

## ARTICLE

### THE ANTIFASCIST ROOTS OF PRESIDENTIAL ADMINISTRATION

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*This Article uncovers the intellectual foundations of presidential administration and—on the basis of original archival research and new contextualization—grounds its legitimacy in the fight against fascism. It shows how the architects of presidential control of the administrative state reconciled a strong executive with democratic norms by embracing separation of powers in order to make the government responsible and anti-fascist. It then draws out the consequences of these overlooked developments for presidential administration today.*

*The Article takes inspiration from the turn to history in Article II scholarship and jurisprudence. In search of legitimating foundations, champions of presidential administration have embraced the work of the New Deal-era President's Committee on Administrative Management. This Article uses untapped sources and overlooked historical context to advance a new reading of the Committee's report, showing how it drew from and adapted an older Progressive Era tradition. At the heart of this story is a notable reversal: Where Progressive Era reformers rejected formal constitutionalism and the principle of separation of powers, the New Dealers embraced both to empower the President while guarding against fascism. This history raises a pair of challenges for the unitary executive theory, while providing a historical and doctrinal foundation for the competing "internal separation of powers" school of Article II jurisprudence.*

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*It also motivates an “antifascist litmus test,” which can help assess proposals for executive branch reform.*

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## INTRODUCTION

Modern administration is presidential administration. Yet, even as presidential administration has become a defining feature of contemporary governance, it remains mysterious. Its legal foundations are unstable; its origins are murky; and its justifications are deeply contested. Aiming to legitimize it, the Supreme Court and legal scholars have turned to history. But, lacking adequate context, they have misunderstood the past—and so the logic and aims of the practice itself.

This Article uses original archival research and rigorous historical contextualization to offer a revisionist account of presidential administration. It traces the intellectual origins of presidential administration to early twentieth-century Progressive Era reform efforts to make American government more responsible. And it shows how, during the New Deal, the institutions that would enable executive control of the administrative state were reimagined in light of fascism. Presidential administration would make American democracy accountable and efficacious in order to stand up to European fascists abroad, while simultaneously checking the American executive in order to prevent it from becoming fascistic at home.

At the center of this story is a subtle but remarkable reversal. For Progressive Era reformers, strengthening the presidency was a way to overcome what they believed were design defects in the American state, especially the separation of powers. The New Deal creators of the modern executive thought differently. They were the Progressive reformers' intellectual successors and shared their goal of making American democracy responsible. In contrast with the Progressives, however, the New Dealers embraced the written Constitution, especially its principle of separation of

powers. This Article reconstructs these overlooked developments and shows their connection to the fight against fascism.

This recovered history has important consequences for contemporary law and legal scholarship. It provides a pair of reasons for resisting the so-called “unitary executive theory” of Article II and suggests the legitimacy of an alternative approach to the presidency, the “internal separation of powers.” It also motivates a litmus test that can help assess theories of presidentialism and so rethink recent debates about the fascistic tendencies of the modern executive.

The argument proceeds in five parts. Part I canvasses the study of presidential administration to explain the recent turn to history. It shows how questions about the legal authority for executive control of administrative action have motivated a search for historical foundations. While the Supreme Court has sought to ground administrative presidentialism in the vision of the Founders, most scholars have recognized its institutional origins in the work of the New Deal-era President’s Committee on Administrative Management (PCAM). Part I argues that, although the Committee was indeed influential, its work has been misunderstood. In particular, lacking appropriate historical context, scholars have generally read it to be more aggressively in favor of unchecked executive power than it actually was.

Part II begins elaborating a more contextualized understanding of the Committee’s report. It shows how these New Dealers were informed by the work of a Progressive Era reform science: public administration. It then turns to the writings of the field’s two influential cofounders, Frank Goodnow and Woodrow Wilson, to show how they believed empowering the executive could make American democracy more efficacious and accountable. This was the Progressive dream of “responsible government.”

Part III explores the extent to which New Deal reformers kept faith with their Progressive Era teachers. It shows how PCAM followed Goodnow and Wilson in seeking to make American democracy more responsible by empowering the executive. But PCAM broke with public administration orthodoxy on the question of constitutional separation of powers. For Goodnow and Wilson, the written Constitution was a problem to be overcome, and separation of powers was part of what made the American republic irresponsible. The members of the President’s Committee disagreed. Their report grounded its reforms in the written Constitution. And their recommendations embraced the principle of separation of powers by embedding it within the executive branch.

Part IV seeks to understand this important reversal. It uses the Committee’s internal files and a close reading of its report to show how it relied on separation of powers to keep fascism at bay. The threat of fascism imposed a dual burden on the Committee’s work. It made its task more urgent, since only an efficacious and accountable democracy could stand up to the European fascist menace. But it also raised worries about the

fascistic risks posed by an empowered chief executive. A crucial encounter with a fascist intellectual at a policy conference in 1936, which PCAM chair Louis Brownlow later dubbed “the Battle of Warsaw,” helped push the New Dealers to clarify what would make America’s executive different from the fascist administrations of Europe. Ultimately, PCAM embraced separation of powers and internal divisions within the executive branch to distinguish American presidential administration from the fascist *Führerprinzip*.

Part V draws out the consequences of this historic reversal for contemporary law and legal scholarship. First, it raises two challenges to the theory of the unitary executive. It shows that, contrary to the assertion of some defenders of the theory, the executive branch has not always interpreted Article II in a unitary fashion. And it recovers a functional argument against putting all nonlegislative and nonjudicial officers under the President’s control or supervision. Second, it provides a historical foundation and some doctrinal justification for a competing school of Article II jurisprudence, the tradition of the internal separation of powers. This approach has sometimes struggled with legitimacy and rarely looked to history to ground its claims. This Article shows that such scholarship finds a legitimizing root in the work of the President’s Committee and might even be entitled to some judicial deference under the Supreme Court’s “longstanding practice” doctrine.

Finally, and most importantly, this history reminds us of the foundational, antifascist commitment of the modern American executive. To the members of PCAM, who confronted fascist intellectuals in Europe, fascist administration was a concrete threat. It presented itself where government became nothing but an extension of the personality of the chief executive. They sought to design a government that would make the President powerful without courting that risk.

This suggests a litmus test for theories of executive power that can be used to shed new light on recent debates about the fascism of the American presidency and analyze recent proposals for executive branch reform. Understanding our antifascist history is a first step toward vindicating it anew.

## I. GROUNDING PRESIDENTIAL ADMINISTRATION

Presidential administration is a recent model of governance that relies on contested legal justifications. To provide it with a stronger foundation, scholars have turned to history, looking to the institutional origins of executive control of the administrative state in the work of the President’s Committee on Administrative Management (PCAM). But their research has lacked adequate contextualization. As a result, they have misunderstood the Committee’s vision.

This Part orients us to the modern study of presidential administration and establishes the need for a contextualized understanding of PCAM’s work. It begins by exposing the contested legal foundations of

presidential administration and showing how, to shore them up, the Supreme Court and scholars have turned to history, especially the work of the President's Committee. The Part next explains and justifies this growing interest as a result of the Committee's influence on the development of executive-centered governance. It then shows how scholars have misunderstood the meaning of PCAM's work by reading its report out of context. This Part motivates and sets the stage for the more richly contextualized analyses of the Committee's vision developed in Parts II, III, and IV as well as the subsequent reevaluation of the meaning of PCAM's work for law and legal scholarship in Part V.

A. *Executive Governance in Search of Foundations*

In a famous law review article from twenty years ago, then-Professor Elena Kagan observed that federal government practice was increasingly defined by "presidential administration."<sup>1</sup> The phrase referred to two related developments. It described, first, the simple fact that Presidents had come to exercise "a comparative primacy" over other actors "in setting the direction and influencing the outcome of administrative process."<sup>2</sup> And, second, it suggested that Presidents could and should use this primacy to realize their specific policy agenda.<sup>3</sup>

In the years since Justice Kagan wrote her article, the phenomenon she identified has only become more pronounced. According to one scholar, writing fifteen years after the article's publication, "White House control over agencies' regulatory activity [reached] its highest level ever" during the Obama years.<sup>4</sup> And, as a different scholar has observed more recently, President Donald Trump took things further still, "us[ing] many of the same tools as [previous Presidents] in order to control the administrative state and stamp its output with his brand."<sup>5</sup> President Joe Biden seems to be continuing the trend.<sup>6</sup> In the past few years, Presidents have sought to use administration to realize many of their signature policies,

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1. Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2246 (2001).

2. *Id.*

3. See *id.* at 2281–82 (detailing how Presidents Ronald Reagan and Bill Clinton paved the way in establishing presidential control of administrative actions).

4. Kathryn A. Watts, *Controlling Presidential Control*, 114 Mich. L. Rev. 683, 698 (2016).

5. Daniel A. Farber, *Presidential Administration Under Trump 2* (2017) (unpublished manuscript) (on file with the *Columbia Law Review*).

6. See, e.g., Bethany A. Davis Noll, "Tired of Winning": Judicial Review of Regulatory Policy in the Trump Era, 73 Admin. L. Rev. 353, 389 (2021) (stating that President Biden utilized regulatory authority of the Department of Justice to undo Trump-era policies by declining to appeal or ask for abeyances in all pending litigation); Note, *Biden Administration Reverses Trump Administration Policies on Immigration and Asylum*, 115 Am. J. Int'l L. 340, 340–41 (2021) (discussing executive actions President Biden took to undo President Trump's policies); Myah Ward, *Biden Fires Social Security Commissioner, a Trump Holdover*, Politico (July 9, 2021), <https://www.politico.com/news/2021/07/09/biden-fires-social-security-commissioner-499009> [<https://perma.cc/64JF-PSJQ>].

from expanding discrimination protections to banning immigration.<sup>7</sup> Simply put, presidential administration has become an entrenched feature of governance at the federal level.<sup>8</sup>

It is not clear, though, that presidential administration is legally licensed. While much attention has focused on individual acts of presidential policymaking, some of which have been struck down in the courts,<sup>9</sup> the deeper puzzle is the legality of the mode of government itself. The legal authority that underlies executive control of administrative action is at least controversial and, in some cases, contested.<sup>10</sup>

Consider the two powers most frequently discussed in the context of realizing presidential administration: directive authority<sup>11</sup> and the removal power.<sup>12</sup> The former refers to the executive's asserted right to instruct agencies to take particular action. The latter concerns the executive's power to fire government personnel. Modern presidential administration relies on both powers, yet their source and scope remain disputed.

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7. See, e.g., Jerry L. Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience*, 35 *Yale J. on Regul.* 549, 563–87 (2018) (examining the major changes in immigration and climate policies during the Obama and Trump Administrations).

8. See Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 *Harv. L. Rev.* 1, 75 (2017) [hereinafter Metzger, *Foreword*] (“[P]residential administration has become the central reality of the contemporary national government.”).

9. See, e.g., *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1915 (2020) (holding that the government’s rescission of the Deferred Action for Childhood Arrivals program was arbitrary and capricious in violation of the APA).

10. Some of the powers at the heart of presidential administration are not “illegal” so much as “extralegal.” Take presidential “appropriation,” the term by which scholars refer to the practice of Presidents taking credit for agency actions. Appropriation is a crucial tool in the presidential administrator’s toolkit, but it is not obviously a “legal” power at all and sometimes depends on public misunderstanding of the legal processes that generate agency decisionmaking. See Jessica Bulman-Pozen, *Administrative States: Beyond Presidential Administration*, 98 *Tex. L. Rev.* 265, 304 & n.190 (2019) (explaining how appropriation shapes the public understanding of presidential power over agencies); Cary Coglianese & Kristin Firth, *Separation of Powers Legitimacy: An Empirical Inquiry Into Norms About Executive Power*, 164 *U. Pa. L. Rev.* 1869, 1870 (2016) (providing an example of how a President will publicly announce agency initiatives as if the “actions being taken were solely his own”).

The use of such extralegal powers to advance presidential administration highlights the primacy of institutional development over formal legal enfranchisement in the development of modern executive power. On the need to go beyond the (formal) law to understand the law of Article II, see Daphna Renan, *Presidential Norms and Article II*, 131 *Harv. L. Rev.* 2187, 2207 (2018) (“[N]orms might fill gaps or silences in written constitutional and statutory text, or even develop in ways that push against prevailing understandings of the written text. Indeed, norms might insulate certain officers or decisions that statutes could not regulate under prevailing understandings of the written Article II.”).

11. See, e.g., Kagan, *supra* note 1, at 2294 (comparing the use of directives in the Reagan, Bush, and Clinton Administrations).

12. See Aziz Z. Huq, *Removal as a Political Question*, 65 *Stan. L. Rev.* 1, 15 (2013) (stating that the Court in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010), viewed removal authority as a “paradigmatic means to achieve presidential control of the bureaucracy”).

In the prototypical directive situation, the President orders an agency to exercise powers it possesses pursuant to a duly enacted statute. It is usually agreed that the agency could take the ordered action of its own accord if it wanted. Whether the President has the authority to instruct the agency to take the action is, however, contentious.<sup>13</sup> Statutes generally delegate powers to agency heads, not to the President, and frequently include specific criteria explaining under what circumstances and according to what considerations agencies should act.<sup>14</sup> It is unsettled to what degree the executive can arrogate these powers and decisions to itself.<sup>15</sup>

Presidential control over executive branch personnel is plagued by similar uncertainties. The Constitution unambiguously gives Congress the authority to create the offices and institutions that make up the federal government.<sup>16</sup> But it seems to make the President the head of the government.<sup>17</sup> The federal workforce, then, is defined and funded by the legislature but in some ways reports to the President. This arrangement raises basic management questions about the scope of the President's authority over government personnel. Whether the executive can or must have the power to remove individuals from the government labor force has been debated since the first Congress.<sup>18</sup> Under the Supreme Court's recent juris-

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13. See Cary Coglianese, *The Emptiness of Decisional Limits: Reconceiving Presidential Control of the Administrative State*, 69 *Admin. L. Rev.* 43, 44–45 (2017) [hereinafter Coglianese, *The Emptiness of Decisional Limits*] (discussing the academic debates over the President's power to direct heads of agencies). See generally Robert V. Percival, *Who's in Charge? Does the President Have Directive Authority Over Agency Regulatory Decisions?*, 79 *Fordham L. Rev.* 2487 (2011) (summarizing debate and arguing against presidential directive authority).

14. See Coglianese, *The Emptiness of Decisional Limits*, *supra* note 13, at 54 (explaining that statutes authorize specific agencies to act).

15. See, e.g., Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 *Colum. L. Rev.* 263, 277 n.66 (2006) (collecting sources highlighting the debate over whether the President may seize powers delegated to agency heads); Peter L. Strauss, *Overseer, or "The Decider"?: The President in Administrative Law*, 75 *Geo. Wash. L. Rev.* 696, 697 (2007) [hereinafter Strauss, *Overseer*] ("One might think this a fairly elementary question, yet it has divided Attorneys General from the beginning of the Republic and divides scholars still.").

16. See U.S. Const. art. I, § 8 ("The Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

17. See, e.g., *id.* art. II, § 2 ("The President . . . may 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 . . ."); see also Coglianese, *The Emptiness of Decisional Limits*, *supra* note 13, at 53 ("No one disputes that the President serves as the head of the Executive Branch . . .").

18. See Akhil Reed Amar, *The Words That Made Us: America's Constitutional Conversation, 1760–1840*, at 359–60 (2021); Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 *Colum. L. Rev.* 1, 21 (2021) (mentioning the "Decision of 1789," involving a debate over the President's

prudence, the President has broad powers to remove executive officers, especially “principal” or “noninferior” officers.<sup>19</sup> But many questions remain—about the President’s ability to threaten or remove members of multimember agencies, inferior officers, or employees, and about Congress’s ability to create offices insulated from direct executive authority.<sup>20</sup>

In this way, the institutions of presidential control have outstripped their foundations. The reality of presidential administration goes beyond its undisputed legal underpinnings.

### B. *Defending Presidential Administration*

This gap between institutions and their legal justifications has motivated a search for foundations. To shore up the case for presidential administration, courts and scholars have turned to history, seeking to locate the roots of presidential control over the administrative state deep in the past and so provide it with a legitimating pedigree.

1. *The Supreme Court’s History.* — The Supreme Court’s recent decision in *Seila Law LLC v. CFPB* is illustrative. There, both the majority and the dissent relied on history to legitimate their understanding of the scope of executive control over the administrative state.<sup>21</sup>

The case concerned the constitutionality of the structure of the Consumer Financial Protection Bureau (CFPB). As designed by Congress, the CFPB was to be headed by a single director appointed by the President with the advice and consent of the Senate for a five-year term and removable only for cause.<sup>22</sup> *Seila Law* challenged the CFPB’s design, arguing that it violated the Constitution by placing too much authority under an agent insulated from direct presidential control.<sup>23</sup>

The Court agreed by a 5-4 vote. The majority held that the head of the CFPB needed to be removable at the President’s will in order to maintain presidential control over administrative action.<sup>24</sup> Only through such

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power to remove the Secretary of Foreign Affairs); Jed Handelsman Shugerman, *The Decisions of 1789 Were Anti-Unitary: An Originalism Cautionary Tale 2* (Fordham L., Legal Stud. Rsch. Paper No. 3597596, 2021) (on file with the *Columbia Law Review*) (referring to when the first Congress created the first three executive departments).

19. See *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1979 (2021); *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2198–200 (2020).

20. See, e.g., Timothy G. Duncheon & Richard L. Revesz, *Seila Law as an Ex Post, Static Conception of Separation of Powers*, U. Chi. L. Rev. Online (Aug. 27, 2020) (“Do *Myers v. United States* and *Humphrey’s Executor v. United States* still stand for the proposition that Congress can impose limitations on the president’s removal authority for agency heads as long as it does not retain a role for itself?”).

21. See *Seila Law*, 140 S. Ct. at 2191–92 (“The President’s power to remove . . . those who wield executive power on his behalf follows from the text of Article II [and] was settled by the First Congress . . .”); *id.* at 2226–27 (Kagan, J., concurring in part and dissenting in part) (describing historical evidence against the majority’s opinion).

22. See *id.* at 2193 (majority opinion).

23. See *id.* at 2194.

24. See *id.* at 2204.

direct control could the President ensure that the agency would implement executive priorities or at least not interfere with them.<sup>25</sup> This was not merely a matter of making government effective. It was a corollary to popular sovereignty. As the Court explained, “[L]esser officers must remain accountable to the President, whose authority they wield,” since it is ultimately through the President that agencies are responsive to the public.<sup>26</sup> Presidential authority over the CFPB was necessary, then, to guarantee democratic accountability—to make sure that the agency did not “slip from the Executive’s control, and thus from that of the people.”<sup>27</sup>

The majority rooted this executive-centered vision of efficacious and accountable government in the Founding. According to the majority, it was “the Framers” who “made the President the most democratic and politically accountable official in Government,” by requiring the executive to be “elected by the entire Nation.”<sup>28</sup> This arrangement, unique in the Constitution, through which the President and Vice President were “render[ed] . . . directly accountable to the people through regular elections,” was intended to “justify and check” the President’s tremendous powers.<sup>29</sup> Those powers, in turn, assured the executive the unified control over the state necessary for an “energetic executive.”<sup>30</sup> On the majority’s account, the institutional build-out of the federal state had kept faith with this Founding “constitutional strategy,” excusing a few exceptions, all the way to the present.<sup>31</sup> The CFPB thus stood out as “a historical anomaly,” “almost wholly unprecedented.”<sup>32</sup> In disallowing its structure, the Court claimed to be simply restoring a deep historical continuity.

The dissenting opinion, authored by Justice Kagan, shared the majority’s concern with history but argued that it cut in the opposite direction.<sup>33</sup> The writing noted that “the CFPB’s single-director structure ha[d] a fair bit of precedent behind it,” stretching back at least to the Civil War.<sup>34</sup> Unsurprisingly, given Justice Kagan’s previous scholarship, her opinion recognized that presidential control over administration could promote efficacy and accountability.<sup>35</sup> But it argued that Congress could advance these goals through a much wider range of institutional designs, including

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25. See *id.* (describing how removal restrictions can hinder the President’s policy objectives).

26. *Id.* at 2197.

27. *Id.* at 2204 (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 499 (2010)).

28. *Id.* at 2203.

29. *Id.*

30. See *id.*

31. *Id.*; see also *id.* at 2201–02 (reviewing the history of agency design).

32. *Id.* at 2201–02.

33. See *id.* at 2241 (Kagan, J., concurring in part and dissenting in part) (providing historical examples of offices with a single-director structure).

34. *Id.*

35. See *id.* at 2236–37 (citing Kagan, *supra* note 1, at 2331–46) (discussing arguments that the President’s engagement can improve agency functions).

putting agencies under the direction of a single leader.<sup>36</sup> In any case, Justice Kagan’s opinion implied, executive control over administration was not required by the Constitution; rather, it was the product of congressional enactments, albeit ones of very long standing.<sup>37</sup>

The Court’s turn to history has only deepened since *Seila Law*. In two recent decisions, it again embraced a robust vision of presidential administrative power along with a stylized history to support it. In *Collins v. Yellen*,<sup>38</sup> that history was somewhat submerged. The case involved, among other questions, the removability of the Director of the Federal Housing Finance Agency.<sup>39</sup> The majority held that insulating the Director from at-will removal by the President was unconstitutional, relying on its analysis from *Seila Law*.<sup>40</sup> In particular, the opinion adopted *Seila Law*’s arguments about the need for presidential control of the administrative state to promote accountability, although it did not rehearse the history on which *Seila Law* had relied.<sup>41</sup> Justice Neil Gorsuch’s concurring opinion and Justice Sonia Sotomayor’s dissenting opinion did, though, digging into the history anew and sparring over the pedigree and purpose of presidential administration.<sup>42</sup>

In *United States v. Arthrex, Inc.*,<sup>43</sup> the legitimating role of history was much closer to the surface. The case concerned the decisionmaking procedures used in the Patent and Trademark Office.<sup>44</sup> As in *Seila Law*, the Court reconnected a specific vision of presidential administration back to the Founding to legitimate an expansive theory of presidential administration today. The Court held that decisions of the Patent Trial and Appeal Board must be reviewable by the Office’s Director to pass constitutional muster.<sup>45</sup> This was necessary in order to maintain democratic accountability through a clear chain of command flowing from the President to the government’s administrative officers.<sup>46</sup> Principal officers, the Court opined, were a key link in that chain, connecting inferior officers like Administrative Patent Judges to the President.<sup>47</sup> For that reason, ever

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36. See *id.* at 2242–43 (discussing a range of options for executive control).

37. Cf. *id.* at 2245 (noting the Constitution’s grant to Congress, “acting with the President’s approval,” to “create and shape administrative bodies”).

38. 141 S. Ct. 1761 (2021).

39. *Id.* at 1778.

40. *Id.* at 1783–84.

41. See *id.* at 1784.

42. Compare *id.*, with *id.* at 1795–97 (Gorsuch, J., concurring in part and dissenting in part), and *id.* at 1804 (Sotomayor, J., concurring in part and dissenting in part).

43. 141 S. Ct. 1970 (2021).

44. *Id.* at 1977.

45. *Id.* at 1986.

46. See *id.* at 1982 (describing how the system before the court “blur[red] the lines of accountability demanded by the Appointments Clause”).

47. See *id.* at 1988 (emphasizing that inferior officers exercising executive power must be supervised by principal officers).

“[s]ince the founding, principal officers have directed the decisions of inferior officers on matters of law as well as policy.”<sup>48</sup>

2. *The Scholars’ History: The New Deal.* — Scholars have shared the Supreme Court’s concern with the history of presidential administration. They have generally disagreed with the Court, however, about its Founding-era origins.<sup>49</sup> Instead, they tend to see it as having grown up alongside the development of the administrative state itself.<sup>50</sup> They have usually located its roots in the 1930s and, in particular, in the work of a New Deal reform commission: the President’s Committee on Administrative Management (PCAM), also known as the Brownlow Committee after its chairman, Louis Brownlow.<sup>51</sup>

It is an unlikely place to ground the modern executive. A committee of experts in public administration chartered by President Franklin D. Roosevelt, its major work product was a short report entitled “Administrative Management in the Government of the United States” that contained several recommendations for reorganizing the workflow of the federal government.<sup>52</sup> The report did inspire the Reorganization Bill of 1937, but Congress voted that legislation down.<sup>53</sup>

To appreciate the importance of PCAM’s work—and therefore the reasons that scholars see it as so important to the development of presidential administration—we have to look beyond its immediate statutory

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48. *Id.* at 1983; see also *id.* at 2004, 2006–09 (Thomas, J., dissenting) (reviewing Founding-era understanding of “inferior officers”).

49. While some scholars have argued that the Framers intended the President to be “Chief Administrator,” see, e.g., Saikrishna Bangalore Prakash, Note, Hail to the Chief Administrator: The Framers and the President’s Administrative Powers, 102 *Yale L.J.* 991, 991–92 (1993) (“Historical evidence . . . indicates that the Framers attempted to establish an executive who alone is accountable for executing federal law and who has the authority to control its administration. This view of the presidency may be called the ‘Chief Administrator theory.’”), the elaboration of the President’s powers and the build-out of the institutions of executive control over the administrative state followed a separate, distinct timeline, see Saikrishna Bangalore Prakash, *The Living Presidency: An Originalist Argument Against Its Ever-Expanding Powers* 3 (2020) [hereinafter Prakash, *The Living Presidency*] (exploring the growth of presidential power across the history of the republic through the “living presidency”); Stephen Skowronek, *The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 *Harv. L. Rev.* 2070, 2079–80 (2009) [hereinafter Skowronek, *Conservative Insurgency*] (exploring how Jeffersonians, Jacksonians, and Progressives built out executive administrative capacities).

50. See, e.g., Metzger, Foreword, *supra* note 8, at 51–52, 72 (describing the process through which the administrative state was built out).

51. See, e.g., Peri E. Arnold, *Executive Reorganization and the Origins of the Managerial Presidency*, 13 *Polity* 568, 569 & n.1 (1981); Bulman-Pozen, *supra* note 10, at 289; Kagan, *supra* note 1, at 2274–75; Metzger, Foreword, *supra* note 8, at 72–75.

52. See President’s Comm. on Admin. Mgmt., *Administrative Management in the Government of the United States* 8–11, 13 (1937) [hereinafter PCAM Report].

53. See Alasdair Roberts, *Why the Brownlow Committee Failed: Neutrality and Partisanship in the Early Years of Public Administration*, 28 *Admin. & Soc’y* 3, 3–4, 25 (1996) [hereinafter Roberts, *Why the Committee Failed*].

impact. With the benefit of hindsight, it is clear that the Committee exercised a powerful, subterranean influence on the development of executive governance in three related ways: (1) by impacting later reorganization initiatives, (2) by generating a storehouse of ideas for empowering the executive in the administrative state, and (3) by shaping the sensibilities of future reformers.

