Id.*; cf. Herbert Croly, *Progressive Democracy* 297 (Routledge 2017) (1914) (observing in the gubernatorial context, that "if the executive were . . . [provided] with all the necessary weapons and instruments of [political] leadership, the adoption of progressive legislation would not depend so much upon the election of a very exceptional individual").

157. Brownlow, *supra* note 2, at 2.

158. See Rossiter, *supra* note 148, at 1208.

159. Hart, *supra* note 72, at 29.

160. See *id.* at 35 ("The Brownlow report, the Reorganization Act, Reorganization Plan No. I, and Executive Order 8248 together were a watershed in the history of presidential staffing.").

161. Exec. Order No. 8248 § II(1), 4 Fed. Reg. 3864 (Sept. 8, 1939).

162. *Id.* § III.

163. Hart, *supra* note 72, at 49; see also Hess & Pfiffner, *supra* note 72, at 2–5.

164. Hart, *supra* note 72, at 97.

165. Stephen Skowronek, *The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 *Harv. L. Rev.* 2070, 2091 (2009).

decisionmaking.<sup>166</sup> This organizational structure has given rise, over time, to small-c constitutional norms and institutions that make the policies and legal interpretations of the presidency more continuous,<sup>167</sup> promote procedural regularity and deliberative decisionmaking,<sup>168</sup> and instantiate internal checks on the president *through* the presidency.<sup>169</sup> The continuity of presidential power, through the EOP and related offices, thus creates a new face of the duality. The perpetuity of the presidency turns in part on the structure of presidential organization, or the accretion of its administrative form.

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We have never fully come to terms, constitutionally or politically, with the relationship between individual presidents and the presidency. Anticipating a paradox that would continue to define the presidency if not American democracy, Hamilton is said to have observed that the time would “assuredly come when every vital question of the state will be merged in the question, ‘Who shall be the next President?’”<sup>170</sup> Influential commentators have continued to oscillate between a president- and presidency-based approach to the chief executive.<sup>171</sup> If anything, the tension between these two bodies—and their interdependence—has only deepened.

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166. See, e.g., Nelson W. Polsby, *Some Landmarks in Modern Presidential-Congressional Relations*, in *Both Ends of the Avenue* 1, 20 (Anthony King ed., 1983) (observing that a landmark development of the post-war period was the “emergence of a presidential branch of government separate and apart from the executive branch . . . that imperfectly attempts to coordinate both the executive and legislative branches in its own behalf”); Rossiter, *supra* note 148, at 1214 (arguing that the EOP is not “simply a staff that aids the President . . . [but] is fast developing into an agency that also formulates and coordinates policies at the highest level”).

167. See, e.g., Renan, *Presidential Norms*, *supra* note 10, at 2239–42; see also Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 *Colum. L. Rev.* 1448, 1454–56 (2010).

168. See, e.g., Renan, *Presidential Norms*, *supra* note 10, at 2221–30.

169. See, e.g., Jack Goldsmith, *Power and Constraint: The Accountable Presidency After 9/11*, at 86–112 (2012); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 *Yale L.J.* 2314, 2316–19 (2006); Renan, *Presidential Norms*, *supra* note 10, at 2215–21.

170. Ford, *supra* note 127, at 196 (quoting 3 John C. Hamilton, *History of the Republic of the United States of America, as Traced in the Writings of Alexander Hamilton and of His Contemporaries* 346–47 (1859)); see also Michael Nelson, *Person and Office: Presidents, the Presidency, and Foreign Policy*, in *The Domestic Sources of American Foreign Policy: Insights and Evidence* 179, 179 (James M. McCormick ed., 6th ed. 2012) (connecting Ford’s assessment of the presidency in this passage with the person–office “conundrum,” with which political scientists “continue[] to grapple”).

171. See generally Peri E. Arnold, *The Presidency as Individual and Collective*, 49 *Rev. Pol.* 432, 433 (1987) (reviewing Colin Campbell, *Managing the Presidency: Carter, Reagan, and the Search for Executive Harmony* (1986)) (“The contemporary presidency presents a paradox to those who would study it . . . . Is presidential behavior a system of interactions

Scholars have long argued that the presidency has become too personalized, that politics and power have become too concentrated in the incumbent. Proposing “[t]he abolition of the presidency” in 1884, Henry C. Lockwood cautioned against “[t]he tendency of all people to elevate a single person to the position of ruler.”<sup>172</sup> Lockwood continued: “A nation comes to know the characteristics and nature of an individual. It learns to believe in the man . . . . He stands alone. He is a separate power in himself. The lines with which we attempt to mark the limits of his power are shadowy and ill-defined” (and this at the historical nadir of the presidency!).<sup>173</sup> Self-consciously echoing Lockwood nearly a century later, Edward Corwin argued that presidential power had become “dangerously *personalized*, in two senses”: First, “the leadership which it affords is dependent altogether on the accident of personality, against which our haphazard method of selecting Presidents offers no guarantee” and, second, “there is no governmental body which can be relied upon to give the President independent advice and which he is nevertheless bound to consult.”<sup>174</sup> And political scientist Theodore Lowi depicted “a plebiscitary republic with a personal presidency[,] . . . a virtual cult of personality revolving around the White House.”<sup>175</sup>

At the same time, scholars alternatively celebrate or critique the rise of an institutional presidency with the capacity simultaneously to promote and to check the will of the incumbent, to diffuse the exercise of presidential power, to regularize presidential decisionmaking, and to make more continuous the policies and practices of individual presidents.<sup>176</sup> While some argue that the rise of an institutional complex surrounding the incumbent is what “converts the Presidency into an instrument of twentieth-century government,”<sup>177</sup> others object that it undercuts the incumbent’s control of the presidency, the executive branch’s independence from the president, or both.<sup>178</sup>

An enduring question in political science is whether presidential power is better understood in personal or institutional terms. Richard Neustadt reoriented the field of presidential studies to the incumbent’s “power to

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within a complex organizational network, or is it the actions of one person imposing his own understanding, character, and ambitions upon the office[?]”).

172. Henry C. Lockwood, *The Abolition of the Presidency* 191–92 (1884).

173. *Id.*

174. Corwin, *supra* note 20, at 372.

175. Lowi, *supra* note 115, at xi; see also Healy, *supra* note 118, at 6–7; Bruce Ackerman, *The New Separation of Powers*, 113 *Harv. L. Rev.* 633, 657–64 (2000).

176. See Burke, *supra* note 121, at 24–26; Hart, *supra* note 72, at 4–9.

177. Rossiter, *supra* note 148, at 1214.

178. Cf. Sidney M. Milkis, *The Rhetorical and Administrative Presidencies*, 19 *Crit. Rev.* 379, 381–83 (2007) (suggesting a longstanding “fragil[ity]” in how American politics has come to understand the presidency: first, as accountable to the people, infusing national governance with democratic values; and second, as institutional and administrative, entrenching policy and making decisionmaking more professional, ongoing, and pluralistic).

persuade,” a direction that others developed with a focus on the personal characteristics of presidential leadership.<sup>179</sup> Meanwhile, Terry Moe and others responded with a more structural and institutional account of the presidency and the nature of institutional leadership in the context of competing sources of constitutional control.<sup>180</sup> Stephen Skowronek has offered something of a synthesis: Individual presidents, operating in “political time,” inhabit a presidency that develops through “secular time.”<sup>181</sup>

The President’s duality has been surprisingly understudied as a feature of American public law. Yet our major disagreements and confusions track the fault lines between the two bodies—that is, the personal/impersonal, temporary/continuous, and singular/composite dimensions

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179. See Richard Neustadt, *Presidential Power: The Politics of Leadership* 153 (1960); see also James David Barber, *The Presidential Character: Predicting Performance in the White House* 1–11 (3d. ed. 1985); Fred I. Greenstein, *The Presidential Difference: Leadership Style from FDR to Clinton* 1–9 (2000). Personality approaches to the presidency have been critiqued on a number of theoretical and empirical grounds, perhaps none more so than Barber’s *Presidential Character*. See generally David McKay, *Leadership and the American Presidency*, in *The Oxford Handbook of Political Leadership* 439, 443–45 (R.A.W. Rhodes & Paul ‘t Hart eds., 2014) (collecting critiques).

180. See Terry M. Moe, *The Politicized Presidency*, in *The New Direction in American Politics* 235, 238–39 (John E. Chubb & Paul E. Peterson eds., 1985); see also, e.g., David E. Lewis, *Presidents and the Politics of Agency Design: Political Insulation in the United States Government Bureaucracy, 1946–1997*, at 1–21 (2003); see generally Terry M. Moe, *Presidents, Institutions, and Theory*, in *Researching the Presidency* 337, 346–380 (George C. Edwards III et al. eds., 1993) (describing Neustadt’s influence and critiquing new-institutionalist interventions as “doubly personalized” in that “their effects [are] realized through the president’s personal filter [and] the institution itself is taken to be highly malleable” before proposing to anchor presidential theory instead in the “politics of structural choice”); Terry M. Moe, *The Revolution in Presidential Studies*, 39 *Presidential Stud. Q.* 701, 710–18 (2009) (arguing that rational choice has “shift[ed] the foundations of [presidential] theory from the personal to the impersonal, [and] from the informal to the structural”). But see Matthew J. Dickinson, *We All Want a Revolution: Neustadt, New Institutionalism, and the Future of Presidency Research*, 39 *Presidential Stud. Q.* 736, 762 (2009) (arguing that “Neustadt’s insights can be used to construct an *institution*-based model of presidential power,” and that “[d]ifferences in nomenclature and approach . . . should not obscure [a] common conceptual foundation”).

181. Skowronek, *Politics Presidents Make*, supra note 128, at 30 (“Presidential leadership in political time . . . refer[s] to the various relationships incumbents project between previously established commitments of ideology and interest and their own actions in the moment . . . Presidential leadership in secular time . . . refer[s] to the progressive development of the institutional resources and governing responsibilities of the executive office . . .”); cf. Gregory L. Hager & Terry Sullivan, *President-Centered and Presidency-Centered Explanations of Presidential Public Activity*, 38 *Am. J. Pol. Sci.* 1079, 1099 (1994) (assessing competing approaches to understanding presidential decisionmaking and finding some support for presidency-centered research, but arguing that combining both approaches “allows for better theory, testing, and explanation”); Lawrence R. Jacobs, *Building Reliable Theories of the Presidency*, 39 *Presidential Stud. Q.* 771, 774 (2009) (observing that “[q]uite apart from rational choice, the field of presidency research has been engaged in a decades-long, thoroughgoing, and decisive shift from personalistic and particularistic accounts to impersonal and institutional analyses,” but arguing that recent efforts toward synthesis are especially valuable).

that comprise the President's duality. Without attempting to be exhaustive, Parts III–V aim to be sufficiently comprehensive to substantiate an encompassing conceptual and analytic claim: The President's duality is the defining ambiguity, the central paradox of the constitutional office.

### III. THE PERSONAL/IMPERSONAL DIMENSION

What does it mean for the Constitution to vest executive power in *a person*? Imagine if Article III had vested the judicial power in “a Chief Justice,” rather than a court.<sup>182</sup> (The language initially drafted by the Committee of Detail was even more explicit: “The Executive Power of the United States shall be vested in a single Person. His Stile shall be, ‘The President of the United States of America’ and his Title shall be ‘His Excellency.’”<sup>183</sup>) This Part argues that resonances of the king's duality—in particular, traces of a personal, charismatic authority—are a defining if unsettling aspect of the constitutional presidency.<sup>184</sup> Vesting institutional power in a person promotes individual responsibility and dispatch, but it also augments the personal clout and charismatic pull of this one individual. And it creates the risk that the immense powers of the constitutional office will be used for this individual's private gain. The personal/impersonal dimension thus poses vexing questions about the nature of presidential power and the meaning of presidential leadership. It complicates issues of justiciability as well. Echoes of a royal “dignity” in the person of the president sit uneasily with public law conceptions of a President subject to judicial review. The tension confounds understandings of the role of law—and legal advisers—as a restraint on the sitting president from within the presidency as well.

Ultimately, the interdependence of the person and the office of the presidency belies efforts to make the President's personal and official character fully severable. In constructing their interconnections, lawyers and

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182. Cf. U.S. Const. art. III, § 1 (vesting “[t]he judicial Power . . . in one supreme Court, and in such inferior Courts as the Congress may . . . establish”).

183. 2 Farrand, *supra* note 84, at 171. The final language of this clause, vesting power in a President, did not receive separate consideration by the Convention as a whole. Corwin, *supra* note 20, at 12.

184. The argument intersects with some originalist work on the presidency, see, e.g., Prakash, *supra* note 81, at 12–25 (illuminating the varied meanings and “imprecise contours” of monarchy), but approaches it from a different perspective and temporal frame and draws different legal and normative implications. Much of the debate has focused on the meaning of the term “executive power” in the Vesting Clause, rather than what it means to vest any sort of tremendous institutional power in a person. And it has framed the inquiry in terms of Founding-era meaning rather than a dynamic constitutional and political development. See generally Mortenson, *supra* note 38 (describing the disagreement among originalists and making an important contribution to the original meaning of “executive power”); see also Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 *Yale L.J.* 231, 233–35 (2001) (offering a classic formulation of the competing originalist account).

jurists are making choices (often implicit) about how to effectuate substantive constitutional commitments.

A. *The Nature of Presidential Power*

How should public law understand presidential leadership? Are its personal qualities extraconstitutional—even a threat to the constitutional order—or are they a facet of the constitutional office itself? Relatedly, are there constitutional limits on the motives of the president—in particular, when exercising power vested directly in his person? These questions are at the crux of longstanding disagreements and confusions about the nature of presidential power.

1. *Presidential leadership and constitutional government.* — Perhaps the most famous Article II case, the *Steel Seizure* case,<sup>185</sup> provides a rare explicit treatment of the president/presidency. But while Justice Jackson's tripartite framework for presidential power in relation to Congress has long consumed constitutional scholars, the case has been largely overlooked as an account of this central tension. A core disagreement between Justice Jackson's concurrence and Chief Justice Vinson's dissent is the nature of presidential leadership in a constitutional government.

For Justice Jackson, the personalizing features of the presidential office are extraconstitutional, and they overwhelm the formal structure of checks and balances. Executive power has an inescapably personal dimension, and the charismatic nature of presidential leadership undermines the capacity of his real power to be checked or cabined. Jackson describes this inherent tension:

Executive power has the advantage of concentration in a single head in whose choice the whole Nation has a part, making him the focus of public hopes and expectations. In drama, magnitude and finality his decisions so far overshadow any others that almost alone he fills the public eye and ear. No other personality in public life can begin to compete with him in access to the public mind through modern methods of communications. By his prestige as head of state and his influence upon public opinion he exerts a leverage upon those who are supposed to check and balance his power which often cancels their effectiveness.<sup>186</sup>

The “essence” of constitutional government, for Jackson, is to temper these personal features of a charismatic presidency with the “impersonal forces which we call law.”<sup>187</sup> This, then, is the constitutional problem with President Truman's seizure of the steel mills: “The executive action . . .

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185. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579 (1952).

186. *Id.* at 653–54 (Jackson, J., concurring).

187. *Id.* at 654.

originates in the individual will of the President” and, as a result, “represents an exercise of authority without law.”<sup>188</sup>

That approach to presidential power, argued Chief Justice Vinson in dissent, misunderstands the nature of presidential leadership in our constitutional system. Faithful execution of the federal laws in an emergency has often required an exercise of personal judgment as to the method of execution, at least until Congress acts. Rejecting a “messenger-boy concept of the Office,” Vinson urged that “any man worthy of the Office should be . . . free to take at least interim action necessary to execute legislative programs essential to survival of the Nation.”<sup>189</sup> The case simply did not present “any question of unlimited executive power,” for “[t]he President himself closed the door to any such claim when he sent his Message to Congress stating his purpose to abide by any action of Congress . . . .”<sup>190</sup> The president’s finding that “a work stoppage would immediately jeopardize and imperil our national defense,” however, was not an uninformed guess; it was supported by the expert, reasoned input of agency leadership.<sup>191</sup>

The disagreement reveals a deep tension, but also a shared objective—to reconcile the personal power of the incumbent with the more impersonal qualities of constitutional government. For Justice Jackson, the personal president is a threat to the constitutional order; the role of constitutional law is to offer a counterweight to presidential charisma in the form of the separation of powers. For Chief Justice Vinson, the president’s individual judgment is not an extraconstitutional impulse but a facet of constitutional leadership itself. And yet, the incumbent’s judgment rests on the informed assessment of a more impersonal and deliberative institution. Chief Justice Vinson’s dissent thus embraces (at least implicitly) the President’s *duality* as the source of constitutional leadership—a quality of leadership that rests in part on personal judgment and in part on the collective and cumulative experience of a more impersonal office.

The idea that the constitutional presidency entails this duality, a largely neglected aspect of Chief Justice Vinson’s dissent, reflects and itself anticipates a core struggle of American public law.<sup>192</sup> The conceptual disagreement, so framed, is not limited to the president’s emergency power.

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188. Id. at 655.

189. Id. at 708–09 (Vinson, C.J., dissenting).

190. Id. at 701.

191. See id. at 678–79; see also Shalev Roisman, Presidential Factfinding, 72 Vand. L. Rev. 825, 870–71 n.208 (2019).

192. This is another sense in which the practice and theory of presidential power vindicates Chief Justice Vinson’s dissent. Accord Jack Goldsmith & John F. Manning, The President’s Completion Power, 115 Yale L.J. 2280, 2282–83, 2302 (2006) (attributing the most comprehensive articulation of a presidential “completion power” to Chief Justice Vinson’s *Youngstown* dissent).

It goes to the very heart of executive government. There is an ongoing ambivalence in American constitutionalism about the centrality of the individual president and the checks that the institutional presidency imposes (such as an institutional separation of functions or reason-giving) on his charismatic leadership.

2. *Article II and the ultra vires question.* — The tension is heightened in connection to those powers constitutionally vested uniquely in the President—what some have termed the “core” or “central prerogatives” of the constitutional presidency.<sup>193</sup> There is an under-examined but widely shared view that the president, when he exercises such powers, is using a type of authority that is absolute or illimitable. On this theory, when the president exercises the pardon power, for example, there is no sense in which he can act *ultra vires*. The idea underlying *ultra vires* action is that an “officer is an officer only so long as he acts within his powers; that when he transcends his authority he ceases to be an officer and [instead acts] only [as] a private individual . . . .”<sup>194</sup> If at least some Article II powers are subject to the president’s absolute control, then there is no circumstance under which his use of them ceases to be official—no sense in which the president’s conduct collapses into the impermissible behavior of a private individual.

Attorney General Bill Barr makes a version of this argument in a memorandum concerning the Mueller investigation, which Barr prepared before he was Attorney General. The president’s Article II powers are “absolute,” argues Barr. There is no legally forbidden motive when the incumbent exercises a core power of Article II including, for Barr, the law enforcement power.<sup>195</sup> Others have made a version of this argument in connection to President Bill Clinton’s pardons of his brother and of a personal

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193. See, e.g., 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, 726 (2008) (internal quotation marks omitted) (quoting *Loving v. United States*, 517 U.S. 748, 757 (1996)). The idea of “core” powers and the question of what types of power fall within such a core are deeply contested. See *id.* at 726–29 (discussing this debate); see also, e.g., *Authority of the United States to Enter Settlements Limiting the Future Exercise of Executive Branch Discretion*, 23 *Op. O.L.C.* 126, 147 (1999) [hereinafter *OLC Settlements Authority Op.*] (“Article II . . . vests certain . . . powers directly in the President . . . and commits their exercise to the President’s unfettered discretion . . . . An analysis of [these] expressly named discretionary functions . . . is beyond [this memorandum’s] scope . . . [but includes] the President’s power to make recommendations to Congress . . . .”).

194. Wilson, *Constitutional Government*, *supra* note 120, at 19. Wilson continues: “It is the same understanding from the king at the top to the constable at the bottom.” *Id.* at 20.

195. Memorandum from Bill Barr to Rod Rosenstein, Deputy Att’y Gen., U.S. Dep’t of Justice & Steve Engel, Assistant Att’y Gen., U.S. Dep’t of Justice (June 8, 2018) [hereinafter *Barr Memorandum*], <https://int.nyt.com/data/documenthelper/549-june-2018-barr-memo-to-doj-mue/b4c05e39318dd2d136b3/optimized/full.pdf> [<https://perma.cc/2VWT-QZC5>].



financial benefactor and international fugitive (among others): There is no such thing as a “corrupt” purpose for a presidential pardon.<sup>196</sup>

On this view, self-dealing on the part of the incumbent (at least short of criminal bribery<sup>197</sup>) is irrelevant to the constitutional exercise of the core powers of the office. This approach has some affinity to the English understanding of the king’s two bodies as it developed in the sixteenth century. As to those prerogatives deemed inseparable from the person, like the pardon power, the king had “unfettered discretion”; for other acts, such as the issuance of proclamations, the law could impose conditions.<sup>198</sup> Extending this theory to the presidency, the idea would be that there is some set of Article II powers that are inseparable from the person and for which the incumbent’s authority is absolute.

