THE PRESIDENT’S TWO BODIES

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

- Are the personal motives or specific intentions of the incumbent relevant to the lawful exercise of the powers of the presidency? 
- Does the office of the presidency bestow legal protections or immunities on the person of the president?
- Who may assert executive privilege: only the sitting president or also his predecessors in office? And to what materials does the presidential privilege extend?
- Can the sitting president acquiesce to legal constraints on the presidency, thereby restraining the powers of the office?
- Do orders made at the whim of the person constitute binding presidential policy, or is some process of the institutional presidency required?

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1 EDMUND PLOWDEN, COMMENTARIES OR REPORTS 212a (London 1816); see ERNST H. KANTOROWICZ, THE KING’S TWO BODIES: A STUDY IN MEDIEVAL POLITICAL THEOLOGY (2016).
2 U.S. CONST. art. II, § 1, cl. 1.
6 This question is at least as old as the trials of Aaron Burr, see Burr, 25 F. Cas. at 192 (“Letters to the president in his private character are often written to him in consequence of his public character, and may relate to public concerns.”), and has recurred in current debates. For an illuminating account that applies Kantorowicz’s framework of the body natural/body politic to President Trump’s two twitter accounts (@POTUS and @realDonaldTrump), see Quinta Jurecic, Body Double: What Medieval Executive Theory Tells Us About Trump’s Twitter Accounts, LAWFARE (Apr. 24, 2017, 11:33 AM), https://www.lawfareblog.com/body-double-what-medieval-executive-theory-tells-us-about-trumps-twitter-accounts.
We cannot really answer these questions without some understanding of the relationship or relationships between the individual and the institution at the center of Article II. Yet legal doctrine has alluded to that nexus mostly in passing, leaving the constitutional concept of the President underdeveloped. When the case law has focused on these relationships, it has done so in piecemeal fashion and, as a result, has not really grappled with the consequences of the concepts being articulated. Ideas and assumptions about the presidency asserted in one doctrinal domain are often in tension with those implied in others. Even within the same doctrine or case, the Court’s separate opinions often proceed from incommensurable (and often unarticulated) starting points relating to the president/presidency.

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

On the other view, the presidency is an institution. It is comprised of certain features—deliberative practices, substantive commitments, and institutional constraints—that are not fully within the control of any individual occupant. The characteristics of the office are more durable, the exercise of presidential power more continuous. The presidential office is a composite; the incumbent is not alone. These other actors protect and even augment presidential power, even as they entrench limits on the incumbent’s individual discretion. On this view, the presidency is a “they,” or at least an “it.”

We have never fully come to terms, constitutionally or politically, with the relationship between individual presidents and the presidency. This ambivalence dates to the Founding, when the powers of the institution were created with the person of George Washington firmly in view. And it permeates the early debates over our constitutional structure. The uneasy relationship between individual presidents and the presidency is made only more stark by political developments of the past century.9

My central claim is conceptual and analytic. The American presidency is a constitutional ideology of both personal and impersonal rule.10 Our major disagreements and confusions about presidential power are disagreements that track the fault lines between what we might think of as the president’s “two bodies.”

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9 This tension has not gone unremarked in political science, where a central disagreement among those who study the presidency is whether personal and particularistic or impersonal and structural perspectives better account for presidential power in American politics, or better predict presidential decision-making. See infra notes 144-155 and accompanying text.

10 See Martin Loughlin, The Constitutional Imagination, 78 MODERN L. REV. 1, 12 (2015) (“[I]deology not only has a distortive or legitimatory role: it also has a constitutive function . . . . Ideology becomes the central concept of the constitutional imagination, the concept on which our understanding of the constitution rests.”)
An array of seemingly disparate debates on topics ranging from impeachment, to executive privilege, to the ownership of presidential papers, to a presidential duty to defend statutes in court, to the role of presidential tweets, to the legal remedies available for presidential misconduct reflect this longstanding, ongoing ambivalence about the nature of the presidential office. American public law reveals different perspectives on how to manage—but it cannot escape—the president’s duality. Rather, this fundamental tension is the constitutional office of the presidency.

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

Our current constitutional and political moment, however, helps to crystallize the risk from the other end as well. A public law that erases the incumbent’s influence from the decisions of the presidency risks sanitizing arbitrary and animus-inflected power. It also understates the role for individual judgment and personal leadership that our constitutional culture has come to expect and desire. There is a person at the heart of the presidency. He has agency and he has will. His moral and political clout—and his personal power, for good and ill—is a defining feature of the American constitutional experience.

There is a fundamental interdependence between the president’s two bodies. To develop a theory of presidential power that is tolerably responsive to problems of legitimate authority, governance, and legal accountability—that is, to interconnected elements of presidential power—public law must work towards something of an accommodation. This creates some irreducible ambiguity. But it puts both person and institution on firmer constitutional footing.

Much of the work of integrating the two bodies must play out case by case. There is no all-in prescription. But a crucial first step, and the goal of this article, is to make the two bodies central to our constitutional understandings of the presidency.

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

Tracking the functional dimensions that comprise the president’s two bodies, Parts III-V recast public law’s interactions with Article II as an ongoing struggle over the president’s duality. That duality is inescapable, and it is even in some respects desirable. But it poses profound challenges for how public law engages questions of presidential power. Approaching the constitutional presidency in this way brings into view traces of a personal, charismatic power simultaneously in deep tension with and fundamentally constitutive of the institutional presidency. It reconstructs seemingly far-flung aspects of American public law—ranging in form from Founding-era debates, to judicial decisions, to statutory enactments, to presidential norms—as a shared effort to accommodate the president’s two bodies. And it helps us to unpack what is at stake—for presidential legitimacy, for governmental capacity, for checks and balances, and for our substantive constitutional commitments—in how public law handles this central ambiguity.

Part VI synthesizes the patterns and themes that emerge in an effort to better understand the constitutional presidency. Ultimately, it argues, the legal lines between the president’s two bodies cannot emerge from the president’s duality itself. Rather, it is a normative project of public law to create them—and to do so in furtherance of articulated constitutional commitments. Even as public law has a crucial role to play in integrating the two bodies, the project reveals as well the limits of law and legal methods in managing this central tension.

Before beginning, a note on the project’s scope: My focus is the American presidency. In a sense, the presidency is one application of a more endemic feature of constitutional government—and of constitutional culture more generally. A duality of roles is inherent in the concept of office. And a cult of personality, from Shakespeare’s King Henry V, “twin-born with greatness,”11 to our “Madisonian” separation of powers, to the Great Chief Justice, to the lions of the Senate, to the Notorious RBG has always shaped how we think about institutional power and its relationship to leadership. There are meaningful continuities between the president/presidency and these other constitutional offices, 12 as

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11 WILLIAM SHAKESPEARE, KING HENRY V. An extensive literature explores Shakespeare’s use of the king’s two bodies, as well as Kantorowicz’s own treatment of the two bodies in Shakespeare and other fiction. See, e.g., Victoria Kahn, Political Theology and Fiction in The King’s Two Bodies, 106 REPRESENTATIONS 77, 79 (2009) (arguing that Kantorowicz’s work makes two central arguments: the “Christological origin of secular constitutionalism in Shakespeare’s England,” and “the secular religion of humanity best articulated by Dante”).
12 Legislative standing, for instance, illuminates both continuities and discontinuities with the presidency. At the crux of cases like Rainey v. Byrd is the question of how to understand the Members’ injury: is it a personal injury, as the D.C. Circuit found prior to the Supreme Court’s intervention, an institutional injury, as Chief Justice Rehnquist’s majority opinion suggests, or is it impossible to fully pry the two apart, as Justice Breyer argues in dissent. If the conceptual and legal challenge points to a similarity with the president’s two bodies, the available doctrinal solutions illuminate an important difference. In the legislative context, the collective
well as between the president and leaders more generally—whether corporate, nonprofit, social movement, or governmental—for whom a duality of personal and institutional identities poses ongoing conceptual and normative, even legal difficulties. The phenomenon might be extended further still, from the role of jurors (who straddle expectations of a relatively mechanical law-follower and a personal expositor of local mores) to the meaning of citizenship itself.