First, although its initial legislative proposal failed, PCAM did shepherd its most important and consequential recommendations into law a few years later. The failed Reorganization Bill of 1937 was followed by the successful Reorganization Act of 1939, which embodied two of PCAM's main proposals: authorizing the President to hire six powerful assistants and granting the executive the authority to reorganize the federal government.<sup>54</sup>

President Roosevelt promptly took advantage of his new powers to create the Executive Office of the President, which laid the foundation for executive administrative supremacy.<sup>55</sup> President Roosevelt's actions "provided for the first professional White House staff" in the country's history, decisively breaking with 150 years of prior practice.<sup>56</sup> It quickly led "a flood of new positions to be created in the White House," greatly expanding the President's ability to manage the state and project power.<sup>57</sup>

This idea—that the President should have a dedicated, institutionalized staff to influence the affairs of government—was the centerpiece of PCAM's vision, and the two presidential documents that brought it into being were drafted by PCAM and its chairman.<sup>58</sup> PCAM thus lies at the origin of the institutions of modern presidential administration in a very straightforward way, despite the failure of its initial 1937 reorganization

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54. Note that the Reorganization Act of 1939 put limits on the President's reorganization authority that had not been included in PCAM's report. On the relationship between the 1937 Bill and the 1939 Act, compare Richard Polenber, *Reorganizing Roosevelt's Government: The Controversy Over Executive Reorganization, 1936–1939*, at 185 (1966) (emphasizing the ways that the Reorganization Act of 1939 constituted a rejection of the 1937 proposals and PCAM's original vision), and John A. Dearborn, *The Historical Presidency: The Foundations of the Modern Presidency: Presidential Representation, the Unitary Executive Theory, and the Reorganization Act of 1939*, 49 *Presidential Stud. Q.* 185, 186 (2019) [hereinafter Dearborn, *Foundations*] (same), with Barry Dean Karl, *Executive Reorganization and Reform in the New Deal: The Genesis of Administrative Management, 1900–1939*, at 257 (1963) (emphasizing the ways that the Reorganization Act of 1939 embodied and helped realize the 1937 proposals and the plan of the PCAM report), Sidney M. Milkis & Michael Nelson, *The American Presidency: Origins and Development, 1776–2018*, at 297–98 (6th ed. 2012) (same), and Sidney M. Milkis, *The President and the Parties: The Transformation of the American Party System Since the New Deal* 125 (1993) (same).

55. See Exec. Order No. 8248, 4 *Fed. Reg.* 3864 (Sept. 8, 1939); Franklin D. Roosevelt, Message to Congress on the Reorganization Act (Apr. 25, 1939), *The Am. Presidency Project*, <https://www.presidency.ucsb.edu/node/209555> [https://perma.cc/KZL8-NZ9X] (last visited Aug. 31, 2021).

56. Shirley Anne Warshaw, *Guide to the White House Staff 2* (2013).

57. *Id.*

58. See Louis Brownlow, *A Passion for Anonymity* 415, 428 (1958) [hereinafter Brownlow, *Passion for Anonymity*].

bill. The Committee envisioned modern presidential administration and wrote the words that brought it into being.

PCAM's influence stretched beyond this moment of creation. Many of PCAM's proposals, although not implemented at the time, were subsequently put into law.<sup>59</sup> For example, the Committee recommended that executive and adjudicative functions within agencies be kept separate<sup>60</sup> and championed presidential supervision of agency regulatory plans.<sup>61</sup> Neither proposal was fully embraced right away. Less than a decade later, however, the Administrative Procedure Act enshrined PCAM's championed division between adjudication and administration.<sup>62</sup> Some four decades after that, the Reagan White House realized PCAM's vision of presidential administrative superintendence through an executive order requiring agencies to prepare regulatory plans for presidential review.<sup>63</sup> This is the second way that PCAM influenced the development of modern presidentialism: by developing a series of specific proposals for bringing about executive governance that, even if unrealized at the time, lay ready-to-hand for the future.

Finally, and most significantly, PCAM continued to shape the growth of the federal state through its effects on government personnel and administrative theory.<sup>64</sup> The members of PCAM were leaders in the field of public administration and continued to train students and advise government officials, including Presidents, for many years.<sup>65</sup> Their report became a foundational text for the discipline.<sup>66</sup> Moreover, PCAM was assisted in its work by a battery of young scholars and professionals, who

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59. See Oral History Interview with Joseph P. Harris, *in* *Professor and Practitioner: Government, Election Reform, and the Votomatic 76* (Harriet Nathan ed., 1980) [hereinafter *Harris Oral History*] ("Most of the recommendations which were turned down in 1936, '37, '38, '39, when it was before Congress, have since been adopted.").

60. See PCAM Report, *supra* note 52, at 37; see also *infra* notes 331–338 and accompanying text.

61. See PCAM Report, *supra* note 52, at 17.

62. See 5 U.S.C. § 554(d) (2018); Kent Barnett, *Resolving the ALJ Quandary*, 66 *Vand. L. Rev.* 797, 806 (2013); Kathryn E. Kovacs, *Avoiding Authoritarianism in the Administrative Procedure Act*, 28 *Geo. Mason L. Rev.* 573, 596–99 (2021).

63. See Exec. Order No. 12,498 § 1(c)(b), 3 C.F.R. § 323 (1985) (revoked 1993); see also Exec. Order No. 12,291 § 5, 3 C.F.R. § 127 (1981) (revoked 1993) (requiring agencies to publish a list of existing regulations covered by the Order and a summary of each regulation). On the differences between President Reagan's vision of presidential administration and PCAM's, see generally Ashraf Ahmed, Lev Menand & Noah Rosenblum, *The Tragedy of Presidential Administration* (C. Boyden Gray Ctr. for the Study of the Admin. State, Working Paper No. 21-39, 2021) (on file with the *Columbia Law Review*).

64. See *Harris Oral History*, *supra* note 59, at 76.

65. See Karl, *supra* note 54, at 38, 112–13, 151.

66. See Stephanie P. Newbold & David H. Rosenbloom, *Brownlow Report Retrospective*, 67 *Pub. Admin. Rev.* 1006, 1006 (2007).

themselves worked in government and trained future government servants.<sup>67</sup> That network continued to advance PCAM's presidentialist vision for many years, even in the face of partisan reversals.<sup>68</sup>

This helps explain and justify scholarly interest in PCAM. The Committee articulated a powerful vision of presidential administration, which stamped a generation of reformers and guided the build-out of the American state. Quite simply, PCAM “established the infrastructure underlying all subsequent attempts by the White House to supervise administrative policy.”<sup>69</sup> In so doing, it “refashioned the American presidency more profoundly than at any time since George Washington’s first administration.”<sup>70</sup>

C. *Revisiting the President’s Committee on Administrative Management (PCAM)*

Despite PCAM’s importance and the attention it has received, scholars have misunderstood its vision. This is largely the result of reading sections of the report in isolation without appropriate historical context.

67. See Richard J. Stillman II, *Creating the American State: The Moral Reformers and the Modern Administrative World They Made* 156 (1998) [hereinafter Stillman, *Creating the American State*]; *The President Needs Help* 9 (Frederick C. Mosher ed., 1988) [hereinafter Mosher, *President Needs Help*]; Harris Oral History, *supra* note 59, at 65–67; Roberts, *Why the Committee Failed*, *supra* note 53, at 14. Professor Peri Arnold observed that “[t]he list of staff members reads like an honor roll of distinguished scholars in American political science, although most of these researchers had yet to make their reputations” and noted that, of the “thirty individuals” on the staff and Committee, six were “past or future presidents of the American Political Science Association.” Peri E. Arnold, *Making the Managerial Presidency: Comprehensive Reorganization Planning, 1905–1996*, at 98 (2d ed. 1998) [hereinafter Arnold, *Managerial Presidency*].

68. Consider the example of the first Hoover Commission. After the end of World War II, Republicans finally recaptured Congress and sought to disentrench Democratic policies. To advance their vision of government, they chartered their own new reorganization commission and appointed Herbert Hoover, the former Republican President, as chair. Arnold, *Managerial Presidency*, *supra* note 67, at 122. But leading government officials believed that “the Hoover Commission should pick up the unfinished task of [PCAM].” *Id.* at 125. And President Hoover himself ultimately relied on a special assistant, Don Price, who had been molded by a PCAM staffer and brought a “Brownlowian perspective” to his work. *Id.* Ultimately, the Hoover Commission furthered PCAM’s project, even though PCAM had been a New Deal commission and President Hoover was regarded as “the New Deal’s foremost critic.” *Id.* at 122; accord Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 *Mich. L. Rev.* 1239, 1271–72 (2017) (“[T]he Hoover Commission adopted a stance similar to the Brownlow Committee. It too urged strong internal presidential oversight of the executive branch, justifying centralized presidential managerial and policy control as necessary for political accountability.”); see also Harris Oral History, *supra* note 59, at 76 (stating that the Hoover Commission made “almost the same recommendations” as the Brownlow Committee).

69. Kagan, *supra* note 1, at 2275.

70. Stillman, *Creating the American State*, *supra* note 67, at 139; see also James W. Fesler, *The Brownlow Committee Fifty Years Later*, 47 *Pub. Admin. Rev.* 291, 292 (1987) (crediting the PCAM Report for reforms that made independent agencies far more responsive to the President).

Most nonspecialists are only familiar with one of PCAM's many proposals: its recommendation to abolish independent regulatory commissions by bringing them within the regular structure of the executive branch.<sup>71</sup> The Committee called them—in a phrase that has since found its way into several Supreme Court opinions—“a headless ‘fourth branch’ of the Government,” “a haphazard deposit of irresponsible agencies and uncoordinated powers” that did “violence to the basic theory of the American Constitution.”<sup>72</sup>

Drawing on these statements, most scholars have read the PCAM Report as a defense of strong executive power and even a forerunner of the theory of the unitary executive.<sup>73</sup> Professors Steven Calabresi and Christopher Yoo are the most fervent champions of this interpretation.<sup>74</sup> For them, a core component of the unitary executive theory is the idea that all “nonlegislative and nonjudicial officials” should be subject to control or supervision by the President.<sup>75</sup> They see this commitment reflected in the PCAM Report and so take the report itself to mean that President Roosevelt shared their unitary understanding of executive power.<sup>76</sup>

Calabresi and Yoo are partisans of the unitary theory, believe it is the understanding of executive power embedded in the Constitution, and argue that all Presidents from George Washington on have shared it.<sup>77</sup> Most scholars do not go so far: Standard legal histories see unitarianism as a product of the Reagan Administration.<sup>78</sup> But the consensus scholarly interpretation has followed Calabresi and Yoo in reading the PCAM Report in a strongly unitary way.<sup>79</sup>

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71. See PCAM Report, *supra* note 52, at 36–38.

72. *Id.* at 36. For the phrase's use by the Supreme Court, see, e.g., *City of Arlington v. Fed. Commc'ns Comm'n*, 569 U.S. 290, 314 (2013) (Roberts, J., dissenting); *Fed. Commc'ns Comm'n v. Fox Television Stations, Inc.*, 556 U.S. 502, 525–26 (2009) (referring to the headless Fourth Branch in a plurality section of the opinion); *Freytag v. Comm'r*, 501 U.S. 868, 921 (1991) (Scalia, J., concurring in part).

73. The first examples of this reading emerged contemporaneously with the Report itself. See, e.g., Ralph F. Fuchs, *Current Proposals for the Reorganization of the Federal Regulatory Agencies*, 16 *Tex. L. Rev.* 335, 337–38 (1938).

74. See Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive: Presidential Power From Washington to Bush 292–95* (2008).

75. *Id.* at 4.

76. See *id.* at 295 (describing President Roosevelt's endorsement of the PCAM Report as an endorsement of the unitary executive).

77. See *id.* at 16; *infra* section V.A.1.

78. See, e.g., Stephen Skowronek, John A. Dearborn & Desmond King, *Phantoms of a Beleaguered Republic: The Deep State and the Unitary Executive* 34 (2021); Ryan J. Barilleaux & Christopher S. Kelley, *What Is the Unitary Executive?*, in *The Unitary Executive and the Modern Presidency* 1, 2, 4–5 (Ryan J. Barilleaux & Christopher S. Kelley eds., 2010); Skowronek, *Conservative Insurgency*, *supra* note 49, at 2099.

79. See, e.g., Dearborn, *Foundations*, *supra* note 54, at 186, 189–91; Stephanie P. Newbold & Larry D. Terry, *The President's Committee on Administrative Management: The Untold Story and the Federalist Connection*, 38 *Admin. & Soc'y* 522, 526 (2006) (emphasizing the unitary features of the PCAM Report).

This includes scholars critical of the unitary project. For instance, in a recent foreword, Professor Gillian Metzger has also interpreted the PCAM Report as essentially unitary. In her analysis, the 1930s saw two “prominent accounts” of “the relationship between the administrative state and executive power,” which helped lay the foundations for the government of today.<sup>80</sup> One was James Landis’s classic study, *The Administrative Process*; the other was the PCAM Report.<sup>81</sup> Both, Metzger argues, shared the “central insight” that “the administrative state was the key to ensuring accountable as well as effective exercise of executive power and guarding against its abuse.”<sup>82</sup> But, she qualifies, the two approaches “compet[ed] in important ways.”<sup>83</sup> According to Metzger, Landis stood for “the independent expertise model of the administrative state,” which trusted in the internal checks of regulated bureaucracy to make government accountable.<sup>84</sup> The PCAM Report, by contrast, leaned into “presidential control.”<sup>85</sup> For Metzger, “Landis won [the] battle in the 1930s,” but with the Reagan Administration’s embrace of unitarianism, PCAM “won the war.”<sup>86</sup>

Metzger resists Calabresi and Yoo’s fully unitary reading of the report. As she notes, PCAM recognized “that *both* presidential control *and* bureaucracy were essential for accountable government.”<sup>87</sup> She also emphasizes that Landis and PCAM “shared more points of agreement” than Landis, at least, acknowledged.<sup>88</sup> But, for Metzger as for Calabresi and Yoo, the key to the PCAM Report is in its “exaltation of the President” and its reliance on executive control or supervision to ensure that the government remains democratic.<sup>89</sup>

In fact, these readings emphasize the PCAM Report’s most conventional and least distinctive aspects. When read in context, what is most striking about PCAM’s work is not that it sought to empower the President. As this Article later discusses, this was a standard reform argument of the

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80. Metzger, Foreword, *supra* note 8, at 72.

81. *Id.* at 72–74.

82. *Id.* at 72.

83. *Id.*

84. *Id.* at 75.

85. *Id.* at 73.

86. *Id.* at 75.

87. *Id.* at 78.

88. *Id.* at 74.

89. *Id.* at 73, 76; see also Metzger & Stack, *supra* note 68, at 1269. The unitary interpretation is so firmly established that even historically sensitive scholars assume it as the backdrop against which to write. So, in her recent article on presidential administration and cooperative federalism, Professor Jessica Bulman-Pozen uncovers the roots of a regionalist administrative vision in the reforms of the New Deal era, including the PCAM Report. See Bulman-Pozen, *supra* note 10, at 289. Her argument advances in part through judicious use of historical context. See *id.* at 290–92. But she, too, ultimately sees PCAM as committed to a vision of government that would enable “an ambitious president . . . to achieve his objectives” and frames PCAM’s embrace of regionalism as a recognition that cooperative federalism could serve this presidentialist agenda. *Id.* at 291–92.

time.<sup>90</sup> Rather, what is remarkable is the extent to which PCAM departed from traditional reform prescriptions in ways that sought to check the executive while embracing the formal Constitution. The Committee's ideal President was hardly "unbound."<sup>91</sup> Its watchword was not "unitary" but "responsible."<sup>92</sup>

Lacking a proper historical contextualization, scholars have concluded that PCAM sought to empower the President more than it actually did. To treat the report as a forerunner of Reagan-era theories of presidentialism is to thin out and misconstrue what the Committee sought. Putting the report back into historical context is a necessary step in uncovering the real foundations of presidential administration.

## II. THE PROGRESSIVE FOUNDATIONS OF PRESIDENTIAL ADMINISTRATION

PCAM was chartered to solve national administrative problems, making use of the emerging methods of a new academic discipline: public administration. The Committee's members and staff were leaders and practitioners of a new kind of science, with roots in the Progressive Era.

This Part explores the public administration background of the President's Committee. It explains how the institutional pressures of the New Deal forced PCAM to rely on the received wisdom of its academic teachers. It then reconstructs the main teachings of the influential founders of public administration, Frank Goodnow and Woodrow Wilson, to show the intellectual context in which the Committee operated.

In particular, Goodnow and Wilson argued that, to make the American state responsible, the executive needed more power to control administration.<sup>93</sup> PCAM was deeply familiar with this argument, as its members had worked and studied with Goodnow and Wilson and accepted their teachings as foundational.<sup>94</sup> This Part recovers the Progressive Era origins of PCAM's presidentialist sensibility.

Attending to this background sets off the innovations of the PCAM Report and so helps grasp its full meaning. As Part III discusses, PCAM

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90. As one contemporaneous commentator put it, the PCAM Report pushed "a reform which has been universally advocated by experts in public administration for years" and "contain[ed] little or nothing with which many teachers of public administration c[ould] find reason to disagree." J.M. Ray, *The Defeat of the Administration Reorganization Bill*, 20 *Sw. Soc. Sci. Q.* 115, 115–16 (1939). But see Roberts, *Why the Committee Failed*, *supra* note 53, at 6–7 (arguing that not all experts agreed with the report).

91. For a discussion of modern, "unbound" executive power, see Eric A. Posner & Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* 5 (2010).

92. See *infra* section III.A.

93. See Frank J. Goodnow, *Politics and Administration: A Study in Government* 202 (1900) [hereinafter Goodnow, *Politics and Administration*]; Woodrow Wilson, *Constitutional Government in the United States* 67 (1908) [hereinafter Wilson, *Constitutional Government*].

94. See generally Karl, *supra* note 54, at 29–30 (describing the background and experience of PCAM's members); *infra* notes 192–202 and accompanying text.

adopted some of Goodnow and Wilson's teachings, including their distinction between politics and administration and their case for concentrating administrative power in the hands of the President. The Committee rejected Goodnow and Wilson's approach to the Constitution, however, and especially their analysis of the separation of powers. This, as Part IV explains, was closely connected with PCAM's antifascist aims and, as Part V explores, has important consequences for thinking about presidential administration today.

A. *Institutional Constraints on the Committee's Work*

PCAM was chartered in response to organizational problems with the American federal state of the 1930s. To tackle the Great Depression, the federal government had expanded at a breakneck pace: Between President Roosevelt's inauguration in March 1933 and the end of his first full fiscal year in office in July 1934, Congress created over sixty new agencies.<sup>95</sup> Most of these reported directly to the President.<sup>96</sup> Meanwhile, the government ballooned in size. By the end of fiscal year 1936, its staff was fifty percent larger than it had been just three years before, and expenditures had nearly doubled.<sup>97</sup>

To manage this vastly expanded state, the President had only ungainly tools. According to an internal White House document from 1934, the government depended on 348 different interdepartmental committees to coordinate and implement policy.<sup>98</sup> And this was before Congress charged the executive with disbursing another \$4.9 billion in aid, more than had ever been appropriated in peacetime.<sup>99</sup> President Roosevelt experimented with a variety of ad hoc arrangements, but none were sustainable.<sup>100</sup>

PCAM was tasked with solving these organizational problems.<sup>101</sup> Its job was to reorganize the government to make it effective while keeping it

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95. See Matthew J. Dickinson, *Bitter Harvest: FDR, Presidential Power and the Growth of the Presidential Branch* 49 (1996).

96. *Id.* at 49–50.

97. See *id.* at 50.

98. See *id.* at 77 & n.118.

99. See David M. Kennedy, *Freedom From Fear: The American People in Depression and War, 1929–1945*, at 249–52 (1999) (“Four billion dollars in new funds, along with \$880 million reallocated from previously authorized appropriations, were to be used for work relief and public works construction.”).

100. See *id.* at 250–52 (noting President Roosevelt's 1935 shift from “dol[ing] out relief” piecemeal to establishing “a prolific brood of new governmental agencies” tasked with administering long-term spending programs).

101. See Franklin D. Roosevelt, *Letters to Congressional Leaders Concerning Reorganization of the Executive Branch* (Mar. 22, 1936), Am. Presidency Project, <https://www.presidency.ucsb.edu/node/208709> [<https://perma.cc/8ELL-BGPM>] (last visited Aug. 31, 2021) (stating the President's intention to name a committee “with the primary purpose of considering the problem of administrative management”).

accountable.<sup>102</sup> This was no mere management challenge. President Roosevelt frankly suggested that he saw the Committee's work as an alternative to calling a constitutional convention.<sup>103</sup>

The political context imposed two important constraints on PCAM. First, the Committee had to make sure not to embarrass the President. President Roosevelt had definite ideas about how the government should be organized born from his previous experience in administration as Governor of New York and Assistant Secretary of the Navy.<sup>104</sup> He worried that the Committee might reach a recommendation with which he disagreed and then release a report he could not support.<sup>105</sup>

To forestall this eventuality, President Roosevelt and his Committee reached a pragmatic compromise. Brownlow drafted a précis for the President noting the general trend of his ideas.<sup>106</sup> And President Roosevelt reviewed the document before he signed off on the study.<sup>107</sup> Only after President Roosevelt had assured himself that Brownlow's thinking was in line with his own did he give PCAM the go-ahead.<sup>108</sup> Additionally, the President had a chance to discuss an outline of the report with the Committee before

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102. See *id.* (detailing President Roosevelt's plan to create a committee that would determine how to integrate New Deal agencies into the administrative machinery and ensure proper management).

103. See Karl, *supra* note 54, at 27.

104. See *id.* at 28 (describing President Roosevelt's arguments for reorganization while he was governor of New York); Letter from Louis Brownlow to Richard E. Neustadt (Sept. 16, 1963), *in* Richard E. Neustadt, *Approaches to Staffing the Presidency: Notes on FDR and JFK*, 57 *Am. Pol. Sci. Rev.* 855, app. at 863 (1963) (recalling that President Roosevelt had developed a preference for a strong executive with full control over regulatory agencies during his time working for the Navy Department); Franklin Delano Roosevelt—Assistant Secretary of the Navy, Nat'l Park Serv., <https://www.nps.gov/articles/franklin-delano-roosevelt-assistant-secretary-of-the-navy.htm> [<https://perma.cc/4REY-986X>] (last updated May 25, 2021) (explaining how President Roosevelt's experience managing the Navy influenced his own presidency, particularly during the war).

105. For President Roosevelt's thoughts, see Memorandum from Charles Eliot II, Exec. Dir., Nat'l Res. Comm. on Feb. 20 Meeting with President Roosevelt, as reprinted in Brownlow, *Passion for Anonymity*, *supra* note 58, at 333, 333–34 (“[H]e would not wish Mr. Brownlow's committee to recommend adoption of [a British Cabinet-style government with its executive committee] . . . because he might have another idea. . . . [I]f Brownlow's organization favored such a set-up and he had a better idea, the public effect of a disagreement would make impossible any action . . .”).

106. See *Rough Notes on Kind of Study Needed*, as reprinted in Brownlow, *Passion for Anonymity*, *supra* note 58, at 334, 334–35.

107. See *id.* at 334.

108. See Neustadt, *supra* note 104, at 855.

it was formally released at a final review meeting.<sup>109</sup> In the interim, however, PCAM operated with a free hand.<sup>110</sup> It apparently did not communicate with President Roosevelt at all between the time it was chartered and the prerelease tête-à-tête.<sup>111</sup>

The second constraint under which the Committee operated was time. It worked on a very tight schedule. President Roosevelt appointed PCAM in March 1936, with a charge to report back after the election eight months later.<sup>112</sup> By the time the Committee had arranged its funding and basic staffing, it was already summer.<sup>113</sup> Formal research instructions were not issued until June.<sup>114</sup> The Committee worked at a sprint.<sup>115</sup>

This need for speed forced people to rely on what they already knew. To round up a staff, the Committee's members used their extant academic networks and co-opted related research projects.<sup>116</sup> Since there was no time to develop new ideas, the Committee drew on old ones. At PCAM's

109. See Gulick Memorandum, as reprinted in Brownlow, *Passion for Anonymity*, supra note 58, at 378–82. In fact, President Roosevelt changed very little, except for encouraging the replacement of a White House secretariat with the broader idea of an Executive Office. See id. at 376 (reporting that the secretariat had been replaced by the Executive Office of the President in part because of conversations with President Roosevelt).

110. Charles E. Merriam, Professor of Pol. Sci., Univ. of Chi., Speech at the National Convention in St. Louis, Missouri: Conflicts in Modern Democracy 10 (Apr. 1938) (PCAM Classification 16.J.I.11) (on file with the *Columbia Law Review*).

111. See Alfred Dick Sander, *A Staff for the President: The Executive Office, 1921–1952*, at 25 (1989) (stating that the committee didn't report to Roosevelt until after the 1936 election and didn't communicate with President Roosevelt while doing its work). Because President Roosevelt exercised a kind of chartering authority, some scholars have argued that he merely made use of the Brownlow Committee to advance a set of conclusions he had already decided on. See Neustadt, supra note 104, at 855 (“The Committee urged what Roosevelt wanted. They wrote, he edited. . . . Did Brownlow educate the President? How much was it the other way around? . . . With all credit to Brownlow . . . my money is on Roosevelt as the one who gave more than he took.”).

Neustadt's analysis does not reflect the sense of the Committee participants. Reflecting on his work many years later, Luther Gulick explained that “[t]his document was drawn up by three men who were working very hard to educate the President to the then advanced thinking of the students of public administration.” Mosher, *President Needs Help*, supra note 67, at 23.

112. See Franklin D. Roosevelt, *Announcement of a Committee to Plan for the Reorganization of the Executive Branch* (Mar. 22, 1936), Am. Presidency Project, <https://www.presidency.ucsb.edu/node/208704> [<https://perma.cc/4GGY-N7YB>] (last visited Aug. 31, 2021).

113. See Brownlow, *Passion for Anonymity*, supra note 58, at 351–55 (describing negotiations to staff and fund the committee, which concluded when President Roosevelt signed a funding bill on June 22).

114. Id. at 355.

115. See Mosher, *President Needs Help*, supra note 67, at 6 (“[W]e had from March until November or December to wrestle with the problems of ‘administrative management.’”).

116. See Brownlow, *Passion for Anonymity*, supra note 58, at 352–53; Karl, supra note 54, at 222; Roberts, *Why the Committee Failed*, supra note 53, at 18 (explaining that the committee purposely chose distinguished scholars of political science and public administration when creating its staff).

initial planning meeting in April, Brownlow instructed his staff to “skim the cream off the top of their . . . memories.”<sup>117</sup> The Committee’s report would be an exercise in application, not invention.

B. *Intellectual Context of the Committee’s Work*

The Committee was well constituted to work so quickly. Its members and staff had already spent a lifetime thinking about the problems they were convened to address. PCAM’s members were all leaders of the newly emerging discipline of public administration.<sup>118</sup> And their staff was made up of political science and public administration academics, all of whom had PhDs, and for whom the experience of working on the Committee sometimes felt like an extension of graduate school.<sup>119</sup>

At the heart of public administration, the discipline that informed PCAM’s thought, was a new way of thinking about government. Public administration academics understood the state as a mechanism for balancing and integrating “politics” and “administration.” The best way to harmonize the two, they believed, was to concentrate power in the executive. This would make modern democracy more accountable and effective or, as they preferred to say, “responsible.”<sup>120</sup>

1. *Frank Goodnow’s Responsible Government.* — The two leading originators of this way of thinking about government in the United States were Frank Goodnow and Woodrow Wilson.<sup>121</sup> Although less famous now, Goodnow was the more influential of the two, at least for the field.<sup>122</sup> A graduate of Columbia Law School, he studied abroad in Paris and Berlin before returning to Columbia as a professor.<sup>123</sup> Goodnow is generally regarded as the first to have offered a modern course in administrative law in the United States and was eventually named Columbia’s Eaton Professor

117. Karl, *supra* note 54, at 212.

118. See *id.* at 38, 112–13, 151.

119. See *id.* at 222; Stillman, *Creating the American State*, *supra* note 67, at 156; Mosher, *President Needs Help*, *supra* note 67, at 9; Roberts, *Why the Committee Failed*, *supra* note 53, at 14.