This approach to presidential power is in deep tension, however, with the development of legitimate authority in American public law.<sup>199</sup> From the beginning, the institution of the presidency was designed to check purely personal self-dealing on the part of the incumbent. Public law has continued to provide a site for contestation over the meaning of public-spirited governance and the legal tools for achieving it.<sup>200</sup> The debate at the Constitutional Convention focused on how structural mechanisms such as term limits and eligibility for reelection might curb self-dealing by individual presidents.<sup>201</sup> In particular, the Framers made the president impeachable, including for “bribery”—a term that they understood broadly to cover the corrupt use of public office for private advantage.<sup>202</sup> Scholars

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196. See, e.g., Margaret Colgate Love, *The Pardon Paradox: Lessons of Clinton’s Last Pardons*, 31 *Cap. U. L. Rev.* 185, 204 (2003) (“Because he regarded the pardon power as a personal one, [President Clinton] felt unconstrained by the rules and procedures that had guided and protected his predecessors. Apparently no one on his own staff made any effort to dissuade him of this intensely narcissistic view of the pardon power . . .”).

197. See, e.g., Josh Blackman, *The Special Counsel’s Constitutional Analysis: The Clear Statement Rule*, *Lawfare* (Apr. 19, 2019), <https://www.lawfareblog.com/special-counsels-constitutional-analysis-clear-statement-rule> [<https://perma.cc/3WGZ-XQCY>] (arguing that criminal bribery prohibitions have a “unique status” as permissible constraints on the presidency, given the multiple ways in which the Constitution prohibits bribery). But see *infra* note 202 and accompanying text (discussing the potentially more encompassing meaning of constitutional bribery).

198. Holdsworth, *Prerogative in the Sixteenth Century*, *supra* note 35, at 560–61. To distinguish between these two ideas of the king’s power, lawyers “borrowed the terms ‘absolute’ and ‘ordinary,’” already in use to distinguish common law cases from equity. See *id.*

199. It is in tension with the development of legitimate power in English constitutionalism as well, for the idea of a royal prerogative illimitable by law did not survive the Glorious Revolution. For a detailed discussion, see Mortenson, *supra* note 38, at 1191–201.

200. Cf. Zephyr Teachout, *Corruption in America: From Benjamin Franklin’s Snuff Box to Citizens United 5* (2014) (“The particular word *corruption* has a long tradition of playing an important role in our country’s political transformation.”).

201. See *supra* notes 95–102 and accompanying text.

202. See Volcansek, *supra* note 53, at 47 (locating the meaning of impeachable bribery in British practice “as an offense against public justice . . . and related specifically to someone involved in the administration of justice who ‘takes any undue reward to influence his

also emphasize the role of the presidential Oath Clause, which, together with the Take Care Clause, imposes on the individual a duty to “faithfully execute” the office.<sup>203</sup>

Beyond original public meaning, understandings of public-interested power have changed since the Founding *through* public law. The collapse of the spoils system and the emergence of conflict-of-interest prohibitions mark important steps in the regulation of government power. Conceptions of legitimate presidential authority cannot be fully disentangled from these developments. As positive law makes illicit conduct that was previously licit, it alters the expectations on the president.<sup>204</sup>

The idea that “corrupt” presidential action is incompatible with the constitutional presidency is at the crux of Special Counsel Robert Mueller’s Report regarding presidential obstruction of justice.<sup>205</sup> The Special Counsel reasoned that a statutory prohibition on “corruptly” obstructing a criminal proceeding, as applied to the president’s removal of the FBI Director or his attempted removal of the Special Counsel, would not unduly intrude on the president’s Article II authority because the statutory prohibition is

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behavior in office” (quoting 4 William Blackstone, *Commentaries on the Laws of England* 139 (8th ed. 1778)); see also Ben Berwick, Justin Florence & John Langford, *The Constitution Says ‘Bribery’ Is Impeachable. What Does that Mean?*, *Lawfare* (Oct. 3, 2019), <https://www.lawfareblog.com/constitution-says-bribery-impeachable-what-does-mean> [<https://perma.cc/T44C-NLRE>] (synthesizing scholarly and English common-law accounts from the Founding to argue that the constitutional meaning of “bribery” covers any “abuse of the power of an office to obtain a private benefit”).

203. Kent et al., *supra* note 81, at 2114, 2119.

204. The institutional presidency itself has recognized this connection between the development of anti-self-dealing norms and presidential legitimacy. Longstanding presidential practice provides, for example, that a president should act as if bound by statutory conflicts of interest prohibitions, even when they do not extend to him personally as a matter of formal law. See Renan, *Presidential Norms*, *supra* note 10, at 2215–21 (documenting this norm and assessing its robustness in light of President Trump’s recent breaches of it).

205. See 2 Robert S. Mueller, III, *Report on the Investigation into Russian Interference in the 2016 Presidential Election* 10 (2019) [hereinafter 2 Mueller Report] (defining “corruptly” as “when a person act[s] with an intent to obtain an ‘improper advantage for [him]self or someone else, inconsistent with official duty and the rights of others’” (quoting *Corruptly*, *Ballentine’s Law Dictionary* 276 (3d ed. 1969))). On the implications of “mixed motives” for presidential corruption, see, e.g., Daniel J. Hemel & Eric A. Posner, *Presidential Obstruction of Justice*, 106 *Calif. L. Rev.* 1277, 1319–20 (2018) (proposing, in the context of presidential obstruction of justice, a “‘but-for motive’ rule, under which the president is liable only if he would not have taken the action without the improper motive”); Noah Feldman, *Is Trump Above the Law?*, *N.Y. Rev. Books* (Dec. 19, 2019), <https://www.nybooks.com/articles/2020/01/16/is-trump-above-the-law> [<https://perma.cc/FZ9H-YEWA>] (arguing, in the context of presidential impeachment, that “the possible existence of a noncorrupt motive . . . doesn’t negate the presence of the corrupt motive”). But see Josh Blackman & Seth Barrett Tillman, *Defining a Theory of ‘Bribery’ for Impeachment*, *Lawfare* (Dec. 6, 2019), <https://www.lawfareblog.com/defining-theory-bribery-impeachment> [<https://perma.cc/5QTR-M4TH>] (arguing that “[w]here the president acts for mixed motives . . . —entertaining related considerations of public policy, his party’s success and his chances of personal reelection—there is nothing to investigate” in the context of constitutional bribery).

of a piece with the president's constitutional duty to faithfully execute the office.<sup>206</sup>

The Special Counsel stopped short, however, of fully embracing the implications of this approach; the report leaves open the question whether corruptly removing a *principal* officer could constitute unlawful obstruction.<sup>207</sup> More minimally, Mueller concludes that at least “[w]here the Constitution permits Congress to impose a good-cause limitation on the removal of an Executive Branch officer, the Constitution should equally permit Congress to bar removal for the corrupt purpose of obstructing justice.”<sup>208</sup> If corruptly removing an officer violates the Take Care duty, however, then it should not matter whether the officer is a principal or inferior officer. Such conduct by the incumbent is *ultra vires*. It ceases to be the exercise of official power; it becomes instead an unconstitutional act by the person of the president.

#### B. *Legal Accountability as a Two-Bodies Problem*

To this point, the discussion has focused on the question of legitimate authority, bracketing justiciability. A central preoccupation of public law, however, is the role of courts in holding the President to legal account. The question whether the office bestows certain immunities or legal protections from suit on the person of the president arose early in American constitutional history and continues to be contested today. Early practice confronted this relationship between the person and the office explicitly, though it did not develop a sustained response. The *king's* duality featured explicitly in some of these early arguments, and recent advocacy retains an uneasy foothold in its rhetoric. Lingered strands in our judicial and executive branch precedent suggest legal protections for the individual that are inconsistent with how American public law has come to understand the institution of the presidency.

The question whether the president may be compelled to present evidence in a criminal trial was first decided by Chief Justice Marshall presiding, in his capacity as circuit justice, over the treason and misdemeanor

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206. 2 Mueller Report, *supra* note 205, at 177 (“[Faithful execution] connotes the use of power in the interest of the public, not in the office holder’s personal interests.” (citing 1 Samuel Johnson, *A Dictionary of the English Language* 763 (1755))). The Special Counsel first had to consider whether the obstruction of justice statutes apply to the president’s conduct, notwithstanding a “clear-statement rule” pursuant to which generally worded statutes are not construed to extend to the president where doing so could create a separation of powers problem. See 2 Mueller Report, *supra* note 205, at 169–71. Mueller’s thin analysis of the clear-statement rule has been elaborated by some scholars and contested by others. Compare, e.g., Marty Lederman, *Why Robert Mueller Is Right that the Obstruction Statutes Apply to the President*, *Just Security* (May 15, 2019), <https://www.justsecurity.org/64087/why-robert-mueller-is-right-that-the-obstruction-statutes-apply-to-the-president> [<https://perma.cc/YWY7-WW4M>], with Blackman, *supra* note 197.

207. See 2 Mueller Report, *supra* note 205, at 177 n.1090.

208. *Id.* at 175.

trials of Aaron Burr.<sup>209</sup> Burr sought to subpoena President Jefferson for two letters written to Jefferson from General John Wilkinson, the prosecution's chief witness.<sup>210</sup> Marshall permitted the subpoena, rejecting the argument that the presidency insulates the president from his legal obligations as a citizen. In reaching this conclusion, Marshall rejected the English precedent of a royal prerogative; "the personal dignity conferred on [each first magistrate]" must be decided by reference to "the constitutions of their respective nations."<sup>211</sup> In contrast to the king, the President is impeachable and "elected from the mass of the people [to which he then] returns."<sup>212</sup> The Chief Justice went on to conclude that the duties of the presidency were not so "unremitting" as to insulate the president entirely from compulsory process.<sup>213</sup> Marshall reaffirmed this position in Burr's subsequent misdemeanor trial, but qualified it with the observation that "[i]n no case . . . would a court be required to proceed against the president as against an ordinary individual."<sup>214</sup> President Jefferson authorized the partial release of the documents at issue but withheld certain passages in the second letter.<sup>215</sup>

The implications of the *Burr* cases for the presidency are "a source of perennial debate."<sup>216</sup> Relying on the *Burr* cases, Attorney General William Wirt advised President Monroe that a subpoena for testimony could be issued against the president.<sup>217</sup> Since that time, several presidents have complied with a compulsory subpoena for testimony or evidence.<sup>218</sup> Though the practice would seem to undermine functional claims that compulsory

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209. See, e.g., Laura Krugman Ray, *From Prerogative to Accountability: The Amenability of the President to Suit*, 80 Ky. L.J. 739, 742–43 (1991).

210. See Raoul Berger, *The President, Congress, and the Courts*, 83 Yale L.J. 1111, 1113–15 (1974) [hereinafter Berger, *President, Congress, and Courts*] (explaining that a first letter was sought in connection to Burr's treason trial and a second letter in connection to his misdemeanor trial).

211. *United States v. Burr*, 25 F. Cas. 30, 34 (C.C.D. Va. 1807) (No. 14,692d).

212. *Id.*

213. *Id.*

214. *United States v. Burr*, 25 F. Cas. 187, 192 (C.C.D. Va. 1807) (No. 14,694).

215. Berger, *President, Congress, and Courts*, supra note 210, at 1115–22 (recounting these episodes, including a subsequent and "less formal commitment proceeding," at which "Marshall permitted Burr to fill the place of the deleted parts by suppositions that would be given the force of evidence").

216. *Id.* at 1111; see also John C. Yoo, *The First Claim: The Burr Trial, United States v. Nixon, and Presidential Power*, 83 Minn. L. Rev. 1435, 1437 (1999) (noting ongoing confusion and controversy over "[w]hether, why, and how" President Jefferson complied with the judicial orders on disclosure and the implications for executive power).

217. Ronald D. Rotunda, *Presidents and Ex-Presidents as Witness: A Brief Historical Footnote*, 1975 U. Ill. L. Forum 1, 5–6.

218. See *id.* at 4–9 (collecting examples).

legal process “damage[s] the Office of the Presidency,”<sup>219</sup> the argument reemerges anew with each fight over a subpoena to the president.<sup>220</sup>

1. *Enjoining the President.* — Following the *Burr* cases, the question whether the office bestows certain immunities on the person of the president reemerged in a different context in *Mississippi v. Johnson*.<sup>221</sup> The State of Mississippi sued President Andrew Johnson to enjoin him from enforcing the Reconstruction Acts of 1867.<sup>222</sup> The *Burr* cases featured prominently in the arguments of both sides. Just as the Court could compel action by the president (the disclosure of materials) in the *Burr* cases, argued the attorneys for Mississippi, so too could it compel the president to refrain from acting through the issuance of an injunction. U.S. Attorney General Henry Stanbery countered that Chief Justice Marshall’s ruling in the *Burr* cases was not only distinguishable but “a very great error.”<sup>223</sup> When the president happens to be privy to information “in his natural capacity,” argued Stanbery, it cannot be that he must “leave his place at the head of the government . . . to attend to the business of the individual citizen . . . .”<sup>224</sup> According to Stanbery, Chief Justice Marshall had misapprehended the relationship between the person and the office:

[S]o far as the mere individual man is concerned there is a great difference between the President and a king; but so far as the office is concerned . . . I deny that there is a particle less dignity belonging to the office of President than to the office of King . . . . He represents the majesty of the law and of the people as fully and as essentially, and with the same dignity, as does any absolute monarch or the head of any independent government in the world. It is not upon any peculiar immunity that the individual has who happens to be President . . . but it is on account of the office that he holds that I say the President of the United States is above the process of any court or the jurisdiction of any court to bring him to account as President.<sup>225</sup>

Were the court to disregard these features of the office, pressed Stanbery, it would set itself on a dangerous course. Should the president refuse to

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219. *Id.* at 4.

220. See also *infra* notes 442–456 and accompanying text (discussing *United States v. Nixon* and criminal investigations involving the president); cf. Memorandum from Robert G. Dixon, Jr., Assistant Att’y Gen., Office of Legal Counsel, Presidential Amenability to Judicial Subpoenas 13 (June 25, 1973), <https://www.documentcloud.org/documents/4753843-Dixon-Memo-on-Presidential-Subpoena.html#document/p1> [<https://perma.cc/Q8QU-ZTLH>] (“The real problem . . . lies not in the existence vel non of the basic subpoena power, as in fashioning rules which properly take into consideration the President’s special status and the particular circumstances of the case.”).

221. 71 U.S. 475 (1866).

222. *Id.* at 475.

223. *Id.* at 483.

224. *Id.* at 483–84.

225. *Id.* at 484.

comply with the judicial order, the court would quickly find itself—by way of contempt of court—imprisoning the president and, in effect, deposing the president by judicial fiat.<sup>226</sup>

The Court in *Johnson* skirted this question, declining to “express[] any opinion on the broader issues discussed in argument, whether, in any case, the President . . . may be required, by the process of this court, to perform a purely ministerial act under a positive law, or may be held amenable, in any case, otherwise than by impeachment for crime.”<sup>227</sup> Instead, in what has been regarded as an early form of the political question doctrine,<sup>228</sup> the Court declined to review the exercise of a “purely executive and political” power by the president.<sup>229</sup> Yet the Court’s language—that it “has no jurisdiction of a bill to enjoin the President in the performance of his official duties”<sup>230</sup>—proved susceptible of broader, still contested readings. And Attorney General Stanbery’s argument about the nature of the office and the protections that it bestows on the individual continues to be used today, though the explicit connection to a monarchical office has been abandoned.

The institutional presidency ultimately provided a mechanism to check the exercise of executive power by individual presidents. Because it was technically a suit against the Secretary of Commerce, the *Steel Seizure* case could coexist doctrinally as a judicial check on the unconstitutional exercise of power by President Truman and yet a judicial action that did not impinge on the “dignity” of the president. While the question at the heart of the *Steel Seizure* case was the judiciary’s role as a check on presidential overreach, none of the Court’s opinions connected the “concern with the boundaries of presidential power to the idea of a President personally accountable within the legal system for his exercise of that power.”<sup>231</sup>

Indeed, in *Franklin v. Massachusetts*<sup>232</sup> the Court embraced precisely the opposite stance. Injunctive relief against the president *himself* would be “extraordinary.”<sup>233</sup> Much better, Justice O’Connor reasoned, to assume for purposes of standing that the incumbent would comply with an authoritative constitutional or statutory interpretation of the courts “even though [he] would not be directly bound” by it.<sup>234</sup> In concurrence, Justice Scalia went even further. Scalia, in effect, recast Attorney General Stanbery’s argument about prerogative power in *Johnson* as an argument about the

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226. See *id.* at 485–87.

227. *Id.* at 498.

228. See, e.g., Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 *Yale L.J.* 517, 551 & n.122 (1966).

229. *Johnson*, 71 U.S. at 499.

230. *Id.* at 501.

231. Ray, *supra* note 209, at 762–63.

232. 505 U.S. 788 (1992).

233. *Id.* at 802 (O’Connor, J.) (plurality opinion).

234. *Id.* at 803.

separation of powers: The courts' inability to direct the president "to exercise the 'executive Power' in a judicially prescribed fashion . . . [is] implicit in the separation of powers."<sup>235</sup> Yet the legality of presidential action remains reviewable, Scalia reasoned, through suits to enjoin the president's subordinates.<sup>236</sup>

It is difficult to ground such an argument in the separation of powers, however. The doctrine of a royal prerogative or immunity from suit turned on the opposite of a separation of powers; it was rooted in the dependence of royal courts on the person of the king. It was because the royal courts were the king's courts that the king could not be sued in them.<sup>237</sup> By contrast, Justice Scalia did not dispute—in fact, he embraced—the idea that the courts can review the legality of presidential action and thereby regulate the exercise of presidential power. Wariness of enjoining the incumbent for the conduct of his presidency thus results in a legal framework under which subordinates are enjoined *in order to control the presidency*. Protecting an abstract and figurative dignitary interest of the person—an interest rooted in royal prerogative and uneasily transposed on the presidential office—leads to a doctrine that, in practice, relies on the institutional features of the presidency to subject the incumbent's actions to legal scrutiny. The institutional presidency enables the revival of *Johnson in Franklin* because it blunts its impact. Yet the argument for presidential immunity appears vestigial in a legal landscape marked by judicial review of presidential action. And it gives expressive force to the idea that the institution insulates the incumbent from legal scrutiny.

2. *Counseling the President.* — Beyond courts, the President's duality is at the crux of debates over the role of law and lawyers inside the presidency. The tension is starkest with respect to the White House Counsel (Counsel).<sup>238</sup> The Counsel's client is "the President." Yet the presidential office is occupied by a flesh-and-blood individual (the small-p president), whose persona, personal judgment, individual policy priorities, and personal political vulnerabilities instantiate the legal needs and policy objectives of the client. While there is widespread agreement that the Counsel does not represent the private interests of the president, perhaps *the* central question for those who serve in this role—and the principal normative debate in the commentary—is how to manage the tension inherent in

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235. *Id.* at 826 (Scalia, J., concurring in part and concurring in the judgment).

236. See *id.* at 828. But see Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 *Colum. L. Rev.* 1612, 1677 n.275 (1997) ("[A] judicial order that the President not take an action[] and a judicial order that a cabinet secretary . . . not obey a presidential directive to take that same action . . . interfere equally with the exercise of executive power.").

237. See, e.g., Seidman, *supra* note 27, at 426–27.

238. On the origins and development of the White House Counsel, a story itself wrapped up with the personal preferences of individual presidents, see Jeremy Rabkin, *At the President's Side: The Role of the White House Counsel in Constitutional Policy*, *Law & Contemp. Probs.*, Autumn 1993, at 63, 65–71.

representing both a particular president and the abstract institutional idea of the presidency.<sup>239</sup>

Bernard Nussbaum, President Clinton's first Counsel, staked out a strongly president-centered perspective—one that ultimately cost him his job. As Professor Jeremy Rabkin recounts, "After a series of controversial interventions into the activities of various federal agencies—in each case, it seemed, simply to protect the personal reputation or political standing of Mr. Clinton—Nussbaum was forced [by outside critics] to resign."<sup>240</sup> These critics argued that Nussbaum failed to appreciate that his obligations ran to the office of the presidency, not its current occupant. The distinction was pressed publicly by Nussbaum's replacement, Lloyd Cutler,<sup>241</sup> though Cutler's own decisions as Counsel only underscore the difficulty of maintaining a clean separation.<sup>242</sup> Cutler took to the press to defend a constitutional argument that any civil litigation against the president in his personal capacity must be stayed until he leaves office, an argument that does not appear to have had the support of OLC,<sup>243</sup> and he wrote op-eds and letters to the editor to defend President Clinton and the

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239. See, e.g., The White House Transition Project, *The White House Counsel* 6, 26 (2017) <http://whitehoustransitionproject.org/wp-content/uploads/2016/03/WHTP2017-29-Counsel.pdf> [<https://perma.cc/99C3-AJBA>] [hereinafter WHC Report] (synthesizing reflections of multiple Counsels to the President on the significance and difficulty of maintaining this distinction between serving the person and the office). Though the issue today is sharpest with respect to the Counsel, versions of this disagreement predate the emergence of a Counsel and relate to the role of the Attorney General. See Nancy V. Baker, *Conflicting Loyalties: Law and Politics in the Attorney General's Office, 1789–1990*, at 2–4 (1992). There is also a related debate about the extent to which the Office of Legal Counsel, in providing legal advice to the presidency, should take into consideration the policy goals of the sitting president. See, e.g., Bruce Ackerman, *The Decline and Fall of the American Republic* 110–16 (2010); Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* 35–39 (2007); John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 *Cardozo L. Rev.* 375, 380–82 (1993); Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 *Admin. L. Rev.* 1303, 1305–06 (2000).