Yet the relationship between individual presidents and the presidency is also unique in our constitutional structure. The idea that the person of the president, by virtue of his election, becomes the singular representative of “the people” figures prominently in American constitutionalism. Our prevailing theories of legitimacy—of the administrative state and of American democracy, at least at the national level—rely on an idea of a presidential “mandate” that is almost mystical given its cultural and constitutional force combined with the paucity of its empirical and theoretical support. And while the “anthropomorphization of the branches” is routine in constitutional theory, its single head again makes the executive branch different. It is at least conceptually plausible to think about this one individual speaking for executive government as a whole in a way that it is not plausible to think of a Senator or Representative speaking for Congress.

The nature of presidential power and the means of exercising it also are less delineated than the nature and means of exercising legislative or judicial power. There is no legally mandated procedure—like bicameralism and presentment—for the president to exercise constitutional authority. If a judge or senator tweets, we do not wonder whether she has issued a judicial opinion or enacted legislation. But the question whether the president’s tweets establish U.S. legal policy is unsettled and genuinely contested. If a judge or senator takes her decision

institutions...
memos home, we are left with a judicial opinion resolving the case or a congressional record and votes on legislation. But when individual presidents leave office with the near entirety of their records, as was the practice for almost two centuries, they take with them the institutional precedent of a presidency. If a Senator or jurist suffers a stroke or other such disability, we do not require a constitutional amendment to continue the work of government. Yet the question of how to handle presidential inability poses genuine constitutional uncertainty, culminating in (and not fully resolved by) the Twenty-Fifth Amendment.

As these examples suggest, presidential charisma is both inseparable from American constitutionalism and a fundamental challenge to the commitments of American public law.

I. THE “TWO BODIES” FRAMEWORK

A. Defining the (King’s) Two Bodies

Medieval historian Thomas Bisson argues that an “accountability of office” emerged from the experience of power without government in the twelfth century. Feudal lords exercised immense power—arbitrary, violent, and comprehensive—with little to no accountability and only limited capacity for governance. From this “crisis of the twelfth century,” Bisson traces a trajectory—piecemeal, non-linear, at times accidental—toward a more public-interested understanding of authority, a felt need for competence and capacity in governance, and the development of mechanisms to restrain the exercise of raw power and hold it to account. The construct of “the king’s two bodies,” whose medieval roots are recounted in Ernst Kantorowicz’s classic work, provides another building block in the development of the modern state. Derived from theological understandings of Christ as both man and god, the king’s two bodies offered a constitutional language to differentiate the reigning king from the kingship.

Conceptually, the king’s two bodies operate along at least three dimensions: the person of the king versus the impersonal qualities of office; temporary kings versus continuity in royal governance; and individual rulers versus the “composite” institution of the Crown. These dimensions are not airtight categories; they run together at times. But they illuminate a set of functional fault lines that, together, comprise core aspects of the king’s duality. This Section uses the construct of the king’s two bodies, at a formative moment in its development, to


21 These dimensions emerge from Kantorowicz’s account, though he did not organize his study around them. See KANTOROWICZ, supra note 1, at 5 (observing how the king’s two bodies seeks to reconcile “the personal with the more impersonal concepts of government”); id. at 273 (arguing that “the concept of the ‘king’s two bodies’ camouflaged a problem of continuity” in governance); id. at 363 (contrasting the individual of the king with the “composite character” of the Crown).
briefly define and refine each dimension. My goal is conceptual. But the king’s
duality also suggests a precedent—one that, as we will see, retains an uneasy
foothold in American constitutionalism.

1. Personal/impersonal.

The dual nature of the king, as it developed in the sixteenth and early sev-
enteenth century, provided a bridge between medieval understandings of a
purely personal kingship and the more abstract machinery of modern govern-
ment.22 It also resolved practical and political problems of capacity and govern-
ance as they emerged from the distinct attributes of individual monarchs. The
Case of the Duchy of Lancaster,23 which marked a significant development of the
doctrine,24 found that Edward VI, an underage minor incapable of transferring
land in his personal capacity, nevertheless had the legal authority to alienate land
in his impersonal capacity or body politic.25 By Calvin’s Case, decided in 1608, the
two bodies are said to be distinct but inseparable, such that the king has two bodies “but one person.”26 Pursuant to this logic, individuals born in Scotland
after the king of Scotland became King James I of England were understood to
be subjects of the person of the king and, as a result, entitled to the protections
of English law.27 The king’s duality thus justified James’s royal proclamation
recognizing mutual subjectship, notwithstanding parliamentary opposition to
treating the “postnati” as English subjects capable of holding English land and
suing in the royal courts.28

Even as the king’s two bodies enhanced the monarch’s legal capacity and his
ability to demand allegiance, it also provided a basis for institutional restraint—
for a conception of official duty as distinct from personal self-interest. In recog-
nizing the fallibility of individual monarchs, the king’s two bodies paved the way
for constitutionalism as a restraint on royal power. Sixteenth-century lawyers
“supplemented” the two-bodies construct with a distinction between “preroga-
tives which were inseparable from the person of the king, and prerogatives
which were not.”29 As to those prerogatives that the lawyers deemed inseparable
(like the pardon power), the king had “unfettered discretion.” But for other acts,

22 See 3 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 351–61 (1909); see also Guy I. Seidman, The
Origins of Accountability: Everything I know about the Sovereign’s Immunity, I learned from King Henry III, 49 ST.
the case as the moment in which the king’s body politic became a proxy for the state and its powers); Frederic
26 Calvin’s Case (1608) 7 Co. Rep. 1.
27 See Loughlin, supra note 20, at 57 (discussing the significance of Calvin’s Case for the development of the
king’s two bodies).
28 See DANIEL J. HULSEBOSCH, CONSTITUTING EMPIRE 22–23 (2005) (arguing that “[t]he decision seems
limited today, amid claims of human rights and calls for universal jurisdiction . . . [but it] was radical for its
time because it encouraged mobility throughout the king’s composite monarchy”).
29 Holdsworth, supra note 24, at 557.
such as “the issue of proclamations, the making of grants, or the seizure of property . . . [the law] prescribed conditions.”\textsuperscript{30} The idea of an “inseparable prerogative” is inherently indeterminate and, as a result, “capable of development” through law itself.\textsuperscript{31} As these examples show, the legal lines between the king’s two bodies were constructed by lawyers and jurists to serve specific interests; such legal lines are not intrinsic in the duality itself.