120. See generally Jesse Tarbert, *When Good Government Meant Big Government: The Quest to Expand Federal Power, 1913–1933* (on file with the *Columbia Law Review*) (forthcoming Feb. 2022) (discussing elite public administration reformers’ concern with responsible government).

121. See Blake Emerson, *The Public’s Law: Origins and Architecture of Progressive Democracy* 73–75, 102–05 (2019) (referencing Wilson’s extensive study of the government, culminating in his essay, *The Study of Administration*, and explaining that Goodnow aimed to “harmonize politics and administration so that the aims of the people could be realized efficiently”).

122. See Samuel C. Patterson, *Remembering Frank J. Goodnow*, 34 *PS: Pol. Sci. & Pols.* 875, 877 (2001) (comparing Wilson’s and Goodnow’s contributions to the field of administrative law but concluding that Goodnow is nonetheless considered the founder of the field).

123. Michael Tolley, *Goodnow, Frank Johnson*, *Am. Nat’l Biography* (Feb. 2000), <https://doi.org/10.1093/anb/9780198606697.article.1400233> (on file with the *Columbia Law Review*).

of Administrative Law and Municipal Science.<sup>124</sup> He is known today as “the founder of the field of administrative law,” the “father of American administration,” and a pioneer in studies of comparative public law.<sup>125</sup>

Goodnow expounded his state theory in his most influential and well-known book, *Politics and Administration: A Study in Government*.<sup>126</sup> The volume, published in 1900, was an instant classic and helped structure the developing field of public administration in the United States around the politics–administration dichotomy.<sup>127</sup>

As Goodnow saw it, government should be understood to serve two functions. The first was to express the will of the state, which he called politics.<sup>128</sup> The second was to implement that will once it was expressed, which he called administration.<sup>129</sup>

Through politics, societies figured out what they wanted. In the United States, this was done through Congress.<sup>130</sup> There, the people’s representatives precipitated regional preferences into something more general and authoritative. By passing laws, Congress transmuted inchoate but democratically legitimate public opinion into the will of the state. Once

124. Patterson, *supra* note 122, at 875.

125. Patrick Overeem, *The Politics–Administration Dichotomy: Toward a Constitutional Perspective* 61 (Routledge 2019) (2012); Tolley, *supra* note 123.

126. See Goodnow, *Politics and Administration*, *supra* note 93 (describing a distinction between politics and administration in American government).

127. Modern commentators have sometimes focused on Woodrow Wilson’s 1887 essay on *The Study of Administration* as the field’s fountainhead and the source of the politics–administration dichotomy in the United States. See Woodrow Wilson, *The Study of Administration*, 2 *Pol. Sci. Q.* 197, 210 (1887) (“[A]dministration lies outside the proper sphere of *politics*. Administrative questions are not political questions. Although politics sets the tasks for administration, it should not be suffered to manipulate its offices.”). This is mistaken. See Patterson, *supra* note 122, at 877 (reporting Goodnow’s contribution to the field by writing the first textbook on administration and elaborating the typological distinction between “politics” and “administration”); cf. Overeem, *supra* note 125, at 54 (“Historical research has shown that [Wilson’s] now-famous essay received scant attention in the four or five decades after its publication. The first scholarly reference to it appeared in Leonard D. White’s 1926 textbook, and until the 1950s comments on the essay remained scarce.”); Alasdair Roberts, *Shaking Hands With Hitler: The Politics-Administration Dichotomy and Engagement With Fascism*, 79 *Pub. Admin. Rev.* 267, 274 n.3 (2019) [hereinafter Roberts, *Shaking Hands*] (observing that Wilson’s essay was not canonical at the time it was published or in 1924).

128. See Goodnow, *Politics and Administration*, *supra* note 93, at 18–22.

129. See *id.*

130. See *id.* at 16–17 (“[In] the American political system . . . the legislature, another governmental organ, expresses the will of the state in most cases where it has not been expressed in the constitution.”). Of course, as Goodnow himself recognized, Congress did not have a monopoly on expressing state will. The President, too, had a role to play in expressing the will of the state, particularly when it came to working out the details of issues on which Congress expressed itself in only a general sense, as did other governmental institutions. See *id.* at 15–18.

that will had been expressed, all that was left for government was to implement it or, in other words, administration.<sup>131</sup>

Goodnow believed that these two activities needed to take place in harmony for the state to avoid paralysis. Politics without administration would be sterile, while administration without politics would be usurpation.<sup>132</sup> For a state to operate, politics and administration had to take place together. In practice, this meant one would have to be subordinated to the other.<sup>133</sup>

This was a problem for the United States. American law famously made no provisions for establishing harmony between politics and administration.<sup>134</sup> The Constitution itself included no discussion of administration at all. Because the American state claimed to be democratic, administration should have been subordinated to politics.<sup>135</sup> But this is not what happened: The “fundamental principle of the separation of governmental powers” made it “impossible for the necessary control of politics over administration to develop within the formal governmental system.”<sup>136</sup>

This design failure did not mean that politics and administration were completely out of harmony in the United States, however. Although the Constitution prevented harmony, some harmonization did occur—it simply took place outside of the “formal governmental system.”<sup>137</sup> In the United States, according to Goodnow, the integration of politics and administration happened through the political parties.<sup>138</sup> These extralegal, nonpolitical, nonadministrative bodies came to dominate formal political and administrative authorities.<sup>139</sup> Instead of politics subordinated

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131. Goodnow recognized that problems of implementation were often difficult to extricate from problems of formulation. Politics and administration could be closely bound together. See, e.g., *id.* at 10 (“[T]he less popular the government, the less is the function of executing the will of the state differentiated from the function of expressing that will.”). Furthermore, institutions that were mostly devoted to politics could have important administrative responsibilities, and vice versa. See *id.* at 20–23.

132. See *id.* at 23–24.

133. See *id.*

134. See *id.* at 25, 205.

135. See *id.* at 24 (“[P]opular government requires that it is the executing authority [that is, administration] which shall be subordinated to the expressing authority [that is, politics], since the latter in the nature of things can be made much more representative of the people than can the executing authority.”).

136. *Id.* at 25.

137. *Id.* at 37.

138. *Id.* at 25–26 (“The party system thus secures that harmony between the functions of politics and administration which must exist if government is to be carried on successfully.”).

139. See *id.* at 25; Frank J. Goodnow, *The Principles of the Administrative Law of the United States* 48 (1905) [hereinafter Goodnow, *Principles of the Administrative Law*] (arguing that due to the legislature’s insufficient control of the executive, the parties attempted to secure harmony between the two out of “political necessity” and obtained “great strength” as a result).

to administration, or administration subordinated to politics, both were subordinated to the parties.<sup>140</sup>

Goodnow believed that the parties did their best to overcome the deficiencies of the American Constitution, but they could only do so much. They were, he remarked, “only partially successful” at harmonization because of frequent deadlock and new elections.<sup>141</sup> At the same time, they introduced their own pathologies, since they were relatively static, with infrequent changes in leadership.<sup>142</sup> Consequently, as Goodnow concluded with characteristic understatement, “The American political system as at present existing does not thus satisfy the demands of popular government . . . in as full a measure as is desirable.”<sup>143</sup>

Goodnow’s solution was not to end party government but to put it on more responsible footing. If the party could be made responsive to the will of the people, the party boss would be made responsive to the popular will too; government as a whole, then, would be made more responsible.<sup>144</sup> Goodnow was at pains to remind his readers that there was nothing inherently wrong with a party boss or boss rule.<sup>145</sup> A boss was simply “the kind of political leader which the American party system has developed.”<sup>146</sup> The problem, such as it was, was that the boss ruled independently of the will of the people.<sup>147</sup> The party boss was irresponsible. The challenge for Goodnowian public administration was not to eliminate the boss but instead to harness their power by placing them on a democratic foundation.<sup>148</sup>

Goodnow was full of specific suggestions for how to do this.<sup>149</sup> More important than his particular proposals is his general scheme: to centralize administrative authority in an elected executive, so that the party boss—now an elected leader—could effectively use the government to realize the party program.<sup>150</sup> This way, voters would be able to judge for themselves whether a party they elected had positive effects on the country and to take

140. For a modern revival of this argument, see Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 *Harv. L. Rev.* 2311, 2325–29 (2006).

141. Goodnow, *Politics and Administration*, *supra* note 93, at 164.

142. See *id.* at 165–66 (suggesting that “the bitter political warfare” of American government makes party members reluctant to demand leadership changes out of fear of weakening the party).

143. *Id.*

144. See *id.* at 198.

145. *Id.* at 174 (“The mere fact that the boss is a political leader of great influence and power is a matter which to the student of politics is of very little importance.”).

146. *Id.* at 173.

147. See *id.* at 173–74.

148. See *id.* at 258–59.

149. See *id.* at 199–254 (describing the sources of party irresponsibility and how the American party leader can be made amenable to popular control).

150. See *id.* at 201–02; see also *id.* at 220–23, 258–59 (“[T]he present [party] boss ought to be made responsible to the party and the party responsive to the popular will. The people, if the government is to be popular, should have the power to veto propositions made by party leaders, to deprive them of their leadership, and to [e]ntrust the conduct of affairs to others more in accord with the popular will.”).

appropriate action at the next election.<sup>151</sup> Meanwhile, the simple fact that parties elected to power would now have actual power to realize their agenda would tend to make them responsible.<sup>152</sup> They would know that voters could and should hold them accountable for what happened to the country on their watch.<sup>153</sup>

2. *Woodrow Wilson's Responsible President.* — Goodnow stopped short of calling the empowered presidency the royal road to national responsibility. This may have been a simple concession to the reality of the time. The presidency, as Goodnow encountered it, was weak.<sup>154</sup> Although he recognized that the office was “not . . . irresponsible,” Goodnow held back from proposing the executive as the proper foundation for a responsible democratic state.<sup>155</sup>

Woodrow Wilson was not so shy. The only figure in Progressive state theory to rival Goodnow, he was explicit in his celebration of the executive as a solution to the same difficulties Goodnow deplored, and for similar reasons.

Wilson's place within the history of public administration is complex.<sup>156</sup> Although initially trained as a lawyer, he turned away from legal

151. See *id.* at 202.

152. *Id.* at 259.

153. *Id.*

154. In his primer on constitutional law, Goodnow remarked that, in the United States, the legislature was the branch with general powers, and the executive, whether at the federal or state level, exercised “merely . . . [those] powers which have clearly been given to him by the Constitution.” Frank J. Goodnow, *Principles of Constitutional Government* 89 (1916). Goodnow acknowledged that the Constitution enumerated Congress's powers, as well as the federal executive's powers.

But the enumeration in [the] case [of Congress] is made for the purpose of securing a distribution of powers, as between the central government and the state governments, and the words vesting the legislative power of the United States in Congress are significant as impliedly denying to any other authority the right to exercise them. The Constitution says expressly that “all legislative powers herein granted shall be vested in a Congress of the United States.”

*Id.* at 88 (emphasis omitted). Thus, with respect to the executive, the “Constitution itself is regarded as a grant of power not otherwise possessed, rather than as a limitation of power already in existence.” *Id.* at 89.

Moreover, Goodnow believed that the case law of the time clearly established that the President did not have a constitutional power to issue regulations, and at least as of 1916, “no serious attempt has been made to derive such a power from the general grant to the President of the executive power or from the duty expressly imposed upon him to see that the laws be faithfully executed.” *Id.* at 93. More generally, Goodnow remarked, American courts “have held that the general statement that ‘the executive power’ shall be vested in [the President], has little if any legal effect, and that for the most part [the scope of the Vesting Clause] is to be explained by the powers which are later specifically mentioned.” *Id.* at 88–89.

155. *Id.* at 95.

156. The secondary literature on Wilson's influence on public administration is vast. See, e.g., *Politics and Administration: Woodrow Wilson and American Public Administration* (Jack Rabin & James S. Bowman eds., 1984).

practice early and became a student of government.<sup>157</sup> He earned his doctorate at Johns Hopkins and led a successful academic career before entering politics.<sup>158</sup> While his influence as a scholar has sometimes been exaggerated, it was significant; he and Goodnow are widely regarded together as the two founders of the field of public administration in the United States.<sup>159</sup> They shared similar approaches and influences, and they wrote in response to similar concerns.

The problem of irresponsible government was, for Wilson just like Goodnow, a central preoccupation. He developed this theme starting with his early academic work and explored it forcefully in his graduate school dissertation, *Congressional Government*.<sup>160</sup> “Power and strict accountability for its use,” he there explained, “are the essential constituents of good government.”<sup>161</sup> For government to work well, Wilson believed, its officers must be imbued with “[a] sense of highest responsibility, a dignifying and elevating sense of being trusted, together with a consciousness of being in an official station so conspicuous that no faithful discharge of duty can go unacknowledged and unrewarded, and no breach of trust undiscovered and unpunished.”<sup>162</sup> Government officials needed authority to act. But they also needed to feel acutely the trust of which they were the keepers. Only the knowledge that they were under constant scrutiny would awaken in them the proper attitude toward their office.

Wilson did not count on internal checks alone, however. To produce responsible government, he paired officials’ internal self-policing with the discipline of the public will.<sup>163</sup> “The best rulers are always those to whom great power is [e]ntrusted in such a manner as to make them feel that they will surely be abundantly honored and recompensed for a just and patri-

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157. On Wilson’s legal training and its effect (or lack thereof) on his future work, see Lael Weinberger, *Judicializing International Relations: Internationalism, Courts, and American Lawyers in the Progressive Era* 46–47 (March 30, 2020) (on file with the *Columbia Law Review*) (unpublished manuscript); see also Kazimierz Grzybowski, *Woodrow Wilson on Law, State and Society*, 30 *Geo. Wash. L. Rev.* 808, 808–09 (1962).

158. See Lloyd E. Ambrosius, *Wilson, Woodrow*, *Am. Nat’l Biography* (Feb. 2000), <https://doi.org/10.1093/anb/9780198606697.article.0600726> (on file with the *Columbia Law Review*).

159. See, e.g., Overeem, *supra* note 125, at 53 (“Wilson’s essay ‘The Study of Administration’ is undeniably the *locus classicus* in the literature on the politics–administration dichotomy.”); John A. Rohr, *To Run a Constitution: The Legitimacy of the Administrative State* 56 (1986) (describing Wilson and Goodnow as the “leading theoreticians” in the founding of the field of public administration). On the extent to which Wilson’s influence has been exaggerated, see *supra* note 127; cf. Richard J. Stillman II, *Woodrow Wilson and the Study of Administration: A New Look at an Old Essay*, 67 *Am. Pol. Sci. Rev.* 582, 587–88 (1973) [hereinafter Stillman, *Wilson and Study of Administration*] (documenting Wilson’s influence as a teacher of administration).

160. See Thomas O. Sargentich, *The Limits of the Parliamentary Critique of the Separation of Powers*, 34 *Wm. & Mary L. Rev.* 679, 684–86 (1993).

161. Woodrow Wilson, *Congressional Government: A Study in American Politics* 284 (1885) [hereinafter Wilson, *Congressional Government*] (emphasis omitted).

162. *Id.*

163. *Id.*

otic use of it . . . .”<sup>164</sup> Rulers must “know that nothing can shield them from full retribution for every abuse of [their power].”<sup>165</sup> Bad representatives should lose elections; corrupt ones should fare worse.

This is where the federal government’s structure presented a problem. Its configuration made it difficult for the public to exercise any disciplinary function at all. Because of the way it was organized, “[n]obody stands sponsor for the policy of the government.”<sup>166</sup> “A dozen men originate it; a dozen compromises twist and alter it; a dozen offices whose names are scarcely known outside of Washington put it into execution.”<sup>167</sup> As a result, it was impossible for the public to know who actually made the laws. Not knowing who was responsible, the public could not hold anyone to account.

This absence of responsibility created a double problem. Because the people could not know who was responsible for good or bad policies, they could not reward good representatives or punish bad ones. Irresponsibility eliminated the people’s external checking power. But this governmental confusion also undermined officials’ own internal self-regulation. Officials knew that the people could not hold anyone responsible for the state’s policy. As a result, they knew that their conduct was insulated from public evaluation. The structure of the government kept them from developing the proper attitude toward their office. Government irresponsibility thus undermined the state’s internal checks as well. It put the government beyond accountability from within and without.

In the 1880s, Wilson may have thought that a British parliamentary cabinet government was the best hope for addressing these concerns and making the federal state “responsible.”<sup>168</sup> But in the next decades, Progressives further lost faith in the efficacy of representative assemblies and took inspiration from strong executive leadership instead.<sup>169</sup> Wilson followed

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164. *Id.*

165. *Id.*

166. *Id.* at 318.

167. *Id.* This structural flaw was not a minor defect. It is the problem to which Wilson is “constantly recurring; to which I recur again and again because every examination of the system [of U.S. government], at whatsoever point begun, leads inevitably to it as to a central secret. It is the defect which interprets all the rest . . . .” *Id.* at 319.

168. See, e.g., *id.* at xvi; see also Stillman, *Wilson and Study of Administration*, *supra* note 159, at 585 (finding that Wilson “pointed out the political abuses and irresponsibility of the legislative branch” and “frequently looked over his shoulder at the British Cabinet Government” as a model).

169. See Charles Edward Merriam, *American Political Ideas: Studies in the Development of American Political Thought, 1865–1917*, at 107, 127 (1920) (explaining how the “continued unpopularity of the legislative bodies” contributed to the strengthening of executive branch leadership); Sargentich, *supra* note 160, at 691–92 (“By the early 1900s, there had been stronger Presidents who provided a larger measure of national leadership under our constitutional system . . . .”); Noah A. Rosenblum, *The Crisis of Liberal Constitutionalism: Antiparliamentarism in Europe and the United States in the Interwar Years 10* (on file with the *Columbia Law Review*) (unpublished manuscript) [hereinafter Rosenblum,

suit: By the time he delivered the George Blumenthal lectures at Columbia University in 1907, he had decisively switched his hopes to the presidency.<sup>170</sup>

The President, Wilson recognized, was not like other government officials. He had a “conspicuous position” that, by its very nature, tended to make him responsible, even in the then-existing “irresponsible” federal state.<sup>171</sup> It was simply a “fact that opinion will hold him responsible.”<sup>172</sup> This was particularly true with respect to the appointments he made but also applied generally to everything the President did.<sup>173</sup> Although the organization of American government had undermined the dual pillars of responsibility for most officials, it had not affected the President at all.<sup>174</sup>

Rather, the reverse was true. Wilson’s analysis suggested that the design of the American state made the President unusually subject to the forces that create responsibility. The President, Wilson argued, was the only political actor “for whom the whole nation votes.”<sup>175</sup> He was, then, directly subject to the sanction of the public will.<sup>176</sup> And this check was not stymied by the confusions and divisions that frustrated the public’s attempts to hold other officials accountable.<sup>177</sup> With other officials, there might be questions about who stood sponsor for the government’s policy, or which of a dozen different people the public should choose to reward or punish. But not so with the President.<sup>178</sup> He was the great “political spokesman” for the country; his was “the only national voice in affairs.”<sup>179</sup> For better or worse, the President stood at the top, alone.

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Liberal Constitutionalism] (noting American Progressives’ pre–World War I objections to the divisive and inefficient aspects of representative democracy).

170. See Woodrow Wilson, *Constitutional Government*, supra note 93, at 215 (stating that the public nature of the President’s appointments leads him “to be judicious in every act for which he is known to be singly responsible”). He likely changed his mind even earlier, as he famously acknowledged in the preface to the fifteenth edition of *Congressional Government*, published in 1901. Woodrow Wilson, *Congressional Government: A Study in American Politics*, at v (15th ed. 1901). By then, the work had already become dated, and the rise of the executive risked putting it “hopelessly out of date.” See *id.* at xiii; Louis Brownlow, *Woodrow Wilson and Public Administration*, 16 *Pub. Admin. Rev.* 77, 78 (1956) [hereinafter Brownlow, *Woodrow Wilson*]; Levinson & Pildes, supra note 140, at 2327 n.57.

171. Wilson, *Constitutional Government*, supra note 93, at 215.

172. *Id.*

173. In discussing the possibility that the President might become a “national boss” using his patronage power to reward cronies at the expense of good government, Wilson observed that “the President’s appointments are public, and he alone by constitutional assignment is responsible for them. Such open responsibility sobers and restrains even where principle is lacking.” *Id.*

174. *Id.* at 215–16.

175. *Id.* at 67.

176. *Id.*

177. *Id.* (“[The President] is likely to be praised if things go well, and blamed if they go wrong . . .”).

178. *Id.* at 69 (“It is the extraordinary isolation imposed upon the President by our system that makes the character and opportunity of his office so extraordinary.”).

179. *Id.* at 68.

As a consequence, the President would be subject to the dual forces creating responsibility. He would bear the external scrutiny of the public's will.<sup>180</sup> And knowing himself subject to that surveillance, he would internalize the people's judgment.<sup>181</sup>

This necessary presidential responsibility created the possibility for a more responsible federal government. A responsible President could be the foundation on which to erect an entire accountable state. The problem of irresponsible government is really just the problem of government action and decisionmaking by irresponsible officials. After all, it was the fact that most government officials were not accountable that made government itself irresponsible. But the President, Wilson believed, was responsible by design.<sup>182</sup> The sphere of government that he operated then was not irresponsible since it was animated by a responsible official. The more fully the President dominated that sphere of activity, the more responsible would be the actions that happened within it. Government irresponsibility could thus be solved by shifting government more fully to the President's control. The President could make government more responsible; he just needed more authority over government action and decisionmaking.

As it happens, Wilson believed that much of the government was already in the President's hands, at least theoretically. A modern President, Wilson remarked, "cannot escape being the leader of his party . . . because he is at once the choice of the party and of the nation."<sup>183</sup> He should therefore have enjoyed a significant ability to coordinate across the different branches of government through the party apparatus.<sup>184</sup> At the same time, what executive authority the federal government had was already formally "consolidat[ed] . . . under the authority of the President."<sup>185</sup> This should

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180. *Id.*

181. There is much more to say about Wilson's conception of the presidency, in particular, the President's role as a creator of public opinion. See, e.g., *id.* at 68 (describing the President's voice as "the only national voice in affairs"); John A. Dearborn, *The "Two Mr. Wilsons": Party Government, Personal Leadership, and Woodrow Wilson's Political Thought*, 47 *Cong. & Presidency* 32, 44–48 (2020) (describing Wilson's notion of an executive's unique connection to public opinion); Stephen Skowronek, *The Reassociation of Ideas and Purposes: Racism, Liberalism, and the American Political Tradition*, 100 *Am. Pol. Sci. Rev.* 385, 398 (2006) ("Wilson was not adopting Republican principles, nor was he reverting to some prior reactionary persona. He was plowing ahead with his own ideals, ideals that were poised at this point to take on a life of their own.").

182. Wilson, *Constitutional Government*, *supra* note 93, at 215.

183. *Id.* at 67.

184. *Id.* at 68 ("He can dominate his party by being spokesman for the real sentiment and purpose of the country, by giving direction to opinion . . . Let him once win the admiration and confidence of the country, and no other single force can withstand him, no combination of forces will easily overpower him.").

185. *Id.* at 206; see also *id.* at 205 (observing that "[e]very one subordinate to the president is appointed by him and responsible to him, both legally and politically" and that "[h]e can control the personnel and the action of the whole of the great 'department' of government of which he is the head" (emphasis omitted)).

have given him the tools to set the machinery of the state in motion. Taken together, these two attributes could have made the President a figure of considerable power. He should have had the ability to formulate an agenda, advance it across the varied institutions of government, and even mobilize the state to implement it.

The actual practice of government, however, left the President diminished, even ineffectual. For one thing, not all Presidents embraced their job as party leaders.<sup>186</sup> Parties were complicated and often got the better of their putative head. Even when a President could lead his party well, the state itself could hamper him: “The way in which the several branches of the federal government have been separately organized and given efficiency in the discharge of their own functions,” Wilson complained, “has only emphasized their separation and jealous independence.”<sup>187</sup> The separation of powers frustrated the attempts of even the most competent executive.

This left Wilson in near despair. In his judgment, the state was simply “not to be driven, and there is no machinery of which the Constitution knows anything by which [the government] can be led.”<sup>188</sup> The problem was fundamental. To realize government responsibility through an effectively empowered President, the state itself would have to be redesigned.

### C. *PCAM's Progressive Background*

Promoting executive power was thus an early twentieth-century commonplace. In line with Goodnow and Wilson's thinking, reforms that empowered executives proliferated at the local and state level, and elite public administrative reformers advocated for greater executive administrative power throughout the 1910s and '20s, with occasional success.<sup>189</sup> The members of PCAM were directly connected to these efforts in the years before they began their work through their study of public administration and their work in government.<sup>190</sup>

Given their background and the social and political context, then, PCAM's embrace of presidential administration can appear to be an unremarkable Progressive Era project, in strong continuity with earlier reform proposals. The Committee was chartered to help the federal government become more accountable and efficacious. According to Goodnow, Wilson, and the Progressive Era public administration reform thinking they shaped, and with which PCAM was familiar, the way to do this was by empowering the executive. It comes as no surprise, then, that PCAM

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186. *Id.* at 70.

187. *Id.* at 206.

188. *Id.*

189. See Tarbert, *supra* note 120, at 147–49 (describing the popular belief among proponents of good government that reorganization of the executive branch was the third and most important pillar of administrative reform).

190. See *supra* note 94 and accompanying text.

embraced this principle in general, or that the technical reforms it proposed tended to advance what both PCAM and Progressives called “responsible government.”<sup>191</sup>

But we cannot attend only to where PCAM followed public administration orthodoxy. To grasp the full meaning of PCAM’s reforms, we have to see both where the Committee tracked Progressive Era reform thinking and where the two parted company. As we will see, PCAM did not fully embrace Goodnow and Wilson’s prescriptions.

In particular, PCAM diverged from accepted public administration thinking on the question of separation of powers and the place of the Constitution in executive branch design. This has important consequences for understanding the significance of PCAM’s reforms and the goals of presidential administration. The next Part assesses the PCAM Report in light of what we have now learned about Progressive Era reform thought.

### III. PCAM’S RELATIONSHIP TO THE PROGRESSIVE TRADITION OF EXECUTIVE REFORM

PCAM was a product of Progressive Era reform thinking. Its leaders were steeped in the emerging science of public administration. And they deployed its teachings, especially about the benefits of executive power and centralization, to make the federal government more accountable and efficacious.

Yet the Committee departed from public administration orthodoxy in a crucial respect. Where Progressive Era reformers had criticized the Constitution and attacked the principle of the separation of powers, PCAM embraced both. Its constitutionalism and strong defense of separation of powers is what set PCAM apart from its Progressive forebears and made its vision of presidential administration distinctive.

This Part reconstructs PCAM’s relationship with Progressive Era public administration thinking. It begins by showing how PCAM followed Progressives in seeking to make government responsible by rendering administration responsive to politics through an empowered chief executive. The Part then details how, in pursuit of that goal, PCAM broke with Wilson, Goodnow, and their followers by embracing the Constitution and the separation of powers. The next Part explains this departure by uncovering its connection with antifascism. Part V then turns to the significance of this recovered history for contemporary law and legal scholarship.