240. Jeremy Rabkin, *White House Lawyering: Law, Ethics, and Political Judgments*, in *Government Lawyers* 107, 107 (Cornell W. Clayton, ed., 1995) [hereinafter Rabkin, *White House Lawyering*]. In his resignation letter, Nussbaum defended his approach, suggesting that the controversy around him was "generated by those who do not understand, nor wish to understand the role and obligations of a lawyer, even one acting as White House Counsel." Letter from Bernard W. Nussbaum, Counsel to the President, to William Jefferson Clinton, President, U.S. (Mar. 5, 1994), <https://www.presidency.ucsb.edu/node/219039> [<https://perma.cc/ZMA4-YC6Y>].

241. Rabkin, *White House Lawyering*, supra note 240, at 108. But see Nelson Lund, *Lawyers and the Defense of the Presidency*, 1995 *BYU L. Rev.* 17, 20–21 (1995) (rejecting as "moralistic romanticism" the argument, advanced by both Cutler and C. Boyden Gray, Counsel to President George H.W. Bush, that "the office of the presidency should, at least to some extent or in some circumstances, be regarded as the real client to whom the president's lawyers owe their professional loyalty").

242. Rabkin, *White House Lawyering*, supra note 240, at 132.

243. *Id.*



First Lady, for example, pushing back against charges of indecision by President Clinton in the selection of a Supreme Court nominee<sup>244</sup> and defending Mrs. Clinton when a columnist suggested that her commodity trading amounted to bribery.<sup>245</sup>

During the Trump presidency, some commentators have argued that White House Counsel Don McGahn veered in the other direction: advancing the agenda of a conservative Republican presidency, while exposing the president himself to potential criminal liability. “[T]here is inevitably some tension between any White House counsel’s duties to the presidency and the demands he or she faces from the particular president,” observes Bob Bauer, former Counsel to President Obama, “[t]ypically laden with political and sometimes personal significance for a president, the most sensitive issues require the [C]ounsel to monitor closely the risks of slipping away from an institutional representation toward just protecting the Boss.”<sup>246</sup>

As these episodes suggest, there is an important line between representing the person and the office. But it is inescapably blurry.<sup>247</sup> The president and the presidency are interdependent aspects of the constitutional office as it exists. Tension in the role morality of the Counsel is insoluble because it inheres in the nature of the presidency itself. And yet, every Counsel must wrestle with the question of when representing “the President” requires resisting the preferences, or even the direction of the sitting president. Navigating that ambiguity quite often is more a matter of

244. Lloyd N. Cutler, *It Was a Good Process*, *Wash. Post*, June 7, 1994, at A19.

245. Lloyd N. Cutler, *No One Bribed Anyone in Clinton Trading*, *N.Y. Times* (June 3, 1994), <https://www.nytimes.com/1994/06/03/opinion/1-no-one-bribed-anyone-in-clinton-trading-288748.html> (on file with the *Columbia Law Review*).

246. Bob Bauer, *Don McGahn as White House Counsel: An Early Appraisal*, *Lawfare* (Sept. 2, 2018), <https://www.lawfareblog.com/don-mcgahn-white-house-counsel-early-appraisal> [<https://perma.cc/7YQ9-YRX4>]. Peter Wallison, Counsel for President Reagan, similarly observed:

[W]hen I was first introduced to this job by Fred Fielding he said to me, ‘You are counsel to the office of the presidency. You are not counsel to the President.’ I absorbed that and thought I understood what it all meant. However, in practice, it’s not a very useful guide, because you really don’t know—when issues like Whitewater come up—whether you’re representing the President or the presidency . . . . But as soon as it becomes clear—and there’s no bright line here—that this isn’t just noise by political opponents, but in fact relates to the President’s personal conduct, then the President should have his own lawyer.

WHC Report, *supra* note 239, at 26.

247. Cf. Rabkin, *White House Lawyering*, *supra* note 240, at 108 (“[T]here remains something decidedly odd about the notion that the [C]ounsel . . . serves only the presidency, not the actual president. No one suggests that the presidential press office should only defend the abstract interests of the presidency . . .”).

judgment than law, though it is a judgment informed by norms of the legal profession.<sup>248</sup>

To the extent that the relationship between the president and the White House Counsel is structured by legal doctrine, it is a doctrine insufficiently attentive to the President's duality. The D.C. Circuit has held, in the grand jury context, that communications between the president and the Counsel are not protected by a governmental attorney-client privilege.<sup>249</sup> Though the president retains a *personal* attorney-client privilege with his private lawyers, no comparable attorney-client privilege shields his communications *as president* with the White House Counsel's office.<sup>250</sup> That formal distinction obscures, however, the functional entanglement of the incumbent and the presidency.<sup>251</sup> As Judge Tatel argued in dissent, "[a]ggressive press and congressional scrutiny, the personalization of politics," and the advent of special prosecutors mean that "[n]o President can navigate the treacherous waters of post-Watergate government, make controversial official legal decisions, decide whether to invoke official privileges, or even know when he might need private counsel, without confidential legal advice."<sup>252</sup> In suggesting that law and lawyers can fully pry apart the President's two bodies, the doctrine risks creating a president *less* tethered to the institution of the presidency, for presidents might simply "shift their trust from White House lawyers who have undertaken to serve the Presidency, to private lawyers who have not."<sup>253</sup>

### C. *Disentangling the President's Public and Private Character*

These disagreements point to a more general problem: Are the President's official and personal identity fully severable? In contrast to

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248. Cf. Daphna Renan, *The Law Presidents Make*, 103 Va. L. Rev. 805, 891–92 (2017) [hereinafter Renan, *Law Presidents Make*] (discussing the significance of, and ambiguity around, legal professional norms in the context of executive branch lawyering).

249. *In re Lindsey*, 158 F.3d 1263, 1278 (D.C. Cir. 1998); see also *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 915 (8th Cir. 1997) (holding that "the White House may not use the [attorney-client] privilege to withhold potentially relevant information from a federal grand jury").

250. *In re Lindsey* recognized a very narrow extension of the president's *personal* attorney-client privilege to a White House official serving "as a mere intermediary" between the president and his private counsel. See 158 F.3d at 1282.

251. See, e.g., Arthur B. Culvahouse, Jr., *Has Attorney-Client Privilege Departed the White House?*, 63 N.Y.U. Ann. Surv. Am. L. 139, 140–41 (2007) ("The most enduring professional and ethical issue that I confronted during my tenure [as White House Counsel] was the uncertain and untested scope of the attorney-client relationship between me . . . and President Ronald Reagan, [who was my] 'client' in every sense of that profound obligation.").

252. *In re Lindsey*, 158 F.3d at 1286–87 (Tatel, J., dissenting); see also *In re Grand Jury*, 112 F.3d at 926 (Kopf, J., dissenting) ("This case involves the institutional capacity of the President of the United States to function with the advice of legal counsel.").

253. *In re Lindsey*, 158 F.3d at 1287 (Tatel, J., dissenting).

Congress or the courts, “the President never adjourns.”<sup>254</sup> The duties and functions of the presidential office are ongoing, underspecified, and, in a fundamental sense, inextricably linked to the persona of its occupant. The boundary of the constitutional office, and the extent to which it overlaps with the personal identity of the incumbent, is a question that cuts across a range of legal frameworks.<sup>255</sup>

1. *Variants on the problem.* — The Court, for example, has recognized an absolute immunity from civil liability for conduct within “the ‘outer perimeter’ of [the president’s] official responsibility.”<sup>256</sup> But when does the president’s conduct fall beyond this “outer perimeter”? As to the behavior itself, *Clinton v. Jones*<sup>257</sup> presented the easy case because the allegations of sexual misconduct involved the person prior to his term as president.<sup>258</sup> Though it recognized that any legal proceedings would need to be structured to accommodate the incumbent’s schedule and duties of office, the Court declined to adopt a presidential immunity from damages actions pertaining to the president’s “unofficial” conduct.<sup>259</sup> Moving from sexual misconduct to the related allegations of defamation and retaliation in *Jones*, however, demonstrates how quickly the legal difficulties emerge. The Court declined to weigh in on the question whether a separate claim, concerning alleged misconduct by President Clinton after he took office, would be justiciable.<sup>260</sup>

Impeachment presents the same question from the other side. If the sitting president cannot be sued civilly for alleged abuses of office, he *can* be impeached for them.<sup>261</sup> With respect to the presidency, a longstanding debate concerns the question whether personal misconduct can amount to an abuse of office actionable under the Impeachment Clause.<sup>262</sup> This

254. *Clinton v. Jones*, 520 U.S. 681, 713 (1997) (Breyer, J., concurring).

255. In addition to the examples that follow in the text, see *Knight First Amendment Institute at Columbia University v. Trump*, 302 F. Supp. 3d 541 (S.D.N.Y. 2018) (adjudicating whether the incumbent can block users from a Twitter account that he uses to announce official conduct, such as presidential appointments and U.S. policy); Jurecic, *supra* note 8 (discussing implications for federal record-keeping statutes and litigation involving presidential policy).

256. *Nixon v. Fitzgerald*, 457 U.S. 731, 756 (1982).

257. 520 U.S. 681.

258. The case concerned four counts (a combination of federal and state law claims) brought in a civil action by Paula Corbin Jones against William Jefferson Clinton. The Court noted that only the fourth count—for defamation relating to statements allegedly made by Clinton’s agents—“arguably may involve conduct within the outer perimeter of the President’s official responsibilities,” and that this question was not before the Court. See *id.* at 686 & n.3.

259. See *id.* at 691–93.

260. See *id.*

261. Indeed, the availability of impeachment is one of the main arguments in favor of absolute immunity from civil damages in *Fitzgerald*, 457 U.S. at 757.

262. See Black, *supra* note 89, at 24–30; Cass R. Sunstein, *Impeachment: A Citizen’s Guide* 134 (2017); Laurence Tribe & Joshua Matz, *To End a Presidency* 43–58 (2018).

question was deeply contested during the proceedings to impeach President Clinton for sexual misconduct with a White House intern, and his lies under oath to cover it up. Commentators debated whether President Clinton's behavior amounted to personal indiscretions, perhaps "disgraceful" but not impeachable,<sup>263</sup> or whether his misconduct "gravely damage[d] the capacity of the President to lead," and thereby undermined his fitness for office.<sup>264</sup> In a post-Me Too legal and political culture, it might be that the president's sexual indiscretions with a White House intern inside the Oval Office become more recognizable as an abuse of the powers of the office—an argument that did not gain much traction during the Clinton controversy.

Impeachment marks the ultimate expulsion of the person from the office of the presidency. Yet in breaking the duality—in cleaving the powers of the presidency from the sitting president as a result of his uses of the office—impeachment also vindicates the duality as a constitutional conception. The shadow of impeachment makes possible an office subject to constitutional commitments with which the person disagrees. The impeachment of individual presidents, meanwhile, sparks contestations that entrench (or change) the meaning of the office and the scope of its permissible use.<sup>265</sup>

If impeachment makes it possible to sever the sitting president from the presidency, however, the national "trauma" that it is said would result only underscores the two bodies' interconnection—the charismatic pull of the person of the president in American constitutional culture.<sup>266</sup> The debate over a presidential "self-pardon" underscores their legal interconnection as well.<sup>267</sup> The self-pardon raises profound rule-of-law concerns precisely because the office and the "flesh-and-blood human occupying [it]" are, in a sense, so inextricable.<sup>268</sup> The Office of Legal Counsel has

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263. See, e.g., Background and History of Impeachment, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 105th Cong. 98 (1998) (statement of Arthur M. Schlesinger, Jr., Professor of History, City University of New York).

264. *Id.* at 95 (statement of Richard D. Parker, Williams Professor of Law, Harvard University School of Law).

265. See Keith E. Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* 121–32 (1999).

266. Laurence H. Tribe, *The Three Key Questions of Impeachment*, *Slate* (Sept. 30, 2019), <https://slate.com/news-and-politics/2019/09/impeachment-ukraine-and-its-costs-three-key-questions.html> [<https://perma.cc/8PMU-FCS3>]; see also Bryce, *supra* note 118, at 190 (observing that "[i]mpeachment . . . is the heaviest piece of artillery in the congressional arsenal, but because it is so heavy it is unfit for ordinary use," and emphasizing that it is exceptionally difficult for Congress to remove a sitting president through impeachment).

267. The Constitution prohibits a pardon "in cases of impeachment." U.S. Const. art. II, § 2, cl. 1.

268. *Cf. Trump v. Mazars USA, LLP*, 940 F.3d 710, 725–26 (D.C. Cir. 2019) (observing that a challenged subpoena to a third party seeking financial documents related to Donald Trump in his pre-presidential, private capacity "presents no direct inter-branch dispute [but] separation-of-powers concerns still linger in the air").

concluded that a presidential self-pardon would run afoul of the basic premise “that no one may be a judge in his own case.”<sup>269</sup> Though the legal question remains contested,<sup>270</sup> President Ford’s pardon of Nixon (however politically fraught) is different from a President Nixon pardon of Nixon. It is different in constitutionally meaningful terms; we cannot fully pry apart the office and the person occupying it.

Indeed, perceptions of the person as head of state create confusions of another sort. A longstanding debate concerns the president’s authority to empower “personal” representatives in the conduct of foreign affairs.<sup>271</sup> Ever since President Washington dispatched Gouverneur Morris to serve as his “private Agent” in discussions with the British, such agents have been part of the tapestry of presidential leadership.<sup>272</sup> Yet these agents occupy a constitutionally ambiguous posture as the personal representative of the president charged with advancing the nation’s foreign policy interests.<sup>273</sup> Such representatives often lack any official status and do not undergo advice and consent in the Senate, even as they exercise significant informal power to effectuate U.S. policy as a result of their perceived intimacy with or proximity to the incumbent. Scholars and lawyers debate whether this use of “ad hoc diplomats” is permitted under the Appointments Clause, and also whether it can be statutorily restricted.<sup>274</sup>

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269. Presidential or Legislative Pardon of the President, 1 Op. O.L.C. 370 (1974).

270. Compare, e.g., Robert Nida & Rebecca L. Spiro, *The President as His Own Judge and Jury: A Legal Analysis of the Presidential Self-Pardon Power*, 52 Okla. L. Rev. 197, 198–201 (1999) (arguing that text and history support self-pardons and proposing a constitutional amendment), and Prakash, *supra* note 81, at 108 (defending self-pardon on originalist grounds), with Kent et. al., *supra* note 81, at 2189–90 (arguing against self-pardons on originalist grounds), and Brian C. Kalt, Note, *Pardon Me: The Constitutional Case Against Presidential Self-Pardons*, 106 Yale L.J. 779, 781 (1996) (arguing that constitutional text, structure, history, and policy proscribe self-pardons).

271. See Maurice Waters, *Special Diplomatic Agents of the President*, 307 *Annals Am. Acad. Pol. & Soc. Sci.* 124, 125 (1956) (“The really big controversy . . . has been with regard to the President’s right to use personal agents to carry out any special mission he may wish to assign them.”).

272. Ryan M. Scoville, *Ad Hoc Diplomats*, 68 *Duke L.J.* 907, 980–81 (2019); see also Maurice Waters, *The Ad Hoc Diplomat: A Study in Municipal and International Law* 7 (1963).

273. Maurice Waters, *The Ad Hoc Diplomat: A Legal and Historical Analysis*, 6 *Wayne L. Rev.* 380, 392 (1960) (“If the agent were exploring a matter pertinent to the executive’s personal life . . . it might be maintained that [the action is without] bearing upon the State. But in each mission known to this writer the objective had some bearing, at times significant, . . . upon United States’ policy.”).

274. See Scoville, *supra* note 272, at 913, 915–16 (contesting on originalist grounds the “orthodox” view that ad hoc diplomatic appointments are constitutional without Senate confirmation); see also Cory R. Gill & Susan B. Epstein, Cong. Research Serv., R44946, *State Department Special Envoy, Representative, and Coordinator Positions: Background and Congressional Actions 2–4* (2017), <https://fas.org/sgp/crs/row/R44946.pdf> [<https://perma.cc/DM7S-JY49>] (discussing S. 1631, a bill that would have limited the use of ad hoc diplomats and expanded advice-and-consent requirements). But see Letter from Stephen E. Boyd, Assistant Att’y Gen. for Legislative Affairs, to Bob Corker, U.S. Senator, Chairman,

Finally, a spate of recent cases challenge President Trump's receipt of payments by foreign, federal, and state governments in connection with the Trump International Hotel in Washington as a violation of the Emoluments Clauses.<sup>275</sup> Defending the President, the Justice Department has argued that an emolument "must be predicated on services rendered in an official capacity."<sup>276</sup> The plaintiffs in these cases argue that the term should be interpreted more broadly but that, in any event, the distinction simply collapses as applied to the president: "When the President interacts with domestic governments or foreign nations, he does not do so as an 'ordinary citizen,' but as a head of state whom they have a powerful incentive to influence in any way possible."<sup>277</sup>

Ultimately, the legal lines demarcating a presidential or "public" character are insoluble in their own terms.<sup>278</sup> Rather, those lines should be constructed in reference to the substantive constitutional interests at stake, such

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Comm. on Foreign Relations 3–4 (Feb. 13, 2018), <https://www.justice.gov/page/file/1035291/download> [<https://perma.cc/W7C3-3TPU>] (arguing that S. 1631's restrictions "on the President's ability to select and employ diplomatic agents and other employees for specific missions would impermissibly interfere with the President's foreign affairs authority").

What makes Rudy Giuliani's putative role as a presidential representative to Ukraine so aberrational—including under the "orthodox" view—is that his work there seemingly advanced the president's private interests, as opposed to the presidency's foreign policy goals. See Philip Bump, *With an Impeachment Trial Looming, New Evidence that Trump Sought Personal Benefit in Ukraine*, Wash. Post (Jan. 14, 2020), <https://www.washingtonpost.com/politics/2020/01/14/with-an-impeachment-trial-looming-new-evidence-that-trump-sought-personal-benefit-ukraine> (on file with the *Columbia Law Review*). Giuliani's status as the president's private lawyer only underscores the crucial difference between standing in for the person of the president in pursuing the nation's foreign policy interests (the customary practice of "ad hoc" diplomats) and using the mantle of the presidency, by extension, to advance the president's private electoral or pecuniary prospects. See also *supra* notes 193–208 and accompanying text (discussing *ultra vires* uses of presidential power).

275. See, e.g., Bobby Allyn, *Trump Still Faces 3 Lawsuits over His Business Empire*, NPR (Dec. 12, 2019), <https://www.npr.org/2019/12/12/787167408/trump-still-faces-3-lawsuits-over-his-business-empire> [<https://perma.cc/EMQ6-6AUJ>].

276. Memorandum in Support of Defendant's Motion to Dismiss at 32, *District of Columbia v. Trump*, 315 F. Supp. 3d 875 (D. Md. 2018) (No. 8:17-cv-1596-PJM), 2017 WL 7587415.

277. Memorandum of Law in Support of Plaintiffs' Opposition to Motion to Dismiss at 38, *District of Columbia*, 315 F. Supp. 3d 875 (No. 8:17-cv-1596-PJM), 2017 WL 5598183. The President's duality complicates other aspects of this litigation as well, including the question whether the emoluments claims at issue concern the president in his "official" capacity, in his "individual" capacity, or both. See *District of Columbia v. Trump*, 291 F. Supp. 3d 725, 747 (D. Md. 2018) (reserving this question); see also Tami Abdollah, *Emoluments Suit vs. Trump Now Personal as well as Official*, Associated Press (Feb. 23, 2018), <https://apnews.com/9e7a82829d2d4ce58388478ae9ddfb55/Emoluments-suit-vs.-Trump-now-personal-as-well-as-official> [<https://perma.cc/QMQ4-FEBX>] (discussing competing scholarly views).

278. Cf. Levinson, *supra* note 60, at 1316 ("[T]he problem of framing constitutional transactions is insoluble in its own terms.").

as the norm against self-dealing.<sup>279</sup> Those substantive commitments are not contained *within* the duality, but in the substantive constitutional order in which the presidency exists. Just such a shift—from an effort to disentangle the President's personal and official identity to a reckoning with the substantive constitutional interests at issue—transformed how public law handles presidential papers. And, in so doing, it made possible a form of institutional precedent that had eluded earlier understandings of such materials as the private property of individual presidents.

2. *Illuminating the stakes: public law's shifting response on presidential papers.* — For nearly two hundred years, presidential papers were treated as the personal property of the president.<sup>280</sup> As President Taft explained in lectures delivered shortly after he left office: “The vast amount of correspondence” involving the office of the President “does not become the property or a record of the government unless it goes on to the official files of [an agency or department] . . . . The President takes with him all the correspondence, original and copies, carried on during his administration.”<sup>281</sup> President Washington created this precedent when he left office. He initially took the papers of his presidency with him to his home in Mount Vernon, Virginia. In his will, he bequeathed these papers to a nephew.<sup>282</sup>

Following Washington's example, every president until Richard Nixon understood his presidential records to be his personal property.<sup>283</sup> Early presidents bequeathed these papers or sold them; some even deliberately destroyed these papers both during and following their administrations.<sup>284</sup> President Franklin Roosevelt conceived of the idea of a Presidential Library as a way to preserve and make public the materials of the presidency, and Congress enacted legislation that facilitated these arrangements

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279. Cf. Teachout, *supra* note 200, at 276 (delineating an “anti-corruption principle” and arguing that American public law should work to better effectuate it).