2. Temporary/continuous.

The two bodies enabled English law to distinguish, however incompletely, between the transient ruler and the continuing kingly office. Kantorowicz traced the medieval origins of this transformation, for example, in connection to the emergence of a royal fisc, separated “as something for the common utility” from the person of the monarch and inalienable by him.\textsuperscript{32} Underscoring the interdependence of the two bodies, however, the continuity of the fisc was enforced by the promise of individual kings, through their coronation oaths, not to alienate the rights and possessions of the Crown.\textsuperscript{33}

As interpreted in sixteenth-century case law, the “demise” of an individual king “signifie[d] a Removal of the Body politic of the King of this Realm from one Body natural to another.”\textsuperscript{34} The two bodies thus facilitated, conceptually, the move away from temporary governance, whereby delegation from the king to judges and other officials expired with each king’s death, requiring litigation and a range of government processes to begin anew under the new monarch. It would take statutory incursions on the mystical Crown, however, to implement this conceptual shift as law.\textsuperscript{35}


The foregoing suggests two senses in which the institution relates to the person. Even if we think about the kingship as inhabited by only one individual, we might say that institutional restraints or duties of office impose conditions on how the person constitutionally executes the office. Understanding the person as conceptually distinct from the institution, in turn, creates the possibility that others inhabit the institution as well—that even though the king is one, the Crown is not.\textsuperscript{36}

\textsuperscript{30} Id. at 560–61.
\textsuperscript{31} Id. at 560.
\textsuperscript{32} KANTOROWICZ, supra note 1, at 343 (internal quotation marks omitted); see Lorna Hutson, Imagining Justice: Kantorowicz and Shakespeare, REPRESENTATIONS 123 (2009) (arguing that “what emerges perhaps most powerfully” from Kantorowicz’s account “is a sense of how the ingenuity of juristic reasoning . . . transformed theological expressions and ideas” into understandings “of a perpetual public good”).
\textsuperscript{33} See KANTOROWICZ, supra note 1, at 342–364.
\textsuperscript{34} Willson v. Berkley (1559) Plowd. 233a, discussed in Loughlin, supra note 20, at 52; see also Marc L. Roark, Retelling English Sovereignty, 4 BRIT. J. AM. LEGAL STUD. 81, 106–09 (2015) (discussing Hill v. Grange, (1556), Plowden 177a, “where the court calls the name of the king ‘the body politic,’ a name of ‘continuance, which shall always endure as the head and governor of the people as the law presumes . . . and in this the King never dies.’”).
\textsuperscript{35} 3 HOLDSWORTH, supra note 22, at 361 (“[T]hough he was said never to die, it has been necessary to pass many statutes, from the sixteenth century to the nineteenth . . . to prevent all the wheels of state stopping or even running backwards’ on a demise of the crown.”).
\textsuperscript{36} See KANTOROWICZ, supra note 1, at 381 (“In many ways the Crown would coincide with the king . . . At the same time, however, the Crown appeared also as a composite body, an aggregate of the king and those responsible for maintaining the inalienable rights of the Crown and the kingdom”); cf. Edward S. Corwin,
The existence of legal constraints on the Crown required a theory of legal accountability. Feudal understandings that the king, like any lord, could not be sued in his own courts coexisted with and contributed to the rise of a system of “ministerial accountability.” The king acted through his ministers, and they could be held to account by both courts and parliament.

Even as it helped to reconcile the competing pulls of executive discretion and legal accountability, the tension inherent in the king’s duality made it possible, if not likely, that the construct would be used instrumentally to advance opposing interests. During the English Civil War of the seventeenth century, revolutionaries in Parliament used the two-bodies construct to argue that they were opposing the monarch — trying Charles Stuart for high treason and ultimately beheading him — in order to preserve the monarchy. Decades earlier, James I had claimed the two-bodies mantle in support of precisely the opposite idea: that the body politic made the body natural inviolable; it made rebellion against the person of the king “not only unlawful but ‘monstrous and unnatural.’” That the idea of the king’s two bodies contained within it this central ambiguity—that the same construct could be used to advance two inherently conflicting understandings of power—was a central theme of Kantorowicz’s exegesis.

The analogy of the king’s two bodies to the presidency is not perfect. But it illuminates a set of analytic fault lines that endure and, it turns out, permeate our disagreements and confusions about presidential power. The transformation of office that Kantorowicz chronicled has changed the terms of this debate. The question, for American constitutionalism, is not whether the president can exercise presidential power in his personal capacity. It is about the nature of the constitutional office itself.

The President as Administrative Chief, 1 J. Pol. 17, 17 (1939) (“Etymologically, an ‘office’ is an officium, a duty; and an ‘officer’ was simply one whom the King had charged with a duty . . . [eventually] the concept of ‘office’ became an institution distinct from the person holding it and capable of persisting beyond his incumbency.”).

37 See 3 HOLDSWORTH, supra note 22 at 357 (“Even before the legal construct that the king could do no wrong, the king’s immunity to suit derived from the feudal idea that ‘[n]o . . . lord could be sued in his own court.’”).

38 See Guy I. Seidman, The Origins of Accountability: Everything I Know About the Sovereign’s Immunity, I Learned from King Henry III, 49 St. Louis U.L.J. 393, 431 (2004) (“The maxim that ‘the king can do no wrong’ played a central role in the development of this regime of ministerial accountability.”).

39 Kantorowicz argued that the two-bodies construct enabled the revolutionaries to “execut[e] solely the king’s body natural without affecting seriously or doing irreparable harm to the King’s body politic.” KANTOROWICZ, supra note 1, at 23. But other scholars argue that “irreparable harm” did occur, “if not to monarchy itself, then precisely to the king’s body politic,” and that the story of the English Civil War in fact proves that the king’s two bodies are “inseparable.” Michael Walzer, Rejected and Revolution, 40 Soc. Res. 617, 632 (1973); see also, e.g., Katherine Boole Hattie, Re-membering the Body Politic: Hobbes and the Construction of Civic Immortality, 75 ELH 497, 498 (2008) (“When the beheading of Charles I brought an end not merely to one particular sovereign’s reign but to the monarchy itself . . . both of the king’s bodies died on the scaffold.” (footnotes omitted)).

40 Attie, supra note 39, at 497 (quoting JAMES I, The Trew Law of Free Monarchies (1598)).

41 The conflictual implications of the king’s duality for English public law continue to be debated in current times. See, e.g., Loughlin, supra note 20, at 34.
B. The President and the Presidency

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

1. Personal president.

What would it mean to understand the presidency solely as an individual, not an institution? On this telling, the president is a charismatic leader. His authority is justified by his personal connection to the people through election. He is their chosen leader, selected because of a set of ideological, political, and moral qualities or commitments. Public law facilitates the individual’s charismatic legitimacy by ensuring, for example, that his vision is not undermined by the decisions or pre-commitments of prior presidents—that he can effectuate his individual will through the office of the presidency.