#### A. *The Adaptations of the President’s Committee*

Given the personal experiences of PCAM’s members, the Committee’s reliance on the teachings of the discipline of public administration

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191. Tarbert, *supra* note 120, at 32.

was to be expected. The three official members of PCAM had been deeply influenced by Goodnow and Wilson's thinking.

Louis Brownlow, PCAM's chair, had known Wilson personally while serving as one of Wilson's Commissioners of the District of Columbia.<sup>192</sup> Brownlow considered him "a pioneer and a very founder of the study of the science and the art of public administration."<sup>193</sup> At the time of his appointment to lead the President's Committee, Brownlow was the Director of the Public Administration Clearing House, an organization devoted to the practical study and improvement of government management according to the latest public administration science of the day.<sup>194</sup>

Charles Merriam, Brownlow's close collaborator, was more academically inclined, but just as knowledgeable. A celebrated professor of political science, he had been trained by some of the leading lights of administrative law and public administration and counted Goodnow as among his most influential teachers.<sup>195</sup> Like Brownlow, Merriam was also involved in reform politics directly. He was elected to the Chicago city council, ran for mayor twice, and served in the New Deal federal government in several capacities.<sup>196</sup>

Luther Gulick, a generation younger than his fellow Committee members, embodied the new, professionalized discipline that Brownlow and Merriam helped institutionalize.<sup>197</sup> Like Merriam, Gulick had trained at Columbia.<sup>198</sup> He was later appointed to Columbia's Eaton Professorship, the chair that had once belonged to Goodnow himself.<sup>199</sup> And, like Merriam and Brownlow, Gulick was also active in Progressive Era government reform causes. He served with both of them on the Social Science Research Council's public administration section,<sup>200</sup> and he continued to advise on government reform into the 1980s, when he was in his nine-

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192. See Karl, *supra* note 54, at 92.

193. Brownlow, Woodrow Wilson, *supra* note 170, at 81.

194. See Alasdair Roberts, Demonstrating Neutrality: The Rockefeller Philanthropies and the Evolution of Public Administration, 1927–1936, 54 *Pub. Admin. Rev.* 221, 224 (1994); Roberts, Shaking Hands, *supra* note 127, at 268.

195. See Patrick Reagan, *Designing a New America: The Origins of New Deal Planning, 1890–1943*, at 57 (1999).

196. See Mark G. Schmeller, Merriam, Charles E., *Am. Nat'l Biography* (Feb. 2000), <https://doi.org/10.1093/anb/9780198606697.article.1400408> (on file with the *Columbia Law Review*).

197. See Karl, *supra* note 54, at 127.

198. See *id.* at 136. Frank Goodnow, however, left Columbia the year before Gulick's arrival to become president of Johns Hopkins. See Tolley, *supra* note 123.

199. See Tolley, *supra* note 123; Luther Halsey Gulick III Papers, Baruch Coll. Archives, <https://archivespace.baruch.cuny.edu/repositories/2/resources/1007#> [<https://perma.cc/Y5CR-VUX2>] (last visited Aug. 30, 2021).

200. See Brownlow, *Passion for Anonymity*, *supra* note 58, at 250; Roberts, Shaking Hands, *supra* note 127, at 268.

ties.<sup>201</sup> In his later years, Gulick was celebrated as “the ‘doyen of public administration.’”<sup>202</sup>

Together, Brownlow, Merriam, and Gulick embodied the new public administration approach to the study of government.<sup>203</sup> Many of their report’s recommendations were simply public administration orthodoxy.<sup>204</sup>

1. *The Politics–Administration Dichotomy*. — The Committee’s debt to public administration thinking began with its frame of analysis. It organized its study around the discipline’s foundational distinction between politics and administration.<sup>205</sup> This pair of concepts provided the basic legitimacy for the Committee’s work and for the recommendations it advanced.

Reprising Goodnow and Wilson, PCAM believed that the state had two fundamental responsibilities: It needed to formulate policy and then implement it.<sup>206</sup> These two functions were more or less independent. Government could change the way it formulated policy without changing its implementation. Or, in the alternative, it could improve administration without altering policy formulation. Reforms in one sphere need not affect the other at all.

It was only because politics and administration could be separated in this way that PCAM could do its work. Policymaking was a job for political actors.<sup>207</sup> About that, PCAM had nothing to say; after all, it was simply a committee of experts. Administration, on the other hand, was something it could speak to.<sup>208</sup> How to implement policy effectively was a technical problem to which PCAM had devoted years of study. Because politics and administration were separate and distinct, the Committee could bring its expertise to bear on the latter without disturbing the former.

For the most part, PCAM relied on the politics–administration dichotomy implicitly. But, where its recommendations were particularly controversial, the Committee invoked it directly in order to bolster its authority. Consider the Committee’s defense of its proposal to give the federal executive “continuous reorganization authority.”<sup>209</sup> Before Roosevelt, Congress

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201. See Jacques Steinberg, Dr. Luther H. Gulick, 100, Dies; Adviser to Roosevelt and Mayors, N.Y. Times, Jan. 11, 1993, at B8, <https://www.nytimes.com/1993/01/11/nyregion/dr-luther-h-gulick-100-dies-adviser-to-roosevelt-and-mayors.html> (on file with the *Columbia Law Review*).

202. Mosher, President Needs Help, *supra* note 67, at 5.

203. See Roberts, Shaking Hands, *supra* note 127, at 268.

204. See Ray, *supra* note 90, at 116.

205. See, e.g., PCAM Report, *supra* note 52, at 33.

206. See, e.g., *id.* at 33, 43 (distinguishing between formulating policy and implementing it).

207. See *id.* at 33.

208. See *id.* at 43.

209. See *id.* at 33 (“This places in the Congress the settlement of broad policy and on the President the executive task of reorganization in accordance with this policy.”).

had periodically granted Presidents a time-limited prerogative to reorganize the federal government.<sup>210</sup> PCAM proposed to make this grant more open-ended, although it knew this would inspire resistance.<sup>211</sup>

To justify its recommendation, the Committee invoked the politics–administration dichotomy. Granting the President power to reorganize the state, PCAM argued, would leave politics unaffected but would help improve administration. Congress, PCAM stressed, was the primary political branch, and so should “retain[] . . . complete control over the things which are to be done by Government, that is, over policy.”<sup>212</sup> It fell to the President, however, to implement that policy.<sup>213</sup> And to do that, the President needed control over the government to take care that it did what Congress wanted.

In giving the President control over reorganization, PCAM asserted, Congress would in fact enhance its own power; the executive would not be making policy but instead would only be making Congress’s policy work better.<sup>214</sup> With the authority to reorganize the government, the executive would be able to structure the state to make sure that Congress’s dictates were implemented as effectively as possible.<sup>215</sup> Since this concerned only administration, politics would be unchanged. Indeed, it would be improved through increased effectiveness.

PCAM worried about how to realize an already-expressed state will—what Goodnow had called administration. PCAM was going to make the government’s administration better. Its recommendations would help the government become the kind of institution that could efficiently and accountably bring about what politics decided.

2. *Empowering the Executive.* — To bring this about, PCAM fell back on that old standby of Progressive Era public administration. It proposed giving the executive greater tools to affect the operation of the government.

What new tools the President needed could be learned by looking to the executive-centered reforms of the prior years. “State governments, . . . city governments, and . . . large-scale private industry” had recently addressed problems similar to those facing the federal government.<sup>216</sup> PCAM

210. See Dearborn, Foundations, supra note 54, at 187.

211. See Gulick Memorandum, supra note 109, at 378–82. Indeed, Congress never did grant the executive the unlimited executive reorganization authority for which the Committee asked. See John Dearborn, Power Shifts: Congress and Presidential Representation 103–24, 206–21 (2021) [hereinafter Dearborn, Power Shifts].

212. See PCAM Report, supra note 52, at 33.

213. See, e.g., id. at 46.

214. See id. at 43, 46.

215. See id. at 33.

216. Id. at 3; see also A Talk Given by Mr. Louis Brownlow, Chairman of the President’s Committee on Administrative Management, Over the Columbia Broadcasting System at 10:30 P.M., at 3 (Jan. 20, 1937) (PCAM Classification 16.J.I.10) (on file with the *Columbia Law Review*) [hereinafter Brownlow Radio Address].

proposed to take inspiration from these near-contemporaneous reforms to strengthen the presidency.<sup>217</sup>

In looking to those contexts, PCAM identified three institutions necessary to enable an executive to be effective. According to the Committee, strong governors, powerful mayors, and successful business leaders made use of (1) a professional staff, (2) the authority to set financial priorities and control expenditures, and (3) agencies with the ability to develop and impose forward-looking plans.<sup>218</sup> Good administration, then, depended on (1) personnel management, (2) budgeting, and (3) planning.

To bring these capacities to the federal government, PCAM proposed creating three new “managerial arms” for the executive, one for each task.<sup>219</sup> Sitting outside of the traditional government departments, these crosscutting institutions would report directly to the President and help them monitor and influence the government’s ongoing work.<sup>220</sup>

Extant federal institutions already did some of this. But they suffered from limitations.<sup>221</sup> The government’s existing personnel management arm, the Civil Service Commission, was not actually beholden to the President. The government’s financial management apparatus, the Bureau of the Budget, was under the executive’s control but was limited in its reach. And the government’s planning outfit, the National Resources Committee, was a temporary agency.

Besides, at the time PCAM wrote, the President did not have the bandwidth to make good use of these existing institutions.<sup>222</sup> It is easy to forget just how few people were officially part of the pre–New Deal presidency. When President Roosevelt came into office, he was dependent on the same “basic structure of private secretaries, assistant private secretaries, and clerical staff that had been in existence for decades.”<sup>223</sup> His predecessor, President Herbert Hoover, had gone to Congress to ask for a special appropriation to hire three private secretaries—a novel extravagance.<sup>224</sup> Not only were the existing institutions of “overall management” problematic, then, but the President was not supported enough to use them effectively anyway.

PCAM aimed to fix this. It wanted to revamp the government’s personnel management, financial control, and policy planning arms to make

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217. See PCAM Report, *supra* note 52, at 3 (“The Federal Government is more extensive and more complicated [than state governments, city governments, and large-scale private industry], but the principles of reorganization are the same.”).

218. See Brownlow Radio Address, *supra* note 216, at 3–4.

219. See *id.* at 3; see also Karl, *supra* note 54, at 240–41.

220. See Brownlow Radio Address, *supra* note 216, at 3.

221. Cf. Karl, *supra* note 54, at 244.

222. See *id.* (“He needs help! He needs help to enable him to carry on this enormous business enterprise . . . [H]e needs more help right in the White House. He hasn’t as much help there as he had when he was Governor of New York in Albany.”).

223. Warsaw, *supra* note 56, at 40.

224. See *id.* at 32.

them adequate to their responsibilities. And it proposed giving the President enough staff to put them into actual use.

The result, as PCAM recognized, would be to strengthen executive power. But this was a feature of its plan, not a bug. Empowering the executive, as we saw, was understood to be a way to make government more responsible. And although PCAM's report did not open with the phrase "responsible government," it stressed that goal repeatedly throughout.<sup>225</sup> The American Republic, the report began, was a democracy, which meant nothing else than that the government should "get[] things done that we, the American people, want done in the general interest."<sup>226</sup> The state's job was to make sure that the will of the people was "promptly, effectively, and economically put into action."<sup>227</sup> In the United States, the will of the people needed to become the action of the state, and the state should do what the people wanted. This was responsible government in action.

To make the state responsible, it would need to be well managed. The government would only be able to implement the will of the people reliably if the executive actually possessed the capacity to put the state machinery to work to realize it. This was why PCAM wanted to give the executive personnel management, financial control, and policy planning arms. "These," the Committee explained, "are the indispensable means of making good the popular will in a people's government."<sup>228</sup>

So understood, PCAM hazarded there was nothing new or threatening in its recommendations. The inadequacy of the executive's "equipment for administrative management" had been "known for many years."<sup>229</sup> "What we need is not a new principle," the Committee asserted, but just a "modernizing of our managerial equipment."<sup>230</sup>

Modernization meant presidential administration. As the Committee saw it, the "canons of efficiency require the establishment of a responsible and effective chief executive as the center of energy, direction and administrative management."<sup>231</sup> To give that executive the power to actually manage the state, the government's activities should be placed "in the hands of qualified personnel under [the President's] direction," and Congress should establish "managerial and staff agencies" to help the President supervise the operations of the state.<sup>232</sup> It was because the President did not have these tools that the Committee had to write its report. Its aim may

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225. See, e.g., PCAM Report, *supra* note 52, at 22 (criticizing the actions of the Comptroller General for "dissipat[ing] responsibility" and the division of authority for "destroying responsibility"); *id.* at 47 ("Our choice is not between power and no power, but between responsible but capable popular government and irresponsible autocracy.").

226. *Id.* at 1.

227. *Id.*; see also Brownlow Radio Address, *supra* note 216, at 1.

228. PCAM Report, *supra* note 52, at 2.

229. *Id.* at 3.

230. *Id.*

231. *Id.* at 2.

232. *Id.*

have been to give the President more power. But this was only to make American democracy more responsible. “To falter at this point is fatal,” the report concluded.<sup>233</sup> “Those who waver at the sight of needed power are false friends of modern democracy. Strong executive leadership is essential to democratic government today.”<sup>234</sup>

B. *The Innovations of the President’s Committee*

PCAM thus adopted a standard public administration recommendation to advance a standard public administration goal: strengthening executive power to make government responsible. But it did so in a novel way. The founders of public administration had championed executive power against the Constitution and as a way to overcome the separation of powers. PCAM argued the opposite. It defended its recommendations as flowing from the Constitution. And it embraced separation of powers as a cornerstone of its vision of the empowered executive.

1. *The Constitution.* — PCAM’s concern with constitutional fidelity is remarkable. Throughout its report, it grounded its recommendations in the text and structure of the Constitution.<sup>235</sup> PCAM repeatedly justified its proposals by claiming that they would do nothing more than give the President power commensurate with their constitutional responsibilities.<sup>236</sup> As the Committee put it, its “paramount purpose” was simply “to find modern methods of carrying out the national aims and programs of America as far as this duty is imposed upon our executive by our Constitution.”<sup>237</sup>

To bring the government into compliance with the Constitution would require some serious retooling. Some aspects of the way the federal government was then structured were “contrary to article II, section 3 of the Constitution, which provides that the President ‘shall take Care that the Laws be faithfully executed.’”<sup>238</sup> PCAM demanded that these inconsistencies be corrected.<sup>239</sup>

Such constitutional fidelity justified the Committee’s notorious recommendation about the independent agencies. The various “independ-

233. *Id.* at 47.

234. *Id.*

235. See, e.g., *id.* at 19 (“[T]he President is charged by the Constitution with important legislative duties, including the duty to advise the Congress ‘from time to time’ of such ‘[m]easures as he shall judge necessary and expedient.’”); *id.* at 30 (“The constitutional principle of the separation of powers and the responsibility of the President for ‘the executive Power’ is impaired through the multiplicity and confusion of agencies which render effective action impossible.”).

236. See *id.* at 47 (observing that PCAM’s reforms would give “the President . . . effective managerial authority over the Executive Branch commensurate with his responsibility under the Constitution of the United States”); see also *id.* at 46 (“[This reform proposal] will make it humanly possible for a President to do his job, and to coordinate the activities for which he is constitutionally, legally, and popularly responsible . . .”).

237. *Id.* at 45.

238. *Id.* at 21.

239. See, e.g., *id.*

ent commissions,” PCAM remarked, were “in reality miniature independent governments” that had been set up piecemeal by a “groping” Congress to handle specific policy problems—“the railroad problem, the banking problem, or the radio problem.”<sup>240</sup> Reflecting no coherent organization, they were fundamentally “unsound.”<sup>241</sup> They combined within themselves “administration and policy determination,” while also doing “important judicial work.”<sup>242</sup> And they operated more or less independently from the rest of the government.<sup>243</sup>

This design made the commissions doubly problematic. At a functional level, they were “virtual[ly] irresponsible,” since they were “unaccountab[le]” to the political branches, making them a threat to democracy.<sup>244</sup> And on a legal level, they were indefensible, since the Constitution stated that “there should be three major branches of the Government and only three,”<sup>245</sup> but the commissions did not fit into any of them and seemed to exercise functions in violation of the specific “responsibility of the President for ‘executive power.’”<sup>246</sup> The Committee thus proposed bringing the independent agencies under the executive branch.<sup>247</sup> It was not just a matter of good administration. It was a legal, constitutional obligation.<sup>248</sup>

This stickling concern with the meaning of Article II was relatively novel.<sup>249</sup> And it was not the only place PCAM worried about constitutional fidelity. PCAM’s report evinced a commitment to many old-fashioned constitutional pieties, especially “the constitutional principle of the separation of powers.”<sup>250</sup> The report devoted its entire penultimate section to the “accountability of the executive to the Congress,” which opened by reminding readers of the many checks and balances built into American government and proclaiming that “the preservation of the principle of the full

240. PCAM Report, *supra* note 52, at 36.

241. *Id.*

242. *Id.*

243. *Id.* (“The Congress has found no effective way of supervising them, they cannot be controlled by the President, and they are answerable to the courts only in respect to the legality of their actions.”).

244. *Id.* (“Power without responsibility has no place in a government based on the theory of democratic control, for responsibility is the people’s only weapon, their only insurance against abuse of power.”).

245. *Id.*

246. *Id.* at 30.

247. *Id.* at 37.

248. See *id.* at 46 (“[This reform proposal reverts] us back to the Constitution . . . [because] it ties in the wandering independencies and abolishes the irresponsible and headless ‘fourth branch’ of the Government which has . . . [developed] unnoticed. It . . . reestablish[es] a single Executive Branch, with the President as its responsible head, as provided by the Constitution.”).

249. See Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. Pa. L. Rev. 1835, 1853 (2016) (“The most striking feature of the Court’s Take Care Clause jurisprudence is that the Court almost never construes the clause, at least not in any conventional way.”); see also *supra* note 154 and accompanying text.

250. PCAM Report, *supra* note 52, at 29.

accountability of the Executive to the Congress is an essential part of our republican system.”<sup>251</sup> Other sections of the report lamented laws “clearly in violation of the constitutional principle of the division of authority between the Legislative and Executive Branches of the Government,”<sup>252</sup> sought to distinguish precisely between law-making and law-executing institutions,<sup>253</sup> and otherwise defended “a firm display of our national constitutional powers.”<sup>254</sup> PCAM characterized its reforms as bringing the country “back to the Constitution.”<sup>255</sup>

Although modern ears may hear nothing strange in these professions of constitutional faith, this Constitution worship was unusual, at least for Progressive Era public administration reformers.<sup>256</sup> PCAM’s teachers had disclaimed it. Indeed, they made a central tenet of their teaching an attack on just this kind of sacralization of the Constitution and its logic.

Wilson and Goodnow are exemplary. Wilson’s *Congressional Government* opened with a broadside against “an indiscriminating and almost blind worship of [the Constitution’s] principles.”<sup>257</sup> It criticized those who believed in the “literary theory” of the American republic.<sup>258</sup> Instead of idolatrously pointing to the written document, Wilson explained, serious students of government should look at how the state actually operated.<sup>259</sup> From this angle, they would see right away that the “ideal” government imagined by the Constitution had long ago been replaced by something much more functional.<sup>260</sup> Worrying about constitutional fidelity was foolish.

Goodnow was similarly clear about the need to move away from talking about the “formal governmental system” to focus on the “actual” operations of the state.<sup>261</sup> To get “a correct idea of the real character of government,” he elaborated, it was wrong to put too much faith in consti-

251. *Id.* at 43.

252. *Id.* at 21.

253. See, e.g., *id.* at 15, 19 (“Our recommendations for improvement of the fiscal administration of the Government are designed to correct these major faults, to return executive functions to the Executive Branch, and to make it accountable to the Congress.”).

254. *Id.* at 47.

255. *Id.* at 46.

256. See Michael Kammen, *A Machine That Would Go of Itself: The Constitution in American Culture* 185 (1986) (observing that, during the Progressive Era, “a cluster of major changes took place [in American constitutional culture]—so major that alarmed observers believed a ‘crisis in constitutionalism’ was occurring”). See generally Andrea Scoseria Katz, *The Lost Promise of Progressive Formalism*, 99 *Tex. L. Rev.* 679 (2021) (exploring debates over constitutional culture in the Progressive Era).

257. Wilson, *Congressional Government*, *supra* note 161, at 4.

258. *Id.* at 12.

259. See *id.* at 9–10, 55 (“The Constitution in operation is manifestly a very different thing from the Constitution of the books.”).

260. See *id.* at 6, 11–12, 52, 56 (“The noble charter of fundamental law given us by the Convention of 1787 is still our Constitution; but it is now our *form of government* rather in name than in reality . . .”).

261. Goodnow, *Politics and Administration*, *supra* note 93, at v.

tutional law, which “deals with the anatomy of government” and so only defines the “formal character of [the state’s] organization.”<sup>262</sup> Constitution worship needed to give way before the realities of the existing American state. Brownlow, Gulick, and Merriam were formed in Wilson and Goodnow’s image. But, to Wilson and Goodnow, PCAM’s obsessive invocation of the Constitution’s principles would have seemed like backsliding.

2. *Separation of Powers.* — Worse, PCAM praised in the Constitution precisely what Wilson and Goodnow most castigated. For Progressive Era public administration reformers, the greatest barrier to creating responsible government was the separation of powers.<sup>263</sup> The Constitution’s framing of a system of divided power was, in their eyes, the single greatest flaw in the design of the American state.<sup>264</sup>

Wilson was quite explicit. As early as his dissertation, he argued that “[i]t is . . . manifestly a radical defect in our federal system that it parcels out power and confuses responsibility as it does. The main purpose of the Convention of 1787,” he went on, “seems to have been to accomplish this grievous mistake.”<sup>265</sup> Separation of powers and checks and balances kept the government from getting anything done.<sup>266</sup> And they mystified voters about who to hold accountable.<sup>267</sup> Taken together, they wove irresponsibility into the fabric of the American state.<sup>268</sup>

Wilson would remain consistent on this point over the course of his academic career. Twenty years later, he continued to inveigh against the separation of powers, making similar arguments about its negative consequences. It had, he explained, succeeded only in paralyzing government and displacing real politics outside the state.<sup>269</sup> “Have we had enough of the literal translation of Whig theory into practice, into constitutions?”, he lamented rhetorically at the end of his Columbia lectures. “Are we ready to make our legislatures and our executives our real bodies politic, instead of our parties? If we are, we must think less of checks and balances and

262. Goodnow, *Principles of the Administrative Law*, supra note 139, at 3–4.

263. See Katz, supra note 256, at 703–04 (relaying that certain Progressive Era accounts criticized the Constitution’s checks and balances).

264. *Id.* at 701 (“Progressives’ charges against the Constitution included its protection of property, its limitation of federal power, and the anti-majoritarian nature of checks and balances.”).

265. Wilson, *Congressional Government*, supra note 161, at 284–85.

266. *Id.* at 318 (“[T]he federal government lacks strength because its powers are divided, lacks promptness because its authorities are multiplied, lacks wieldiness because its processes are roundabout, [and] lacks efficiency because its responsibility is indistinct and its action without competent direction.”).

267. See, e.g., *id.* at 331 (“Authority is perplexingly subdivided and distributed, and responsibility has to be hunted down in out-of-the-way corners.”).

268. See *id.* at 285 (“[C]hecks and balances have proved mischievous just to the extent to which they have succeeded in establishing themselves as realities . . . [T]he only fruit of dividing power ha[s] been to make it irresponsible.”).

269. See Wilson, *Constitutional Government*, supra note 93, at 200–01, 204 (“[The Whig theory had] become more interested in providing checks to government than in supplying it with energy and securing to it the necessary certainty and consistency of action.”).

more of coordinated power, less of separation of functions and more of the synthesis of action."<sup>270</sup> Maintaining separation of powers, he believed, contributed only to irresponsibility and weakened the state.<sup>271</sup> For the republic to thrive, Americans would have to abandon the principle outright.

Goodnow was, if anything, more thoroughgoing than Wilson in his denunciation. Like Wilson, he too believed that the separation of powers made government irresponsible. But Goodnow went further than Wilson in two respects. First, he resisted the practical palliatives that Wilson proffered. In *Constitutional Government*, Wilson worried that the separation of powers made responsible government within the state impossible. But he held out hope that the extra-governmental parties could offer a framework for a kind of responsibility anyway.<sup>272</sup> Goodnow was less sanguine. As we saw, and like Wilson, he thought that parties provided a necessary, missing ingredient for the coherence of the American state.<sup>273</sup> But he believed that the separation of powers prevented even the parties from fully instantiating the responsibility that the state itself could not provide. The organization of government made it too hard for any party, even one in power, to advance its program and so become actually responsible to the voters.<sup>274</sup>

Second, and more fundamentally, Goodnow thought Wilson's pragmatic attempt to safeguard responsibility within divided government was beside the point. There was a profound theoretical difficulty with the principle of separation of powers, one that Wilson did not apparently appreciate. Separation of powers was incoherent. As an institutional theory of politics, it was grounded on an intellectual mistake.

As far as Goodnow was concerned, there could be no complete separation of powers. The different powers of the state could not actually be separated, at least not along the lines that the Constitution suggested.<sup>275</sup> Consider the constitutional division between the legislative (Article I) and the executive (Article II). In a well-functioning state, Goodnow maintained, the two powers would not really be separate at all. Since no law could account for every eventuality that might come up in its application, the organs of the state that executed the law would need to fill in some of

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270. *Id.* at 221.

271. *See id.* at 221–22.

272. *See id.*

273. *See* Goodnow, *Politics and Administration*, *supra* note 93, at 25–26 (“The party system thus secures that harmony between the functions of politics and administration which must exist if government is to be carried on successfully.”).

274. *See id.* at 204–05.

275. *Id.* at 14 (“This principle of the separation of powers and authorities has proven, however, to be unworkable as a legal principle.”).

a law's details as they applied to concrete cases.<sup>276</sup> They would thus participate in lawmaking, even while being “executive.”<sup>277</sup> At the same time, law-making bodies could not avoid exercising some control over how the laws they made would be enforced: Simply by defining rights and causes of action, they would subvert the division between the “legislature” and the “executive” from their own side too.<sup>278</sup> Moreover, as far as Goodnow was concerned, the Constitution's third branch, the judiciary, exercised no distinct power at all.<sup>279</sup> Judging was just a particular act of applying the will of the state to a specific case.<sup>280</sup> This was really part of the executive power.<sup>281</sup> To treat judging as its own “power” to be separated out from the rest of the executive's responsibilities was therefore nonsensical.<sup>282</sup>

On Goodnow's read, then, the Constitution's attempt to enforce the separation of powers was foolhardy. “The principle of the separation of powers in its extreme form cannot . . . be made the basis of any concrete political organization. For this principle demands that there shall be separate authorities of the government, each of which shall be confined to the discharge of one of the functions of government which are differentiated.”<sup>283</sup> But simple reflection proved to Goodnow that this was not possible.<sup>284</sup> It was certainly not something to aspire to.