280. Nat'l Study Comm'n on Records and Documents of Fed. Officials, Final Report 13 (1977) [hereinafter Report on Records].

281. William Howard Taft, *The Presidency: Its Duties, Its Powers, Its Opportunities and Its Limitations* 30 (1916).

282. See *Nixon v. United States*, 978 F.2d 1269, app. at 1287 (D.C. Cir. 1992). Washington's papers became the focus of the only early case on the status of presidential papers by way of a copyright dispute. Justice Story, riding circuit, premised his ruling in *Folsom v. March* on an understanding of the President's papers as his personal property, see 9 F. Cas. 342, 345–46 (D. Mass. 1841) (No. 4,901), even as he acknowledged that the public might have an interest in the publicity of presidential materials that “embrac[e] historical, military, or diplomatic information.” *Id.* at 347; see also Jonathan Turley, *Presidential Papers and Popular Government: The Convergence of Constitutional and Property Theory in Claims of Ownership and Control of Presidential Records*, 88 *Cornell L. Rev.* 651, 682 (2003) (“What is striking about Justice Story's ruling is that he structured the entire decision on property, rather than constitutional, principles.”).

283. See Report on Records, *supra* note 280, at 5.

284. See *id.* at 13.

(though it did not require them).<sup>285</sup> President Roosevelt himself, however, famously left his successor only the Map Room papers relating to the “conduct and conclusion of World War II, which President Truman continued to use,”<sup>286</sup> and President Eisenhower left his successor only a “satchel containing a series of orders and instructions to be of assistance in the event of nuclear attack or other national crisis.”<sup>287</sup> Through two centuries, then, presidents and their increasingly burgeoning staff created “records of governance and policy,” and treated this precedent of the presidency as their personal property.<sup>288</sup> A 1951 legal memorandum from the Office of the Solicitor General (in its capacity as predecessor to what is today the Office of Legal Counsel) advised President Truman that any “dichotomy [between the ‘official’ and ‘personal’ papers of the President] appears difficult to effectuate. In the activities of the President, the personal and the official are inextricably intertwined.”<sup>289</sup>

Against this backdrop, Richard Nixon, when he resigned from office, directed government archivists to send some forty-two million pages of documents and hundreds of tape recordings of conversations from the Oval Office to a storage repository near his home in California.<sup>290</sup> Before releasing the materials, President Ford asked Attorney General William B. Saxbe for legal advice regarding their ownership.<sup>291</sup> Documenting the practice of every president since Washington, the Attorney General concluded that the vast majority of the papers were properly considered the personal property of the former president.<sup>292</sup> Two days later, the Administrator of General Services, Arthur F. Sampson, announced an agreement with President Nixon, which gave Nixon the right after three years to withdraw and retain these documents “for any purpose.”<sup>293</sup> The agreement also

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285. See Wendy R. Ginsberg, Erika K. Lunder & Daniel J. Richardson, Cong. Research Serv., R41513, *The Presidential Libraries Act and the Establishment of Presidential Libraries 6–11* (2015), <https://fas.org/sgp/crs/secretary/R41513.pdf> [<https://perma.cc/AA53-KAZF>].

286. *Nixon*, 978 F.2d app. at 1295.

287. *Id.* (quoting Affidavit of John S.D. Eisenhower (June 30, 1975)).

288. Turley, *supra* note 282, at 680, 686.

289. Memorandum from Ellis Lyons, Chief Legal Consultant on President Truman’s Papers 3 (July 24, 1951) (obtained via FOIA request and on file with the *Columbia Law Review*). The memorandum continues: “While the White House Central File includes, among others, an ‘Official’ and a ‘Personal’ file, these classifications are fairly arbitrary; moreover, both are dwarfed by the ‘General File,’ which likewise contains material of personal, official, and mixed nature.” *Id.*

290. *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 430–31 (1977).

291. Letter from Gerald R. Ford, President, U.S., to William B. Saxbe, Att’y Gen., U.S. Dep’t of Justice (Aug. 22, 1974), <https://www.fordlibrarymuseum.gov/library/document/0019/4520691.pdf> [<https://perma.cc/M26W-59KX>].

292. The “Public Documents Act”: Hearing on H.R. 16902 and Related Legislation Before the Subcomm. on Printing of the H. Comm. on H. Admin., 93rd Cong. 45 (1974) (legal opinion by William B. Saxbe, Att’y Gen. of the U.S.).

293. *Nixon*, 433 U.S. at 431–32 (internal quotation marks omitted) (quoting *Nixon v. Sampson*, 389 F. Supp. 107, 161 (D.D.C. 1975)).



provided for the initial storage and subsequent destruction of the tape recordings pursuant to Nixon's direction.<sup>294</sup>

Congress responded with the Presidential Recordings and Materials Preservation Act.<sup>295</sup> Signed by President Ford just months after Nixon's resignation, Title I of the Act directed the Administrator of General Services to take custody of Nixon's presidential papers and tape recordings and to promulgate regulations for their processing and access. The statute was designed specifically to abrogate the Nixon-Sampson agreement.<sup>296</sup> Nixon challenged the statute in court, arguing that it violated the separation of powers and the presidential privilege, as well as his First and Fourth Amendment rights and the guarantee against bills of attainder.<sup>297</sup>

*Nixon v. Administrator of General Services*<sup>298</sup> sidestepped the question of ownership of presidential records, but it opened the door to a new approach to presidential papers. In defending the statute, the Ford administration and then the Carter administration emphasized that, in addition to historical and public interest, such materials comprise important precedent for the institutional presidency. According to the Solicitor General's brief:

[O]fficials of the succeeding administration found it necessary to review portions of the presidential materials from appellant's administration concerning [Strategic Arms Limitation Talks (SALT)] negotiations with the Soviet Union, our relations with the People's Republic of China, the Vietnamese negotiations concluded in 1973, and negotiations regarding the Middle East situation . . . . Some important documents, such as memoranda of conversations between appellant and foreign leaders, can be found only in the materials at issue here.<sup>299</sup>

Former presidents, the Solicitor General argued, should not be permitted "to stop up the flow of information to the incumbent and his staff. The government should not be required to start from scratch each time a new President assumes office."<sup>300</sup> The Supreme Court heeded the administration's concerns. Writing for the majority, Justice Brennan reasoned that "[a]n incumbent President should not be dependent on happenstance or the whim of a prior President when he seeks access to records of past decisions that define or channel current governmental obligations. Nor

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294. *Id.*

295. Pub. L. No. 93-526, 88 Stat. 1695 (1974) (codified as amended at 44 U.S.C. § 2111 (2018)).

296. *Nixon*, 433 U.S. at 433-34; see also *id.* at 493-94 (Powell, J., concurring) (discussing legislative history).

297. *Id.* at 429-30.

298. 433 U.S. 425.

299. Brief for Federal Appellees at \*28-29, *Nixon*, 433 U.S. 425 (No. 75-1605), 1977 WL 189792.

300. *Id.* at \*34-35.

should the American people's ability to reconstruct and come to terms with their history" turn on such matters of happenstance.<sup>301</sup>

The Nixon–Sampson agreement and the litigation that it spawned ignited congressional interest in the ownership of presidential papers. In 1978, Congress enacted the Presidential Records Act (PRA), repudiating two centuries of practice and declaring for the first time that presidential records are the property of the United States.<sup>302</sup> The PRA establishes an affirmative obligation on the incumbent to ensure that “the activities, deliberations, decisions, and policies that reflect the performance of [the President’s] constitutional, statutory, or other official or ceremonial duties are adequately documented and that such records are maintained as Presidential records.”<sup>303</sup> The statute requires the incumbent to consult with the Archivist prior to the destruction of any presidential records.<sup>304</sup> And it establishes procedures for the initial withholding and eventual release of presidential papers to the public.<sup>305</sup> It also creates special-access procedures for an incumbent administration, as well as Congress and the courts, to access a former president’s records before they become publicly available.<sup>306</sup> The PRA thus recognizes that there are functional reasons to protect the confidentiality of presidential deliberations—especially close in time to the deliberations at issue. But the statute attempts to balance these interests against the need for government actors and eventually the public to access and understand the decisions of the presidency.<sup>307</sup>

Told from the two-bodies perspective, we might say that the PRA amounts to a formal recognition of a more latent and gradual development: the shift away from a wholly personal understanding of the

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301. *Nixon*, 433 U.S. at 452–53 (footnote omitted).

302. See 44 U.S.C. § 2202 (2018) (“The United States shall reserve and retain complete ownership, possession, and control of Presidential records . . .”).

303. 44 U.S.C. § 2203(a).

304. *Id.* § 2203(c).

305. *Id.* §§ 2204–2205.

306. See *id.* § 2205(2). Incumbent administrations establish procedures with the National Archives and Records Administration (NARA) for the retrieval of records of prior administrations pursuant to this authority. See, e.g., Memorandum from Mary B. DeRosa, Deputy Counsel to the President, to Sharon Fawcett, Assistant Archivist, Office of Presidential Libraries 1 (Feb. 6, 2009), <https://www.archives.gov/files/foia/nsc%20memo%20re%20pra.pdf> [<https://perma.cc/B3LD-J348>].

307. Passage of the PRA was aided by the incumbent. President Carter embraced the position that his presidential papers are public property, and he supported enactment of the PRA—though he opposed a competing bill as unnecessarily intrusive on presidential deliberation. See Memorandum from Robert J. Lipshutz, Counsel to the President & Hugh A. Carter, Jr., Special Assistant to the President, to Jack Brooks, Chairman, House Comm. on Gov’t Operations 3–5 (July 14, 1978) (on file with the *Columbia Law Review*). In a signing statement, Carter emphasized his campaign promise “to make the Presidency a more open institution.” Presidential Statement on Signing the Presidential Records Act of 1978, 2 Pub. Papers 1965, 1965 (Nov. 6, 1978).

president's decisional materials.<sup>308</sup> The PRA reflects and itself entrenches the idea that presidential papers are a form of institutional precedent crucial to constitutional and political understandings of the office. And yet, the personalized understanding of presidential papers through much of this nation's history set in motion and continues to reinforce a system that makes it exceedingly difficult for outside observers to discern a consistent practice of the presidency. Presidential papers are strewn across more than a dozen Presidential Libraries and the Library of Congress, with no systematic way for outside observers to trace policies and protocols across individual presidents.<sup>309</sup> Presidential Libraries themselves often operate as shrines of personality, reifying the charismatic president in popular and political culture even as they maintain, piecemeal, the records of an institutional presidency.<sup>310</sup>

Even within the presidency, the longstanding tradition of presidential papers attaching to a particular administration, itself codified in the PRA, makes it more difficult for presidential advisers to reconstruct the institutional memory of the presidency.<sup>311</sup> Because presidential records are transferred to the Archivist at the end of a particular president's term, internal processes and external nonpartisan groups have emerged to facilitate the transfer of information about the institution (its practices, norms, and routines) from one president to the next, focused especially on the moment of presidential transition.<sup>312</sup> How presidential practice gets handed down remains surprisingly intertwined with the personal leadership of the outgoing president in facilitating a smooth transition.<sup>313</sup>

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308. Of course, this is not to suggest that the legal structure of the PRA is unproblematic. The PRA channels many forms of public inquiry through FOIA, which means that archivists at PRA libraries must screen records piecemeal and out of context, creating huge backlogs in the public release of presidential records. See Anthony Clark, *The Last Campaign: How Presidents Rewrite History, Run for Posterity & Enshrine Their Legacies* 21–30 (2015).

309. By contrast, there is a long history of publishing legal opinions from the Attorney General and now the Office of Legal Counsel. For a discussion of this practice and the decline of written opinions in recent administrations, see Renan, *Law Presidents Make*, *supra* note 248, at 819–22, 842–46.

310. See Clark, *supra* note 308, at 46–47; cf. David Demarest Lloyd, *Presidential Papers and Presidential Libraries*, 8 *Manuscripts* 1, 8 (1955) (noting that putting libraries in the president's hometown enables researchers to understand “first-hand, that Independence, Missouri or Abilene, Kansas does not leave the same mark upon the personality of a man as Hyde Park, New York or Fremont, Ohio.”).

311. Martha Joynt Kumar, *Before the Oath* 22–23 (2015).

312. See *id.* at 58–67.

313. See *id.* at 68; cf. Jack M. Beermann & William P. Marshall, *The Constitutional Law of Presidential Transitions*, 84 *N.C. L. Rev.* 1253, 1270–85 (2006) (arguing that outgoing presidents have a constitutional obligation to help prepare the incoming president for office).

The story of presidential papers thus provides a conceptual bridge between two dimensions of the President's duality—the personal/impersonal and the temporary/continuous axes. Public law's rejection of presidential papers as the private property of individual presidents makes possible their use as a form of precedent for the institutional presidency. But the idea that a particular individual has a distinctive claim to, or identity with, these materials—itself deeply entrenched—complicates the pathways available to study presidential practice and even to build on it from inside the presidency.

#### IV. THE TEMPORARY/CONTINUOUS DIMENSION

This Part argues that the President develops capacity, legitimacy, and the means for continuity in governance through the institutional presidency. And yet, public law reveals an ongoing, profound ambivalence over the function of the institution in maintaining consistency across individual presidents. The authority of the sitting president to implement a particular policy and ideological vision collides with understandings that the institution creates stable and durable national commitments. This recurring struggle between the president's "presentism" and the presidency's continuity—the duality's second axis—is at the crux of wide-ranging disagreements, including over the incumbent's authority to direct administrative policy change, the constitutionality of consent decrees involving presidential authority, and the president's duty to defend in litigation statutes that he personally opposes. Beyond the capacity to make durable national commitments, this tension also confounds public law's most basic goals, such as the continuity of the presidential office itself when confronted with the occupant's temporary disability.

##### A. *The Means of Continuity in Presidential Governance*

Consider this threshold question: Why should the decisions of a particular president survive his administration? On an exclusively president-centered view, it is not clear that they should. In contrast to judicial opinions or statutes that, by design, survive their makers, the incumbent possesses Article II power only during his tenure in office. The authority underlying those decisions ceases with the end of his term. Notwithstanding the incumbent's temporary status, however, the presidency needs some way to integrate the decisions (both substantive and procedural) of prior presidents. These decisions generate invaluable information about how the presidency has been conducted and the consequences of the choices made. They also affect innumerable individuals, both inside the government and beyond. This means that some presidential decisions create hugely consequential reliance interests, both domestically and abroad. Following the practice of prior presidents can have political advantages for the incumbent as well, and it can provide a source (though

not an unqualified source) of legitimacy or acceptability for conduct that the incumbent desires to continue.

Presidential practice is thus a core component of presidential power. As elaborated below, it supplies the incumbent with institutional continuity and the capacity to govern in a manner that others in the system deem “respect-worthy.”<sup>314</sup> It creates a source of precedent crucial for (though not legally binding on) individual presidents. And it provides a *legal* precedent through which jurists and executive branch lawyers have augmented the scope of presidential power over time. And yet, if elections matter, if representative democracy means something for the presidency, then a new president must be able to revisit, refine, or repudiate some of the decisions of his predecessors. He needs to have some say, maybe substantial say, in the law and policy of his administration. This is the challenge of presidential precedent: Make it too entrenched through the institution and you inhibit the authority of the current president. Make it too unstable, too focused on the person, and the presidency cannot execute the powers of an indefinite institution.

1. *Executive orders as an instrument of indefinite presidential power.* — The institutional presidency has developed various forms of precedent, with differing means of entrenchment. A longstanding norm, for example, treats executive orders as binding unless and until revoked or amended by a successor.<sup>315</sup> Presidents since Washington have exercised this authority.<sup>316</sup> The incumbent can alter or undo his predecessors’ orders (just as Congress can reverse prior legislation). And some executive orders are so altered.<sup>317</sup> But executive orders and proclamations have effected significant, lasting policy and structural change—including the Louisiana Purchase, the Emancipation Proclamation, the desegregation of the military, and the creation of federal agencies like the EPA.<sup>318</sup>

Some executive orders, over time, have assumed a quasi-constitutional status similar to the “super statutes” that scholars have theorized in the

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314. See generally Michelman, *supra* note 61 (exploring what “respect-worthiness” means in a system of constitutional government).

315. See Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 *J.L. Econ. & Org.* 132, 155–75 (1999).

316. Jeremy D. Bailey & Brandon Rottinghaus, *The Development of Unilateral Power and the Problem of the Power to Warn: Washington Through McKinley*, 43 *Presidential Stud. Q.* 186, 187–90 (2013); see also John Contrubis, *Cong. Research Serv., Executive Orders and Proclamations 2–3* (1999), <https://fas.org/sgp/crs/misc/95-772.pdf> [<https://perma.cc/Q2Y8-J7CR>].

317. See Sharece Thrower, *To Revoke or Not Revoke? The Political Determinants of Executive Order Longevity*, 61 *Am. J. Pol. Sci.* 642, 643–44 (2017) (“Of the 6,158 executive orders issued between 1937 and 2013, 18% are amended, 8% are superseded, and 25% are revoked.”).

318. See Kenneth R. Mayer, *With the Stroke of a Pen: Executive Orders and Presidential Power* 4–7 (2001); Moe & Howell, *supra* note 315, at 133–34.

legislative context.<sup>319</sup> For example, Executive Order 12,333, issued by President Reagan, structures the governance of foreign intelligence and establishes both authorities and restraints for specific actors such as the Attorney General and the NSA.<sup>320</sup> These practices have become deeply entrenched features of the American presidency and the foreign intelligence collection conducted under Article II. “Twelve-triple-three” authority, as it is often called, provides stability in the structure of foreign intelligence collection and a small-c constitutional framework for collection practices rooted in the President’s Article II power but implemented on an indefinite basis by a massive intelligence bureaucracy.<sup>321</sup>

With respect to domestic regulatory policy, the framework of “regulatory review,” also commenced under Reagan by executive order, has become a defining feature of administrative practice, even as it has evolved under subsequent presidents.<sup>322</sup> What was so “dramatic” and “surprising” about Executive Order 12,866, issued by President Clinton, was just how much continuity it preserved with the earlier and, at the time, quite controversial executive orders on regulatory review issued by President Reagan.<sup>323</sup> Regulatory review by the Office of Information and Regulatory Affairs (OIRA), a part of the Executive Office of the President, has become so entrenched in our legal culture that some scholars have even suggested that independent agencies, which are not subject to the same executive oversight, should receive more stringent scrutiny in the courts to compensate for the absence of this sort of regulatory review.<sup>324</sup>

Procedures have developed over time to distinguish presidential orders with indefinite, binding force from other types of presidential action. Process and publicity help to legitimate what, in effect, is a form of unilateral lawmaking by the presidency.<sup>325</sup> Most of those procedural requirements—such as interagency consultation and a form of internal legality review by OLC—have developed inside the presidency itself.<sup>326</sup>

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319. See William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 *Duke L.J.* 1215, 1216–17 (2001).

320. See Exec. Order No. 12,333, 3 C.F.R. § 200 (1981).

321. See, e.g., Erica Newland, *Executive Orders in Court*, 124 *Yale L.J.* 2026, 2030–31 (2015) (discussing the scope and sweep of Executive Order 12,333).

322. See, e.g., Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 *U. Chi. L. Rev.* 1, 14–16 (1995).

323. *Id.* at 6.

324. See Catherine M. Sharkey, *State Farm “With Teeth”*: Heightened Judicial Review in the Absence of Executive Oversight, 89 *N.Y.U. L. Rev.* 1589, 1591 (2014).

325. See Moe & Howell, *supra* note 315, at 152.

326. See generally Tara Leigh Grove, *Presidential Laws and the Missing Interpretive Theory*, 168 *U. Pa. L. Rev.* (forthcoming 2020), <https://ssrn.com/abstract=3338466> (on file with the *Columbia Law Review*) (documenting the norm-based process governing executive orders that has developed over time and continues to structure presidential practice).

When incumbents have resisted calls to institutionalize presidential decisionmaking and the issue achieves political salience, Congress also has intervened.