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

Since the incumbent alone is the presidency, the purpose of any presidential decision is his intention or motive. If he is motivated by impermissible animus, so is the policy or action itself. There is no conceptual daylight between the

45 See Max Weber, Politics as Vocation (1919 Lecture), in WEBER’S RATIONALISM AND MODERN SOCIETY 137–39 (Tony Waters ed., 2015) (developing a conception of “charismatic authority” and arguing that this basis for the legitimacy of political authority depends on the “traits characteristic of a Leader,” whether a “chosen warlord, a popularly elected ‘Ruler,’ or the Leader of political parties,” id. at 13).
incumbent’s judgment and the decisions of his presidency. This means, for example, that unfiltered presidential speech, even tweets, may be especially probative of presidential purpose. Note that this a normative idea not a predictive claim, though the two are related. Political scientists have long debated whether the personal qualities or institutional features of the presidency better explain presidential decision-making. The legal question whether presidential intent refers to the incumbent or the institution, however, is not entirely, perhaps not primarily empirical. It entails “some value judgment about what should count” as the presidency’s “intended decision and why.”

If we understand constitutional authority and legitimacy in governance to turn on the will of the individual, his words, his motives, then we might think that rights infringement requires a sniffing out of his impermissible purpose and that the legal interpretation of presidential instruments is an exercise in implementing this one individual’s avowed intent.

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

2. Institutional presidency.

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

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

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48 This conception is closest to Weber’s idea of rational or bureaucratic authority, see Weber, Politics as Vocation, supra note 45, at 138, though it incorporates elements of custom and practice (which arguably straddle Weber’s traditional source of authority as well).
49 Cf. Renan, Presidential Norms, supra note 8, at 2221-2230 (documenting a family of norms that comprise the “deliberative presidency”).
On this account, the means of institutional continuity become a core concern of public law. Presidential orders outlast the issuant; they continue to bind actors inside the executive branch—至少 until formally revised or rescinded. Presidential papers become a form of precedent—a “common law” of the presidency as an institution of constitutional governance. And presidential commitments, whether made in litigation settlements or administrative regulation, comprise the ongoing and consistent obligations of a continuous body.

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

In adjudicating presidential power, moreover, public law would understand the intent of the presidency as an institutional inquiry involving a collective body—more akin to “legislative intent” than to an individual’s reasons for action.\(^{50}\) If the legal concept of presidential intent concerns a composite institution, not an individual, then the positions of the presidency that have undergone a more regularized institutional process are more probative of presidential purpose, and more normatively desirable as a source of legal meaning.\(^{51}\)

Finally, the institutional presidency necessitates a different form of law. Rather than criminal law or tort law, the presidency requires a legal regime addressed to institutional executive governance; it necessitates “administrative law.”\(^{52}\)

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\(^{50}\) A familiar account in the legislative context suggests that “we have only a limited capacity to distinguish between what [individual] legislatures want and what various procedural elements have foreordained.” Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239, 248 (1992). See also Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT L. REV. 123, 134 (1989) (arguing that statutes are the “vector sum of political forces expressed through some institutional matrix which has had profound, but probably unpredictable and non-traceable, effects on the policies actually expressed”).

\(^{51}\) Cf. Katherine Shaw, *Speech, Intent, and the President*, 104 CORNELL L. REV. (forthcoming 2018) (manuscript at 41) (arguing that “[i]selective citation to isolated presidential utterances . . . is unlikely to provide reliable insight into the proper interpretation of a presidential directive,” and that “the values of process and rigor suggests that [Justice Department briefs and similar documents] . . . should be treated as containing the authoritative statements of the position of the executive branch”).

\(^{52}\) By administrative law, I do not mean the APA. Rather, I use the term administrative law expansively to capture a body of law that builds and binds the presidency as a legal institution of governance. See JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION (2012).
3. The president’s two bodies.

The president’s two bodies thus provide distinct and, in important respects, competing accounts of presidential power. Representative elements of this duality are collected in the table below.

![Figure 1. The President’s Two Bodies](image)

<table>
<thead>
<tr>
<th>Personal President</th>
<th>Institutional Presidency</th>
</tr>
</thead>
<tbody>
<tr>
<td>Charismatic legitimacy</td>
<td>Practice-based legitimacy</td>
</tr>
<tr>
<td>Governance by edict</td>
<td>Deliberative governance</td>
</tr>
<tr>
<td>Transient ideological and policy commitments</td>
<td>Stable and consistent Administration</td>
</tr>
<tr>
<td>Robust legal immunity</td>
<td>Ordinary legal oversight</td>
</tr>
<tr>
<td>Criminal and tort law</td>
<td>Administrative law</td>
</tr>
</tbody>
</table>

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

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

Another way to define the presidency would be from the perspective of public law. That is, we might define the presidency in terms of the legal and quasi-legal rules (both substantive and procedural) that constitute the institution. Some of these rules are contained in the constitutional text itself. For example, the president serves a four-year term and is selected through the Electoral College. Some of

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53 Identifying the size of the EOP is notoriously difficult. See John C. Hart, The Presidential Branch 43–44 (1994). To give a rough sense of size and scale, the fiscal year 2018 budget estimate for all components within the EOP was $754,917,000 or 1,932 “FTEs” (the equivalent of full-time employment positions) and for the White House Office it was $55,000,000 or 450 FTEs. See Executive Office of the President, Fiscal Year 2018 Congressional Budget Submission, https://www.whitehouse.gov/sites/whitehouse.gov/files/docs/EOP-FY18-Budget.pdf. This may significantly understate the resources of the EOP, however, because it does not appear to include “detailees” from other agencies. On the “prodigious growth” of the EOP, see Stephen H. Hess, Organizing the Presidency 9 (1976).


55 See infra Part V.B-C.
these rules are contained in statutes and judicial precedent. Most of these rules exist as the policies, norms, and institutional practices of the presidency—what we might collectively call “presidential practice.”

Adapting a classic schematic from the field of statutory interpretation, we can conceptualize this “public law” design of the presidency in terms of a funnel. The text of Article II comprises the narrow bottom, which opens up into the more sizeable (in scope and reach) category of presidential practice at the top (with statutes and judicial precedent as intermediate points along the funnel). Meaning flows in both directions: Presidential electors, for example, are specified in the constitutional text. But they are given different meanings over time through the conventions that govern the Electoral College. The statutory creation of the National Security Council gained (and changed) meaning over time as a result of the norms that govern national security decision-making. And the status of presidential precedent, including the practice of individual presidents with respect to their papers, changed as a result of both statutes and judicial precedent. The schematic of a funnel thus helps to visualize the presidency as a product of public law, a term that I use expansively to include both formal and informal sources.

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

**Figure 2. What is the Presidency?**
These are two ways of identifying an institution of the presidency distinct from the person of the president. They are also interconnected. Statutes, judicial precedent, and presidential practice structure the organizational units that comprise the presidency and set the terms of the relationships between the incumbent and these other actors. Meanwhile, the existence of close advisers, a robust EOP, and some offices of the executive branch more generally (such as the Office of Legal Counsel) makes possible the decisional and epistemic environment necessary to entrench norms and regularize practice.

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

II. CONSTRUCTING THE PRESIDENCY: A DEFINING AMBIGUITY

The uneasy relationship between individual presidents and the presidency is as old as the presidency itself. Pierce Butler, a delegate at the Constitutional Convention, famously remarked that the Framers probably would not have designed such a powerful president had they not “‘cast their eyes towards General Washington . . . and shaped their ideas of the powers to be given to a president by their opinions of his virtue.’”61 The president’s duality is at once intrinsic in the structure of the office, and mediated or constructed in distinct (but layered) ways by different actors over time.62 This Part focuses on three key moments of presidential construction, beginning with the Constitutional Convention. The inseparability of the two bodies is a core ambivalence in these efforts to create (and revise) the presidential office, and their interdependence has only grown as a result of these designs.