In this context, PCAM's embrace of the separation of powers appears bewildering. A document ostensibly grounded in the finest administrative science of its time rejected some of the discipline's heretofore central tenets without so much as a comment. To the Progressive Era reformers who trained PCAM's leaders, the separation of powers was something to be overcome to make democracy work. But in the pages of the PCAM Report, it became something to be embraced for the very same reason—even while PCAM maintained continuity with traditional, core goals of Progressive reform.

#### IV. PCAM'S ANTIFASCISM

From the perspective of orthodox public administration theory, PCAM's embrace of the separation of powers can seem confusing. Separation of powers was understood to make government less responsible. Yet

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276. See *id.* at 15–16 (“[T]he organ of government whose main function is the execution of the will of the state is often, and indeed usually, [e]ntrusted with the expression of that will in its details.”).

277. *Id.* at 15.

278. See *id.* at 16 (“[T]he legislature has usually the power to control in one way or another the execution of the state will by that organ to which such execution is in the main [e]ntrusted.”).

279. See *id.* at 12.

280. *Id.* at 17.

281. See *id.* at 12.

282. See *id.*

283. *Id.* at 23.

284. *Id.* at 16.

PCAM championed it anyway. This might be easily explicable if PCAM's members had a different aim than their Progressive Era teachers. But this was not the case. PCAM did not depart from traditional Progressive Era goals. Like Goodnow and Wilson, Brownlow, Merriam and Gulick wanted to make government more responsible.

Looking to history and the Committee's internal files helps explain PCAM's innovation. PCAM worked in a different context than Progressive Era reformers in at least one respect: It operated against the backdrop of European fascism. The threat fascism posed inflected PCAM's work in two decisive and contradictory ways. On the one hand, it made more urgent the Progressive project of making government responsible, since only an effective and accountable democracy could stand up to fascism. On the other hand, it suggested a risk to executive-centered government that Progressive reformers had not considered: Concentrating too much power in the executive could make even a democratic government fascistic.

PCAM's break with public administration orthodoxy helped it resolve this tension. The separation of powers provided PCAM with a way to simultaneously champion executive centralization—to make democracy stronger—and place limits on the executive—to guard against the fascistic personalization of rule.

This Part explains PCAM's antifascist, pro-executive separation of powers vision. It begins by showing how the Committee encountered a particular understanding of fascist administration at an international conference in Warsaw in the summer of 1936, which emphasized the way fascistic governments turned administration into an extension of the personality of the chief executive. This Part then shows how PCAM relied on separation of powers and checks and balances to guard against personal rule while at the same time advancing executive control of the administrative state. The next Part explores what this overlooked aspect of PCAM's vision means for presidential administration today.

#### A. *The Rise of PCAM's Antifascist Constitutionalism*

PCAM's break with its Progressive teachers has not been appreciated by previous scholars. As a result, the mystery of its departure from public administration orthodoxy remains unexplained. PCAM's embrace of formal constitutionalism in general, and of the separation of powers in particular, is a puzzle in need of resolution.

Looking to history suggests an explanation for the Committee's shift. It seems that PCAM embraced the separation of powers late in its work, probably sometime in the summer of 1936, likely as a result of the Committee's deepening engagement with the problem of fascism.

1. *Charting PCAM's Shift.* — The Committee's internal files show this movement. Early PCAM documents hew closely to Progressive Era pieties and do not discuss separation of powers, fascism, or the danger of person-

alized executive governance. So, for example, Brownlow's prospective outline of the PCAM Report from February 1936 adhered closely to orthodox public administration theory without any of the Committee's later innovations.<sup>285</sup> It stressed the President's responsibility for "overall-management" and harped on problems of efficacy and accountability.<sup>286</sup> But it did not mention the Constitution, fascism, or checks and balances at all.<sup>287</sup>

Only in a single place did the outline gesture toward the separation of powers.<sup>288</sup> And the mention only reinforced the document's debt to traditional, executive-centered public administration theory. In the sentence in question, Brownlow brought up the fact that the executive exercised some of its powers pursuant to delegations from Congress.<sup>289</sup> He raised the issue not to ensure that the executive remained within legally prescribed limits, however, but to make sure that the Committee's report would explore how the President might effectively use these powers to advance unified policy.<sup>290</sup>

Similarly, Brownlow's more comprehensive prospectus, delivered a couple of weeks later to a meeting of the Advisory Committee of the National Resources Committee, had substantially the same framing and omissions.<sup>291</sup> PCAM, he explained, would investigate how to get the President "managerial direction and control . . . commensurate with his responsibility."<sup>292</sup> "[T]he central fact," he went on, was that, "in the American scheme, the President is in fact responsible for all the administrative work" of the agencies in the executive branch, whatever the law might say.<sup>293</sup> PCAM would let this governance reality guide its study. Brownlow again made no mention of the Constitution, fascism, or checks and balances.

The report did betray, once more in a single place, that the President did not run the federal government entirely alone. Some of the "regulatory agencies," Brownlow observed, "regard[] themselves as subject only

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285. See *Rough Notes on Kind of Study Needed*, *supra* note 106, at 334–35 (focusing more on the President's responsibilities rather than discussing separation of powers, fascism, or checks and balances).

286. See *id.* (emphasizing that overall management requires the coordination of staff agency relationships by the President who cannot escape such responsibility).

287. See *id.* at 335.

288. See *id.* ("Some of the problems are tending to center in the expression by the President of the executive direction under authority of Congress in Executive Orders.").

289. *Id.*

290. *Id.* ("Over-all management requires coordination of all these relationships to make effective the President's responsible control but without depriving him of coordinated information and recommendations and without adding to his burdens and by diminishing the number of agencies reporting directly to him.").

291. Correspondence and Reports, 1919–1954: Reorganization Story Manuscript, 1933–1939 (Apr. 14, 1949), in 5 *Louis Brownlow Personal Papers* 1, 73–76 (1949) (on file with the *Columbia Law Review*) [hereinafter LBPP, Reorganization Story Manuscript].

292. *Id.* at 73.

293. *Id.* at 74.

to Congress.”<sup>294</sup> But Brownlow noted the reality of the separation of powers only to emphasize the challenge of realizing effective presidential control over a divided government. “Effective over-all management requires coordination of all these relationships,” he concluded.<sup>295</sup> They should be “organized so as to make effective the President’s responsible direction.”<sup>296</sup>

The Committee’s final report from January 1937, however, embraced constitutionalism, separation of powers, and limitations on executive power.<sup>297</sup> And it made fighting authoritarianism a central motif.<sup>298</sup> The fascists alleged that democracies were inefficient and unresponsive to crises.<sup>299</sup> But, PCAM reminded its readers, “[i]n the late war [i.e., World War I], democracies showed vast strength and tenacity in times of strain that racked every fiber of the ship of [the] state.”<sup>300</sup> The United States had proven itself equally nimble and robust in its response to the Great Depression.<sup>301</sup> PCAM’s reforms would help ensure that the country could continue to take such decisive action in the future. While increasing the productivity, efficiency, and responsibility of government was an important and worthwhile project at any time in a nation’s life, it was especially important for the United States at that very moment, “[f]acing one of the most troubled periods in all the troubled history of mankind.”<sup>302</sup> “If America fails,” the Committee warned, “the hopes and dreams of democracy over all the world go down.”<sup>303</sup>

2. *Explaining PCAM’s Shift.* — It seems likely, then, that between Brownlow’s initial prospective accounts and PCAM’s final report—that is, sometime between March 1936 and January 1937—something happened that changed how the Committee thought. Brownlow’s diary and memoir and the minutes of PCAM’s internal deliberative meetings from that time suggest an answer. The Committee was concerned about an encounter with a fascist intellectual that some members had during the summer of 1936.

Brownlow later called it the “Battle of Warsaw.”<sup>304</sup> In his retrospective memoir, he explained that the meeting had raised the question: “Was the chief executive of a modern nation to be absolute or was he to be the freely

294. *Id.*

295. *Id.* at 75.

296. *Id.*

297. See *supra* section III.B.1; *infra* section IV.C.

298. PCAM Report, *supra* note 52, at 47 (“Our choice is not between power and no power, but between responsible but capable popular government and irresponsible autocracy.”).

299. See, e.g., Brownlow, *Passion for Anonymity*, *supra* note 58, at 367 (summarizing the fascist position on government by representative assemblies).

300. See PCAM Report, *supra* note 52, at 47.

301. See *id.* at 7–8.

302. *Id.* at 2.

303. *Id.*

304. Brownlow, *Passion for Anonymity*, *supra* note 58, at 367.

chosen, democratically controlled, popularly responsible leader of a nation of free men?”<sup>305</sup> In his memoir, and in an undated manuscript on “reorganization,” which appears to have been written closer to the event, Brownlow observed that he and Merriam “thought that [they] learned a good deal” in the encounter with the fascist, “which later was to appear in the report of the President’s Committee on Administrative Management.”<sup>306</sup> And in his near-contemporaneous diary, Brownlow recorded that the meeting was “of very great interest” to him and Merriam because of its connection with their work on PCAM.<sup>307</sup> He went on to describe in colorful prose how the encounter was a “head-on collision between the authoritarian and the democratic governments.”<sup>308</sup> It saw, as Brownlow explained to the Committee, a vicious verbal floor fight between fascists and democrats, in which Merriam championed the U.S. Constitution and checks on the executive against fascist administration.<sup>309</sup>

While it seems unlikely that a single encounter at an international conference in Europe could have transformed PCAM’s understanding, the meeting does seem to have informed the Committee’s work, at least according to its own accounts. At a minimum, it marks a turning point and provides an interpretive key. Before going to this meeting, PCAM proposed a traditional report grounded in public administration orthodoxies.<sup>310</sup> At this meeting, Brownlow and Merriam understood themselves to be facing off against fascism.<sup>311</sup> And on their return, PCAM’s final report embraced constitutionalism and antifascism.<sup>312</sup>

Whatever PCAM’s new presidentialism meant, it stood opposed to the fascist proposal Brownlow and Merriam encountered in Europe. And Merriam’s reported invocation of the Constitution against fascism at the Warsaw meeting, as recorded in the minutes of PCAM’s meeting on his return,<sup>313</sup> suggests a connection between PCAM’s constitutionalism and antifascism. A better understanding of the “Battle of Warsaw” thus offers insight into the connection between PCAM’s constitutionalism, antifascism, and departure from Progressive Era public administration thinking.

305. *Id.* at 370.

306. *Id.* at 369; LBPP, Reorganization Story Manuscript, *supra* note 291, at 137–38.

307. Brownlow Bound Book, 13 May 1936–June 1937, *in* 5 Louis Brownlow Personal Papers 1296-a, 1296-s (1937) (on file with the *Columbia Law Review*) [hereinafter LBPP, Bound Book].

308. *Id.* at 1296-x, 1296-z.

309. President’s Comm. on Admin. Mgmt, Minutes of Meeting 7–8 (Aug. 17, 1936) (PCAM Classification 1.A.II.33a) (on file with the *Columbia Law Review*) [hereinafter PCAM Minutes].

310. See *supra* section IV.A.1.

311. Brownlow, *Passion for Anonymity*, *supra* note 58, at 362 (“What we found in Warsaw was the gulf, wide and deep, between the democratic and the authoritarian modes of thought, a division of power not only in professed theory but in daily practice.”).

312. See *infra* section IV.D.

313. PCAM Minutes, *supra* note 309, at 7.

B. *The Battle of Warsaw*

The Battle took place in July 1936.<sup>314</sup> Brownlow and Merriam, along with other American public administration intellectuals, had gone to Europe to learn more about public administration practices that might inform their work.<sup>315</sup>

This was not itself especially noteworthy. Brownlow and his colleagues were part of a group of social reformers that frequently crossed continents.<sup>316</sup> Brownlow himself maintained numerous European connections and correspondents and had traveled to Europe several times in the years before he chaired PCAM.<sup>317</sup> When he took these trips, he met with specialists in law and government from many different countries and attended international conferences and summits to discuss shared problems.<sup>318</sup> He did so again this time;<sup>319</sup> it was standard practice.<sup>320</sup>

The timing of this trip, however, was disconcerting. By 1936, Hitler and Mussolini had consolidated their respective rule in Germany and Italy.<sup>321</sup> The emergence of these European dictatorships changed the valence of intellectuals' "Atlantic crossings."<sup>322</sup> Where before, Americans went to Europe to discover solutions that could be imported back to the United States, now they were more wary.<sup>323</sup> Some argued for a ban on all

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314. See Brownlow, *Passion for Anonymity*, *supra* note 58, at 363.

315. *Id.* at 356 ("During the summer of 1936 we remained in Europe . . . Merriam and I were keeping our eyes open to discover anything that would be of value to us in our business of recommending top-management changes in the executive branch of the United States government.").

316. See generally Daniel T. Rodgers, *Atlantic Crossings: Social Politics in a Progressive Age* (1998) [hereinafter Rodgers, *Atlantic Crossings*] (discussing the networks of Progressive Era Atlantic reform).

317. See Brownlow, *Passion for Anonymity*, *supra* note 58, at 227–33, 302–10 (describing Brownlow's various visits and connections in Paris, Brussels, and London).

318. His foreign itinerary, name cards, and letters of introduction are held in the Louis Brownlow Personal Papers collection at John F. Kennedy Library. See *European Trips and Conferences*, in 6 *Louis Brownlow Personal Papers* (1958) (on file with the *Columbia Law Review*).

319. See *id.*

320. See Daniel T. Rodgers, *An Age of Social Politics*, in *Rethinking American History in a Global Age* 250, 261 (Thomas Bender ed., 2002) [hereinafter Rodgers, *Age of Social Politics*] ("[C]ompare the sharp but intermittent interest of European progressives in the United States . . . against the sustained American interest in Europe . . .").

321. See Martin Clark, *Mussolini 198–99* (2014); Lorraine Boissoneault, *The True Story of the Reichstag Fire and the Nazi Rise to Power*, *Smithsonian Mag.* (Feb. 21, 2017), <https://www.smithsonianmag.com/history/true-story-reichstag-fire-and-nazis-rise-power-180962240/> [<https://perma.cc/G5X7-W4N9>].

322. See Rodgers, *Atlantic Crossings*, *supra* note 316, at 423, 479–84.

323. Rodgers, *Age of Social Politics*, *supra* note 320, at 259 ("In the aftermath of World War I, when their German models suddenly turned suspect and double-edged, many American progressives retreated to less overt importation strategies."); Rodgers, *Atlantic Crossings*, *supra* note 316, at 483 ("As the promise of Europe crumbled once more into war, many American progressives found it all the more necessary to place a native tradition behind lessons learned abroad.").

engagement with fascist governments.<sup>324</sup> Others continued to engage but looked to Europe less as a guide than as a warning.

Brownlow and Merriam's trip took place as American attitudes toward fascism decisively crystallized into opposition. Fascism had not initially been a problem for policy intellectuals.<sup>325</sup> In the early years of the New Deal, American reformers sometimes drew inspiration from fascist innovations, and admiration for fascism and fascist heroes was not taboo.<sup>326</sup> But, by the late 1930s, things had shifted.<sup>327</sup> Mussolini's invasion of Ethiopia in 1935 was perhaps the critical event in turning Americans decisively against fascist dictatorships.<sup>328</sup> As PCAM began its work, anti-fascism was becoming a core American commitment.

This emergent antifascist alignment was founded in fear.<sup>329</sup> The European dictatorships were themselves terrifying. But fascism was not just a foreign problem.<sup>330</sup> The rise and fall of Huey Long and Father Coughlin suggested domestic fascist analogues.<sup>331</sup> *It Can't Happen Here*, Sinclair Lewis's 1935 novel about a fascist takeover of the United States, testified to anxieties that fascism very well could take hold at home as it had abroad.<sup>332</sup>

324. See Roberts, *Shaking Hands*, supra note 127, at 269–70.

325. See, e.g., John P. Diggins, *Mussolini and Fascism: The View From America* 60 (1972) (“Seeing in modernization a source of political liberation and moral uplift, conservative businessmen and not a few liberal intellectuals admired the rationalization of Italy’s economy under Fascism.”).

326. See Ira Katznelson, *Fear Itself: The New Deal and the Origins of Our Time* 58–95 (2013) (observing how Mussolini’s Italy inspired the Truman and Roosevelt Administrations); James Q. Whitman, *Of Corporatism, Fascism, and the First New Deal*, 39 *Am. J. Comp. L.* 747, 747 (1991) (“A startling number of New Dealers had kind words for Mussolini.”).

327. See Benjamin L. Alpers, *Dictators, Democracy, and American Public Culture: Envisioning the Totalitarian Enemy, 1920s–1950s*, at 77 (2003) (explaining the shift in American attitudes with regard to dictatorships); Diggins, supra note 325, at 295 (noting that “[f]or over a decade America had admired Fascism for its industrial virtues and patriotic pieties” until “1936 [when] American opinion rose against Mussolini”).

328. See Diggins, supra note 325, at 295–96 (explaining why Mussolini’s conquest in Ethiopia shifted American attitudes away from fascism).

329. See Alpers, supra note 327, at 77 (noting that “fears that dictatorship would soon arise in America were . . . growing”); Brownlow, *Passion for Anonymity*, supra note 58, at 367 (“What I did not confide in my diary then was the fact that a feeling of fear permeated the . . . atmosphere; that there was a sense of impending great change that, for some, was the elation of dominance soon to be realized . . . and for others, a sense of impending doom . . .”). See generally Katznelson, supra note 326, at 12 (describing how “[a] climate of universal fear deeply affected political understandings and concerns” in the United States of the 1930s).

330. Sarah Churchwell, *American Fascism: It Has Happened Here*, N.Y. Rev. Books (June 22, 2020), <https://www.nybooks.com/daily/2020/06/22/american-fascism-it-has-happened-here/> [<https://perma.cc/YHP3-Q2D8>].

331. See Alan Brinkley, *Voices of Protest: Huey Long, Father Coughlin & the Great Depression* 7, 263 (1982) (identifying 1935–1936 as marking the zenith and collapse of both tendencies).

332. See Churchwell, supra note 330 (stating that *It Can't Happen Here* was inspired by the Ku Klux Klan and individuals such as Huey Long and Gerald B. Winrod).

It was against the backdrop of such fears that some members of PCAM set sail. Going to Europe, they knew, meant confronting the fascist threat.<sup>333</sup> The first meeting they were to attend, the International Union of Local Authorities, was to be held in Berlin.<sup>334</sup> That conference, Brownlow later recalled, was pervaded by an aura of “Nazi domination,” despite an agreement that the Nazi Party would not interfere in the proceedings.<sup>335</sup> As it happened, Hitler hosted a reception for prominent attendees, including Brownlow, and a photograph of their meeting made the front page of the *Völkischer Beobachter*, the Nazi house paper.<sup>336</sup>

The “Battle of Warsaw,” which so marked PCAM’s records, came afterward. Brownlow, Merriam, and their colleagues, including Leonard White and Lindsay Rogers, were delegates to the Congress of Administrative Sciences that met in Warsaw that July.<sup>337</sup> Representatives from nineteen different countries gathered to discuss topics in public administration and governance.<sup>338</sup> Of particular interest to the Americans was a session on the organization of the administrative apparatus necessary to assist the chief executive in a modern state.<sup>339</sup> In light of PCAM’s work, then ongoing in Washington, the topic of the meeting was unusually on point.

The congress’s sessions were organized around the presentation and discussion of a commissioned expert report, followed by a vote on a related resolution.<sup>340</sup> At the session on the executive’s staff auxiliary, the report and resolution were introduced by Zoltan Magyary, a Hungarian professor at the University of Budapest.<sup>341</sup> For reasons that remain unclear, Magyary seems to have colluded with the president of his session to railroad

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333. Brownlow, *Passion for Anonymity*, supra note 58, at 359 (“[T]here was no possibility of escaping the all-pervasive Nazi domination.”).

334. *Id.* at 358.

335. See *id.* at 358–59.

336. See Louis Brownlow Personal Papers, *Völkischer Beobachter* (June 10, 1936), in 6 Louis Brownlow Personal Papers (1936) (on file with the *Columbia Law Review*).

337. For Brownlow’s letter of appointment as a delegate to the Sixth International Congress of Administrative Sciences that lists other delegates, including Merriam, see Letter to Louis Brownlow (May 14, 1936), in 1 Louis Brownlow Personal Papers (1936) (on file with the *Columbia Law Review*). Despite the Nazi presence, the Berlin meeting seems not to have had much of an effect on PCAM. In the minutes of the PCAM committee meeting after their return, at which Brownlow and Merriam briefed Gulick and their research director, they had only one line of commentary about Berlin: “[W]e were concerned mainly with the municipal affairs and I [Brownlow] didn’t get anything on it.” PCAM Minutes, supra note 309, at 2.

338. See Brownlow, *Passion for Anonymity*, supra note 58, at 363.

339. *Id.* (“The [majority] . . . of the Americans attended Section III, which was devoted to the subject of the staff auxiliary of the chief executive of the national government. This was a subject which was of . . . interest to . . . many of the Americans, especially to Dr. Merriam and me [as] . . . members of [PCAM].”).

340. *Id.* at 363–64.

341. *Id.* at 363.

through a resolution that Americans perceived as “a distinct recognition and approval of the totalitarian and authoritarian state.”<sup>342</sup>

The Americans, along with the other democrats, were scandalized.<sup>343</sup> They quickly countermobilized.<sup>344</sup> According to Brownlow, Merriam spoke up, observing that “we had settled the thing when we wrote a constitution, when we had put the political and the executive power in one person, but that did not mean at all that that one person was not subject to democratic controls, and so on.”<sup>345</sup> Others joined in.<sup>346</sup> Magyary, for his part, “was furious when delegates from the democratic countries dared to question his report that put the executive power in supreme authority over the legislative and the judicial and that recognized the staff agents of the executive only as veritable extensions of his personality.”<sup>347</sup>

This was the so-called “Battle of Warsaw.” The democratic countries and orators unified to resist a fascist motion on the executive. And they won, voting the fascist resolution down and replacing it with one more aligned with their own beliefs.<sup>348</sup>

Studying the resolutions is instructive.<sup>349</sup> Magyary’s initial draft had stressed the absolute primacy of the chief executive.<sup>350</sup> “[T]he evolution of the state during the last fifty years,” Brownlow glossed Magyary as saying, “had resulted in a decisive preponderance of the executive power over the legislative and judicial.”<sup>351</sup> The actual text of the resolution was chilling against the backdrop of a Europe increasingly threatened by the rise of Nazism. It stated that “the evolution of the State apparatus” made it clear that the “chiefs of [the] auxiliary agency,” in charge of operationalizing state administration—that is, the “civil general staff,” the functionaries of the state—should operate as “a veritable extension of the personality of the chief executive.”<sup>352</sup> The strong implication was that the machinery of the state should be operationalized and controlled directly by the govern-

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342. *Id.* at 364. It may have been significant that representatives from the German Nazi government also attended that particular session. See *id.* at 368; PCAM Minutes, *supra* note 309, at 7.

343. *Id.* at 365.

344. See Brownlow, *Passion for Anonymity*, *supra* note 58, at 365–67.

345. See PCAM Minutes, *supra* note 309, at 7.

346. *Id.* (“Then Farley made his speech, and then everybody wanted to make a speech, Czech, Belgian, Swiss, French . . . [T]he democratic orators were having a field day . . .”).

347. Brownlow, *Passion for Anonymity*, *supra* note 58, at 367.

348. *Id.* at 365.

349. Both are reprinted in full in Brownlow, *Passion for Anonymity*, *supra* note 58, at 363–64, 366.

350. *Id.* at 364.

351. *Id.*

352. *Id.* at 363–64.

ment's leader.<sup>353</sup> This was why the Americans thought of it as an endorsement of fascist authoritarianism.<sup>354</sup> It seemed an articulation of Nazi government, the *Führerprinzip*.<sup>355</sup>

The substitute resolution offered by the Americans differed importantly but subtly in its details. It, too, began by noting the massive development of the "functions and administrative apparatus" of the modern state.<sup>356</sup> It recognized the need for coordination across government's many parts. And it also acknowledged a singular role for the chief executive in putting the state to work.<sup>357</sup> But—and this was the crucial difference—it sought to confine their sphere of dominance to "conducting general administrative activities."<sup>358</sup> It kept a place for the independence of the "auxiliary administrative agencies," noting that they should be "responsible to the Chief Executive" but clarifying that other principles should be respected as well, including "professional competence[,] stability[,] and permanence."<sup>359</sup> The Americans' resolution took on board many of Magyary's proposals but sought to give them limits and conditions.

The staid language of conference reports can mask the stakes of the conflict. No one disagreed about empowering the executive. At issue was the meaning and reach of that empowerment. For Magyary, the executive's reach should correspond to the reach of the government itself.<sup>360</sup> It should operate as an unchecked extension of the executive's will. For that reason, he proposed that the next meeting of the congress take up the question of "the state and the economic life from the point of view of the chief executive."<sup>361</sup> For him, the chief executive's was the only perspective that mattered: Since the economic life of a people and the organization of its government are within the reach of the state, they should also be, in substance, within the reach of the leader. The very dullness of the language obscured the radicalness of the proposition. A people's leader needed the government machinery to enable them to do whatever they needed.

The Americans' resolution, in opposition, sought to walk a fine line. American reformers agreed that the executive needed state machinery that would allow them to project and realize their will.<sup>362</sup> But the Americans were sure that Magyary's conception of things went too far.<sup>363</sup> Their

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353. See PCAM Minutes, *supra* note 309, at 6 ("[T]hen in another place it went on to say that the chief of state had to be implemented with full political power to enable him to control the administration . . .").

354. See Brownlow, *Passion for Anonymity*, *supra* note 58, at 364.

355. *Id.* at 367.

356. *Id.* at 366.

357. See *id.*

358. *Id.*

359. *Id.*

360. See *supra* notes 341–343 and accompanying text.

361. See Brownlow, *Passion for Anonymity*, *supra* note 58, at 364.

362. See *supra* notes 346–347 and accompanying text.

363. See *supra* notes 348–349 and accompanying text.

challenge was to temper claims about the executive enough to stave off the terrifying consequences that Magyary's proposal evoked without abandoning their central commitment to building out executive power as a way of realizing responsible government.

Constitutionalism and separation of powers, internal and external, provided an answer. They countered Magyary's premise—that the last fifty years had rendered powers other than the executive irrelevant—by positing that the executive had a separate role from other government departments.<sup>364</sup> Those other departments were not irrelevant but merely dealt with other aspects of governance.<sup>365</sup>

Meanwhile, even within their sphere, the executive had to be bound by more than just the leader's will. Government was institutional and professional.<sup>366</sup> Thus, even while projecting the executive's will through the state, the executive needed to take care to promote competence, stability, and state independence.<sup>367</sup> In contrast to Magyary's call to examine all of economics and politics through the lens of the chief executive, the Americans proposed a narrow study focused on the "Technical and Administrative Problems of the Relations between the State and Economic Life from the Viewpoint of the Chief Executive."<sup>368</sup> They would confine the executive to a distinct role and place.

The encounter with Magyary, then, brought PCAM face-to-face with the central difficulty of its project given the time and climate in which it was pursued. Championing the expansion of the executive in 1936 put PCAM in dangerous company. In many ways, the Committee's goals aligned with those of its fascist counterparts. Both PCAM and fascist reformers recognized the importance of administrative coordination. Both championed the centralization of certain government functions. Both reserved a special role for the chief executive. And if the fascists were more forthright in their celebration of the rule of public opinion and their contempt for legislative assemblies, this only highlighted their kinship with PCAM's teachers, if not with PCAM itself.<sup>369</sup> PCAM's challenge was to defend a strengthened executive while remaining distinct from European fascism. The separation of powers and checks and balances became the way the Committee chose to do this.