A surge of executive orders under FDR, and the controversy that some of them sparked, prompted one such response.<sup>327</sup> A contemporaneous committee of the American Bar Association found that some orders are “buried in the files of the government departments, some are confidential and are not published, and the practice . . . is not uniform.”<sup>328</sup> Meanwhile, “[t]he comparatively large number of recent orders which incorporate provisions purporting to impose criminal penalties by way of fine and imprisonment for violation is without numerical precedent in the history of the government.”<sup>329</sup> Roosevelt initially dismissed calls for more systematic publicity of executive orders as an unwanted “government newspaper.”<sup>330</sup> The issue gained political and legal traction, however, when the government asked the Supreme Court to dismiss a pending criminal case involving the National Industrial Recovery Act because the lawyers discovered days before oral argument that the executive order “had omitted the offense charged.”<sup>331</sup> The Federal Register Act of 1935 required for the first time that executive orders and agency regulations be published in the Federal Register.<sup>332</sup>

Executive orders thus illuminate how two aspects of the institutional presidency reinforce each other: Through institutionalizing the structure and process of presidential lawmaking, the presidency makes more legitimate or acceptable a form of indefinite presidential power—one that begins as the decisions of an individual president but survives the incumbent as the law and policy of a continuous institution.<sup>333</sup>

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327. President Roosevelt issued close to 1000 executive orders between March 1933 and October 1934. See Erwin N. Griswold, *Government in Ignorance of the Law—A Plea for Better Publication of Executive Legislation*, 48 *Harv. L. Rev.* 198, 199 n.4 (1934); see also Report of the Special Committee on Administrative Law, 57 *Ann. Rep. A.B.A.* 539, 553 (1934) (observing that this “volume is, conservatively estimated, greater than the total of the preceding four year period . . . , during which 1004 orders were approved, most of them not having an important legislative character”).

328. Report of the Special Committee on Administrative Law, *supra* note 327, at 554.

329. *Id.*

330. James H. Ronald, *Publication of Federal Administrative Legislation*, 7 *Geo. Wash. L. Rev.* 52, 65–66 (1938).

331. *Oil Suit Dismissed in Supreme Court: Government Withdraws Texas Quota Case Not Covered by President's Order*, *N.Y. Times*, Oct. 2, 1934, at 6; see also Ronald, *supra* note 330, at 66–67; Theodore C. Wallen, *Complete File of New Deal Laws Lacking*, *N.Y. Herald Tribune*, Dec. 12, 1934.

332. Federal Register Act of 1935, Pub. L. 74-220, 49 Stat. 500–503 (codified as amended at 44 U.S.C. §§ 1501–1511 (2018)).

333. Cf. Renan, *Presidential Norms*, *supra* note 10, at 2239 (“A President armed with nuclear capabilities, overseeing a sprawling criminal code and a sweeping domestic administrative establishment grew to be tolerated in our culture, or understood by many legal and

2. *Presidential practice as a source of legal precedent.* — Presidential practice also provides a source of *legal* precedent for the constitutional powers of the office. Presidential practice is the principal mechanism through which jurists and executive branch lawyers develop—and augment—the content and reach of presidential power over time. “Historical gloss,” as it is often called, provides the means through which Article II authority incorporates the decisions of prior presidents *as law*—or at least as a source of constitutional meaning.<sup>334</sup> The constitutional contours of the presidential office are “not really knowable in the abstract or in the imaginings of a Founding moment.”<sup>335</sup> The scope of Article II authority has grown dramatically in response to political, economic, and social changes to the polity. The iterative decisions of prior presidents become the cumulative practice of the presidency and, in turn, a source of constitutional authority for the incumbent.

Gloss shapes how courts interpret presidential authority and its respect-worthy limits. Gloss also plays an especially important role inside the presidency, where it informs the many questions of presidential authority that do not receive judicial scrutiny. Legal opinions by the Attorneys General and the Office of Legal Counsel about the scope of presidential power develop in response to new calls for authority from individual presidents. The Office of Legal Counsel’s advice tends more often to be put in the form of written, formal “opinions” when it permits presidential action than when it prohibits it.<sup>336</sup> Those opinions, in turn, become a legal precedent of the presidency, governed to a point by its own norms of *stare decisis*.<sup>337</sup> These opinions comprise the legal material through which expanded conceptions of presidential power are formed.

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political elites to be constitutionally legitimate, at least in part because of . . . norms that the presidency [itself developed].”).

334. See, e.g., *NLRB v. Noel Canning*, 573 U.S. 513, 525 (2014) (“[T]he longstanding ‘practice of the government’ . . . can inform our determination of ‘what the law is.’” (internal citations omitted)); see also Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 *Harv. L. Rev.* 411, 414–17 (2012) (exploring the role of historical practice in the constitutional separation of powers). Scholars debate whether the framework of “gloss” or “liquidation” better captures the accretion of legal meaning through practice. See, e.g., William Baude, *Constitutional Liquidation*, 71 *Stan. L. Rev.* 1, 63–66 (2019); Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Madisonian Liquidation, and the Originalism Debate*, 106 *Va. L. Rev.* 1, 3–9 (2020). To the extent liquidation is understood as a process that continues after the Founding period, as Baude suggests, then either term captures the practice that I am describing. To the extent that liquidation is understood to be “fixed” closer to the time of the Founding, then the term does not capture, sociologically at least, how presidential authority has developed as a matter of constitutional law.

335. Renan, *Presidential Norms*, *supra* note 10, at 2248.

336. See Morrison, *supra* note 167, at 1468–69.

337. See *id.* at 1464–66.



B. *Institutional Consistency and the Incumbent's Mandate for Change*

Even as the institutional presidency provides a source of precedent foundational to current understandings of presidential power, the role of the institution as a means of consistency and entrenchment—that is, as a restraint on the incumbent's presentist impulses—is a source of recurring tension.

1. *Administrative stability and the incumbent's policy and ideological vision.*—Jurists and administrative law scholars have long debated the conflicting public law impulses for stability in executive branch law and policy on the one hand and, on the other, democratic responsiveness through the incumbent. This conflict is at the crux of enduring disagreements about the role of administrative law in constraining administrative policy change and the special solicitude that the case law and theory sometimes afford those decisions with the personal imprimatur of the president.<sup>338</sup> At its core, the debate concerns the capacity of presidential elections to imbue individual presidents with a mandate for programmatic and ideological change, and the legal implications of such a mandate in the context of national administrative governance. Does something about the distinctive political character of the incumbent give him a unique authority to advance his particular policy and moral vision through the administrative state?<sup>339</sup> Or must policy change be justified on more rational and technocratic grounds? Framing this tension as one of presidential versus administrative government (as it is often debated) somewhat obscures the issue, for technocracy exists inside the presidency as well.<sup>340</sup>

Instead, a defining ambivalence of the modern state concerns the charismatic legitimacy of administration *through* the individual of the president, notwithstanding the apparatus of a more rational bureaucracy—both inside the White House and in the agencies—that is capable of producing stable policy and consistent legal interpretations.<sup>341</sup> The danger, increasingly realized, is that the charismatic president “can, as it grows stronger, cancel itself out across administrations.”<sup>342</sup> As Jerry Mashaw and

338. See Nzelibe, *supra* note 17, at 1260–67 (observing and critiquing this practice).

339. Cf. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part) (“A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency’s reappraisal of the costs and benefits of its programs and regulations.”).

340. See Cass R. Sunstein, *Commentary, The Office of Information and Regulatory Affairs: Myths and Realities*, 126 *Harv. L. Rev.* 1838, 1839–43 (2013) (arguing that OIRA’s work “largely involve[s] interagency coordination and highly technical questions,” as opposed to politicized review); see also Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 *Colum. L. Rev.* 1260, 1305–10 (2006).

341. Weber anticipated this tension in *Politics as Vocation*. See Weber, *supra* note 62, at 165–67.

342. Jerry L. Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience*, 35 *Yale J. Reg.* 549, 607 (2018).

David Berke observe, the individual president's "ability to control administration has become sufficiently powerful that erasing a prior Administration requires little more than determination—and perhaps a dash of ruthlessness."<sup>343</sup> The "regulatory whiplash" of recent years is not simply a threat to values of regularity or predictability in governance; it is a challenge to the idea of popular authorship itself.<sup>344</sup> These erratic swings in American public policy and national commitments underscore the costs of presidential direction even as they call into question the resilience of anything resembling a durable presidential mandate.<sup>345</sup>

And yet, the president *is* the means through which American public law has recognized some connection between administration and sovereignty in a system of policymaking and remaking that increasingly operates without Congress.<sup>346</sup> It is also public law's response to the concern that administrative problems often require *some* value judgment and persistent unease about unelected bureaucrats exercising such moral authority over American life. If technocracy all the way down is either unappealing or unachievable, then we cannot entirely write out the charismatic president. The challenge for public law is to recognize and hold both commitments at once. How public law manages this duality decides the capacity of the administrative state to make durable national commitments, grounded in science and data, even as it retains some conceptual and legal space for a more transient presidential judgment.<sup>347</sup>

2. *Litigation settlements and presidential discretion.* — Less studied in the scholarship, but of considerable significance in practice, is the question whether the executive branch can bind the discretion of individual presidents through consent decrees or other litigation settlements.<sup>348</sup> In a painstaking opinion, OLC determined that litigation settlements can limit the

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343. *Id.*

344. See Bulman-Pozen, *supra* note 144, at 280–81, 316–18.

345. Cf. Jack Goldsmith, *The Trump Administration Reaps What the Obama Administration Sowed in the Iran Deal*, *Lawfare* (May 9, 2018), <https://www.lawfareblog.com/trump-administration-reaps-what-obama-administration-sowed-iran-deal> [<https://perma.cc/BLR6-CYQS>] (arguing that President Obama's decision to structure the Iran deal as a non-binding political commitment "paved the way" for President Trump's withdrawal of it and, as a result, "pledged the reputation of the nation" on an inherently fragile arrangement).

346. On the early foundations of the relationship between administration and sovereignty, see generally Richard Tuck, *The Sleeping Sovereign* (2016). On the challenges that agencies face in designing policy solutions without Congress, see generally Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 *U. Pa. L. Rev.* 1 (2014).

347. For one account of what such an accommodation might look like, see Stephenson, *Optimal Political Control*, *supra* note 144, at 71–84.

348. For important scholarly interventions (and competing perspectives), see generally Michael W. McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change*, 1987 *U. Chi. Legal Forum* 295; Michael T. Morley, *Consent of the Governed or Consent of the Government? The Problems with Consent Decrees in Government-Defendant Cases*, 16 *U. Pa. J. Const. L.* 637, 643–46 (2014); Jeremy A. Rabkin & Neal E. Devins, *Averting Government by Consent Decree: Constitutional Limits on the*

*statutory* authority of the executive branch but that they may not interfere with those powers that Article II vests “directly in the President.”<sup>349</sup> Thus, for example, OLC concluded that a proposed consent decree that would require the Departments of Navy and Energy to seek certain appropriations from Congress was unconstitutional because no executive branch official, *including the sitting president*, could agree to limit “the President’s discretion to make whatever legislative proposals he or his successors deemed desirable.”<sup>350</sup> OLC reasoned that the Recommendations Clause “commits the President to exercise his personal discretion,” and “[t]he President may not divest himself of his constitutional obligation to judge personally which recommendations should be made to Congress.”<sup>351</sup>

The relationship between statutory authority and the president’s constitutional power is more interconnected, however, than the OLC opinion suggests. And the potential for profound conflict between the commitments of the ongoing institution and the ephemeral ideological and policy attachments of individual presidents has been an important feature in litigation settlements involving the executive branch.<sup>352</sup> Litigation during the 1980s over a school desegregation consent decree between the federal government and the Board of Education for the City of Chicago, entered into in 1980 in response to the Justice Department’s enforcement of the Civil Rights Act of 1964, is illustrative. The consent decree obligated “[e]ach party . . . to make every good faith effort to find and provide every available form of financial resources adequate for the implementation” of a court-approved school desegregation plan agreed to by the parties.<sup>353</sup> Over a period of years, the City of Chicago expended approximately \$120 million to effectuate various elements of the plan and continued to budget for its ongoing implementation.<sup>354</sup> When President Reagan took office, however, he sought to dismantle the U.S. Department of Education (the relevant federal funding source for the decree) and to cut desegregation assistance to local educational agencies through direct grants.<sup>355</sup> His administration

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Enforcement of Settlements with the Federal Government, 40 Stan. L. Rev. 2038 (1987); Peter M. Shane, Federal Policy Making By Consent Decree: An Analysis of Agency and Judicial Discretion, 1987 U. Chi. Legal Forum 241.

349. OLC Settlements Authority Op., *supra* note 193, at 147.

350. *Id.* at 161 (quoting Letter from Walter Dellinger, Assistant Att’y Gen., Office of Legal Counsel, to Steven S. Honigman, Gen. Counsel, Dep’t of the Navy & Robert R. Nordhaus, Gen. Counsel, U.S. Dep’t of Energy (Sept. 12, 1995)).

351. *Id.* at 160.

352. *Cf.* Citizens for a Better Env’t v. Gorsuch, 718 F.2d 1117, 1136 (D.C. Cir. 1983) (Wilkie, J., dissenting) (“So long as a consent decree remained in force, no new policy spurred by a change in administrations . . . could take effect without the prior blessing of the court.”).

353. United States v. Bd. of Educ., 717 F.2d 378, 380 (7th Cir. 1983).

354. United States v. Bd. of Educ., 567 F. Supp. 272, 273–75 (N.D. Ill. 1983), *aff’d in part, vacated in part*, 717 F.2d 378 (7th Cir. 1983).

355. See *id.* at 274–75.

also undertook more specific efforts, including through exercise of the presidential veto, to limit funding for the Chicago desegregation plan in particular.<sup>356</sup> The Chicago Board of Education took the federal government to court, arguing that the executive branch was in violation of the decree.<sup>357</sup> The district court agreed, finding that the executive branch “could not in good faith, having entered into the Consent Decree, work actively to make financial resources *unavailable*” for its implementation.<sup>358</sup>

Emphasizing the personal discretion of the president in the constitutional structure, the Justice Department argued that interpreting the consent decree to prohibit these activities violates Article II and the separation of powers.<sup>359</sup> Underscoring the impersonal and continuous qualities of the presidency, the district court countered that “the Executive Branch itself properly exercised its own constitutionally assigned power when it chose to enter into the Consent Decree,” and that “[e]nforcement of the Executive Branch’s own voluntary decision is not an unwarranted ‘disruption’ of the exercise of its powers.”<sup>360</sup>

Palpably uneasy with the conflict between the ongoing legal commitments contained in a consent decree and the sitting president’s discretion to shape his budget and legislative agenda, the Seventh Circuit sought in a series of decisions to skirt the constitutional issue. It first construed the consent decree narrowly to avoid the constitutional questions,<sup>361</sup> and subsequently rejected the remedy ordered by the district court without deciding whether the findings of bad faith were sustainable.<sup>362</sup> Even as it reversed some aspects of the district court’s rulings, the Seventh Circuit offered the presidency this rebuke: The conduct at issue, “while perhaps within constitutional limits, . . . do[es] not befit a signatory of the stature of the United States Department of Justice”; having initiated “this critical litigation[,] [the Executive Branch] bears a continuing shared and special responsibility for its eventual outcome, regardless of changes in personnel

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356. The President vetoed a bill “the only substantive provision of which was a \$20 million appropriation to enable . . . [federal compliance] with the Consent Decree,” and the Reagan administration undertook extensive efforts (including proposed legislation and Committee report drafting) to prevent Congress from making the funds restrained by the district court available to the Chicago Board of Education for implementing the consent decree. *United States v. Bd. of Educ.*, 588 F. Supp. 132, 208–12, 237–39 (N.D. Ill. 1984), vacated, 744 F.2d 1300 (7th Cir. 1984).

357. *Bd. of Educ.*, 717 F.2d at 380.

358. *Bd. of Educ.*, 567 F. Supp. at 282.

359. OLC developed these arguments in an internal memorandum to the White House Counsel, arguing that the issue goes “to the heart of presidential authority.” Memorandum from Theodore B. Olson, Assistant Att’y Gen., Office of Legal Counsel, for Michael J. Horowitz, Counsel to the Dir. & Gen. Counsel, Office of Mgmt. & Budget 15 (Aug. 9, 1984) (on file with the *Columbia Law Review*).

360. *Bd. of Educ.*, 588 F. Supp. at 243.

361. See *Bd. of Educ.*, 717 F.2d at 383.

362. See *United States v. Bd. of Educ.*, 744 F.2d 1300, 1308 (7th Cir. 1984).

and ideology that will inevitably accompany the passage of time.”<sup>363</sup> Implicit in this logic is a shift from the legality of the individual president’s discretion to the morality of abandoning the shared project of desegregation in Chicago’s schools that the institution of the executive branch itself had commenced.<sup>364</sup>

3. *The institutional duty to defend statutes that the incumbent opposes.* — This tension is also at the center of ongoing debates about a presidential “duty” to defend in court the constitutionality of statutes, even those with which the incumbent disagrees on moral or policy grounds. On one view, the institution of the presidency is best served when the Justice Department defends the constitutionality of all statutes in court, at least when a reasonable defense is consistent with existing judicial precedent and the statute at issue does not impinge on the president’s Article II authority.<sup>365</sup> This “duty to defend” is understood to protect the Executive’s capacity to speak for the United States in litigation (rather than competing with Congress), promote a culture of professionalism at the Justice Department, and preserve the credibility of the president’s lawyers in the courts.<sup>366</sup> Yet individual presidents have resisted this norm in defining moments of their presidencies. What some commentators consider leadership and an expression of moral authority from the person, others regard as an abdication of the commitments of the institution.

While it may be tempting to cast these disagreements as politically or policy motivated, and there is surely something to this, it misinterprets the terms of the debate for public law. Scholars and officials who support a given president’s politics and policies have taken opposing views on how the duty to defend applies in a given context, such as President Obama’s decisions initially to defend and then to cease to defend the constitutionality of section 3 of the Defense of Marriage Act.<sup>367</sup> Politics and ideology alone are insufficient to explain either the practice or the scholarly debate around the duty to defend.

Making the President’s duality central to these disagreements suggests a reinterpretation of the practice. The nature of the duty to defend, and the

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363. *Id.*

364. The institutional presidency itself has limited the practice of such consent decrees pursuant to DOJ policy, commenced under Attorney General Meese. See Memorandum from Edwin Meese III, Att’y Gen., to All Assistant Att’y Gen. (Mar. 13, 1986), <https://www.archives.gov/files/news/samuel-alito/accession-060-89-1/Acc060-89-1-box9-memoAyer-LSWG-1986.pdf> [<https://perma.cc/8BHM-2NV6>]. Underscoring the two bodies, however, the force of these restrictions appears to vary across individual presidents (as reflected in the OLC opinion issued under President Clinton). See *supra* note 193.

365. The “duty to defend” is extensively elaborated in executive branch legal precedent. See generally Renan, *Presidential Norms*, *supra* note 10, at 2198–202 (collecting OLC opinions and scholarly accounts).

366. See Daniel J. Meltzer, *Lecture, Executive Defense of Congressional Acts*, 61 *Duke L.J.* 1183, 1198–201, 1209 (2012).

367. See Renan, *Presidential Norms*, *supra* note 10, at 2201–02 (collecting sources).

rules for when and how it applies, are inescapably contested and imprecise because the commitments of the institutional presidency are so directly at odds with the commitments of the personal president. The debate is not one of norms versus no-norms, but of two intractable impulses. Lawyers for the presidency recognize the significance of the duty to defend—as a matter of presidential precedent and also as a way to protect the interests of the institution. As a result, institutional actors like OLC have articulated a strong presumption in favor of the presidency’s defense of statutes in court, and Justice Department litigators often work to reinforce it. Congress too has weighed in, requiring public notice when the presidency declines to defend the constitutionality of a statute.<sup>368</sup> The practice retains, however, some conceptual and constitutional space for the sitting president to exercise moral leadership—to decline to defend in court a statute that he concludes is truly illegitimate.<sup>369</sup> Debate over how to interpret particular episodes is inescapable, and often affected by commentators’ political and policy priors. But a more categorical rule would fail to recognize some role for the moral leadership of the incumbent in directing executive government—a moral authority that sits uneasily with, but is nevertheless deeply entrenched in, constitutional understandings of the presidency.

C. *Transient Occupants of an Indefinite Office*

There is a further intertemporal difficulty: The presidential office is indefinite and, in a sense, indestructible while its occupants are transient and subject to infirmity. How can public law make continuous the exercise of power so closely tethered, at any given time, to its temporary occupant? This conundrum is at the crux of disagreements over how to handle multiple (and coexisting) presidents, for example, with respect to executive privilege. It is also why questions of presidential inability are so confounding for public law.

1. *Executive privilege and the problem of multiple presidents.* — Hamilton famously cautioned that the possibility of former presidents “wandering among the people like discontented ghosts” was a reason to preserve the incumbent’s eligibility for reelection.<sup>370</sup> With the emergence of term limits, the issue has reemerged in a variety of small-c constitutional norms governing presidential transitions, such as the norm restricting a president-elect’s pronouncements on foreign policy to ensure that the United States has “only one president at a time.”<sup>371</sup> The issue implicates legal practice as

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368. 28 U.S.C. § 530D (2018).

369. Cf. Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 Harv. L. Rev. 1787, 1794 (2005) (explicating the concept of legitimacy).

370. The Federalist No. 72, at 498 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

371. See, e.g., Uri Friedman, *It’s Official: America Has Two Presidents at One Time*, Atlantic (Dec. 23, 2016), <https://www.theatlantic.com/international/archive/2016/12/trump-obama-israel-settlements-security-council/511637> [<https://perma.cc/35JX-7NYV>] (describing

well, for example, with respect to the executive privilege assertions of former presidents. Does the presidential privilege follow the individual when the incumbent leaves office, or does it instead belong to the permanent institution?