A. Ambivalence at the Founding.

The president’s duality was a central theme, a core tension in the drafting of Article II. The Framers recognized that a singular executive inescapably personalizes power, and yet institutionalizes methods of responsibility and dispatch not otherwise available. The delegates continuously revisited the question of how to make the individual faithful to the office, and how to design an institution with

61 Quoted in MICHAEL KLARMAN, THE FRAMERS’ COUP 238 (2016). Historians debate Washington’s significance to the design of Article II. Compare Judith A. Best, The Presidency and the Executive Power, in THE FRAMING AND RATIFICATION OF THE CONSTITUTION 215 (Leonard Levy ed., 1987) (“Washington was the president of the convention by unanimous choice and a man so respected and admired that many historians are convinced that without his constant presence before them, the delegates would not have created a powerful executive office.”), with JACK N. RAKOVE, ORIGINAL MEANINGS 244 (1996) (“Butler’s observation hardly squares with the tangled record of proposals, tentative decisions, reconsiderations, and reversals from which the presidency finally, and belatedly, emerged.”).

stability and resiliency to the fallibilities of individual presidents. This Section shows how the delegates grappled with what they took to be intrinsic features of the president’s two bodies and how they used public law (here, constitutionality) to construct that duality. In so doing, I do not attempt to make an originalist argument for a specific meaning of Article II. Rather, I aim to show the centrality of this ambiguity to the emergent structure of presidential power.63

1. Personal/impersonal: the debate over presidential impeachment.

The idea that the presidential office imposes institutional restraints on the person—that the president should be held accountable for acting ultra vires—developed in the context of impeachment. Impeachment would render the chief magistrate “amenable to Justice,” argued Gouverneur Morris,64 it would guard against corruption by punishing the president “not as a man, but as an officer.”65 Politics is not enough to guard against abuse of power—especially, cautioned Madison, “[i]n the case of the Executive Magistracy which was to be administered by a single man, [for] loss of capacity or corruption was more within the compass of probable events, and either of them might be fatal to the Republic.”66

The debate at the Convention thus suggests a nascent conception of public law—that is, the need for a framework to hold the exercise of presidential authority to legal account in order to prevent the abuse of official power, whether understood in terms of “corruption,” “peculation” (or self-dealing), “maladministration,” “perfidy,” or—in the terms ultimately adopted—“high crimes and misdemeanors.”67 The technology of accountability imagined by the delegates was impeachment.

The delegates debated at length whether the president should be impeachable and what would be the proper forum. Suggested fora included jurists—for Hamilton, of the state courts and, as reported from the Committee of Detail, by conviction in the Supreme Court.68 But some delegates worried that the Supreme Court would not be sufficiently impartial, initially because “the first judge was [also to serve on the] privy Council,”69 and later because the justices would be appointed by the President and because the Court, “too few in number[,] . . .

63 The discussion is intended to be illustrative, not exhaustive of the ways in which the president’s duality figured into the debates at the Convention.
64 2 FARRAND, supra note 64, at 68–69.
65 Id. at 68–69.
66 Id. at 66.
67 The delegates debated how to delineate the category of impeachable offenses. Treason and bribery were too narrow. Mason proposed “maladministration” to suggest a broader sweep but Madison worried this term was too vague. Mason then withdrew maladministration and proposed “other high crimes & misdemeanors,” 2 Farrand at 550, a term with deep roots in English law and practice, see Michael Stokes Paulsen, To End a (Republican) Presidency, 132 HARV. L. REV. 689 (2018) (book review); CHARLES L. BLACK, JR., IMPEACHMENT: A HANDBOOK 49–50 (1998).
68 See 1 FARRAND, supra note 64, at 292–93 and 2 id. at 67 (discussing Hamilton’s proposal that the forum include state judges); see also id. at 185–86 (Committee of Detail draft in which the President would be “remov[able] on impeachment by the House of Representatives, and conviction in the supreme Court”); id. at 551 (Madison expressing a preference for the “supreme Court for the trial of impeachments”).
69 Id. at 427 (attributed to Govr Morris).
might [itself] be warped or corrupted.” 70 A “conclusive reason for making the Senate instead of the Supreme Court the Judge of impeachments,” argued Gouverneur Morris, “was that the latter was to [criminally] try the President after the trial of the impeachment.” 71

It is incomplete, then, to suggest that no person is above the law. The president’s two bodies required two forms of law: criminal law (or tort or contract) to govern the citizen, and impeachment—perhaps our earliest form of U.S. administrative law—to govern the presidency as an institution of executive governance. 72

2. Temporary/continuous: term limits and re-eligibility.

Throughout their discussions, the delegates implicitly recognized two senses of the “personal” president. On one meaning, the focus is the individual—his will, his judgment. But personal might also mark the motives or objectives of the individual’s exercise of power. The person might act for purely self-interested reasons or self-dealing. The delegates sought to tease apart these two understandings. They wanted individual responsibility, but public-interested governance. They sought to make the passing occupant faithful to the commitments of an office. These concerns permeated the discussion over term limits and re-election. 73

Hamilton initially argued that, in order to align the interests of the person with those of the institution, the Executive should serve during “good behavior.” 74 In England, the interest “of the King was so interwoven with that of the Nation, and his personal emoluments so great, that he was placed above the danger of being corrupted from abroad—and at the same time was both sufficiently independent and sufficiently controuled, to answer the purpose of the institution at home.” 75 Hamilton urged the delegates “to go as far in order to attain stability and permanency” toward the English model “as republican principles will admit.” 76 Others, however, feared that the absence of term limits would turn the president into an elected monarch and that, because of the difficulty of carrying out an impeachment, an Executive during good behavior was but “a softer name . . . for an Executive for life.” 77

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

70 Id. at 551 (quote attributed to Govr Morris); see also id. (Sherman “regard[ing] the Supreme Court as improper to try the President, because the Judges would be appointed by him.”). Others feared that the Court, at least acting alone, would not command enough authority to remove a president from office.
71 Id. at 500.
72 Cf. 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 480 (Jonathan Elliot ed., 2d ed., J.B. Lippincott & Co. 1901) (“[N]ot a single privilege is annexed to [the President’s] character; far from being above the laws, he is amenable to them in his private character as a citizen, and in his public character by impeachment”).
73 The delegates considered multiple approaches, including a three-year term with re-eligibility and a seven-year term without. See 1 FARRAND, supra note 64, at 68–69.
74 Id. at 289–92.
75 Id. at 289.
76 Id.
77 2 id. at 53.
the duties of governance. Ineligibility for re-election, argued Gouverneur Morris, would “tempt him to make the most of the Short space of time allotted him, to accumulate wealth and provide for his friends.” It was precisely this fear that a temporary magistrate would be insufficiently loyal to the office that led some delegates to support the availability of impeachment for the president.