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364. See Resolution, reprinted in Brownlow, *Passion for Anonymity*, supra note 58, at 366, 366.

365. *Id.*

366. See *id.* ("[I]t is indispensable not only to [e]nsure professional competence, but also to be certain that the principles of stability and permanence are maintained . . .").

367. *Id.*

368. *Id.*

369. See *id.* at 367; Rosenblum, *Liberal Constitutionalism*, supra note 169, at 20 (explaining the similar treatment of public opinion by a strong executive and autocratic rulers).

C. *PCAM's Pro-Executive but Antifascist Use of the Separation of Powers*

Reading the PCAM Report through the lens of the Battle of Warsaw reveals the centrality of the separation of powers to PCAM's presidentialism. Separation of powers could be a tool to resist fascism. At Warsaw, the *Führerprinzip* revealed itself as an administrative principle according to which the government would operate as an extension of the personality of the chief executive. To guard against this personalization of rule, PCAM relied on the separation of powers, both between the branches and inside the executive branch. At the same time, the conference showed how fascism and democratic rule were in that moment in a "head-on collision."<sup>370</sup> It was thus imperative to make democracy strong enough to stand up to fascism, which required strengthening the presidency. PCAM discovered ways to use constitutionalism and the separation of powers to advance that goal too.

In this way, the separation of powers served two core purposes at the same time. It enabled an expansion and consolidation of presidential administration. But it also made sure that expanded presidential power was limited and bounded. The separation of powers allowed PCAM to champion the growth of the executive while simultaneously guarding against a fascistic personalization of rule.

1. *The Separation of Powers as a Tool to Make Government Responsible by Placing Administration in the Executive.* — PCAM embraced the separation of powers in service of expanding executive power where it made the state more efficacious and clarified accountability. This would in turn make government itself more responsible.

Like its Progressive Era teachers, PCAM believed that the federal government had diffused power in ways that made it difficult for the state to accomplish its goals or for the voters to evaluate its performance.<sup>371</sup> This in turn was partly a function of having given power that should belong to the President to nonexecutive actors.<sup>372</sup> In particular, some administrative authority had shifted to agents that the President did not supervise.<sup>373</sup> This made the executive less effective than it should be.<sup>374</sup> And it confused voters, who would hold the President accountable for developments over which the President had no actual control.<sup>375</sup>

370. LBPP, Bound Book, *supra* note 307, at 1296-x, 1296-z.

371. See PCAM Report, *supra* note 52, at 30 ("The constitutional principle of the separation of powers and the responsibility of the President for 'the executive Power' is impaired through the multiplicity and confusion of agencies which render effective action impossible.").

372. See *id.* ("Without plan or intent, there has grown up a headless 'fourth branch' of the Government, responsible to no one, and impossible of coordination with the general policies and work of the Government as determined by the people through their duly elected representatives.").

373. See *id.*

374. See *id.*

375. See *id.* at 29–30.

The separation of powers provided an argument for reforming this arrangement. It justified taking administrative powers away from agents that the President did not supervise or control and giving them to the executive.<sup>376</sup> This would enhance the President's power, of course. But it would do so only in the service of making the government more responsible.<sup>377</sup> Giving the President power commensurate with the office's responsibilities and popular expectations would enable the government to better fulfill its aims.<sup>378</sup> Thus, PCAM championed a formalist, tripartite division of powers between the branches most aggressively where it tended to enhance executive authority by bringing administrative powers under presidential control in ways that would make the government as a whole more responsible.

This nexus between responsibility, executive power, and the separation of powers is most evident in the Committee's recommendations about the Comptroller General.<sup>379</sup> The Comptroller was a relatively new office, created by the Budget and Accounting Act of 1921.<sup>380</sup> The Comptroller had responsibility for conducting audits of government expenses and also, in some cases, for releasing congressionally appropriated funds to be spent by the executive branch and government agencies.<sup>381</sup> Under the Budget Act, the Comptroller served a fifteen-year term.<sup>382</sup> The nation's first Comptroller, John McCarl, was therefore still in office when President Roosevelt came to power.<sup>383</sup>

McCarl caused problems. He turned out to be a staunch anti-New Dealer. He aggressively used his pre-expenditure disbursement authority to frustrate New Deal programs, refusing to release funds to pay for signature initiatives and generally slowing the operation of government.<sup>384</sup> This

376. *Id.* at 29 (“The constitutional principle of the separation of powers . . . places . . . in the President alone . . . the whole executive power of the Government . . . . The administrative organization of the Government to carry out ‘the executive Power’ thus rests upon statute law, and upon departmental arrangements made under the authority of law.”).

377. *See id.* at 41 (“Modern management under responsible leadership is the keynote of the reorganization herein recommended.”).

378. *See id.* at 31 (“It is the purpose of these recommendations to make effective management possible by restoring the President to his proper place as Chief Executive and giving him both a governmental structure that can be managed and modern managerial agencies . . .”).

379. *See id.* at 20–21.

380. *See* Budget and Accounting Act of 1921, Pub. L. No. 67-13, §§ 302–303, 42 Stat. 20, 23–24; PCAM Report, *supra* note 52, at 20.

381. *See generally* Harvey C. Mansfield, *The Comptroller General (1939)* [hereinafter *Mansfield, Comptroller General*] (describing the office of the Comptroller General as created by the Budget and Accounting Act of 1921).

382. Budget and Accounting Act of 1921 § 303, 42 Stat. at 23–24.

383. *See* Dale L. Flesher, *Remembering J. Raymond McCarl: The First Comptroller General*, *Gov. Accts. J.*, Spring 1993, at 21, 24 (noting that President Roosevelt was unable to get rid of McCarl, despite their ideological differences, until McCarl's fifteen-year term ended in 1936).

384. *See* Memorandum from Fred A. Ironside, Jr. to Donald R. Richberg 1 (Sept. 18, 1934) (PCAM Classification 9.D.XIII.1) (on file with the *Columbia Law Review*) (asserting

would have frustrated any President. It was especially galling to President Roosevelt, who sought to implement new government programs quickly to deal with the ongoing economic emergency.<sup>385</sup>

The design of the office of the Comptroller General made it impossible for the President to bring McCarl to heel. Under the terms of the Budget Act, the Comptroller enjoyed for-cause removal protection.<sup>386</sup> This meant that President Roosevelt could not fire McCarl merely because of their policy differences, as the Supreme Court had recently held in *Humphrey's Executor v. United States*.<sup>387</sup> Meanwhile, other tools of executive control proved ineffectual. In particular, McCarl refused to be bound by the legal opinions of President Roosevelt's Attorney General, claiming an independent prerogative to pass on the legality of government expenditures himself.<sup>388</sup>

While McCarl finished his term as Comptroller in the middle of PCAM's work, the difficulties his office had caused for government administration remained on the Committee's mind. In an internal memorandum, Gulick tackled them abstractly from the perspective of public administration theory.<sup>389</sup> His analysis drew attention to the way separation of powers could enhance responsibility.<sup>390</sup>

"There can be no efficient or responsible organization for the performance of extensive tasks," Gulick opined, "unless there be at the head of the organization a single executive" with real control over finances.<sup>391</sup>

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that the Comptroller General has, among other things, withheld approval of expenditures, thus frustrating the administration and interpretation of laws); Memorandum from Clark C. Wren to Chairman & Joint Comm. on Gov't Org. 1-31 (Mar. 20, 1937) (PCAM Classification 9.D.XVI.2) (on file with the *Columbia Law Review*) (reporting on complaints from departments and agencies regarding specific instances where the Comptroller General issued certain interpretations or disallowed certain department or agency actions, resulting in delays or other performance issues).

385. Dickinson, *supra* note 95, at 80 (noting that McCarl's use of his "pre-audit" authority to void appropriations for New Deal programs presented an obstacle to President Roosevelt's administrative authority).

386. Budget and Accounting Act of 1921 § 303, 42 Stat. at 23-24.

387. See 295 U.S. 602, 631-32 (1935) (holding that the President's removal power for some officers may be limited to for-cause reasons).

388. See Frederick C. Mosher, *The GAO: The Quest for Accountability in American Government* 81-82 (1979) ("The first Comptroller General made it clear that he regarded the opinions of the attorney general, like the decisions of the lower courts, only advisory to him."); PCAM Report, *supra* note 52, at 21-22 ("The first Comptroller General of the United States consistently refused to submit any disputed question to the Attorney General or to modify any of his rulings in conformance with the opinions of the Attorney General.").

389. Memorandum from Luther Gulick to the President's Comm. on Admin. Mgmt., *Fundamental Considerations Concerning the Place of Control and Audit in Administration* 1 (Mar. 8, 1937) (PCAM Classification 8.D.IX.3) (on file with the *Columbia Law Review*) [hereinafter Gulick, *Fundamental Considerations*]. Note that this memo is dated after the Committee published its report. I rely on it here on the assumption that it reflects the Committee's internal thinking.

390. *Id.*

391. *Id.*

Such control could not “be exercised jointly and concurrently by two independent authorities without chaos and inefficiency.”<sup>392</sup> The design of the office of the Comptroller General, however, had divided a power that needed to be united.<sup>393</sup> The executive was mostly in control of finance. But the Comptroller, who had been created to audit the government, was also given some “control” authority.<sup>394</sup> This was intolerable. The power to control should have all been vested in one place.

Since “once a policy has been determined and a law passed by the legislative branch, . . . the execution of that law is the responsibility and work of the executive,” it stood to reason that financial control should reside in the executive branch.<sup>395</sup> The Comptroller, however, was not an executive agent since that position was not under the power of the President.<sup>396</sup> The existing arrangement, which split power between the President and the unaccountable Comptroller, was thus not only bad policy but also “a violation of the constitutional principle of division of power,” since it lodged an executive power in an agent not responsible to the President.<sup>397</sup>

The PCAM Report mirrored Gulick’s insights.<sup>398</sup> It invoked the separation of powers to argue that financial control should be unified in the executive branch in order to make the government more responsible.

The basic problem, the report observed, was confusion over audit and control. “The control of expenditures is essentially an executive function, whereas the audit of such expenditures should be independent of executive authority or direction.”<sup>399</sup> The Budget Act ignored this, placing both functions in the Comptroller.<sup>400</sup> The result was an office that “straddles both positions.”<sup>401</sup> This “ha[d] a profoundly harmful effect.”<sup>402</sup> It created a “division of authority” that “destroys responsibility and produces delays and uncertainty,” making it “difficult, and at times simply impossible, for the Government to manage its business.”<sup>403</sup>

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392. *Id.*

393. See Mansfield, *supra* note 381, at 2–4 (arguing that the main result of the Comptroller General’s office has been to create “intolerable” burdens and “meaningless” obstacles for responsible administrative officials).

394. PCAM Report, *supra* note 52, at 20–21.

395. Gulick, *Fundamental Considerations*, *supra* note 389, at 3.

396. See Mansfield, *supra* note 381, at 74, 76.

397. Gulick, *Fundamental Considerations*, *supra* note 389, at 3.

398. Indeed, as Gulick’s memorandum is dated after the publication date of the report, it can be speculated that Gulick’s memorandum in fact explicated the logic already contained in the Report itself. See *id.* at 4.

399. PCAM Report, *supra* note 52, at 20.

400. Budget and Accounting Act of 1921, Pub. L. No. 67-13, §§ 307–312, 42 Stat. 20, 25–26.

401. See PCAM Report, *supra* note 52, at 20–21 (noting that the Budget and Accounting Act placed certain control functions and auditing functions in the Office of the Comptroller General).

402. *Id.* at 22.

403. *Id.*

It was also unconstitutional. “The removal from the Executive” of financial control “and the vesting of such authority in an officer independent of direct responsibility to the President . . . is clearly in violation of the constitutional principle of the division of authority.”<sup>404</sup> It was also contrary to the Constitution’s Take Care Clause and in direct tension with the Supreme Court’s decision in *Springer v. Government of Philippine Islands*, which reaffirmed that executive functions must vest in executive officers.<sup>405</sup>

The irresponsibility of the Comptroller was bound up with this unconstitutionality. “Effective and responsible management of the executive departments is impossible,” the report concluded, “as long as this unsound and unconstitutional division of executive authority continues.”<sup>406</sup>

Since irresponsibility was a product of unconstitutionality, the Constitution offered a path to reform. With financial control under the executive, the operation of the government could be brought “in conformity with . . . constitutional principle.”<sup>407</sup> This would “provid[e] the Chief Executive with the essential vehicles for current financial management and administrative control,” thus overcoming the nefarious “dissipat[ion] [of] executive responsibility” caused by existing arrangements.<sup>408</sup> Respecting the separation of powers would empower the executive and make the government responsible at the same time.

2. *The Separation of Powers as a Check on the Executive.* — The separation of powers, however, did not operate only to enhance executive administrative authority. It also worked as a check on the executive. In particular, in the PCAM Report, separation of powers—both inside the executive branch and between the branches—guarded against the personalization of rule. It helped ensure that presidential administration advanced responsible government but did not turn the administrative state into an extension of the chief executive’s personality.

a. *Internal Checks on the Comptroller General.* — The Committee’s proposed reforms to the position of the Comptroller General are again illustrative. As discussed above, the Committee believed that, for the government to be responsible, the President needed full authority over financial control. But, in the pursuit of that same goal, PCAM also concluded that the President needed to be divested of authority over audits.<sup>409</sup> In other words, to achieve responsible government, it was necessary that some powers not vest in the President and that internal and external checks ensure that separation.

404. *Id.* at 21.

405. 277 U.S. 189, 202–06 (1928) (holding that executive functions must be vested in the executive or within an executive department).

406. PCAM Report, *supra* note 52, at 23.

407. *Id.*

408. *Id.* at 22–23.

409. See PCAM Report, *supra* note 52, at 43 (advising that the executive be held to account through an independent auditor that reports to the Congress).

The distinction between the control and audit powers was at the heart of Gulick's reflections on financial management.<sup>410</sup> Control was the act of spending appropriated monies. But expending monies was only one half of responsible financial administration. It was also necessary to confirm that monies had been spent appropriately by auditing expenditures.<sup>411</sup> And, as Gulick observed, "[t]hrough long experience in private business and in public business it is recognized that no executive officer, however honest, should be entrusted to audit his own transactions or to certify to the accuracy of his own financial reports."<sup>412</sup> Placing them both in the same hands made one person both prosecutor and judge, which was "psychologically impossible" to do with appropriate perspective since "[n]o man can audit his own acts or books."<sup>413</sup> It would inevitably lead to the substitution of the personal for the principled.<sup>414</sup> "Audit and control must [therefore] be sharply differentiated; they must never be placed in the same hands."<sup>415</sup>

Gulick's analysis complicated the institutional design of presidential administration. If the President were in charge of financial control, he could not also be in charge of the audit, since then he would be "audit[ing] his own acts or books."<sup>416</sup> But the government still needed an executive audit apparatus, since auditing was a necessary part of responsible financial management. To avoid making the President both prosecutor and judge—and so personalizing a process that should be institutionalized—auditing would have to belong to someone outside the President's reach.

The PCAM Report solved this problem by creating an independent auditor inside the executive branch. It proposed that, once the Comptroller General had been stripped of their authority over financial control, they simply take a new title, Auditor General.<sup>417</sup> As PCAM re-envisioned the office, the Auditor would be bound by the opinions of the Attorney General.<sup>418</sup> But they would also be able to disagree with the Secretary of the Treasury about the propriety of expenses, and where the two agencies could not resolve their disagreements, the Auditor would be empowered

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410. Gulick, *Fundamental Considerations*, supra note 389, at 2 ("Audit and control must be sharply differentiated; they must never be placed in the same hands.").

411. See *id.* at 1–2 ("Wherever extensive administrative enterprise is placed in the hands of a responsible executive for management, there is need for various types of independent outside inspections of the work in order to test the results and fix [sic] the responsibility therefor.").

412. *Id.* at 2.

413. *Id.*

414. See *id.* ("No experienced executive would think of asking for such power as he knows that an independent audit is essential for his own protection as well.").

415. *Id.*

416. *Id.*

417. See PCAM Report, supra note 52, at 23 (recommending that the title of the Comptroller General should be changed to Auditor General to conform to the limits in the remaining functions).

418. *Id.*

to appeal directly to Congress.<sup>419</sup> In all other matters, including tenure, the Auditor would be independent of the President.

To the Committee, then, Article II and the principle of the separation of powers did not mean that everyone who worked for the government needed to be accountable to the President. It did not even mean that everyone in charge of executing Congress's laws should be controlled by the executive. After all, the reimagined Auditor General was still "executing" the laws. They were simply "executing" the audit requirement of the Budget Act. To execute that requirement in a way compatible with responsible government, it was necessary that they be independent of the reach of the President. Without that independence, the President would be able to subvert financial management at whim. To be responsible, then, execution needed to be divided against itself.

The PCAM Report's treatment of the Comptroller General thus reveals the Committee's commitment to what has come to be called the "internal separation of powers."<sup>420</sup> Dividing authority within the state, rather than just between the branches, could be a powerful way of making government responsible. PCAM embraced this internal separation of powers where it would serve that goal. In order to make administration better, the Committee envisioned internal, institutionalized limits on what the President could do.

b. *Internal Checks on Civil Service.* — We see internal checks at work again in the Committee's discussion of the civil service. "Democratic government today," PCAM opined, "requires personnel of the highest order—competent, highly trained, loyal, skilled in their duties by reason of long experience, and assured of continuity and freedom from the disrupting influences of personal or political patronage."<sup>421</sup> To run a complicated organization like the modern federal government required a sophisticated and educated workforce.

Finding and recruiting that personnel was no easy matter. To attract talented workers, government jobs needed to provide stable careers.<sup>422</sup> To retain them, there had to be clear opportunities for advancement on the basis of skill.<sup>423</sup>

In order to accomplish these goals, the Committee championed the old Progressive merit principle. PCAM argued unabashedly that "[t]he merit system should be extended upward, outward, and downward to include all positions in the Executive Branch of the Government except those which are policy-determining in character."<sup>424</sup> The President, who was at that time responsible for filling thousands of offices, should be limi-

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419. *Id.* at 24, 43.

420. See *infra* section V.B.

421. PCAM Report, *supra* note 52, at 7.

422. *Id.*

423. *Id.*

424. *Id.*

ted to selecting only a small number of close advisors and agency heads.<sup>425</sup> Everyone else, “all permanent positions . . . except a very small number of a high executive and policy-forming character,” should become part of a protected, professionalized government workforce.<sup>426</sup>

The expansion of merit selection would, admittedly, limit the President’s control over individual government employees. But it would do so in the interest of making democracy more effective. The President would be better able to operationalize the federal bureaucracy, since the “very highest posts” of the government service would still “be filled by the Chief Executive with persons who support his program and policies, and in whom he has entire confidence.”<sup>427</sup> Meanwhile, the nonpolicymaking staff would be bureaucratic professionals “of high competence,” insulated from presidential favor or disfavor and protected in their jobs from political change.<sup>428</sup> The President would thus have power over a small circle of policymaking officers, who in turn could give orders to a professional and efficient government workforce.<sup>429</sup> “Only in this way [would it be] possible . . . to translate the mandate of the people at the polls into responsible governmental policies.”<sup>430</sup>

This left the question of how to manage the merit-based civil service itself. The Committee recognized that “[p]ersonnel management” needed to “serve the needs of the Chief Executive and the executive establishments” since, otherwise, government would be ineffectual.<sup>431</sup> But there were dangers to putting personnel management under the thumb of the President. “[A] central personnel managerial agency directly under the President, with the primary duty of serving rather than of policing the departments, [might] be subject to political manipulation and would afford less protection against political spoils.”<sup>432</sup>

The Committee’s solution was, again, to place internal limits on the President’s control. The Committee proposed replacing the multimember Civil Service Commission with a single Civil Service Administrator to be appointed by the President, with the advice and consent of the Senate.<sup>433</sup> That Administrator would be removable by the President.<sup>434</sup> But the President would not be completely free in their selection for the position. They would be required to choose the Administrator from among the top three finishers of a competitive, open examination administered by a new Civil

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425. See *id.* at 8.

426. *Id.* at 7.

427. *Id.* at 8.

428. *Id.*

429. See *id.*

430. *Id.*

431. *Id.* at 10.

432. *Id.*

433. *Id.* at 9.

434. *Id.*

Service Board, composed of seven nonpartisan members serving overlapping seven-year terms.<sup>435</sup> In this way, the President would be sure to have confidence in the head of personnel management, while staffing would remain insulated from presidential whim or interference and committed to principles of professionalism and expertise.

PCAM thus again relied on internal checks to promote good administration while guarding against the possibility of personalized rule. Under PCAM's proposal, the President would get the benefit of a professional civil service that would help administer the state effectively. But, to protect that professionalism, the civil service would be insulated from direct presidential control or oversight. Moreover, the civil service's professionalism would help the President effectively execute the laws, while frustrating idiosyncratic or unprofessional presidential action. Putting an internal check on the President's power over staffing was the condition under which empowering the executive would help create harmony between politics and administration rather than autocracy.

*c. Internal Checks on Agencies.* — PCAM championed internal checks within agencies for similar reasons. As discussed, the Committee urged the abolition of the "independent agencies."<sup>436</sup> It troubled the Committee that agencies could implement policy without presidential supervision. But this was not the only aspect of their design that bothered PCAM. Like some modern critics of the administrative state, the Committee was uncomfortable with the way agencies mixed administrative and adjudicative functions.<sup>437</sup> As the report put it, the agencies "suffer from an internal inconsistency[:] . . . they are vested with duties of administration and policy determination . . . and at the same time they are given important judicial work."<sup>438</sup> This raised the risk that an agency might substitute its whim for what the law required.

PCAM proposed bringing the independent agencies under the control of the President in order to promote accountability and efficacy in their policy and administrative work.<sup>439</sup> But this left the problem of agencies' judicial functions unresolved. "[T]he bulk of regulatory commission work involves the application of legislative 'standards' of conduct to concrete cases, a function at once discretionary and judicial . . . ."<sup>440</sup> To do

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435. *Id.* at 9–10 ("[The] Board must be entirely divorced from partisan influences and from administrative or operating functions of any kind; it should be nonpartisan instead of bipartisan . . . . [It must not be] too closely identified with any Administration.").

436. See *supra* section III.B.

437. See, e.g., Phillip Hamburger, *Is Administrative Law Unlawful?* 29 (2014) ("[W]hen the executive adjudicates disputes, it claims to sidestep most of the requirements about judicial independence, due process, grand juries, petit juries, and judicial warrants and orders."); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 *Harv. L. Rev.* 1231, 1248 (1994) (remarking that the "destruction of this principle of separation of powers is perhaps the crowning jewel" of the administrative state).

438. PCAM Report, *supra* note 52, at 36.

439. *Id.* at 37.

440. *Id.* at 36.

that work well, agencies needed “both responsibility and independence.”<sup>441</sup> And in order to inspire public confidence and operate fairly, these adjudications “ought to be wholly independent of Executive control.”<sup>442</sup>

To address this need, the Committee turned once more to internal divisions within the executive branch. Agencies should be “divided into an administrative section and a judicial section.”<sup>443</sup> The administrative section should be part of the executive branch accountable to the President.<sup>444</sup> But the judicial section “would be wholly independent of the department and the President with respect to its work and its decisions.”<sup>445</sup> Its members should even enjoy for-cause removal protection and Senate confirmation.<sup>446</sup> In this way, even as agencies came further under presidential control, they would be protected from acting as mere extensions of the President’s personality.

The Committee’s proposal was, again, a powerful restriction on presidential power. It introduced more division into the executive branch, creating executive officers unaccountable to the President. But the Committee felt these reforms were necessary to avoid courting personalized rule. Housing both sections under the same department in the executive branch would enable adaptation and flexibility in implementation, which was a virtue of administration.<sup>447</sup> But it was imperative that, when agencies engaged in quasi-judicial work, they had independence and neutrality.<sup>448</sup> When it came to the determination of private rights, no one should be both judge and prosecutor.<sup>449</sup>

d. *Summary.* — It is clear, then, that PCAM’s commitment to the Constitution and separation of powers was nuanced. It did not mean that the President needed to have control over every officer in the executive branch nor that the execution of every law needed to be within the President’s direct reach. Separation of powers was a way to make democratic government more responsible. Where the executive branch needed to be divided against itself to promote responsibility and guard against personalized rule, PCAM did not hesitate to invoke an internal separation of powers and saw nothing unconstitutional in so doing.

Separation of powers thus advanced twin goals: promoting responsible government and preventing the President from using the state as an extension of their personality. This was as true for the internal separation of powers as for the traditional divisions between the branches. PCAM

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441. *Id.*

442. *Id.*

443. *Id.* at 37.

444. *Id.*

445. *Id.*

446. *Id.*

447. See *id.* at 38.

448. *Id.* at 37.

449. See *id.* at 36–37.

closed its report with a short final section, entitled “Accountability of the Executive to the Congress.”<sup>450</sup> Here, PCAM displayed fully its commitment to dividing authority in the interest of furthering responsible government and checking personalized rule. The Committee’s proposed reforms, it explained, would enhance the executive’s ability to implement the laws through “improvement[s] in [the] coordination of administrative work.”<sup>451</sup> But, at the end of the day, the executive was Congress’s agent, executing the laws and implementing the policies that Congress enacted.<sup>452</sup> It was, thus, essential to “preserv[e] . . . the principle of the full accountability of the Executive to the Congress” as “an essential part of our republican system.”<sup>453</sup> In addition to free speech, regular elections, and “the protection of civil rights under an independent judiciary,” these checks and balances ensured that “the Executive power is balanced and made safe.”<sup>454</sup>

D. *The Constitution Against Fascism*

When PCAM’s report was finally turned into a bill, its fascist-proofing seemed for naught. President Roosevelt’s opponents attacked his reorganization proposal for subverting the Constitution and aggrandizing his power.<sup>455</sup> President Roosevelt did not help things by releasing a letter in which he explained that he would not make a good dictator, even if he had wanted to become one.<sup>456</sup> Walter Lippmann, the famed commentator, feared the reorganization plan would lead to a “rapid descent into personal government,” and *Harper’s Magazine* carried an article concerned that the bill “would destroy all the effective barriers to totalitarianism.”<sup>457</sup> Frank Gannett, one of President Roosevelt’s critics, organized a “National Committee to Uphold Constitutional Government,” which charged the proposed act with implementing “one man rule.”<sup>458</sup> Opponents called it the “Dictator Bill.”<sup>459</sup> Many thought like Senator Josiah Bailey, who remarked

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450. *Id.* at 43.

451. *Id.*

452. See *id.* (“The preservation of the principle of the full accountability of the Executive to the Congress is an essential part of our republican system.”).

453. *Id.*

454. *Id.*

455. See Polenberg, *supra* note 54, at 68–69 (noting critics’ fears that the President would possess too much power).

456. See *id.* at 159.

457. *Id.* at 51 (first quoting Walter Lippmann, Speech at Johns Hopkins University (Apr. 21, 1937); and then quoting Bernard DeVoto, *Desertion From the New Deal*, *Harper’s Mag.*, Oct. 1937, at 557).