The Court's decision in *Nixon v. Administrator of General Services* reveals an effort to accommodate the two bodies.<sup>372</sup> Former President Nixon asserted executive privilege in response to the passage of the Presidential Recordings and Materials Preservation Act, the legislation enacted by Congress to govern the disposition of Nixon's presidential papers. President Carter (as well as his immediate predecessor, President Ford) supported the statutory framework that Nixon challenged as a violation of the presidential privilege. Individual presidents thus took competing positions on the presidential privilege and whether it was appropriately invoked to prevent review of President Nixon's papers by the institution of the presidency (through the Archivist).<sup>373</sup>

The Court's separate opinions suggest three different understandings of the relationship between the president and the presidency. For Justice Powell (in concurrence), the presidential privilege belongs to the institution alone.<sup>374</sup> In practice, of course, we still need some office-holder to assert the privilege. But the current office-holder's position is conclusive. Though the privilege survives a change in administration, "the incumbent, having made clear . . . his opposition to the former President's claim, alone can speak for the Executive Branch."<sup>375</sup> In dissent, Chief Justice Burger disputed this understanding; the privilege "inures to the President *himself*," reasoned Burger, "it is personal in the same sense as the privilege against compelled self-incrimination."<sup>376</sup> And the "validity of one person's constitutional privilege does not depend on whether some other holder of the same privilege supports his claim."<sup>377</sup> For Chief Justice Burger, then, the views of the incumbent are irrelevant if a former president has asserted executive privilege as to the materials of his administration.

The majority rejected both of these poles, charting instead an intermediate approach between them. "[T]he privilege," urged Justice Brennan, "is not for the benefit of the President as an individual, but for the benefit of the Republic."<sup>378</sup> This means that the privilege survives any individual's presidency. It also means, however, that the current

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the norm and compliance with it by prior presidents of both parties but reporting breaches by president-elect Donald Trump).

372. 433 U.S. 425 (1977).

373. See *id.* at 430–33, 441–46.

374. *Id.* at 503 (Powell, J., concurring in part and concurring in the judgment).

375. *Id.* at 502.

376. *Id.* at 518 (Burger, J., dissenting) (emphasis added).

377. *Id.* at 523.

378. *Id.* at 449 (majority opinion) (internal quotation marks omitted) (quoting Brief for Federal Appellees at 33, *Nixon*, 433 U.S. 425 (No. 75-1605), 1977 WL 189792).

administration is “in the best position to assess the present and future needs of the Executive Branch.”<sup>379</sup> That President Carter opposed former President Nixon’s claim “detracts from the weight” of Nixon’s assertion of the privilege.<sup>380</sup> Justice Brennan’s framework for assessing a former president’s claim of executive privilege is analogous to the famous tripartite structure developed by Justice Jackson in the *Steel Seizure* case to assess presidential power in relation to Congress. A claim of executive privilege is strongest when the former president and the incumbent act in concert. When the former president’s assertion of the privilege contravenes the incumbent’s position, his power to claim the privilege might be understood to be at its lowest ebb.<sup>381</sup> In accommodating successive presidents, the doctrinal framework makes possible the continuity of an office partially revealed in each.

Stepping back, the two-bodies prism explains why the question of executive privilege, when it pertains to a prior president, has continued to be so vexing. The idea that the sitting president speaks for the continuous institution, and is perhaps best positioned to assess the needs of the office, runs into the concern that the person runs his presidency and has a distinct stake in the work and confidentiality of his administration. Justice Brennan’s effort at accommodation retains some irreducible ambiguity, and individual presidents have continued to grapple with the role of former presidents whose work in office is at issue.<sup>382</sup> Yet neither a legal framework that erases the individual nor one that eclipses the institution seems wholly satisfying. The privilege exists to sustain an ongoing institution. But the presidency cannot be fully disentangled from the persons of the president.

2. *Temporarily unfilled office: the problem of presidential inability.* — The debates over presidential inability further illuminate the enduring challenge of a permanent branch of government so closely intertwined, at any point in time, with one “body mortal.” Periods of presidential disability have created considerable legal uncertainty and even concealment on the part of individual presidents. Article II provides that “[i]n Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President.”<sup>383</sup> Prior to the Twenty-Fifth Amendment, a central legal question concerned the words “the Same” in this paragraph: Was it the office of the President that devolved to the Vice President, or only its

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379. *Id.*

380. *Id.*; see also *id.* at 451 (“The expectation of the confidentiality of executive communications . . . has always been limited and subject to erosion over time after an administration leaves office.”).

381. Cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

382. See Martha Joynt Kumar, Executive Order 13233 Further Implementation of the Presidential Records Act, 32 *Presidential Stud. Q.* 194, 194–95 (2002).

383. U.S. Const. art. II, § 1, cl. 6.



powers and duties?<sup>384</sup> And, if it was *the office*, could the person of the president regain the office after it devolves to the Vice President?

The second (and more consequential) question was complicated by the precedent that early practice established around the first. When President William Henry Harrison became the first President to die in office in 1841, debate centered on whether Vice President John Tyler *becomes* the president (as Tyler argued) or instead serves as “acting President” for the duration of the term.<sup>385</sup> Tyler’s claim to the presidential office, though initially contested,<sup>386</sup> quickly became the accepted precedent and followed practice of the presidency.<sup>387</sup>

It was not until 1881 that the presidency confronted the question whether a *temporarily* disabled president could resume the office after it devolves to the vice president. When President James Garfield was shot by an assassin, he spent eighty days in a coma before he died. After sixty days, the president’s Cabinet voted that Vice President Chester Arthur should assume the powers of the presidency. But the Cabinet divided on the question whether, in so doing, the Vice President *becomes* the President.<sup>388</sup> By a vote of four to three, the Cabinet concluded that Arthur would assume the office of President and “thereby oust Garfield from office.”<sup>389</sup> Consequently, the Cabinet resolved that Vice President Arthur should first consult with Garfield. The president’s physician advised that such consultation might kill the president and, in any event, Vice President Arthur “*emphatically declined*” to assume the powers of the presidential office under these conditions.<sup>390</sup> As a result of President Garfield’s inability, “officers were unable to perform their duties because the President was unable to commission them,” foreign relations “*deteriorat[ed]*,” and the Central Pacific Railway considered litigation “for a writ of mandamus directing Vice President Arthur to assume the President’s duties and appoint an Auditor

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384. Herbert Brownell, Jr., *Presidential Disability: The Need for a Constitutional Amendment*, 68 *Yale L.J.* 189, 190 (1958).

385. See Ruth C. Silva, *Presidential Inability*, 35 *U. Detroit L.J.* 139, 151–52 (1957).

386. When Whigs in the House sought to impeach Tyler, the charges listed him as “John Tyler, Vice-President, acting as President,” and various members of the Twenty-Seventh Congress recognized him only as “a Vice President exercising presidential power.” *Id.* at 152.

387. See Brownell, *supra* note 384, at 193; see also John D. Feerick, *The Twenty-Fifth Amendment: Its Complete History and Application* 5–7 (2d ed. 1992) [hereinafter Feerick, *Twenty-Fifth Amendment*].

388. Brownell, *supra* note 384, at 193.

389. See Silva, *supra* note 385, at 140 (noting that the Secretaries of State, War, and the Navy thought Vice President Arthur could temporarily discharge presidential duties, while the Attorney General, Secretary of the Treasury, Postmaster General, and Secretary of the Interior “thought that Arthur’s exercise of presidential power would be equivalent to removing Garfield from office”).

390. Brownell, *supra* note 384, at 193–94. Arthur was in an especially politically precarious situation because Garfield’s assassin “had proclaimed his loyalty to Arthur and to Stalwartism,” giving rise to rumors that the assassination had been orchestrated by those sympathetic to the “Stalwart wing” of the Republican Party. Silva, *supra* note 385, at 141.

of Railway Accounts since Garfield was unable to do so.<sup>391</sup> Yet unease that the Vice President's exercise of presidential power might in effect oust the sitting president led those close to Garfield to "minimize the need for an active President . . . [and] refuse[] to recognize the full extent of his disability."<sup>392</sup>

The office of the President was again physically occupied but functionally vacant in 1919 in the six months after President Woodrow Wilson suffered a stroke. Wilson's condition was initially "concealed not only from the public but also from the Congress and members of the Cabinet," while the president's wife, physician, and secretary controlled access and directed information.<sup>393</sup> A "sort of regency" was established around Mrs. Wilson.<sup>394</sup> Political scientist Ruth Silva argues that "the entire problem was handled largely on the basis of personal loyalty," not public interest.<sup>395</sup> Given the substantial constitutional uncertainty over whether Wilson could resume the office if it were to devolve, Vice President Thomas Marshall refused to exercise any powers of the presidency.<sup>396</sup> Fusing the personal and the institutional, Marshall "told his secretary that he 'would assume the presidency' only upon [a] resolution of Congress and with the written approbation of Mrs. Wilson and Dr. Grayson [(the president's physician)]."<sup>397</sup> The impact of the individual's disability on national governance was again considerable.<sup>398</sup>

Congressional committees held extensive hearings and considered various proposals in response to President Wilson's inability and again after President Dwight Eisenhower suffered both a heart attack and a stroke in office. But Congress was unable to settle on a legal mechanism for how to displace the person of the president to ensure the continuous functioning of the presidency.<sup>399</sup> President Eisenhower himself directed the Justice Department to conduct a legal study of presidential disability and proposed a constitutional amendment to Congress.<sup>400</sup> The Eisenhower administration's plan opposed other proposals, then in circulation, for

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391. Silva, *supra* note 385, at 140.

392. *Id.* at 141.

393. Feerick, *Twenty-Fifth Amendment*, *supra* note 387, at 13; see also John D. Feerick, *From Failing Hands: The Story of Presidential Succession 172-73* (1965).

394. Silva, *supra* note 385, at 144.

395. *Id.* at 145.

396. Brownell, *supra* note 384, at 194.

397. Silva, *supra* note 385, at 146.

398. Feerick, *Twenty-Fifth Amendment*, *supra* note 387, at 14-15 (describing how in 1919 to 1920 "the business of government was brought to a standstill," including the defeat of U.S. participation in the League of Nations, unfilled government vacancies, twenty-eight bills passed into law by default, among much else); see also Silva, *supra* note 385, at 146-47.

399. Proposals included the decision being made by "either separately or in combination the Vice President, Cabinet, Congress, Supreme Court, or an inability commission." Feerick, *Twenty-Fifth Amendment*, *supra* note 387, at 52-54.

400. See Brownell, *supra* note 384, at 196-97.

some sort of inability commission to decide whether a presidential disability exists.<sup>401</sup> Attorney General Herbert Brownell argued to Congress, and later in the pages of the *Yale Law Journal*, that such proposals misconstrued the objective of a constitutional amendment, which was “for [the] unquestioned continuity of executive power and leadership.”<sup>402</sup> Implicitly invoking the interdependence of the personal and the institutional presidency, Brownell argued that a judgment on presidential inability must be the Vice President’s and the Cabinet’s to make because “the public would accept the Cabinet’s opinion as reflecting the views of persons close to the President and alert to any unconstitutional attempt to deprive him, even temporarily, of his powers.”<sup>403</sup>

With Congress at an impasse, President Eisenhower ultimately entered into an informal agreement with Vice President Nixon, which specified the conditions under which the Vice President would assume the duties of the presidency and declared that the president could resume those duties when he determined that the inability had passed.<sup>404</sup> The Eisenhower–Nixon memorandum became a precedent for the institutional presidency. The same agreement was later adopted by President Kennedy (with Vice President Johnson), and by President Johnson (with the House Speaker and then with his Vice President).<sup>405</sup> The Kennedy assassination would again refocus Congress on the need for a constitutional amendment.

The way out of the constitutional conundrum was to cede some power of the individual president to the executive branch. The Twenty-Fifth Amendment provides a mechanism for the president to transfer his powers to the Vice President, serving in an acting capacity, and, pursuant to Section 4, for the Vice President and a majority of “the principal officers of the executive departments” to unseat a president as a result of his inability to fulfill the duties of the office.<sup>406</sup> If the president contests the inability, Section 4 provides a mechanism for Congress to resolve the disagreement.<sup>407</sup>

As a mechanism to ensure the continuity of the institution of the presidency during temporary episodes of personal disability, the Twenty-Fifth

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401. See Silva, *supra* note 385, at 162–69.

402. Brownell, *supra* note 384, at 198 (arguing that the “physical and mental capacity one needs to serve as President . . . is far more than a matter of medical findings,” that an inability commission would be “an affront to the President’s personal dignity,” and that it could “give a hostile group power to harass the President”); see also Presidential Inability, Hearing Before the Spec. Subcomm. on Study of Presidential Inability of the H. Comm. on the Judiciary, 85th Cong. 4–32 (1957) (statement of Herbert Brownell, Jr., Att’y Gen. of the U.S.).

403. Brownell, *supra* note 384, at 200.

404. *Id.* at 204.

405. Feerick, Twenty-Fifth Amendment, *supra* note 387, at 56.

406. U.S. Const., amend. XXV, §§ 3–4. It also provides a mechanism for the Vice President’s replacement. See *id.* § 2.

407. *Id.* § 4. Each of these provisions has roots in the Eisenhower plans. See Brownell, *supra* note 384, at 201–02.

Amendment provides an important constitutional corrective. By clarifying that temporary devolution of presidential power does not oust the incumbent from office, the Amendment has made it possible for individual presidents to prepare—and for the institutional presidency to regularize— instruments that temporarily delegate the powers of the presidential office to the vice president. But the intractable force of the charismatic president in the American constitutional experience suggests that Section 4 of the Amendment, which empowers executive branch leadership to override the judgment of the sitting president as to his competency, is and must be exceedingly limited in practice. Barring extreme conditions—and perhaps even under such circumstances—it would be enormously difficult for the institutional presidency to unseat the incumbent against his will and maintain the sociological legitimacy of the office.<sup>408</sup> What such a devolution of power would look like itself raises a host of thorny and unresolved legal questions.<sup>409</sup> To the extent that the institutional presidency is empowered in practice to check the sitting president, it is as a result of its composite feature<sup>410</sup>—a dimension of presidential power to which the next Part turns.

#### V. THE SINGULAR/COMPOSITE DIMENSION

Article II vests power in a single individual. At least in the context of contemporary governance, however, the execution of presidential power requires a collective. This “one versus many” dimension of the President’s duality gives rise to longstanding and quite current controversies about the nature of presidential power. Perhaps most fundamentally, we lack clarity on the nature of the institution: Are senior White House officials—and even agency leaders—the “alter egos” of the incumbent, there to implement his individual will, or are they subordinates of a different character, supervised by but not fully subservient to the person of the president?<sup>411</sup> This question is at the crux of enduring disagreements about a “unitary”

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408. See Fallon, *supra* note 369, at 1795 (defining sociological legitimacy).

409. For a thoughtful analysis of these unresolved legal issues, see generally Yale Law Sch. Rule of Law Clinic, *The Twenty-Fifth Amendment to the United States Constitution: A Reader’s Guide* (2018).

410. Cf. Ash Carter, *Inside the Five-Sided Box: Lessons from a Lifetime of Leadership in the Pentagon 202–03* (2019) (observing that one “nightmare scenario . . . is the idea of a mentally disabled president deciding to launch a nuclear attack” but emphasizing that “the high-ranking leaders . . . who surround every president . . . [would be unlikely to] robotically follow the unlawful orders of a clearly deranged president”).

411. For classic competing views, compare *Myers v. United States*, 272 U.S. 52, 133 (1926) (characterizing department heads as the “alter ego[s]” of the President), with *Humphrey’s Executor v. United States*, 295 U.S. 602, 625–26 (1935) (recognizing Congress’s authority “to create a body of experts who shall gain experience by length of service; a body which shall be independent of executive authority, *except in its selection*, and free to exercise its judgment without the leave or hindrance of any other official”).

executive.<sup>412</sup> As recent episodes underscore, we lack as well an understanding of when and how the president speaks for the presidency. The question has implications for checks and balances; for those institutions that hold presidential power to legal and political account must be able to discern the policy and conduct of *a presidency*. It also has implications for substantive constitutional commitments, especially in a time when the person of the president regularly expresses racial and religious animus and declares his personal impunity. Finally, one versus many is the axis along which many of our disagreements over legal remedies for presidential misconduct turn. Because these cases underappreciate the interdependence of the President's two bodies, however, they create a doctrine that both under- and overprotects presidential power.

A. *The Process of Presidential Decisionmaking*

A central question of Article II is how the president acts with the force of law: Do edicts made at the whim of the incumbent comprise binding U.S. policy or, alternatively, is some process of the institutional presidency required? It is perhaps remarkable that centuries into the American republic, we lack a clear answer to this question. The trappings of legislative lawmaking, by contrast, are established in our constitutional text, and they rely on a form of collective action that is inherently distinguishable from the utterings of any single member. But what happens when the president pronounces foreign policy or a law enforcement directive by tweet? Has he issued a legal order binding on subordinates? Has he established U.S. policy? The issue has taken on new urgency in the Trump administration because the President's statements so often contradict the conduct and avowed commitments of his administration. But the current controversies illuminate a deeper ambiguity about when and how the president speaks for the presidency.

On one account, what matters is the individual's will. When the president has spoken on a matter, his words carry legal force irrespective of the process undertaken to inform his judgment (or the absence of any process at all). Article II vests the executive power in a single person. That individual has no obligation to make decisions through the composite. On the other view, the presidency imposes certain procedural or deliberative duties on the incumbent; these institutional features are what make the exercise of presidential direction "respect-worthy"—including to those

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412. Compare, e.g., Calabresi & Prakash, *supra* note 111, at 550 (defending a strongly unitary view on originalist grounds), and Lessig & Sunstein, *supra* note 111, at 4 (rejecting originalist argument but defending executive unitariness on functional grounds), with Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 *Colum. L. Rev.* 263, 267 (2006) (arguing presidents have authority to direct administrative action only when such authority is expressly conferred by statute), and Peter L. Strauss, *Presidential Rulemaking*, 72 *Chi.-Kent L. Rev.* 965, 984–86 (1997) (arguing congressional authority delegated to agencies is not given to the president).

who must implement the president's command.<sup>413</sup> These duties derive from social practice. But they also instantiate certain moral commitments or values. Some scholars trace these commitments to the "big C" Constitution.<sup>414</sup> Others root them in "small c" norms of constitutional morality.<sup>415</sup> When institutions inside the presidency regularize presidential decisionmaking and promote reason-giving, for example, they may advance Fullerian rule of law principles or deliberative constitutional values.<sup>416</sup> The President's two bodies thus give rise to competing understandings of how the President "makes law"—that is, under what conditions the president can bind others in a composite presidency.

If presidential power concerns more than formal (and perhaps unusable) power, however, then a theory of presidential lawmaking must recognize how the two bodies interact.<sup>417</sup> Whether presidential rhetoric has binding force is answered on the ground by those who surround the incumbent—the other actors of a composite institution. Presidential rhetoric loses real or effective power if those who comprise the presidency choose to ignore it. For political scientist Richard Neustadt, this was "the essence of the problem[:]. . . 'powers' are no guarantee of power, clerkship is no guarantee of leadership."<sup>418</sup> Neustadt's focus on the personal influence of the president, however, underappreciates the role of the institution in both blunting presidential power and protecting it.

Institutional practice can offer a means for those inside the presidency to push back on the incumbent's personal judgment: by rejecting his unmediated rhetoric as a presidential decision and demanding a more formal process. Thus, for example, President Trump's tweet that "the United States Government will not accept or allow . . . Transgender individuals to serve in . . . the U.S. Military"<sup>419</sup> was regarded

413. See Renan, *Presidential Norms*, supra note 10, at 2240; see also Michelman, supra note 61, at 346.

414. See e.g., Kent et al., supra note 81, at 2120–21; Roisman, supra note 191, at 852–59.

415. See Renan, *Presidential Norms*, supra note 10, at 2189 n.1, 2203 n.76 (collecting sources); see also Vicki C. Jackson, *Pro-Constitutional Representation: Comparing the Role Obligations of Judges and Elected Representatives in Constitutional Democracy*, 57 *Wm. & Mary L. Rev.* 1717, 1737–47 (2016); Richard Primus, *Unbundling Constitutionality*, 80 *U. Chi. L. Rev.* 1079, 1081–82 (2013); Neil S. Siegel, *After the Trump Era: A Constitutional Role Morality for Presidents and Members of Congress*, 107 *Geo. L.J.* 109, 126–27 (2018).

416. See Renan, *Presidential Norms*, supra note 10, at 2223–29.

417. On the shift from formal theories of presidential power to those more sensitive to real or effective power, see generally Richard H. Pildes, *Law and the President*, 125 *Harv. L. Rev.* 1381, 1392–93 (2012) (reviewing Eric A. Posner & Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (2010)).