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

The problem, argued Madison, “arose from the nature of Republican Government [itself] which could not give to an individual citizen that settled pre-eminence in the eyes of the rest, . . . [nor] that personal interest against Betraying the National interest, which appertain to an hereditary magistrate.” Revisiting the issue quite late in the proceedings, Benjamin Franklin pressed that the delegates had “too much . . . fear [in] cabals in appointments by a number, and . . . too much confidence in those of single persons.” A Council, he argued, “would not only be a check on a bad President but . . . a relief to a good one.” John Dickinson agreed that “It would be a singular thing if the measures of the

78 See Best, supra note 61, at 214.
79 2 FARRAND, supra note 64, at 53.
80 See ERIC M. NELSON, THE ROYALIST REVOLUTION: MONARCHY AND THE AMERICAN FOUNDING (2014); see also RAKOVE, supra note 61, at 273.
81 James Wilson, probably the presidency’s most influential architect, argued during the Convention that a “single magistrate . . . [would] give[e] energy[,] dispatch and responsibility to the office.” 1 FARRAND, supra note 64, at 65-66; see also KLARMAN, supra note 61, at 215 (“Wilson . . . more than anyone in Philadelphia influenced the design of the presidency”).
82 See 1 FARRAND, supra note 64, at 21; id. at 93-99; 2 id. at 343–44; id. at 367; see generally Rakove, supra note 61.
83 See CHARLES C. THACH, JR., THE CREATION OF THE PRESIDENCY, 1775-1789, at 25–55 (1923); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 431–35 (1998 ed.). These state constitutions generally rejected executive unitariness: “[i]n at least two states, the executive was a council, meaning that a council majority decided how to exercise all or almost all executive powers,” SAIKRISHNA BANGALORE PRAKASH, IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE 33 (2015), and in other states the form and powers of the privy council varied. See THACH, supra, at 27–28. New York stood out as the exception; “[t]here was no privy council of the kind set up elsewhere in America, the sole remnants of the idea being found in the senatorial council of appointment and the council of revision.” THACH, supra, at 35; id. at 37 (“all of the isolated principles of executive strength in other constitutions were here [in the New York constitution] brought into a new whole”); see also PRAKASH, supra, at 33 (“The Massachusetts governor [under the 1780 state constitution] was another exemplar of strength.”).
84 FARRAND, supra note 64, at 138.
85 2 id. at 542 (Sept. 7).
86 Id.
Executive were not to undergo some previous discussion before the President.87 A final motion to add such a council was defeated. But the Opinions Clause, which passed the same day, retains a version of this advisory function, authorizing the president to “require the Opinion, in writing, of the principal officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices.”88

Competing images of the chief executive as an individual, acting on his will, and an institution, with the markings of stability, continuity, and expert counsel thus pervaded the discussions at the Convention, and they carried through in Hamilton’s defense of the presidency in The Federalist. Hamilton emphasized the benevolent “power of a single man,” with “a due dependence on the people.”89 And yet, he stressed “the intimate connection between the duration of the executive magistrate in office, and the stability of the system of administration.”90 As political scientist Jeremy Bailey argues, “Hamilton showed the need for not one, but two executives . . . [O]ne would use elections to make republican theory work with the requirements of energy. The other would be staffed by qualified men who would be attracted by the permanence of the institution as well as its insulation from public opinion.”91

### B. Growing Interdependence

Though the president’s two bodies create an inescapable tension, the story of the American presidency is one of interdependence. As a matter of political development, the presidency gained personal and institutional power together, and these developments in important respects reinforced each other.92

The nineteenth-century presidency “fluctuated violently in influence and power.”93 Though presidents like Andrew Jackson, James Polk, and Abraham Lincoln stand out as exceptions, scholars describe a succession of weak incumbents inhabiting an impoverished office, legally and politically subservient to

87 Id.; see also id. at 541 (“Mason said that in rejecting a Council to the President we were about to try an experiment on which the most despotic Governments had never ventured.”).
89 THE FEDERALIST NO. 70 (Alexander Hamilton); see also THE FEDERALIST NO. 74 (Alexander Hamilton) (arguing with respect to the pardon power that “one man” is a better “dispenser of mercy”).
90 THE FEDERALIST NO. 72 (Alexander Hamilton); see also THE FEDERALIST NO. 71 (Alexander Hamilton) (duration in office would promote “personal firmness” because it would give the president a personal stake in the presidency; “a man acting in the capacity of Chief Magistrate, under a consciousness, that in a very short time he must lay down his office, will be apt to feel himself too little interested in it.”).
92 See Theodore J. Lowi, The Personal President: Power Invested, Promise Unfulfilled 57 (1985) (“The presidency grew because it had become the center of a new governmental theory, and it became the center of a governmental theory by virtue of a whole variety of analyses and writings that were attempting to build some kind of consonance between the new, positive state and American democratic values.”).
Congress. In his classic *The American Commonwealth*, first published in 1888, James Bryce dedicated a full chapter to the question why “great men are not chosen president.” Bryce argued that party politics and congressional dominance meant that, “in quiet times,” American presidents did not need to be great; the office simply did not require it. Then-professor of political science Woodrow Wilson, still focused on “Congressional Government,” described the president as titular head of an “Executive” the constitutional contours of which remained “very difficult to lay down”; “[t]hose elements can be determined exactly of only one administration at a time, and of that only after it has closed and someone who knows its secrets has come forward to tell them.” Nineteenth-century presidents occupied a small and relatively private institutional structure. They regularly hired family members and close relatives to serve as their clerks and “private secretaries,” and they paid these small staffs out of pocket. The intellectual underpinnings and institutional supports of a more robust presidency developed in patchwork fashion.

This Section focuses on two specific moments of revision: the presidential “mandate,” which political scientists trace to President Andrew Jackson, and the Executive Office of the President (EOP) created under FDR. I focus on these because the presidential mandate is widely embraced as a marker of the personal president, while the EOP is often discussed as the emblem of the institutional presidency. Yet each reveals a variant on the two bodies problem. They are, in a sense, two sides of the same struggle for public law: the question of how to

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96 Bryce, supra note 95, at 70-75; see also Lowi, supra note 92, at 40 (“In the nineteenth century, chief executives were chief of very little and executive of even less. They were commanders-in-chief without an army and chief diplomats without a unified and professional diplomatic corps and without any substantial foreign policy except the tariff.”).

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

98 President McKinley would change the title from private secretary to secretary to the president in an effort to “give the office a new dignity.” Hart, supra note 53, at 22.