458. See *id.* at 55.

459. See Donald G. Morgan, *Congress and the Constitution: A Study of Responsibility* 192 (1966).

that, when considered alongside the judicial reorganization bill that President Roosevelt unveiled at the same time, PCAM's presidential reforms "would have given [Roosevelt] all the powers of a dictator."<sup>460</sup>

The charges galled the members of the Committee. As they observed in internal memoranda and argued on the radio, the attacks were based on a superficial reading of their work.<sup>461</sup> PCAM did not want to make the President into a dictator; in fact, quite the opposite.<sup>462</sup> The Committee sought to make them and the federal government responsible, and guard against the emergence of personal rule. "Dictatorships," PCAM argued, "have universally sprung up because of the inability of democratic government to get things done."<sup>463</sup> PCAM's reforms would counter this. They would give the President the power necessary to realize democratic aims while simultaneously making it easier for Congress and the American people to hold them accountable.<sup>464</sup>

To PCAM, then, its critics had it exactly backwards. The Committee did not want to subvert the Constitution but rather affirm it.<sup>465</sup> The Constitution was the cornerstone of the Committee's bill and the great guard against the fascist danger PCAM's opponents evoked.<sup>466</sup> By clinging to the

460. *Id.* at 125 (quoting Sen. Bailey).

461. See Memorandum on the Argument That the Reorganization Bill Concentrates Authority in the President and Creates a Dictator I (Mar. 31, 1938) (PCAM Classification 16.J.I.21) (on file with the *Columbia Law Review*) (arguing that there is no factual basis for believing that the bill concentrates authority in the President); Questions and Answers on the Reorganization Program I (n.d.) (PCAM Classification 16.J.I.25) (on file with the *Columbia Law Review*) ("The increase in the authority granted to the President by the pending bills in Congress would be really very slight."); see also Joseph Pratt Harris, The Purpose and Plan of Government Reorganization, in *Public Affairs and the Engineers' Relation to Them: Addresses and Digest of Discussion Before Third Public Forum, American Engineering Council* (Jan. 12-13, 1939), at 30, 30-31 (PCAM Classification 6.C.XLIII.15) (on file with the *Columbia Law Review*) ("I think it is fair to say that about these proposals there was a considerable campaign of misrepresentation . . ."); Brownlow Radio Address, *supra* note 216, at 3 ("We think [the President] ought to have, besides the secretaries who have served him so well . . . five or six executive aides, not assistant presidents, we don't want that at all.").

462. Memorandum on the Argument That the Reorganization Bill Concentrates Authority in the President and Creates a Dictator, *supra* note 461, at 2 ("The assertion that the President is given dictatorial powers because of the proposed change in the auditing and accounting provisions is groundless . . . This title of the bill increases the authority and control of Congress rather than that of the President.").

463. Memorandum Concerning the Concentration of Authority in the President by the Reorganization Bill I (Mar. 14, 1938) (PCAM Classification 7.C.XLV.2) (on file with the *Columbia Law Review*).

464. See *id.* at 1, 4 (describing how provisions of the bill would enhance accountability).

465. See, e.g., Luther Gulick, Original Draft on Reorganization for Report of Committee 7 (n.d.) (PCAM Classification 6.C.XLIII.1) (on file with the *Columbia Law Review*) ("[W]e are committed by the American Constitution to the American plan of effective leadership . . .").

466. See, e.g., *id.* at 6 ("[W]e are convinced as the result of the consideration of events here and abroad in the trying years since 1914 that the American constitution is *from the standpoint of structure* in no need of change." (emphasis altered to italics)).

constitutional principle of the separation of powers and bringing divisions within the executive branch, PCAM hoped to make democracy responsible and keep the presidency antifascist.

This embrace of the Constitution distinguished PCAM from its predecessors. The founders of the discipline of public administration had sought to make the American state responsible. But those founders believed that, to do this, reformers needed to abandon the Constitution in general and the separation of powers in particular. PCAM disagreed: The Committee followed Progressives in trying to make the government responsible, but it believed responsible government was compatible with constitutional principles. Indeed, in the age of fascism, responsible democratic government rested on both an internal and external separation of powers.

PCAM thus sought to expand executive power but within bounds. It embraced the old public administration proposal to realize responsible government through an empowered executive. But it sought to reconcile that plan with the Constitution in general and the constitutional principle of the separation of powers in particular.

The result was an executive not quite like anything anyone had seen before. The President would be stronger and the chief administrator. But in some administrative matters, the executive branch would be divided against itself in the name of good government. And, as chief administrator, the President would remain accountable to Congress, the primary policy-making body. The goal was to guard against the new fascist menace, which the Progressive Era reformers had not anticipated. As PCAM knew from the Battle of Warsaw, the fascists too believed in the chief executive as the lead administrator. But their executive had power unbound. The government bureaucracy was, to them, a mere extension of the chief executive's personality. Whatever American presidentialism would be, it must never become that.

#### V. ANTIFASCIST PRESIDENTIAL ADMINISTRATION

Presidential administration was the realization of a specific institutional vision. Its intellectual foundations trace back to the Progressive Era. But it experienced a decisive transformation during the New Deal at its moment of institutionalization. In response to the threat of fascism, the architects of executive control over the administrative state embraced separation of powers, especially internal to the executive branch, as a way to make presidential administration antifascist.

This overlooked development has important consequences for contemporary law and legal scholarship. First, it changes the standard narrative of the history of presidential administration in the United States. This in turn raises a pair of challenges to the theory of the unitary executive, undermining claims that the executive branch has been continuously com-

mitted to a maximalist vision of executive power and suggesting an argument for limiting presidential power in service of the unitary theory's own governance goals. Second, this new history offers a historical foundation and some doctrinal support for a competing, non-unitary approach to Article II, the internal separation of powers school. Finally, by centering the importance of resisting administrative fascism to executive branch design, it suggests a litmus test for evaluating theories of presidentialism. The test can be used to shed new light on current debates about the fascism of the American presidency and to evaluate recent proposals for reforming the office.

A. *PCAM Against the Unitary Theory*

Understanding PCAM's innovations underscores a simple truth: The institutions of presidential administration are modern and have changed over time, including very recently. Well into the first decades of the twentieth century, the President did not have effective authority over all executive branch agencies, nor was the Constitution understood to grant the executive an independent power as "administrator in chief."<sup>467</sup> Progressive reformers envisioned a strong President, and the scholar-Presidents of the Progressive Era worked in their way to bring it about.<sup>468</sup> But they did not institutionalize their innovations successfully, and the New Deal vision of presidential administration was more bounded and limited than the dreams of the Progressive Era.<sup>469</sup> The history of the rise of presidentialism is thus not one of ever-increasing power moving along the straight line of inevitability but rather a story of turns and reversals, bound up with complex institutional negotiations and shifting intellectual, social, and political contexts.<sup>470</sup>

This evolution continued after PCAM. Post–New Deal theorists and politicians pushed for even more expansive executive power, occasionally hearkening back to Progressive Era forebears.<sup>471</sup> But even they have had to work within PCAM's institutions, whether building upon them or seeking to circumvent them.<sup>472</sup> The New Deal foundations of presidential administration have held.

1. *PCAM's Historical Challenge to Unitary Theory.* — This history poses a challenge to an argument some champions of the "unitary" executive

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467. See Tarbert, *supra* note 120, at 52–64; *supra* notes 134–139 and accompanying text.

468. See Peri E. Arnold, *Remaking the Presidency: Roosevelt, Taft, and Wilson, 1901–1916*, at 18–20 (2009); Andrea Katz & Noah Rosenblum, *Progressive Presidentialism 4–15* (Sept. 8, 2021) (on file with the *Columbia Law Review*) (unpublished manuscript) (detailing different Progressive Era Presidents and their preference for a strong executive power).

469. See *supra* Part III.

470. See generally Dearborn, *Power Shifts*, *supra* note 211 (detailing the legislative and executive struggle in negotiations for presidentialism).

471. Jeffrey Crouch, Mark J. Rozell & Mitchel A. Sollenberger, *The Unitary Executive Theory: A Danger to Constitutional Government 19–22* (2020).

472. See Skowronek, *Conservative Insurgency*, *supra* note 49, at 2075–76.

have relied on. The Supreme Court in *Seila Law* asserted that strong executive control over the administrative state is part of a mostly unbroken tradition stretching back to the Founding.<sup>473</sup> Calabresi and Yoo have made a similar argument in their book-length history of presidential power.<sup>474</sup> They argue that “every single one of our presidents has believed in the classic vision of the unitary executive to at least some degree,” including claiming a right to direct the execution of the laws, resisting congressional attempts to create agency independence, and asserting authority to remove nonpolicymaking civil servants.<sup>475</sup>

The history that Parts III and IV reconstruct suggests the limits of this account. PCAM’s constitutionalism did empower the President, but it also put important limits on executive power. Seen in historical context, PCAM’s constitutional language is not unitarian, as Calabresi and Yoo read it, but rather about responsible antifascist government.<sup>476</sup>

PCAM’s non-unitarianism can be seen most fully in the way it championed internal divisions within the executive branch. According to the traditional unitary theory, all nonlegislative and nonjudicial government actors must be under the President’s control or supervision.<sup>477</sup> But PCAM rejected this principle several times over: (1) in its definition of the role of the Comptroller General,<sup>478</sup> (2) in its suggested reforms to the civil service,<sup>479</sup> and even (3) in its critique of the independent agencies.<sup>480</sup>

President Roosevelt fully accepted these recommendations. In so doing, he explicitly endorsed limitations on his power, divisions within the executive branch, and the vesting of authority in officers he could not remove or control, all in the name of making government accountable, effective, and antifascist. Contextualizing PCAM’s work thus suggests that the unitary tradition is not continuous. Whatever the Presidents before Roosevelt may have thought, the Roosevelt Administration did not subscribe to unitarianism.

2. *PCAM’s Conceptual Challenge to Unitary Theory.* — PCAM’s work also challenges the unitary theory on its own terms. It suggests that internal divisions within the executive branch and limits on the President’s removal power might be compatible with the Constitution and enhance the executive’s ability to take care that the laws are faithfully executed.

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473. See *supra* notes 23–30 and accompanying text.

474. See generally Calabresi & Yoo, *supra* note 74 (arguing that history shows that this position of the unitary executive is deeply rooted in history).

475. *Id.* at 16.

476. Cf. Dearborn, *Foundations*, *supra* note 54, at 189–91 (identifying the ways PCAM relied on language with unitary overtones).

477. See Calabresi & Yoo, *supra* note 74, at 4.

478. See *supra* section IV.C.2.a.

479. See *supra* section IV.C.2.b.

480. See *supra* section IV.C.2.c.

Nonhistorical defenses of the unitary theory lean heavily on text and predicted outcomes.<sup>481</sup> Textually, unitarians point to several specific provisions of the Constitution, including, most prominently, Article II's Vesting and Take Care Clauses.<sup>482</sup> Functionally, they argue that the unitary approach promotes efficacious and accountable government.<sup>483</sup> Their claim is thus that the unitary theory is both constitutionally required and normatively attractive.

PCAM's report, read in context, raises questions about both propositions. When it comes to text, the report highlights that the constitutional provisions on which unitarians rely admit of non-unitarian readings, even by champions of executive power.<sup>484</sup> The Committee's commitment to constitutional fidelity did not lead it to conclude that the President needed to have directive authority over all agency action or removal power over all personnel charged with executing the laws. This is not because PCAM ignored the text that unitarians invoke. To the contrary, the Committee was concerned with the very same language, citing both the Vesting Clause and the Take Care Clause, each several times, in its report.<sup>485</sup> Indeed, this concern with the Constitution's specific language was part of what made PCAM distinctive. Nevertheless, PCAM's report implies that it believed that the Vesting Clause was no barrier to granting the Auditor General removal protection and that the Take Care Clause was no barrier to insulating agency adjudicative functions from presidential superintendence.

This may be connected to PCAM's pragmatic defense of the internal separation of powers. The Committee was deeply committed to making government efficacious and accountable. This was its inheritance from the Progressive Era tradition of public administration. Yet, the Committee concluded that to advance efficacy and accountability, particularly in light of the danger of fascism, it was sometimes necessary for the executive branch to be divided against itself.<sup>486</sup> The way to make government responsible, according to PCAM, was not to make all nonlegislative and nonjudicial actors more or less subservient to the President. Rather, the best way was to incorporate checks and balances into the operation of the executive branch to prevent the personalization of rule and to enable the President to effectively administer what politics brought about.<sup>487</sup>

In this way, PCAM challenges defenses of the unitary theory on three fronts. It undermines the claim for a consistent tradition of executive

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481. Cf. Cass R. Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Present, Future*, 2020 *Sup. Ct. Rev.* 83, 88–99 (teasing out textual and functionalist arguments for the unitary executive theory).

482. See Crouch et al., *supra* note 471, at 23.

483. See, e.g., Calabresi & Yoo, *supra* note 74, at 7; Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 *Ark. L. Rev.* 23, 42 (1995).

484. See PCAM Report, *supra* note 52, at 45–47.

485. See *id.* at 2, 21, 23, 29, 37.

486. See *id.* at 18.

487. See *id.* at 23.

branch unitarianism. It reminds us that, at the moment when the executive branch was building out presidential administration, it did not interpret the specific constitutional language that unitarians rely on as granting it the powers unitarians claim. And, finally, it advanced an argument that, to fulfill the governance goals unitarians cherish, it might be necessary to embrace the very internal checks, divisions, and limitations they condemn.

B. *PCAM as Foundation for the Internal Separation of Powers*

PCAM's endorsement of divisions inside the executive branch suggests the second way in which this recovered history is relevant for contemporary law and legal scholarship. It offers a foundation for a leading, non-unitary approach to Article II: the tradition of internal separation of powers. Scholars in this vein have echoed PCAM on the virtues of executive branch divisions.<sup>488</sup> But they have sometimes struggled to find a legitimating ground for their analyses.<sup>489</sup> PCAM offers a historical foundation for this approach and contributes arguments for its doctrinal legitimacy.

1. *PCAM as Historical Foundation.* — In contrast with unitarians, internal separation of powers scholars embrace division within the executive branch. They may also champion limits on the President's ability to exercise executive power.<sup>490</sup> As a matter of institutional design, they reject the claim "that a strong unitary executive is . . . a necessary condition of effective governance."<sup>491</sup> Rather, they argue that division and limitation, properly deployed, can advance democratic goals.<sup>492</sup> In their eyes, a strong President may be a threat to democracy, not its guardian or embodiment.<sup>493</sup>

Like "presidential administration," "internal separation of powers" is both descriptive and normative. Descriptively, it seeks to characterize certain features of the federal government as it stands. Normatively, it argues that these features are desirable. Professors Gillian Metzger and Kevin Stack's work on "internal administrative law" is illustrative. As administra-

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488. See, e.g., Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch From Within*, 115 *Yale L.J.* 2314, 2316 (2006).

489. See *id.* at 2318.

490. See, e.g., Strauss, *Overseer*, *supra* note 15, at 759–60.

491. *Id.* at 698 n.6.

492. See *id.*

493. See, e.g., William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons From the Divided Executive*, 115 *Yale L.J.* 2446, 2478 (2006) ("The current presidency has the potential of becoming a law unto itself as the expediency and demands of modern government have, in some critical areas, freed the President from the effective oversight of the other two branches."); Jenny S. Martinez, *Inherent Executive Power: A Comparative Perspective*, 115 *Yale L.J.* 2480, 2510 (2006) (arguing that "executive power is generally not fixed but contingent and is strongly influenced by political context" and that this undermines overly broad interpretations of the executive's constitutional mandates).

tive governance has increased, they observe, so too have features of “internal administration.”<sup>494</sup> They further argue that this is to be celebrated.<sup>495</sup> Practices that regulate agencies from the inside help ensure that agency action is not willful or arbitrary but rather lawlike.<sup>496</sup>

The internal separation of powers project has special salience for presidential administration. Modern Presidents exercise their power through the administrative state.<sup>497</sup> To chart and champion internal checks on administration is, then, to document and valorize a particular way of channeling executive action. As presidential policymaking has become more commonplace, and presidential administration more expansive, it has become both more imperative and more difficult to make executive action conform to law. Internal separation of powers suggests a way to check an otherwise hard-to-discipline legal office.<sup>498</sup>

The challenge for champions of the internal separation of powers has always been legitimacy.<sup>499</sup> Making divisions and checks and balances internal to the executive and giving them the force of law might be a good idea. But this does not render the internal separation of powers legally defensible.

The two dominant modalities for grounding the internal separation of powers have been positive and functional. On the positive side, scholars have drawn attention to the “statutory separation of powers.”<sup>500</sup> Divisions and checks within the administrative state are said to exist as a matter of enacted law.<sup>501</sup> It just is the case that the institutions of modern administration were built out that way.<sup>502</sup> This construction has consequences. For Presidents to use the administrative state to realize their agendas, they

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494. Metzger & Stack, *supra* note 68, at 1242.

495. *Id.* at 1266 (arguing that the benefits of internal administrative law justify the potential drawbacks).

496. See *id.* at 1244–45 (noting that such internal measures encourage “consistency, predictability, and reasoned argument”).

497. See Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 *Sup. Ct. Rev.* 1, 1.

498. See Katyal, *supra* note 488, at 2348; Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 *Emory L.J.* 423, 428–29 (2009). On conceptualizing the presidency as an office, see generally Daphna Renan, *The President’s Two Bodies*, 120 *Colum. L. Rev.* 1119 (2020) [hereinafter Renan, *President’s Two Bodies*].

499. Cf. Aziz Z. Huq, *Separation of Powers Metatheory*, 118 *Colum. L. Rev.* 1517, 1530 (2018) (book review) (discussing the legitimacy deficit of the “balance” model of constitutional separation of powers).

500. See Sharon B. Jacobs, *The Statutory Separation of Powers*, 129 *Yale L.J.* 378, 386–87 (2019).

501. See *id.* at 387.

502. *Id.* at 398 (“[I]n the statutory separation of powers, agencies’ relative position within the bureaucracy matters. Congress might separate powers between two or more executive departments, between two or more independent commissions, or between executive agencies and independent commissions.”).

should have to respect those structures. Statutory law thus should constrain the President as a matter of institutional design and limit the executive as a matter of doctrine.<sup>503</sup>

If the positive defense of the internal separation of powers undergirds its legality, the functional defense safeguards its legitimacy. As scholars have observed, the separation of powers has never been merely a formalist exercise in making distinctions.<sup>504</sup> It has always been understood to have a goal.<sup>505</sup> The separation of powers serves governance ends.<sup>506</sup> It fractures power to tame government, prevent overreach, and lead to better decisions.<sup>507</sup>

The functional defense of the internal separation of powers argues that separation of powers goals can and should be advanced in sub-constitutional domains. In building out the apparatus of the federal government, institutional designers can and should seek to replicate separation of powers dynamics to achieve the ends of divided, checked, and effective government.<sup>508</sup> To the extent that the design and operation of the administrative state serves those ends, it is fundamentally legitimate.<sup>509</sup>

There is no one way to do this. In Professor Peter Strauss's influential formulation, internal separation is a matter of reproducing divided, rivalrous government below three well-defined and bounded branches, each ultimately entrusted with fundamental responsibility for a basic government power.<sup>510</sup> For Professor Jon Michaels, the separation of powers can be reproduced within administration as a separation of functions, calquing constitutional divisions onto administrative institutions through a kind of relational isomorphism.<sup>511</sup> These different approaches share the same aim and a similar methodology. They recreate divisions of functions within the administrative state to check and fracture power in the name of making government better.

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503. See *id.* at 392; Stack, *supra* note 15, at 322–23 (“[I]n view of the structural incentives for presidents to make adventurous claims of statutory authorization, and the institutional deficits of Congress to check these assertions, there are strong reasons to embrace statutory constructions that limit the occasions for the President to claim statutory power . . .”).

504. See M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. Pa. L. Rev. 603, 604 (2001) (arguing that making the distinctions at the heart of separation of powers is impossible to do in a “principled” way).

505. See *id.* at 603.

506. See *id.* at 650.

507. See *id.*

508. Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 Colum. L. Rev. 515, 597 (2015).

509. See Cynthia R. Farina & Gillian E. Metzger, *Introduction: The Place of Agencies in Polarized Government*, 115 Colum. L. Rev. 1683, 1683–84 (2015).

510. See Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 639 (1984) [hereinafter Strauss, *Place of Agencies*].

511. See Michaels, *supra* note 508, at 556 (“The administrative reproduction of a scheme of separation of powers is a faithful one with respect both to form and content.”).

Recovering a contextual understanding of PCAM offers a historical foundation for this project. PCAM's reforms provided the basic structure for building out the modern executive branch. As a positive matter, its reforms embraced division. And as a philosophical matter, it championed a functional separation of powers in the name of making democratic government efficient, accountable, and antifascist.

Internal separation of powers scholars have mostly overlooked this historical foundation. Many make their arguments without appealing to history.<sup>512</sup> Others invoke history but miss how internal separation of powers has been integral to the modern executive since its inception.<sup>513</sup> Only Metzger, writing with Stack and on her own, has identified the Brownlow Committee as relevant to this project.<sup>514</sup> And even she takes the Committee to be the executive-empowering foil to the more checked and disciplined vision of James Landis.<sup>515</sup>

The history recovered here shows that PCAM's work aligns deeply with the internal separation of powers school. It is not simply that the Committee championed internal separations. Rather, a historically contextualized understanding of the PCAM Report shows how dividing power within the executive branch was the condition on which the Roosevelt Administration itself envisioned an empowered executive in the first place. Internal divisions and checks were not incidental to creating presidential administration. They were constitutive.

2. *PCAM as Doctrinal Foundation.* — This deep historical root has doctrinal significance. Under the Supreme Court's standard approach to separation of powers questions, history matters.<sup>516</sup> "Arguments based on historical practice are a mainstay of debates about the constitutional separation of powers" and appear in Supreme Court opinions as far back

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512. See generally, e.g., Strauss, *Place of Agencies*, supra note 510 (making such an argument).

513. See, e.g., Jacobs, supra note 500, at 382–84; Michaels, supra note 508, at 526–29.

514. See Metzger, *Foreword*, supra note 8, at 72–77; Metzger & Stack, supra note 68, at 1267–72.

515. See supra notes 80–89 and accompanying text. Of course, as Metzger notes, Landis himself saw PCAM in this way. See Metzger, *Foreword*, supra note 8, at 74; see also James M. Landis, *The Administrative Process* 4 (1938).

516. See, e.g., *Mistretta v. United States*, 488 U.S. 361, 401 (1989) (“[T]raditional ways of conducting government . . . give meaning’ to the Constitution. Our 200-year tradition of extrajudicial service is additional evidence that the doctrine of separated powers does not prohibit judicial participation in certain extrajudicial activity.” (citation omitted) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring))); see also *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (“Past practice does not, by itself, create power, but ‘long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent . . . .’” (alterations in original) (quoting *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915))).

as *McCulloch v. Maryland*.<sup>517</sup> Scholars have argued about the precise circumstances under which historical practice should inform the Constitution's meaning.<sup>518</sup> But it is widely agreed that, "when democratically accountable institutions, state as well as federal, act for many years on the basis of a particular understanding of constitutional principle, that interpretation [can] become[] authoritative" and, even when not authoritative, should influence judicial construction.<sup>519</sup>

In *NLRB v. Noel Canning*, the Supreme Court clarified this "long-standing practice" doctrine.<sup>520</sup> The case called for the Court to consider the meaning of a constitutional provision it had never before interpreted.<sup>521</sup> In assessing its meaning, the Court began by laying out a "background consideration[]." <sup>522</sup> "[I]n interpreting the Clause," the majority wrote, "we put significant weight upon historical practice."<sup>523</sup> This is true, the Court went on, "even when the nature or longevity of that practice is subject to dispute and even when that practice began after the founding

517. Curtis A. Bradley & Trevor W. Morrison, Historical Gloss and the Separation of Powers, 126 Harv. L. Rev. 411, 412 (2012); see also *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819) ("The principle now contested was introduced at a very early period of our history, has been recognized by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation.").

518. See Alison L. LaCroix, Historical Gloss: A Primer, 126 Harv. L. Rev. Forum 75, 85 (2013) ("Many types of historical practice matter for constitutional law, but without an account of which practice and whose practice is most authoritative, appeals to the gloss of history risk becoming hopelessly open-ended or distressingly cynical."). Compare William Baude, Constitutional Liquidation, 71 Stan. L. Rev. 1, 4 (2019) ("Liquidation was a specific way of looking at post-Founding practice to settle constitutional disputes, and it can be used today to make historical practice in constitutional law less slippery, less capacious, and more precise."), with Curtis A. Bradley & Neil S. Siegel, Historical Gloss, Madisonian Liquidation, and the Originalism Debate, 106 Va. L. Rev. 1, 41 (2020) ("[A]lthough Baude's broader account of liquidation responds to some of our normative concerns by diminishing the distinction between liquidation and gloss, significant differences remain that continue to raise normative problems for liquidation.").

519. Michael W. McConnell, Lecture: Time, Institutions, and Interpretation, 95 B.U. L. Rev. 1745, 1771 (2015); see *Nat'l Lab. Rels. Bd. v. Noel Canning*, 573 U.S. 513, 525 (2014) ("[T]his Court has treated practice as an important interpretive factor even when the nature or longevity of that practice is subject to dispute, and even when that practice began after the founding era.").

520. 573 U.S. at 514 ("[I]n interpreting the Clause, the Court puts significant weight upon historical practice. The longstanding 'practice of the government,' can inform this Court's determination of 'what the law is' in a separation-of-powers case." (citations omitted) (first quoting *McCulloch*, 17 U.S. (4 Wheat.) at 401; and then quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803))); see also McConnell, *supra* note 519, at 1771 n.106.

521. *Noel Canning*, 573 U.S. at 526 ("We have not previously interpreted the Clause, and, when doing so for the first time in more than 200 years, we must hesitate to upset the compromises and working arrangements that the elected branches of Government themselves have reached.").

522. *Id.* at 522.

523. *Id.* at 524 (emphasis omitted).

era.”<sup>524</sup> The crucial question is whether the practice represents a settled and accepted government construction of the Constitution.<sup>525</sup>

The revised history of PCAM affects internal separation of powers jurisprudence via this “longstanding practice” doctrine in two different ways: by (negatively) disproving the claim that the internal separation of powers has no historical pedigree and by (constructively) suggesting that it may qualify as a longstanding practice.

In a negative sense, the history undermines arguments that the executive branch has never accepted the internal separation of powers. Through President Roosevelt’s endorsement of PCAM’s report, it clearly did. Under the longstanding practice doctrine, consequently, the Court should not read history to weigh against the constitutional legitimacy of internal checks.

To the contrary, and on the constructive side, the longstanding practice doctrine might provide the internal separation of powers with its own legitimacy. As the *Noel Canning* Court observed, acquiescence by one branch in another branch’s own understanding of its powers has historically been a strong indicator for the Court about where to draw delicate separation of powers lines.<sup>526</sup> If the executive has long and openly accepted a practice that might be construed to invade its power, the Court should take that as evidence for the practice’s constitutionality. Here, PCAM argued openly for limitations on the President’s power over the executive branch. Some of those restrictions and divisions, like the expansion of the civil service, for-cause removal protection for some executive agents, and the division of internal agency operations, are still with us today. The PCAM Report suggests that these are practices to which the President has acquiesced for considered, principled reasons. They may thus constitute longstanding practices that should inform the Court’s constitutional interpretation.