418. Neustadt, supra note 179, at 10.

419. Donald J. Trump (@realDonaldTrump), Twitter (July 26, 2017, 8:55 AM), <https://twitter.com/realDonaldTrump/status/890193981585444864> [<https://perma.cc/822S-T8RN>]; Donald J. Trump (@realDonaldTrump), Twitter (July 26, 2017, 9:04 AM) <https://twitter.com/realDonaldTrump/status/890196164313833472> [<https://perma.cc/6HA3-XWQF>].

by his subordinates as empty rhetoric, barring a more formal directive to the Secretary of Defense.<sup>420</sup>

Yet the institutional presidency can also operate to protect the incumbent and insulate his conduct. Congressional hearings on Russian interference in the 2016 election are illustrative. The Secretary of State was repeatedly questioned by senators on whether statements from President Trump in the media and on Twitter constitute statements on behalf of the United States that establish foreign policy. “The president says things,” Secretary Pompeo responded, but this does not mean that he is making U.S. policy.<sup>421</sup> The challenge, urged senators, is how do we know the difference. When does the president speak for the presidency? Secretary Pompeo’s response leaned heavily on the practices and procedures of the institutional presidency: The president can say a lot of things in a lot of places, he pressed, but “we have a National Security Council. We meet, we lay out strategies, [and] we develop policies.”<sup>422</sup> If Congress wants to know the policies of the presidency, Pompeo urged, it must look to the work of the institution.

In this way, the institutional presidency obscures the space between the incumbent’s behavior and the expectations of legal and political elites for a more rational and deliberative process, even as it also makes it possible for actors inside the presidency to orient presidential decisionmaking toward these features of interagency consultation, deliberation, and a fact-informed process.

#### B. *The Nature (and Sources) of Presidential Intent*

The uneasy relationship between the president and the presidency is also at the crux of ongoing debates about how to interpret presidential instruments. Is presidential intent a unitary construct rooted in the purpose and motives of a particular individual? Or is it instead a collective body that produces presidential policy through executive orders and other such directives? The question has implications both for how courts and executive branch actors give meaning to presidential orders and for the frameworks that jurists and lawyers use to address constitutionally impermissible animus.

A purely institutional approach to the presidency—one that ignores the intentions of the incumbent—sits uneasily with a unitary understanding of the office, which usually focuses on the will of the individual and

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420. See Recent Social Media Posts: Executive Power—Presidential Directives—In Tweets, President Purports to Ban Transgender Servicemembers, 131 Harv. L. Rev. 934, 936–38 (2018).

421. Mara Liasson, *It’s Not the Deep State that Hurts Trump—It’s the Shallow State*, NPR (Aug. 9, 2018), <https://www.npr.org/2018/08/09/635021427/its-not-the-deep-state-that-hurts-trump-it-s-the-shallow-state> [<https://perma.cc/CS68-KF45>] (quoting Secretary of State Mike Pompeo).

422. *Id.*

understands the executive branch as there to do his bidding. Meanwhile, if the institutional presidency *is* central to governance—if its deliberative processes regularize and discipline presidential decisionmaking—then public law needs some way to decide when or at what point the incumbent’s personal motives have become sufficiently attenuated from the decisions of the presidency.<sup>423</sup>

These issues were at the heart of *Trump v. Hawaii*.<sup>424</sup> The case concerned a proclamation by President Trump, issued under the Immigration and Nationality Act, to restrict the entry of nationals of eight countries into the United States. Two prior iterations of the policy—what became known as the “travel ban”—were struck down on Establishment Clause and statutory grounds in the lower courts.<sup>425</sup> In disposing of the case, a fractured Supreme Court issued several opinions. Each opinion assumes a different frame or body of the President controls. And its implicitly chosen frame then in effect decides the question presented. What results is three different understandings of the relationship between the president and the presidency. Yet the work that each is doing in the logic of the opinions is almost entirely implicit. As a result, the opinions seem to talk past each other on the pivotal issues of the case.

1. *President- versus presidency-based doctrine.* — The majority opinion, authored by Chief Justice Roberts, embraces an impersonal, thoroughly institutional presidency. Any anti-Muslim animus of the sitting president is nearly irrelevant to the doctrinal question whether the presidential proclamation violated the First Amendment. So long as the institutional presidency has put forward a national security purpose, and in light of what the majority perceived to be a rigorous institutional process, the Court need not assess whether the president himself intended to ban Muslims. Though plaintiffs in the case, along with their amici curiae,<sup>426</sup> established an extensive record of statements from President Trump avowing interest in a Muslim ban and expressing anti-Muslim animus, directing his subordinates to implement such an anti-Muslim policy, and connecting earlier iterations of the presidential proclamation to that objective, the majority did not find those statements probative. At stake was not the conduct of a

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423. Cf. Richard H. Pildes, Institutional Formalism and Institutional Realism in Constitutional and Public Law, 2013 Sup. Ct. Rev. 1, 3 (2014) (describing a pervasive “tension between institutionally formalist and realist approaches . . . throughout the constitutional (and public) law of institutions”).

424. 138 S. Ct. 2392 (2018). This discussion incorporates and builds on some preliminary thoughts that I offered in a blog post. See Daphna Renan, When the President Is at War with the Presidency: Implications for Presidential Authority from *Trump v. Hawaii*, Just Security (July 20, 2018), <https://www.justsecurity.org/59592/president-war-presidency-implications-presidential-authority-trump-v-hawaii> [<https://perma.cc/6FCC-V2K4>].

425. *Hawaii*, 138 S. Ct. at 2403–04.

426. See, e.g., Brief of Constitutional Law Scholars as Amici Curiae in Support of Respondents at 19–23, *Hawaii*, 138 S. Ct. 2392 (2018) (No. 17-965), 2018 WL 1605673.



“particular President,” the majority reasoned, but the “authority of the Presidency itself.”<sup>427</sup>

The opinion is striking in part because it is written by Chief Justice Roberts, author of *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, and joined by the Court’s fiercest unitarists.<sup>428</sup> As detailed above, unitary executive theory typically embraces a construction of the presidency in which implementing the will of the incumbent is central to the proper functioning of Article II.<sup>429</sup> And yet, the presidency of *Trump v. Hawaii* is neither charged with, nor expected to implement the incumbent’s will. Instead, it is an institutional infrastructure—seemingly autonomous from presidential interference—or at least insulated from the sitting president’s impermissible animus.

Recognition of executive “unitariness”—at least insofar as the incumbent has informal powers to direct his subordinates—comes instead from Justice Sotomayor’s dissent. Because the sitting president in practice controls the goals and objectives of the presidency, in part by directing his senior aides and his Cabinet, the person of the president cannot—as a legal matter—hide behind the façade of an orderly office. If presidential governance promotes accountability through the incumbent, then his avowed animus has legal consequence: Deference ordinarily afforded to the institution of the presidency is inappropriate when its current inhabitant has expressly repudiated constitutional commitments of religious freedom. For Justice Sotomayor, then, the presidential proclamation was “contaminated” by the incumbent’s “impermissible discriminatory animus against Islam and its followers.”<sup>430</sup>

Justice Breyer’s dissent (joined by Justice Kagan) suggests a middle approach between these presidency- and president-based perspectives: The institutional presidency can operate as a check on the animus-driven objectives of a sitting president. But the question is *has it here?* This is a question for courts to resolve. And the implementation of the proclamation’s “elaborate system of exemptions and waivers,” by other actors of a composite presidency, provides relevant evidence.<sup>431</sup> “For one thing,” Justice Breyer reasons, “the relevant precedents—those of Presidents Carter and Reagan—would bear far less resemblance to the present Proclamation” if the government is not meaningfully implementing these “case-by-case exemption[s].”<sup>432</sup> And, if the government is not implementing the

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427. *Hawaii*, 138 S. Ct. at 2416–23.

428. 561 U.S. 477 (2010); see, e.g., Richard H. Pildes, *Free Enterprise Fund*, Boundary-Enforcing Decisions, and the Unitary Executive Branch Theory of Government Administration, 6 Duke J. Const. L. & Pub. Pol’y 1, 1–2 (2011) (emphasizing the starkly unitary vision of the executive branch in *Free Enterprise Fund*).

429. See *supra* section I.B.1.

430. *Hawaii*, 138 S. Ct. at 2440–45 (Sotomayor, J., dissenting).

431. *Id.* at 2429 (Breyer, J., dissenting).

432. *Id.* at 2430.

exemption and waiver system specified in the Proclamation, then the argument that the Proclamation *is* in fact the incumbent's desired "Muslim ban" . . . becomes much stronger."<sup>433</sup> As Justice Breyer suggests, there is both an individual and an institution at the crux of Article II. The challenge, in adjudicating presidential authority, is to give conceptual and doctrinal content to their interconnection.

2. *Accommodating the two bodies.* — Judicial review of presidential instruments requires a theory of both decisionmaking inside the presidency and adjudication or the role of courts in reviewing presidential action.<sup>434</sup> With respect to presidential *decisionmaking*, Chief Justice Roberts's focus on the institution makes good sense absent indicia of an uninstitutional decision. Roberts's opinion valuably reorients questions of presidential decisionmaking to a more institutional understanding—one that sees interagency consultation and the distinctive fact-finding capacities of the executive branch as relevant to an assessment of presidential power. In this way, Chief Justice Roberts's opinion teases out the suggestion more implicit in Chief Justice Vinson's dissent in the *Steel Seizure* case:<sup>435</sup> that the institution of the presidency can promote a form of impersonal, law-constrained governance.

The problem, however, is that Roberts sees an institution all the way down. Absent from his framework is any consideration of when the incumbent might exercise uninstitutional power or why this could matter to our public law understandings of the presidency. This legal and conceptual gap seems to be what Justice Breyer is getting at. Breyer's dissent can be read to suggest something of a burden-shifting model under which evidence of the incumbent's impermissible animus alters the burden of proof, the discovery and evidence available to those challenging the presidency, or some combination of the two. Put differently, it recognizes the possibility of an uninstitutional decision, one rooted in the incumbent's personal animus.

With respect to *adjudication*, an intermediate approach—that is, an approach primarily focused on the institution but sensitive to the possibility that the individual president could be legally salient—requires further elaboration of why the incumbent's role matters in the first place. Is the court engaged in routine legal interpretation—discerning the legal purpose of a legal instrument, such as a presidential proclamation or executive order?<sup>436</sup> If so, courts might want to assume that the order was

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433. *Id.*

434. Cf. Manning, *supra* note 65, at 2431 (“[E]very theory of [statutory] interpretation involves a question of legislation and a question of adjudication . . .”).

435. See *supra* section III.A.I.

436. As Lisa Manheim and Kathryn Watts show, presidential orders are increasingly at the crux of litigation involving executive power, challenging an earlier legal framework that focused on presidential action through the agencies. Lisa Manheim & Kathryn A. Watts, *Reviewing Presidential Orders*, 86 U. Chi. L. Rev. 1743, 1745–47 (2019).

developed through the regular, institutional process and that institutional sources (such as DOJ briefs) are more probative of legal meaning than unfiltered presidential speech.<sup>437</sup>

If the court is trying to sniff out a constitutionally impermissible purpose, however, then adjudication should not ignore clues of an irregular process or an uninstitutional decision. A president who acts on unconstitutional animus to effectuate policy through the presidency is not executing institutional power. Rather, he is laundering personal animus through the institution of the presidency. In such circumstances, Chief Justice Roberts has it backwards: The question is *not* the “authority of the presidency itself,” but the potentially unconstitutional conduct of “a particular president.”<sup>438</sup>

A theory of adjudication should also ask whether it is desirable for courts to play some role in regulating the incumbent’s rhetoric. Under Chief Justice Roberts’s approach, the incumbent’s expressed desire for and commitment to effectuate a “Muslim ban” is legally irrelevant. The dissents, by contrast, interpret the incumbent’s rhetoric as relevant to a legal accounting of the presidential policy at issue. If avowed animus from the person of the president is uniquely pernicious in our constitutional culture, in part because of the outsized role that the person of the president has come to play in American politics, then we might think that courts should play some role—perhaps especially an indirect one<sup>439</sup>—in checking presidential rhetoric that threatens substantive constitutional commitments.<sup>440</sup> By heightening judicial scrutiny of the policy outputs that follow anti-Muslim speech on the part of the president himself, courts do two things. They recognize the possibility of a legal connection between avowed animus on the part of the incumbent and the policies of his presidency. At least as important, courts serve an expressive function;<sup>441</sup> they recognize that avowed animus on the part of the incumbent *is* a basis for vigilance from courts to protect religious minorities—not in spite of but because he is president.

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437. See Katherine Shaw, *Beyond the Bully Pulpit: Presidential Speech in the Courts*, 96 *Tex. L. Rev.* 71, 100–03 (2017).

438. See *Hawaii*, 138 S. Ct. at 2418.

439. For analogous defenses of an indirect role for judges in enforcing constitutional norms, see Renan, *Presidential Norms*, *supra* note 10, at 2265–73; Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 *Yale L.J.* 2, 7–25 (2008).

440. This suggestion qualifies a claim made by Jeffrey Tulis on whether law can regulate the rhetorical presidency. Tulis argues that popular rhetoric can be entirely prohibited, as he says it was in the early Republic, or it can be permitted always. But he suggests that “the discretion needed to mediate between [these two poles] is itself antithetical to law and regular procedure.” Tulis, *supra* note 137, at 203.

441. See Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 *U. Pa. L. Rev.* 1503, 1531–33 (2000).

C. *Legal Liability and the One Versus Many*

In the context of current governing arrangements, the one-versus-many axis comes to the fore of the conceptual and doctrinal difficulties relating to the president's criminal and civil liability as well.

1. *Investigating (and indicting?) the president.* — The incumbent's immunity from the criminal process reemerged in a series of cases involving President Nixon, who had taken personal possession of the tape recordings sought by special prosecutors investigating Watergate.<sup>442</sup> When it reached the Supreme Court, *United States v. Nixon* presented one of the most important confrontations between the person and the institution in American constitutional development.<sup>443</sup> President Nixon argued that the Court lacked jurisdiction to decide the case because the special prosecutor simply disagreed with a decision ultimately within the constitutional authority of the incumbent to make; "if the decision below were allowed to stand it could no longer fairly be contended that the President of the United States is 'master in his own house.'"<sup>444</sup> In their reply brief, the President's attorneys went further: "It will not do to say . . . that 'the President is the head of the Executive Branch . . . .' Instead, as the Court said in *Johnson*, 'the President is the Executive Department.'"<sup>445</sup>

The Supreme Court rejected this argument, holding that it could properly resolve the dispute between the president and the special prosecutor. But the Court seems almost to collapse any distinction in institutional status between the special prosecutor and the president: "[T]hat both parties are officers of the Executive Branch," the Court reasons, "cannot be viewed as a barrier to justiciability."<sup>446</sup>

The Court's outcome finds firmer footing if it is reinterpreted as an effort to accommodate the President's two bodies. The president and the presidency are in an important sense inextricable. But the incumbent is neither the whole of the institution, nor is the president unable to precommit to be bound by other parts of the institution. Indeed, such precommitments—though not undoable—are crucial to the vitality of the institution itself. The Court's opinion hints at this possibility in its

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442. When the issue came before the D.C. Circuit, the court rejected the argument for prerogative rooted in the king's two bodies: "Though the President is elected by nationwide ballot, and is often said to represent all the people, he does not embody the nation's sovereignty. . . . Sovereignty remains at all times with the people, and they do not forfeit through elections the right to have the law . . . applied to every citizen." *Nixon v. Sirica*, 487 F.2d 700, 711 (D.C. Cir. 1973).

443. 418 U.S. 683 (1974).

444. Brief for the Respondent at 67, *Nixon*, 418 U.S. 683 (Nos. 73-1766, 73-1834), 1974 WL 187588.

445. Reply Brief for the Respondent at 2, *Nixon*, 418 U.S. 683 (Nos. 73-1766, 73-1834), 1973 WL 159435 (second emphasis added) (citations omitted) (quoting *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 500 (1867)).

446. *Nixon*, 418 U.S. at 697.

discussion of the *Accardi* principle but fails to develop it.<sup>447</sup> The salience of the *Accardi* principle is not really about the personal intentions of the incumbent or his Attorneys General to abide by the special prosecutor regulation, as the Court in *Nixon* emphasized. Rather, it is that public law recognizes such a regulation as binding unless formally rescinded. That constraint on the personal whim of the incumbent is a significant way in which the presidency preserves legitimate authority.<sup>448</sup> The second aspect of the Court's constitutional holding thus follows from the first: that "neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances."<sup>449</sup>

There is a related question lurking in the Watergate cases: whether the institution of the presidency insulates the president from criminal indictment. If we imagine the nature of personal exposure as a continuum, with investigatory proceedings at one end and imprisonment of the incumbent at the other, there appears to be substantial agreement today about the outer poles. The incumbent may be investigated by other actors inside the executive branch (as several presidents have been), but he may not be imprisoned prior to being impeached. Between these two points, however, there is long-running disagreement about when criminal process against the person impermissibly interferes with the institution and precisely what the nature of that interference is.

Adopting a strongly president-centered frame, the Office of Legal Counsel has concluded that a sitting president cannot be indicted. With striking resonances to the logic of James I—that the body politic renders the body natural inviolable—OLC reasoned in 1973: "[T]he President is the symbolic head of the Nation. To wound him by a criminal proceeding is to hamstring the operation of the whole governmental apparatus, both in foreign and domestic affairs."<sup>450</sup> President Nixon pressed a similar

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447. See *id.* at 695–96. The *Accardi* principle requires agencies to abide by their own regulations. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 265–66 (1954).

448. Cf. Brief for the United States at 43–44, *Nixon*, 418 U.S. 683 (Nos. 73-1766, 73-1834), 1974 WL 174854 ("[It] stands the . . . separation of powers on its head to suggest that it precludes the Judiciary from giving [effect] . . . to the allocation of authority within the Executive Branch under an arrangement . . . approved by the President as indispensable to forestall a further erosion of faith in the Executive Branch.").

449. *Nixon*, 418 U.S. at 706.

450. Memorandum from Robert G. Dixon, Jr., Assistant Att'y Gen., Office of Legal Counsel, to Att'y Gen. 30 (Sept. 24, 1973), <https://fas.org/irp/agency/doj/olc/092473.pdf> [<https://perma.cc/ZB2V-G2ZD>]. OLC reaffirmed the position that the president cannot be indicted in 2000. The opinion identified three types of burdens on the presidential office: the "public stigma and opprobrium" occasioned by a criminal proceeding, which could compromise the president's "constitutionally contemplated leadership role"; the "mental and physical burdens [on the incumbent] of assisting in the preparation of a defense"; and the potential physical constraints of incarceration. See *A Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 Op. O.L.C. 222, 246 (2000).

position before the Supreme Court, arguing that “[t]he functioning of the executive branch ultimately depends on the President’s personal capacity . . . . If the President cannot function freely, there is a critical gap in the whole constitutional system.”<sup>451</sup> And President Trump’s lawyers have echoed these arguments in current debates.<sup>452</sup>

By contrast, arguments that the incumbent *can* be indicted embrace a strongly institutional frame; they separate the fallibility of the individual from the resilience of the institution. Though he urged the Supreme Court not to decide the question in *United States v. Nixon*, special prosecutor Leon Jaworski argued that “it cannot escape notice that, in practical terms, the governmental system that has evolved since 1789 depends for the day-to-day management of the Nation’s affairs upon the operation of the several cabinet departments and independent regulatory agencies, without direct Presidential guidance,” and the Twenty-Fifth Amendment “now expressly provides for interim leadership whenever a President is temporarily disabled or incapable of discharging the responsibilities of his office.”<sup>453</sup> If anything, these lawyers and commentators argue, the legal violability of the incumbent *secures* the constitutional function of the presidency.<sup>454</sup>

The legal question of indictability is genuinely hard because it pushes so forcefully on the nexus between the president and the presidency. Yet the legal framework that flows from the Justice Department’s position—of a president who can be investigated but not indicted—leads to pathologies of its own, as evident in recent fights over the Special Counsel’s conclusions relating to whether President Trump obstructed justice. The Special Counsel refrained from deciding this question *because* he concluded that under DOJ policy, such a legal decision could not result in indictment.<sup>455</sup>

Shorn of the rhetoric of a person embodying the whole of national government, the duty of the president to the presidency might look quite different. Where real criminal exposure rises to the level of inhibiting the

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451. Brief for the Respondent at 96, *Nixon*, 418 U.S. 683 (Nos. 73-1766, 73-1834), 1974 WL 174855; see also Alexander M. Bickel, *The Constitutional Tangle*, New Republic, Oct. 6, 1973, at 14 (arguing that the president cannot be indicted because the presidency embodies “the continuity and indestructibility of the state”).

452. See, e.g., *Trump v. Vance*, 941 F.3d 631, 640 (2d Cir. 2019) (recounting President Trump’s argument that the sitting president is “immune from all stages of state criminal process . . . including pre-indictment investigation”).

453. Reply Brief for the United States at 32, *Nixon*, 418 U.S. 683 (Nos. 73-1766, 73-1834), 1973 WL 159436. The Watergate task force was internally divided on whether a sitting president could be indicted. See, e.g., Memorandum from Ronald D. Rotunda, Professor of Law, Univ. of Ill., to Kenneth W. Starr., Indep. Counsel, Office of the Indep. Counsel 45–47 n.140 (May 13, 1998) (on file with the *Columbia Law Review*) (recounting this disagreement).

454. See, e.g., Eric M. Freedman, *The Law as King and the King as Law: Is a President Immune from Criminal Prosecution Before Impeachment?*, 20 *Hastings Const. L.Q.* 7, 50 (1992) (“Rather than degrading the office . . . the incumbent’s amenability to prosecution enhances the reputation of the Presidency . . .”).