101 See, e.g., Burke, supra note 99, at 1–24.
integrate the president’s two bodies. These developments are also intercon-
connected; the Jacksonian presidential mandate is reformulated by Progressive-era
thinkers into an argument for the institutionalization of the presidency.102

1. The presidential “mandate.”

Political scientists trace the origins of a democratic (or “pseudo-democratic”) theory of presidential power to Andrew Jackson.103 A confluence of factors, including ideology, party politics,104 and changes in the state rules governing white male suffrage105 contributed to the Jacksonian construction of the incumbent as “the direct representative of the American people.”106 Jackson’s war with the Bank of the United States became a key battleground over the nature of the presidency and the institutional powers of a popular or democratic leader. Jackson regarded the Bank as a personal threat and a danger to American democracy,107 as well as an ideological enemy to “the humble members of society—the farmers, mechanics, and laborers.”108 As Professor Robert Remini recounts, to destroy the Bank, Jackson “stretched the veto power and claimed the right to block legislation for reasons of policy or expediency rather than constitutionality.”109 Following his veto of legislation to re-charter the Bank—hotly contested during his reelection campaign—Jackson interpreted his reelection as a mandate to kill the Bank, an interpretation of the election contested by contemporaries.110

Jackson embraced a muscular understanding of the removal power as the institutional instrument through which the President could implement his popular mandate to redirect government policy. Yet Jackson also observed an important institutional restraint on the incumbent’s power. The president could not step into the shoes of the Secretary of the Treasury and act in his place (to
remove the government’s deposits from the Bank); where authority was de-
legated by Congress to the Secretary of the Treasury, it had to be exercised by the
Secretary and not the President.\footnote{111}

Following Jackson, the idea that the president is accountable to a national
electorate and uniquely situated to represent a national interest developed spo-
radically during the nineteenth century.\footnote{112} Political scientist Jeffrey Tulis argues
that the rhetorical practices of the presidency changed in the early twentieth cen-
tury—with significant interventions from Presidents Theodore Roosevelt and
Woodrow Wilson—from formal and written communications directed to Con-
gress to a more popular or “public” president communicating directly to the
mass public.\footnote{113} Wilson also reestablished the practice, abandoned by Thomas
Jefferson, of presidents appearing personally before Congress.\footnote{114} In defending
this shift, Wilson spoke directly to the president’s two bodies. By personally “ad-
dress[ing] the two Houses,” Wilson urged, he was able “to verify . . . that the
President of the United States is a person, not a mere department of Govern-
ment hailing Congress from some isolated island of jealous power, sending mes-
sages, not speaking naturally and with his own voice[].”\footnote{115} Though their causes
are contested, these developments helped to entrench a culture of presidential
leadership rooted in the person.

The conception of the president as the singular representative of “the Peo-
ple” has had a dramatic effect on the institutional powers of the office, even as
its theoretical and empirical underpinnings have long been questioned.\footnote{116} In his
classic \textit{The Myth of the Presidential Mandate}, political scientist Robert Dahl under-
scored the vulnerability of this theory of American democracy. Dahl argued that
“no elected leader, including the president, is uniquely privileged to say what an
election means—nor to claim that the election has conferred on the president a
mandate to enact the particular policies the president supports.”\footnote{117} Even as the
mechanisms of a presidential mandate remain conceptually elusive and empiri-
cally gaunt—perhaps all the more so in times of deep polarization—this con-
struction of the presidency has had a firm grip on constitutional culture and

\footnotesize{\begin{itemize}
\item \footnote{111}{See id. at 1590, 1597.}
\item \footnote{112}{See WHITE, supra note 103.}
\item \footnote{113}{See JEFFREY TULIS, THE RHETORICAL PRESIDENCY (1987). Scholars debate the origins of the “rhetor-
cical” or “public” presidency and the extent to which it constitutes a break from nineteenth-century practice. See Renan, Presidential Norms, supra note 8, at 2231–34, 2246–50 (collecting sources and discussing the scholar-
ly disagreements).}
\item \footnote{114}{For a description of this change and a discussion of the competing theories to explain it in the political
science literature, see, e.g., Anne C. Pluta, Reassessing the Assumptions behind the Evolution of Popular Presidential
Communications, 45 PRES. STUD. Q. 70 (2015).}
\item \footnote{115}{Woodrow Wilson, Address to a Joint Session of Congress on Tariff Reform, Apr. 8, 1913, available at
https://www.presidency.ucsb.edu/documents/address-joint-session-congress-tariff-reform.}
\item \footnote{116}{Indeed, they were questioned in Jackson’s time. See REMINI, supra note 106, at 157 (writing that Senator
Daniel Webster “expressed the feelings of a majority of his colleagues who feared . . . the beginning of
presidential despotism, or, as Webster put it: ‘ONE RESPONSIBILITY, ONE DISCRETION, ONE
WILL!’”).}
\item \footnote{117}{Dahl, supra note 14, at 366.}
\end{itemize}}
The constitutional legitimacy of the administrative state is increasingly framed in terms of the incumbent and his singular connection to the people. Meanwhile, the idea that the president is uniquely situated to represent the national interest has shaped the “institutional entailments” of the office, such as the presidency’s statutory power over the budget process. Proponents of a robust presidency reformulated the presidential mandate into an argument for the institutionalization of the presidency.

2. The Executive Office of the President.

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

The Brownlow report offered an interpretation of the president’s two bodies, though it is not framed as such. It presented a framework to organize an institutional presidency related to but separate from the personal president. Brownlow grappled with but ultimately left unresolved the question of how to understand their interdependence—an ambivalence heightened by the political and moral impulse to distinguish the American presidency from the fascist models of executive power then looming abroad. The Brownlow report argued that individual presidents should have a small “immediate staff.” These “assistants, probably not exceeding six in number” in addition to his current secretaries, would be channels for the incumbent to the institution. The Brownlow report elaborated: “These aides would have no power to make decisions or issue instructions in their own right. They would not be interposed between the President and the heads of his departments . . . They would remain in the background, issue no orders, make no decisions, emit no public statements.”

118 For critiques of this theory of presidential control in current legal scholarship, see Nzelibe, supra note 14; and also Jessica Bulman-Pozen, Administrative States (unpublished manuscript) (on file with author); Aziz Huq, Removal as a Political Question, 65 STAN. L. REV. 1 (2013); Matthew Stephenson, Optimal Political Control of the Bureaucracy, 107 MICH. L. REV. 53 (2008).
119 See generally Nzelibe, supra note 14, at 1242 (collecting and critiquing these lines of scholarship).
120 See Dearborn, supra note 102, at 1 (“The BAA was the first instance in which Congress passed a law that relied upon the idea of presidential representation as its core design assumption.”).
121 See, e.g., FORD, supra note 103, at 215 (“While the presidential office has been transformed into a representative institution, it lacks proper organs for the exercise of that function . . . and the body-politic suffers acutely from its irregularity.”); cf. Dearborn, supra note 102, at 1.
122 REPORT OF THE PRESIDENT’S COMMITTEE ON ADMINISTRATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES 18 (1937) [hereinafter Brownlow Report]; see also HART, supra note 53, at 26 (“[T]he modern staff system took off with the publication of the Brownlow report.”).
123 Brownlow Report, supra note 122, at 18.
124 See Noah Rosenblum, Ch. 3 of draft dissertation (on file with author).
125 See generally HART, supra note 53.
126 Brownlow Report, supra note 122, at 19. In words that would quickly become both famous and infamous, Brownlow argued that these aides “should be possessed of high competence, great physical vigor, and a passion for anonymity.” Id. at 19.
the president’s immediate staff would tend to the person, a separate institutional and organizational apparatus would implement the policy, organization, and budget planning of the presidency. Specifically, three managerial agencies would be relocated to the Executive Office—the Bureau of the Budget, the Civil Service Administration, and the National Resources Board, and the president would be given “immediate responsibility” for their work.127