### C. *The Antifascist Litmus Test*

The centrality of a divided and checked executive to PCAM’s recommendations points us toward the third payoff that flows from this exercise in historical reconstruction. It suggests that there is a litmus test applicable to theories of executive governance. This test can help bring traction to the recent debate over the fascism of President Trump’s Administration.

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524. *Id.* at 525 (citations omitted).

525. See *id.* (observing that the “longstanding practice of the government,” particularly when acquiesced to by one or the other branches, “can inform [the Court’s] determination of what the law is” (citations omitted) (internal quotation marks omitted) (first quoting *McCulloch*, 17 U.S. (4 Wheat.) at 401; and then quoting *Marbury*, 5 U.S. (1 Cranch) at 177)). But see *id.* at 573 (Scalia, J., concurring) (“Past practice does not, by itself, create power.” (internal quotation marks omitted) (quoting *Medellín v. Texas*, 552 U.S. 291, 532 (2008))).

526. See *id.* at 524–26 (majority opinion); Bradley & Morrison, *supra* note 517, at 412 (“Arguments based on historical practice are a mainstay of debates about the constitutional separation of powers.”).

And it gives us a tool to assess contemporary proposals for reforming the presidency.

1. *The Recent Debate on Presidential Fascism.* — The framers of the modern executive sought to balance empowering the President with preventing overreach. The President, they argued, needed control over administration to make government responsible. But that control could not be unlimited. In particular, it should not enable the President to treat the administration as an extension of their personality. This nuance was the crucial difference between democratic administration and fascist government.<sup>527</sup>

These concerns have taken on renewed importance in the last few years in light of the rise of what is sometimes called right-wing populism. The resurgence of strongmen around the globe has inspired a wave of studies of democratic deconsolidation and a growing interest in the institutions that sustain liberal democracy.<sup>528</sup> In the United States, this conversation has focused on whether President Trump was a fascist and what law should look like to keep fascism at bay.<sup>529</sup>

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527. A strict textualist would observe that the Constitution is not necessarily antifascist. Indeed, historical aspects of the American state, especially but not exclusively in the Jim Crow South, have been characterized as fascist. See, e.g., Alberto Toscano, *The Long Shadow of Racial Fascism*, *Bos. Rev.* (Oct. 28, 2020), <https://bostonreview.net/race-politics/alberto-toscano-long-shadow-racial-fascism/> [<https://perma.cc/MA3B-BNKD>] (“[R]acial Black thinkers have long argued that racial slavery created its own unique form of American fascism.”). These same historical aspects have served as inspiration for fascist government design in Europe. See James Q. Whitman, *Hitler’s American Model: The United States and the Making of Nazi Race Law* 78 (2017). Nevertheless, antifascism has become a core commitment of American legal culture since at least the end of World War II, and perhaps earlier. See Edward A. Purcell, Jr., *The Crisis of Democratic Theory: Scientific Naturalism & The Problem of Value* 137 (1973); Richard Primus, Note, *A Brooding Omnipresence: Totalitarianism in Postwar Constitutional Thought*, 106 *Yale L.J.* 423, 423 (1996) (“[T]he desire to articulate principles that distinguished America from the Soviet Union and Nazi Germany contributed to a long line of liberal Supreme Court decisions from the Second World War through the Warren era.”).

528. See, e.g., Ruth Ben-Ghiat, *Strongmen: Mussolini to the Present* 5–8 (2020) (focusing on “strongmen” such as “Benito Mussolini, Adolf Hitler, . . . and Donald Trump” to look at the “evolution of authoritarianism”); Steven Levitsky & Daniel Ziblatt, *How Democracies Die* 2–10 (2018) (elaborating on the state of democracies around the world); Jan-Werner Müller, *What Is Populism?* 7–9 (2016) (discussing current invocations of populism and how that indicates the perils of democracy); Jedediah Britton-Purdy, *Normcore*, *Dissent*, Summer 2018, <https://www.dissentmagazine.org/article/normcore-trump-resistance-books-crisis-of-democracy> [<https://perma.cc/EJ2R-QYXK>] (discussing the “proliferating ‘crisis-of-democracy’ literature”).

529. See Udi Greenberg, *What Was the Fascism Debate?*, *Dissent*, Summer 2021, <https://www.dissentmagazine.org/article/what-was-the-fascism-debate> [<https://perma.cc/CZ2L-QXNW>] (outlining the broad range of positions taken in the debate regarding whether President Trump could correctly be termed a fascist). On the question of President Trump’s fascism, compare Peter E. Gordon, *Why Historical Analogy Matters*, *N.Y. Rev. Books* (Jan. 7, 2020), <https://www.nybooks.com/daily/2020/01/07/why-historical-analogy-matters/> (on file with the *Columbia Law Review*) (explaining the potential value and pitfalls of utilizing historical analogy), with Samuel Moyn, *The Trouble With Comparisons*, *N.Y.*

The conversation is hampered by confusion over terms. Although resisting fascism is a widely shared goal, commentators have not agreed on what fascism is. Political theorists and historians have long debated whether fascism is best understood as a doctrine or a political movement, a coherent racist and nationalist theory or a set of disparate tendencies.<sup>530</sup> In general, scholars have moved away from attempting to isolate a “fascist bacillus” toward appreciating the many different factors that combine to create a fascist state.<sup>531</sup> Among fascism’s main commitments, scholars have identified claims that the nation or race is the true subject of history, that the leader enjoys a special connection with the essence of the people, and that cosmopolitan, globalist elites are subversive enemies.<sup>532</sup>

Attending to PCAM’s work offers a new way to think about this question that makes it more tractable. It shifts the discussion from the ideas that might constitute fascism toward the practices through which fascism operates. At the Battle of Warsaw, the Brownlow Committee fought not fascism’s ideology but instead its administrative organization. The fascists sought to make the state a reflection of the leader. Responsible democratic administration, by contrast, would organize executive power to resist the *Führerprinzip*. To be antifascist, presidential administration would hold the line between the “President’s Two Bodies.”<sup>533</sup>

This history offers a way into thinking about the fascism of the American executive. One can ask whether an existing regime of presidential administration allows the administrative state to become an extension of the personality of the chief executive or guards against the personalization

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Rev. Books (May 19, 2020), <https://www.nybooks.com/daily/2020/05/19/the-trouble-with-comparisons/> (on file with the *Columbia Law Review*) (“For all its other virtues, comparison in general does not do well with the novelty that Trump certainly represents, for all of his preconditions and sources.”).

530. See Robert O. Paxton, *The Anatomy of Fascism* 16 (2004) (“Fascism does not rest explicitly upon an elaborated philosophical system, but rather upon popular feelings about master races, their unjust lot, and their rightful predominance over inferior peoples.”).

531. See *id.* at 18–19 (explaining that a holistic approach is necessary because “cultural origins” and “the crisis to which fascism was a response,” for instance, cannot necessarily be determinative causally); Robert O. Paxton, *The Five Stages of Fascism*, 70 *J. Mod. Hist.* 1, 4 (1998) [hereinafter Paxton, *Five Stages of Fascism*] (“[F]ascism does not rest on formal philosophical positions with claims to universal validity.”).

532. See Jason Stanley, *How Fascism Works: The Politics of Us and Them* 3–4 (2018) (“In the rhetoric of extreme nationalists, such a glorious past has been lost by the humiliation brought on by globalism, liberal cosmopolitanism, and respect for ‘universal values’ such as equality.”); Paxton, *Five Stages of Fascism*, *supra* note 531, at 5 (“[Fascists’] only moral yardstick is the prowess of the race, of the nation, of the community. They claim legitimacy by no universal standard except a Darwinian triumph of the strongest community.”).

533. See Renan, *President’s Two Bodies*, *supra* note 498, at 1181 (stating the President has “two bodies”: one representing the President as an individual and the other representing the President as a continuous institution).

of rule instead. Call it the antifascist litmus test. To pass it, an administrative regime must prevent its executive from using their powers as administrator in chief to turn the state to personal ends.

This test can be used to offer an assessment of Trump's presidency. As Professor Jud Mathews has observed in his recent analysis of Trump's approach to presidential administration, Trump did not "perceive the presidency as an office, as a public trust, but merely a collection of powers and prerogatives for him to use as he please[d]." <sup>534</sup> His managerial style reflected that understanding: He made policy on the basis of personal preference and attempted to eliminate protections that might insulate government servants from his whims. <sup>535</sup> This seems akin to the personalization of rule that antifascist presidential administration aims to frustrate. Trump's approach to presidential administration fails the antifascist litmus test.

2. *The Antifascist Litmus Test Applied: Howell and Moe, Prakash, and Bauer and Goldsmith.* — The test has broader applicability than retrospective analysis of President Trump. It asks us to consider the institutional correlates of presidential administration and interrogate whether they adequately guard against personal rule. Trump's actions built on the growth of a personalized form of presidential administration that stretched back several presidencies already. <sup>536</sup> His idiosyncratic normbreaking revealed that the office had developed latent fascistic possibilities.

The antifascist litmus test provides a bright-line way of assessing plans to respond to these deeper institutional dangers. To remain antifascist, the institutions of presidential administration must prevent the President from using the machinery of the state for personal purposes. Antifascist presidential administration will limit the President's capacity to interfere in the operations of the government except insofar as they seek to advance "faithful execution" of the laws. <sup>537</sup> PCAM sought to do this by insulating adjudicatory officers from presidential control, separating executive functions, protecting government servants engaged in implementing Congress's laws, and otherwise embracing the internal separation of powers. Other approaches to institutional design may achieve similar goals. The antifascist litmus test scrutinizes these design choices, asking whether they successfully prevent the President from using their powers as administrator in chief to run the state as an extension of their personality.

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534. Jud Mathews, *Trump as Administrator in Chief: A Retrospective*, in *The American Presidency Under Trump* (forthcoming 2021) (manuscript at 11), <https://ssrn.com/abstract=3747046> [<https://perma.cc/VR8T-Q48M>].

535. See, e.g., *id.* (manuscript at 7–8).

536. See *id.* (manuscript at 2); *supra* notes 4–8 and accompanying text.

537. See Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 *Harv. L. Rev.* 2111, 2117 (2019) ("The Faithful Execution Clauses are linked not only by common words, but also by a common historical purpose: to limit the discretion of public officials.").

In the aftermath of Trump's term, several leading law professors and political scientists have suggested reforms to the office of the President to shore up American democracy. Assessing these proposals in light of the antifascist litmus test reveals some of their weaknesses and, conversely, offers additional reasons for support.

a. *Howell and Moe's Presidents, Populism, and the Crisis of Democracy*. — Consider the reforms recently put forward by William Howell and Terry Moe, two leading political scientists who specialize in the study of the executive. They take as their starting point the “crisis of democracy” created by Trump's presidency.<sup>538</sup> It was the result, they argue, of “the ineffectiveness of American government,” which fueled his “populist” support.<sup>539</sup> Their reforms focus on making government “more effective” to lessen the appeal of antidemocratic demagoguery.<sup>540</sup>

Following the Progressives, Howell and Moe find their solution in strengthening the executive.<sup>541</sup> “Our system of separation of powers is inherently unwieldy,” they explain, echoing Wilson and Goodnow, “and in great need of coherent governance,” which Presidents alone can provide.<sup>542</sup> To that end, they propose giving the executive greater power to coordinate across the government, including “universal fast-track authority” to shepherd preferred legislation through Congress.<sup>543</sup>

Howell and Moe recognize that too great a concentration of power in the President poses its own dangers.<sup>544</sup> For this reason, they propose two constraints on the executive.<sup>545</sup> They suggest limiting the President's influence over the DOJ and the intelligence agencies,<sup>546</sup> and they propose reducing the number of presidential appointees and expanding the civil service.<sup>547</sup> These reforms, they explain, will make sure that the President is not able to subvert the “agencies that are charged with protecting the rule

538. William G. Howell & Terry M. Moe, *Presidents, Populism, and the Crisis of Democracy* 63 (2020).

539. *Id.* at 6.

540. *Id.* at 11.

541. See *id.* at 115, 217.

542. *Id.* at 14; see also *id.* at 162–63, 219 (“[T]he framers’ hallowed system of checks and balances? Get up off your knees and see it for what it is: a byzantine structure of government, designed for a bygone era, that is disastrously ill-equipped to handle the problems of modern society.”).

543. *Id.* at 176–77.

544. See *id.* at 14 (“If too much power is vested in the executive, rogue presidents can undermine the rule of law and destroy our democracy.”).

545. *Id.* at 180.

546. See *id.* at 181–86 (“Because of the vast powers they wield and the sensitivity of the information they collect, these bureaucracies must be professionalized and insulated from thoroughgoing presidential control if our democracy is to be protected from authoritarian impulses and function effectively for the nation.”).

547. See *id.* at 189–94 (“[A] well-functioning administrative state must be staffed with top-flight, well-resourced, independent bureaucrats . . . . The path to a more effective and less dangerous government lies in a drastic reduction in the number of presidential appointees and a corresponding expansion of the civil service (and other career systems).”).

of law and defending the nation's security," while making government itself "more effective and less dangerous."<sup>548</sup>

Nevertheless, this reform package probably fails the antifascist litmus test. Howell and Moe do attempt to limit the possibility of personal rule in a couple of areas. But their choice of fields and the extent of their restrictions are reactive, a response to President Trump's idiosyncratic excesses.<sup>549</sup> For instance, they do not seek to protect agency heads' ability to implement Congress's laws or ensure that the President is only able to interfere in agency decisionmaking in furtherance of "faithful execution."<sup>550</sup> Their reforms seek to guard against a recurrence of Trump's specific conduct, not the personalization of executive power. As a result, their plan does not attempt to prevent the President from using the administrative state as an extension of their personality.

To the contrary, Howell and Moe's reform project seems grounded in a personalized conception of the presidency. They argue that individual Presidents are driven by concern "*about their legacies*."<sup>551</sup> "More than anything else, presidents ultimately want to be regarded as great leaders."<sup>552</sup> Howell and Moe aim to harness that personal ambition to make government effective. Giving the President personal control, or the opportunity to "'connect his name' with the great events of the day," is at the root of their vision of how the presidency and—through it—the state should operate.<sup>553</sup>

Assessing their proposals through the lens of the antifascist litmus test sensitizes us to concerns they have missed. How will Howell and Moe prevent their empowered executive from becoming fascistic? Might their President pose a threat to the American constitutional system rather than be its champion?<sup>554</sup>

b. *Prakash's The Living Presidency*. — Howell and Moe's approach stands in contrast to that taken by Professor Saikrishna Prakash. An avowed

548. *Id.* at 186, 193.

549. See, e.g., *id.* at 180–82, 192 (justifying the proposed reforms as "eminently reasonable in light of the Trump experience"). This focus on Trump helps explain some of their other proposed reforms, which also respond to Trump's specific conduct, including eliminating the President's pardon power and reining in conflicts of interest. See *id.* at 204–05 (arguing that many of Trump's presidential pardons "could [not] be justified based on restorative justice or as necessary checks on bad judicial decisions" but were rather "political ploys intended to strengthen Trump's popularity with conservatives and his populist base").

550. On the rich meaning of faithful execution, see generally Kent et al., *supra* note 537.

551. Howell & Moe, *supra* note 538, at 161.

552. *Id.* at 162.

553. *Id.* (quoting Abraham Lincoln).

554. Cf. Tom Ginsburg & Aziz Z. Huq, *How to Save a Constitutional Democracy* 211–12 (2018) (worrying that Howell and Moe's executive-empowering proposals will hasten democratic erosion).

originalist and sometimes unitarian, Prakash's analysis is much more concerned with addressing the dangers of an unchecked, personalized form of executive rule.

According to Prakash, the President was always supposed to be powerful. Prakash subscribes to the argument recently revived by the historian Eric Nelson that the Founders were explicitly inspired by royalism.<sup>555</sup> By “vesting significant authority in one person,” the Constitution “create[d] a monarch, albeit a limited, republican one.”<sup>556</sup> This “presidential monarch was meant to be formidable,” an office of “awesome” power, “a king in all but name.”<sup>557</sup>

This did not mean that the President was “omnipotent,” however.<sup>558</sup> The President was supposed to be a “republican monarch[,]” meaning that the office's powers should be limited and, in some cases, tightly constrained.<sup>559</sup> In particular, the executive was supposed to enforce the laws that Congress passed<sup>560</sup> and did not have authority to suspend law, pass its own laws, or change the Constitution on its own say-so.<sup>561</sup>

Prakash believes that the modern executive has slipped these restraints. Our “living constitution[] systematically privileges the presidency” by enabling the executive to “influence . . . the constitutional system” through “informal change.”<sup>562</sup> Prakash identifies several tools that Presidents have used to make “informal amendments” to the Constitution, which have massively expanded executive power.<sup>563</sup> As a result, while originally the President was to be the preserver of the legal order, modern Presidents are “Brahma, Vishnu, and Shiva” rolled into one: “creators, preservers, and destroyers” all at once, “switch[ing] between these roles to suit their personal and policy interests.”<sup>564</sup>

To rein in this personalization of rule, Prakash proposes a grab bag of reforms, all of which tend to weaken the executive's ability to make law unilaterally. Many of Prakash's proposals aim to increase Congress's power

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555. See Eric Nelson, *The Royalist Revolution: Monarchy and the American Founding* 2 (2014) (“[T]he American Revolution . . . was—for a great many of its protagonists—a revolution against a legislature, not against a king. It was, indeed, a rebellion in favor of royal power.”). On Nelson's argument, see Noah A. Rosenblum, *Of Kingship and Counselors: The Royalist Revolution in Legal History*, H-Net Revs. (2016), <https://www.h-net.org/reviews/showpdf.php?id=42926> [<https://perma.cc/FFA3-NBYT>].

556. Prakash, *The Living Presidency*, *supra* note 49, at 23, 29.

557. *Id.* at 15, 36.

558. *Id.* at 15.

559. *Id.* at 42.

560. See *id.* at 216.

561. See *id.* at 42, 218.

562. *Id.* at 94, 129.

563. *Id.* at 114; see also *id.* at 128–29 (using an example from the Obama Administration to highlight the erroneous presidential belief “that the [P]resident can (or should) do whatever any previous holder of the office has been able [to] get away with”).

564. *Id.* at 146.

relative to the executive.<sup>565</sup> But some of his proposals are explicitly directed at ensuring that the President is not able to substitute their whim for law, including that Congress (1) make “all high-ranking White House officials subject to Senate advice and consent,”<sup>566</sup> (2) grant some existing executive branch agencies independence,<sup>567</sup> and (3) create a new independent agency charged with supervising the executive branch and exercising Congress’s budgetary and regulatory authority.<sup>568</sup>

Prakash’s proposals surely pass the antifascist litmus test. Prakash, like PCAM, wants to create structures that prevent the executive from using the state as an extension of the President’s personality. Moreover, PCAM’s embrace of antifascism should carry special weight for the executive under Prakash’s theory of informal amendments. This Article has argued that antifascism was a core, executive-driven component of the institutionalization of presidential administration in the New Deal. Antifascism, then, could be understood as a kind of executive lawmaking, embedded in the U.S. legal fabric through an executive-led “informal amendment.” Prakash’s reforms, which recognize expanded executive power but seek to prevent the President from dominating the whole of government, accord with that antifascist principle.

Admittedly, Prakash’s reforms go much further. To his eyes, presidential administration has enabled “the modern executive branch [to become] something of a junior varsity Congress,” a “secondary lawmaker[.]”<sup>569</sup> He believes that this arrangement constitutes a perversion of the original constitutional system.<sup>570</sup> When combined with the power and discretion the President already enjoys, it leads inexorably to “corrupt[ion].”<sup>571</sup>

Prakash thus meets the antifascist litmus test almost by accident. A government reorganized to meet his concerns would constrain the President to wield power only in furtherance of enumerated constitutional powers and Congress’s laws. It would also create new checks to prevent the President from interfering in administration in ways that Congress did not

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565. See, e.g., *id.* at 253 (arguing that Congress should increase its staff); *id.* at 266 (encouraging Congress to take constitutional stands).

566. See *id.* at 251–53 (arguing that the Senate should exploit its leverage over would-be presidential advisers to extract promises and guarantees about their future actions).

567. See *id.* at 269 (proposing that Congress grant independence to several existing executive agencies).

568. See *id.* at 271 (suggesting that Congress can bypass the arduous process of obtaining the President’s signature to overturn an administrative action or signal its disapproval by creating a “rival power center” to “supervise the executive”).

569. *Id.* at 216, 243.

570. See *id.* at 215–16 (noting that modern presidential practice diverges sharply from the “timidity” endorsed by Article II’s Faithful Execution Clause imposing on Presidents a duty to “take Care that the Laws be faithfully executed”).

571. *Id.* at 243.

approve. In these ways, it would guard against the substitution of the President's personal opinion for law. But Prakash achieves these goals by, in part, dismantling the very institutions of presidential administration.

The antifascist litmus test, then, highlights the appeal and the distinctiveness of Prakash's recommendations. It draws attention to what makes his reforms normatively attractive. But it also exposes how his conception of the executive fundamentally departs from the development of the modern office.

c. *Bauer and Goldsmith's After Trump*. — Of the recent plans to reform the presidency, Professors Robert Bauer and Jack Goldsmith's proposal is the one that most aligns with PCAM's antifascist vision. Like PCAM, Bauer and Goldsmith believe that a strong executive is a governance asset. They take as their starting "assumption that a powerful, vigorous presidency is vital to the proper functioning of American democracy."<sup>572</sup> They hold their view for some of the same reasons PCAM did: In a sometimes sclerotic and unwieldy state, the President is a major source of "energetic . . . leadership," the "central engine of the federal government."<sup>573</sup>

Bauer and Goldsmith worry, however, that the President is no longer sufficiently "political[ly] accountab[le]" and might pose a threat to "institutions vital to the American constitutional democracy."<sup>574</sup> Trump's presidency heightened these concerns. It was not simply a matter of his "law-breaking tendencies."<sup>575</sup> Rather, "his conception of the office . . . and his actions in it have exposed gaps and ambiguities . . . in presidential accountability."<sup>576</sup> Trump's tenure "has shown that the current array of laws and norms governing the presidency is inadequate . . . to ensure that the president is, and appears to be, constrained by law."<sup>577</sup> Bauer and Goldsmith aim to address these lacunae by preserving efficacy while shoring up accountability and guarding against authoritarianism.

Bauer and Goldsmith's project sounds like PCAM's endeavor revisited. Similar to PCAM, they believe that the executive needs to be both efficacious and accountable for American democracy to thrive. And, although Bauer and Goldsmith do not frame their concerns around the need to resist fascism, their worry about the extralegal personalization of executive rule is highly resonant with PCAM's own concern.

Bauer and Goldsmith propose several dozen changes across many different areas of law and policy to make the presidency more accountable

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572. Robert F. Bauer & Jack Goldsmith, *After Trump: Reconstructing the Presidency* 11 (2020).

573. *Id.* at 12–13.

574. *Id.* at 4, 14.

575. *Id.* at 2.

576. *Id.*

577. *Id.* at 4.

and less personal.<sup>578</sup> Several of their reforms concern the President's relationship with the administrative state.<sup>579</sup> There, they often follow PCAM in relying on internal and external checks to prevent the President from using the administration as an extension of their personality.

By way of illustration, consider their proposed reforms to the DOJ. Bauer and Goldsmith recognize a tension between the need for the President to "oversee the execution of the laws" and the principle that "partisan and personal considerations should play no role in investigating or prosecuting cases."<sup>580</sup> To square this circle, they recommend shoring up internal DOJ norms around independence to block improper presidential influence on charging decisions.<sup>581</sup> In a related vein, they urge Congress to use its powers to impose qualification requirements on DOJ personnel, simultaneously creating a vector for greater congressional influence in the executive branch while raising the likelihood that DOJ staffers will act with independence and professionalism.<sup>582</sup> In this way, internal and external checks would safeguard the DOJ from improperly falling under the domination of the person of the chief executive.

Such reforms likely pass the antifascist litmus test. Bauer and Goldsmith's goal is very similar to PCAM's: to empower the executive while keeping it from becoming fascistic in the way PCAM feared. In light of Prakash's analysis, one can question whether Bauer and Goldsmith's reforms go far enough. But their project takes its place in the long tradition of building out a responsible, antifascist presidency.

History serves to recommend Bauer and Goldsmith's plan and provide it with a pedigree. They see their work as picking up the reforms of the 1970s, which were initiated in response to Nixon's disruptive presidency.<sup>583</sup> But, as Professor Stephen Skowronek has argued, Nixon's Administration is best understood as a break with earlier practices of executive governance.<sup>584</sup> Nixon began a process of personalizing executive rule by consolidating power directly under himself in the White House.<sup>585</sup> The reforms of the 1970s were in their way an attempt to restore the earlier, more

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578. See *id.* at 357–70 (proposing reforms such as increasing transparency in campaign financing and support from foreign governments, restricting presidential activity in the oversight of any business, and ensuring public disclosure of presidential tax returns to increase accountability).

579. See, e.g., *id.* at 361–62, 364–66.

580. *Id.* at 138 (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 499 (2010)); *id.* at 142.

581. *Id.* at 155.

582. See *id.* at 160–61.

583. See *id.* at 18 ("The final principle that guides us is the need for sensitivity to the lessons that history has taught about how the presidency, and reforms of the presidency, operate. No period is richer . . . than the 1970s following Nixon's presidency.").

584. See Skowronek, *Conservative Insurgency*, *supra* note 49, at 2098–99 (noting the "move away from the idea of governing more collectively *through* the presidency toward the idea of governing more exclusively *within* the presidency").

585. See *id.*

bounded President that emerged from PCAM's work. Bauer and Goldsmith's project fits into that longer history. In light of this Article, it appears as another outgrowth of presidential administration's antifascist roots.

#### CONCLUSION

Modern presidential administration was born antifascist. The members of PCAM sought to empower the American executive to resist fascistic tendencies abroad and at home. The federal government needed to be efficacious and accountable to fight fascist governments in Europe. But the American executive also needed to be checked and divided against itself, lest it become fascistic.

To accomplish these ends, PCAM embraced internal and external separation of powers. This shift marked an important break with the Progressive Era reformers whose work inspired the Committee's members. The real innovation of the President's Committee was not in proposing to strengthen the executive to make American democracy responsible. Progressive Era reformers had pursued the same goal through the same means. Rather, what made PCAM distinctive was its embrace of the Constitution and the separation of powers.

Importantly, that embrace did not commit PCAM to a unitary or maximalist position on presidential power. Just the opposite: PCAM embraced internal separation of powers and checks on the executive as a way of keeping the American President antifascist.

Scholars have mostly missed this important aspect of PCAM's work. Recovering a richer institutional and intellectual context helps correct misunderstandings of the Committee's report. It also forces a rethinking of the history of presidential administration writ large. Far from a linear process of executive aggrandizement starting at the Founding, the rise of presidential governance in the United States has been a modern, twentieth-century story, with twists and reversals animated by competing conceptions about how to realize widely shared goals of responsible government.

That history matters today. It helps clarify what American-style presidentialism was intended to do and what dangers its Framers sought to guard against. As a legal matter, the history recounted here provides a reason for rejecting the unitary theory and accepting the alternative tradition of internal separation of powers. As a matter of institutional design, it suggests a precautionary antifascist litmus test that highlights the ways that the President's administrative power threatens free government and provides a tool for evaluating proposals for executive reform.

The New Deal architects of presidential administration understood that enhanced executive administrative authority raised unique fascistic dangers. They would not risk the former without protecting against the latter. Their institutional logic remains relevant even today.