455. 2 Mueller Report, *supra* note 205, at 1.

work of the office, perhaps the incumbent's obligation is to voluntarily exercise Section 3 of the Twenty-Fifth Amendment and thereby provide for the continued functioning of the presidency.<sup>456</sup> At a minimum, the question today is not whether the president is amenable to criminal process but at what point such process unduly interferes with the institution of the presidency. Claims of impending damage to the institution have been made at every step toward legal accountability.

2. *Civil damages and the presidency.* — The president's amenability to civil liability also has prompted a distinctive "jurisprudence of the presidency."<sup>457</sup> Here, again, the disagreement concerns the relationship between the person and the institution of the presidency. Because the cases underappreciate the interdependence of the President's two bodies, however, they create a doctrine that both under- and overprotects presidential power. Approaching the issue through the two-bodies prism enables a more coherent view of what the question of presidential immunity actually implicates.

*Nixon v. Fitzgerald* held that absolute immunity from damages liability predicated on official acts is "a functionally mandated incident of the President's unique office."<sup>458</sup> Embracing the view of Justice Story that the person of the president must enjoy "in civil cases at least . . . an official inviolability,"<sup>459</sup> the Court reasoned that the president is responsible for the "enforcement of federal law," "the conduct of foreign affairs," "and management of the Executive Branch."<sup>460</sup> In contrast to other executive officials, such as governors or cabinet officers, who enjoy only qualified immunity, "the singular importance of the President's duties" and his "unique status under the Constitution" meant that "diversion of his energies by concern with private lawsuits would raise unique risk to the effective functioning of government."<sup>461</sup>

According to the dissenters, the majority misconstrued the nature of the office and the extent to which it protects the individual from legal scrutiny. "Attaching absolute immunity to the Office of the President," argued Justice White, "is a reversion to the old notion that the King can do no

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456. Cf. Freedman, *supra* note 454, at 54–55 (noting that "during Watergate, lawyers for both the White House and the Special Prosecutor planned for the possibility of President Nixon making use of [S]ection 3 [of the Twenty-Fifth Amendment] if he wished to step aside temporarily while fighting legal battles").

457. *Nixon v. Fitzgerald*, 457 U.S. 731, 792–93 (1982) (White, J., dissenting) (disagreeing with the majority's reliance on *Mississippi v. Johnson* and other historical materials for the proposition that there is a "special jurisprudence of the Presidency").

458. *Id.* at 749 (majority opinion).

459. *Id.* (quoting 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1563, at 418–19 (1st ed. 1833)).

460. *Id.* at 750.

461. *Id.* at 750–51.

wrong.”<sup>462</sup> Neither original meaning nor public policy justified so “cloth[ing] the Office of the President with sovereign immunity [and] placing it beyond the law.”<sup>463</sup>

If *Nixon v. Fitzgerald* held that the office bestows certain protections on the person, *Harlow v. Fitzgerald* (decided the same day) posed the question from the other side: Does the incumbent’s unique status afford immunity to the other actors who comprise the institution of the presidency?<sup>464</sup> The majority in *Harlow* declined to extend absolute immunity derivatively to senior presidential staff, distinguishing these aides from the president.<sup>465</sup> In dissent, Chief Justice Burger argued that no such separation was possible.<sup>466</sup> Emphasizing a composite presidency, Burger argued that senior presidential staff enable the president to fulfill his constitutional role; declining absolute immunity to these senior aides interferes with the effective functioning of the presidential office itself.<sup>467</sup>

Recognizing the interdependence of the person and the institution could have resulted in a different outcome in both cases. The individual is supported by a composite institution, which both participates in governance (such that the whole machinery of government does not rest on a single person) and exposes the person to legal scrutiny routinely. Perhaps some of the president’s functions warrant absolute immunity, but it was a mistake to conflate the functioning of executive government as a whole with the personal inviolability of the incumbent. So too, it misinterprets the constitutional presidency to reject the legal status of senior presidential aides as a part of it.

This approach to civil damages would resolve some of the confusions that the current legal framework creates. When the Court decided *Nixon* and *Harlow*, it had already ruled, in *Butz v. Economou*, that Cabinet officers do not enjoy absolute immunity from civil damages.<sup>468</sup> A significant question in *Harlow*—though not one clearly marked by the Court—was where and how to draw the boundary of the constitutional presidency. Do senior presidential aides fall inside of the line, but Cabinet members outside of it? For the majority, such a legal rule was untenable: “Members of the Cabinet are direct subordinates of the President,” the majority reasoned, “frequently with greater responsibilities, both to the President and to the

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462. Id. at 766 (White, J., dissenting).

463. Id. at 766–67, 771–79; cf. Seidman, *supra* note 27, at 431–45 (discussing the connection between the doctrine of sovereign immunity and the king’s two bodies).

464. *Harlow v. Fitzgerald*, 457 U.S. 800, 802 (1982).

465. Id. at 809.

466. Id. at 826 (Burger, C.J., dissenting).

467. See id. at 825–27.

468. 438 U.S. 478, 485 (1978).



Nation, than White House staff.”<sup>469</sup> As a result, the Court created a constitutional presidency centered *only* on the person.

Such a conception of the presidential office, however, fails to understand the nature of presidential power and the role of the institution in executing it. As Chief Justice Burger, writing only for himself, pressed in dissent: “[T]he President cannot personally implement a fraction of his own . . . decisions. . . . The function of senior Presidential aides . . . is an integral, inseparable part of the function of the President.”<sup>470</sup> Every significant aspect of the presidency involves actors beyond the president. If absolute immunity is important to protect a specific presidential function, then that particular function is not really protected when immunity extends only to the president himself. At the same time, if Cabinet members and presidential aides can fulfill that function shielded by qualified (not absolute) immunity, then the presidency does not require absolute immunity for the incumbent either. A doctrine that shrouds the person of the president, and only this person, in absolute immunity recreates a form of ministerial responsibility reminiscent of the king’s two bodies—an idea that sits uneasily with the commitments of American public law.

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Ever since George Washington provided the embodiment of an institution still in the making, the President’s “two bodies” has been at the crux of ongoing debates about presidential power. Parts III–V argued that the President’s duality is the defining ambiguity, the central paradox of the constitutional office. The figure below offers a visual illustration of the argument.

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469. *Harlow*, 457 U.S. at 809.

470. *Id.* at 824–28 (Burger, C.J., dissenting).

FIGURE 3. THE PRESIDENT'S DUALITY IN AMERICAN PUBLIC LAW

DIMENSIONS	PUBLIC LAW PROBLEMS	EXAMPLES
<b>Personal/ Impersonal</b>	<i>Scope of presidential power</i>	Emergency powers
		<i>Ultra vires</i> conduct
	<i>Legal review of presidential action</i>	Presidential injunctions
		Presidential lawyers
	<i>Severability of person and office</i>	Impeachment
		Self-pardons
Presidential papers		
<b>Temporary/ Continuous</b>	<i>Means of presidential governance</i>	Executive orders
		Historical gloss
	<i>Durability of national commitments</i>	Administrative deference
		Litigation settlements
		The “duty to defend”
	<i>Continuity of the office</i>	Executive privilege
Presidential disability		
<b>Singular/ Composite</b>	<i>Speaking for the presidency</i>	Removal authority
		Presidential tweets
	<i>Nature of presidential intent</i>	Presidential animus
		Presidential instruments
	<i>Legal remedies revisited</i>	Investigations (and indictment)
		Civil liability

## VI. CONCLUSION: UNDERSTANDING THE CONSTITUTIONAL PRESIDENCY

The President's duality is the conception on which our understandings of presidential power rest; it is our ideology of presidential power.<sup>471</sup> The duality plays a mystifying or obscuring role, even as it also serves a constitutive or causal function. In both distorting the gulf between actual practice and our aspirations for presidential leadership, and in orienting practice toward certain conflicting but fundamental expectations for governance, the duality legitimates the constitutional presidency as it exists.

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471. Cf. Loughlin, *Constitutional Imagination*, supra note 13, at 12 (arguing that ideology is not only distortive but “constitutive”—it is “the concept on which our understanding of the constitution rests”).

1. *The duality's obscuring function.* — The duality plays a role in how we understand the legitimacy of presidential power by equivocating on the idea of “the President.” The President means two different things; it has two distinct bundles of attributes. This enables constitutional and political argument to obscure the ways in which each body creates constitutional unease by emphasizing attributes that inhere in the other—and by suggesting or implying that those attributes pertain to the President as a whole.

The person of the president, by virtue of being elected, lays claim to an imagined national will—a mandate to execute this singular individual's programmatic vision of the state. As reflected in then-Professor Kagan's classic *Presidential Administration*, both presidents and presidential scholars use this idea of presidential leadership to justify sweeping policy reform without Congress and wide-ranging control by the person of the president over agency personnel.<sup>472</sup> Whether inescapable in the nature of contemporary problems or contingent on our hyperpolarized times, Congress is rarely the actor driving policy change. Scholars, reformers, and executive branch actors justify the President's centrality to national policymaking by invoking the president's personal electoral bond.

These accounts reconfigure the idea of the “mandate”—which, as a political construct, has exceptionally rare and temporally constrained effects<sup>473</sup>—into a structural claim about the nature of the presidential office. Here is the person through whom national administration is made responsive to the people as a whole. Jurists and lawyers use this rhetorical move as well to reconceive the role of constitutionalism with respect to presidential power. Rather than a legal constraint on the personal power of the president, constitutionalism becomes a protector of presidential prerogative—a way to justify the president's personal control over agency personnel through removal and his personal direction of national policy through the work of the administrative state.

This development, in an important sense, is the opposite of the *king's* duality, at least as portrayed by Kantorowicz. With the king, there was the real person and the fictive, immortal body. This second body became a way for jurists to justify constitutionalism as the custodian of “a perpetual public good.”<sup>474</sup> An impersonal, even continuous public interest, in turn, created conceptual space for legal incursions on the mystical Crown; it enabled constitutionalism to check the authority of the individual. With the American presidency, the impersonal, immortal body has become institutionalized; it is real. But the fictive or mythical idea of sovereignty has

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472. See Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2331–35 (2001).

473. See Lawrence J. Grossback, David A.M. Peterson & James A. Stimson, *Mandate Politics* 24, 184, 191 (2006) (finding that only three elections in post-war America generated the perception of a mandate (1964, 1980, and 1994), and rejecting the idea that any political mandate is “presidential” in nature as opposed to party-oriented).

474. Hutson, *supra* note 49, at 123–24.

become personalized. Public law theory and doctrine justifies a profound reimagining of our national commitments every four years through the charismatic legitimacy of the president.

The institutional presidency serves a distortive (and legitimating) role as well. Its role is at its apex when the person of the president suffers considerable personal vulnerabilities or even incapacities in governance. Just as the king's two bodies allowed a child to hold land in his official capacity or body politic, the idea of "the presidency" can shield the personal animus or inadequate decisionmaking capabilities of the president from constitutional scrutiny.<sup>475</sup> It can legitimate presidential policy as the work of a continuous and constrained institutional apparatus removed from the personal whim of a feckless individual. (And it can do this, even as the individual rails against the institution and disavows its longstanding restraints.) Even when the stakes are not quite so stark, however, the institutional presidency legitimates the accretion of immense power to the person of the president by infusing public law with an idea of the office that is deliberative, pluralistic, and self-limiting.

Failing to ask which body is being relied upon in a particular context (and why) creates some incoherence in our law, but, more importantly, it opens the door to opportunism. Jurists and executive branch lawyers can rely on whichever body expands (or, if this is one's preference, contracts) presidential power in a particular decisional domain.<sup>476</sup> The conflictual accounts of presidential power in *Free Enterprise Fund* and *Trump v. Hawaii* are suggestive of this dynamic. If public law requires the president to be personally responsible for the decisions of the presidency, then the animus of the incumbent is salient, even central to the constitutional analysis of impermissible discriminatory intent. If, on the other hand, the individual president does not fully control the decisions of the institution, then a central (and growing) critique of the administrative state—that limits on the sitting president's control over administration render aspects of the administrative state unconstitutional—is overdrawn. Power sharing between the elected president and unelected bureaucrats occurs at the center of the presidency as well; it is a facet of, not a threat to, presidential power.

2. *The duality's constitutive function.* — Even as it obfuscates political and legal disagreements, the duality is also constitutive of "the President" that exists. The two-bodies conception orients practice toward certain

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475. Such arguments from the institutional body are made with respect to the role of courts but also with respect to impeachment. See, e.g., John Yoo, Opinion, Beware of Impeaching Trump. It Could Hurt the Presidency., N.Y. Times (Sept. 24, 2019), <https://www.nytimes.com/2019/09/24/opinion/ukraine-trump.html> (on file with the *Columbia Law Review*).

476. Cf. Karl N. Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed, 3 Vand. L. Rev. 395–400 (1950).

fundamental, though conflicting, ideas about what the exercise of presidential power should actually entail. In this sense, the “two bodies” plays a role in legitimating presidential power by shaping what the office is.

That we have a presidency distinct from any individual incumbent is an organizing tenet of American constitutional practice. It structures patterns of behavior across the institution of the presidency and among those who interact with it. Presidential lawyers interpret law and establish precedent with the understanding that they are creating rules to govern not just “their guy” but future occupants. This has the effect of both constraining and empowering the constitutional office. Lawyers may look for limiting principles that will restrain the exercise of presidential judgment when it is exercised by someone else. But they also develop precedent sensitive to and wary of unduly constraining the office when future presidents confront new challenges. Because these actors understand their role to serve an institution, not just a person, there is greater continuity across administrations.

Actors inside the presidency (both civil servants and political appointees) rely on prior presidential practice. They look to legal precedent created by OLC, among other agencies. They build institutional memory. And they develop norms of fidelity to something bigger, something more permanent than the current occupant. Such norms, in turn, contribute to whether these same actors resist, even repudiate the impulses of the sitting president when he deviates too radically from their conception of the office.<sup>477</sup>

The idea of “the presidency” is constitutive of the deliberative capacity, norms of legal and professional accountability, and instruments of continuity in governance that have developed inside the institution, even as it distorts the space between these norms and the practices of individual presidents. Meanwhile, individual presidents—ever since George Washington—have entrenched their ideas and ambitions through the institution of the presidency. This is the story of Andrew Jackson and of FDR. It is in this conflation of the personal and the institutional that the powers of the constitutional office congeal.

3. *Integrating the two bodies.* — The two-bodies framework does not provide a fully worked out theory of presidential power. It does, however, provide an encompassing conception of the American constitutional presidency. And, in so doing, it suggests certain characteristics or attributes to which such a legal theory should conform. A theory of presidential power should take as its starting premise that these are two intractable but ever-present impulses—for personal, charismatic leadership and for a deliberative and durable presidency. Responsiveness, responsibility, deliberation,

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477. See, e.g., 2 Mueller Report, *supra* note 205, at 107–20 (recounting failed efforts by President Trump to have Attorney General Sessions reverse his recusal and to have the special counsel fired).

and containment are inextricably wrapped up in the two bodies of the President, even as they play out differently in different contexts.

There is no final answer between the President's two bodies. This means that public law cannot solve or somehow move beyond the two-bodies paradox. But it can get the nature of the problems right. The duality points to questions, for example, about whether a theory of democratic accountability *should* rely so heavily on this one individual's electoral bond, even as it also underscores limits in how the current structure of presidential selection effectuates national representation through the president. Should the Electoral College, an institution initially designed to coalesce electors around the nation's "favorite sons,"<sup>478</sup> today decide the nature of democratic representation through the presidency?<sup>479</sup> And might a system of "executive federalism" offer opportunities to reimagine a more pluralistic form of electoral accountability through interacting chief executives?<sup>480</sup>

The interconnection of the two bodies suggests, moreover, that legal efforts to fully pry apart the personal and official character of the president may do more to distort than to reveal the underlying complications of merger and distinction. The duality can effectuate a sort of "acoustic separation" between the anticonstitutional commitments that the president as a person conveys (policy in furtherance of religious animus or retaliation for political dissent) and the "official" conduct that courts or Congress are expected to check.<sup>481</sup> There is danger—for a working system of legal or political accountability—in a president who can avow one thing as a person and purport to do something different entirely as the institution.

The current constitutional and political moment sharpens these aspects of merger and distinction, or maximizes their contradictions. In a sense, the Trump presidency implicates one of the most longstanding and fundamental precepts regarding the duality: that some conceptual and constitutional space for the person's moral or policy leadership not collapse into the use of power for purely personal gain. Ever since the Framers debated term limits and presidential impeachment, the disagreement has been over *how* to institutionalize a space for charismatic leadership while resisting self-dealing or the use of public office for private ends. President Trump's insistence—in his actions and his rhetoric—that this is a distinction without a difference flies in the face of centuries of constitutional and political development.

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478. Ford, *supra* note 127, at 292–93.

479. See Lawrence Lessig, *They Don't Represent Us: Reclaiming Our Democracy* 36–43 (2019).

480. See Bulman-Pozen, *supra* note 144, at 316–22 (arguing that federal–state and regional institutions can create more plural forms of accountability that, by relying on elected executives at different levels of government, reduce the emphasis on the president in democratic legitimacy).

481. Cf. Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 *Harv. L. Rev.* 625, 630–34 (1984).

At the same time, the Trump presidency illuminates some problematic developments of the duality, if this remains a substantive constitutional goal. Public law doctrine has become ever more protective of the personal charge of the president in controlling administration, even as a deep reluctance to adjudicate the personal responsibility of the president takes different doctrinal forms. It might be that practical political controls ameliorated this tension to a point, and that changes in the structure of American politics have exposed the underlying conflict. The result, however, is a potentially potent mix of personal control and personal impunity when it comes to presidential power—a legal possibility realized in the actions of the sitting president.

The President's duality does not supply a master principle from which we can "reason down" about presidential power; the constitutional presidency is not a hedgehog.<sup>482</sup> Rather, legal engagement with the two-bodies paradox must come at a more retail level, context by context. This suggests a limitation of unitary executive theory. That theory is not wrong in drawing attention to the personal responsiveness and individual responsibility of the president. But it is incomplete. Alongside this set of constitutional impulses is the other.

This means, finally, that jurists and lawyers should negotiate the President's duality in reference to the substantive constitutional commitments at stake. These substantive commitments are not contained within the duality; they are extrinsic to it. They include the substantive constitutional norms contained in the Bill of Rights or dispersed among multiple provisions, like the norm against self-dealing. But they also include structural commitments relating to Congress's power or that of the states. The President's duality cannot tell us how to reconcile these inherently contested values. Nor can it circumvent them; constitutional rhetoric that eclipses one body with the other merely obscures the work of public law in constituting these relationships.

Efforts to integrate the two bodies—to manage this duality—have taken the form of constitutional amendment, statutes, judicial precedent, and presidential norms. These aspects of our public law define the institutional presidency as it exists and, in so doing, they refine or reconstruct the personal power of individual presidents. This is the story of the Twenty-Fifth Amendment and of the Presidential Records Act. It helps to explain the staying power of Chief Justice Marshall's opinion in the *Burr* cases. It elucidates the significance of Justices Breyer and Kagan's dissent in *Trump v. Hawaii*. It makes sense of the resilience of Justice Brennan's framework for executive privilege in the context of multiple presidents. And it provides a theoretical justification for the Special Counsel's treatment of presidential obstruction of justice.

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482. Cf. Isaiah Berlin, *The Hedgehog and the Fox* 3 (1993) ("The fox knows many things, but the hedgehog knows one big thing.").

The legal rules differ, and they should. But what these legal schemas share is an assessment of the substantive constitutional interests at stake, and how to understand the President's two bodies in light of them. The question of how to manage the President's duality thus emerges from close engagement with those underlying substantive commitments. It is not mysteriously independent of them. Chief Justice Marshall assesses the needs of a just criminal process and defines the obligations of individual presidents in light of them. Justices Breyer and Kagan suggest a pathway to enforce the substantive values of equal protection and religious freedom when institutional behavior is shown to be a façade for the personal animus of the president, even as they embrace the idea of a more impersonal and composite presidency in the making of presidential policy. Justice Brennan's framework for executive privilege weighs the needs of an individual president for confidentiality in presidential deliberations against the presidency's creation of a vital form of ongoing institutional precedent. The Special Counsel's report embraces (implicitly) the idea that some exercises of Article II are *ultra vires*; they become the private conduct of an individual because they are sufficiently corrupt or self-interested to exceed the constitutional authority of the office. As these and other examples in the preceding pages show, the legal lines connecting the President's two bodies do not emerge from the duality itself. It is in the ingenuity of constitutional argument that they are constructed and, over time, revised.

Even as the two-bodies prism illuminates a crucial role for public law in constituting "the President," it also underscores the limits of law and legal methods in managing its defining ambiguity. In those times when the sitting president repudiates the institutional presidency as it exists, the presidency itself must be assessed. Public law offers a set of tools to structure contestation over the nature of presidential authority, the expectations for governance, and the role of legality (both judicial review and internal legal advisers) in holding presidential conduct to account. But public law cannot definitively settle the terms of the relationship between the president and the presidency. Neither can the person of the president. When the institution has lost the support of elites and the public, the constitutional office *has* been transformed. The sitting president is uniquely positioned to fuel such reassessment. But the incumbent alone does not decide the nature of the presidency. Presidential charisma is both inseparable from American constitutionalism and itself governed—albeit incompletely and provisionally—by choices that jurists and lawyers make about how to construct the President's duality.