The Brownlow report reflects a deep ambivalence among progressive thinkers about the president’s duality. The two bodies problem is implicit in these reformers’ efforts to construct an office amenable to the incumbent’s policy and political leadership but not wholly contingent on his personal attributes. These reformers celebrated the policy achievements of individual presidents but feared a “quality of leadership” that is overly dependent on the whim of the sitting president; as one scholar urged, “[t]he point is that we have leadership by presidents at times, but the presidency is not yet an institution. It has traditions; but it lacks essential organization and supporting personnel. Traditions alone are not enough.”128 Instead, the presidency “must be the channel through which the thinking and experience of the entire executive side of government are pooled and brought to bear upon the problems of government. The President must be the spokesman for the ‘administration’ in the real sense of the word, not merely the interpreter of his own fancies.”129 Brownlow himself would later reflect on the uneasy interconnection between the person and the office: “If I take the two phases, the President and the Presidency, the Man and the Institution, together,” he wrote, “it is because as I see it, while they are distinguishable at certain times and in light of certain events, they are nevertheless inseparable.”130

The Brownlow report was hailed by some and impugned as a dictatorial power grab by others. Congress eventually passed a presidential authority to reorganize executive government and bolster the presidential staff in the Reorganization Act of 1939.131 Pursuant to this new authority, President Roosevelt submitted a reorganization plan to Congress and issued an Executive Order that would redesign the structure of the presidency.132 Executive Order 8248 implemented the basic framework proposed by Brownlow. The Order created a White House Office “to serve the President in an intimate capacity in the performance of the many detailed activities incident to his immediate office.”133 The Order then detailed the responsibilities of the EOP, specifying that the Bureau of the

127 Id. at 20.
128 See George A. Graham, Reorganization—A Question of Executive Institutions, 32 AM. POL. SCI. REV. 708, 710 (1938).
129 Id. at 710; cf. HERBERT DAVID CROLEY, PROGRESSIVE DEMOCRACY 297 (1915) (writing, in the context of gubernatorial leadership, that “if the executive were placed in a position which forced him to assume political leadership of the state and which provided him with all the necessary weapons and instruments of leadership, the adoption of progressive legislation would not depend so much upon the election of a very exceptional individual.”).
131 HART, supra note 53, at 28.
132 See HART, supra note 53, at 36 (“The Brownlow report, the Reorganization Act, Reorganization Plan No. I, and Executive Order 8248 together were a watershed in the history of presidential staffing”).
Budget and the National Resources Planning Board would be the “two principal management arms of the Government.” This distinction between the institutional body (the EOP) and the incumbent’s personal staff has since disintegrated. Political scientists argue that “[t]he White House Office is now the directing force of the presidential branch, and the important units within the EOP are very much satellite agencies of the White House Office.”

The “institutional capstone of the progressive presidency,” the EOP enabled closer presidential management of executive policy, law, and budget processes. But the EOP also provided an injection of professional judgment, interdisciplinary expertise, and institutional processes into the methods of presidential decision-making. Political scientist Nelson Polsby remarked that a landmark development of the post-war period was the “emergence of a presidential branch of government separate and apart from the executive branch . . . that sits across the table from the executive branch at budgetary hearings, and that imperfectly attempts to coordinate both the executive and legislative branches in its own behalf.” Historian and political scientist Clinton Rossiter similarly observed in 1949 that the EOP is not “simply a staff that aids the President . . . [but] is fast developing into an agency that also formulates and coordinates policies at the highest level.” Beyond organizational and political structure, legal scholars (including myself) have elaborated on small-c constitutional norms and institutions that make the policies and legal interpretations of the presidency more continuous; promote procedural regularity and deliberative decision-making; and instantiate internal checks on the president through the presidency.

* * *

We have never fully come to terms, constitutionally or politically, with the relationship between individual presidents and the presidency. Anticipating a paradox that would continue to define the presidency if not American democracy, Hamilton is said to have observed that the time would “assuredly come when every vital question of the state will be merged in the question, ‘Who shall

134 Id. § III.
135 See HART, supra note 53, at 112; HESS, supra note 53, at 5–7.
136 HART, supra note 53, at 112. The structure of the EOP has changed over time, with organizational units both created and dismantled by individual presidents and by Congress. But four divisions have formed “the core” of the EOP since the late 1940s: the White House Office and the Bureau of the Budget (what would become the Office of Management and Budget)—both part of FDR’s first reorganization—as well as the Council of Economic Advisers and the National Security Council. HART, supra note 53, at 39.
138 See id.; Renan, Presidential Norms, supra note 8.
140 Clinton L. Rossiter, The Constitutional Significance of the Executive Office of the President, 43 AM. POL. SCI. REV. 1206, 1214 (1949); see also HART, supra note 53, at 241 (“[though] designed as an administrative entity, [the EOP] has become a political entity competing for power in the pluralistic and fragmented structure of American government.”).
141 See Renan, Presidential Norms, supra note 8, at 2239–42; Trevor W. Morrison, Stare Decisis in the Office of Legal Counsel, 110 COLUM. L. REV. 1448 (2010).
142 See Renan, Presidential Norms, supra note 8, at 2231–29.
143 See BURKE, supra note 99; JACK GOLDSMITH, POWER AND CONSTRAINT (2012); Neal Katyal, Internal Separation of Powers, 115 YALE L.J. 2314 (2006); Renan, Presidential Norms, supra note 8.
be the next President?"”. Influential commenters have continued to oscillate between a president- and presidency-based approach to the chief executive. If anything, the tension between these two bodies—and their interdependence—has only deepened.145

Scholars have long argued that the presidency has become too personalized, that politics and power has become too concentrated in the incumbent. Proposing “[t]he abolition of the presidency” in 1884, Henry C. Lockwood cautioned against “[t]he tendency of all people to elevate a single person to the position of ruler…. A nation comes to know the characteristics and nature of an individual. It learns to believe in the man…. He is the chief officer of the nation. He stands alone. He is a separate power in himself. The lines with which we attempt to mark the limits of his power are shadowy and ill-defined” (and this at the historical nadir of the presidency!).146 Self-consciously echoing Lockwood nearly a century later, Edward Corwin argued that presidential power had become “dangerously personalized, in two senses: first, that the leadership which it affords is dependent altogether on the accident of personality, against which our haphazard method of selecting Presidents offers no guarantee; and, secondly, that there is no governmental body which can be relied upon to give the President independent advice and which he is nevertheless bound to consult.”147 And political scientist Theodore Lowi would depict “a plebiscitary republic with a personal presidency[,] . . . a virtual cult of personality revolving around the White House.”148

At the same time, scholars alternatively celebrate or critique the rise of an institutional presidency with the capacity simultaneously to promote and to check the will of the incumbent, to diffuse the exercise of presidential power, to regularize presidential decision-making, and to make more continuous or ongoing the policies and practices of individual presidents. While some argue that the rise of an institutional complex surrounding the incumbent is what “converts the Presidency into an instrument of twentieth-century government,”149 others object that it undercuts the incumbent’s control of the presidency, the executive branch’s independence from the president, or both. Political scientist Sidney Milkis suggests a longstanding “fragility” in how American politics has come to understand the presidency150: first, the president is accountable to the people, infusing national governance with democratic values; and second, the presidency

144 FORD, supra note 103, at 196.
145 See generally Peri E. Arnold, The Presidency as Individual and Collective, 49 REV. POL. 432, 433 (1987) (reviewing COLIN CAMPBELL, MANAGING THE PRESIDENCY (1986)) (“[t]he contemporary presidency presents a paradox to those who would study it . . . Is presidential behavior a system of interactions within a complex organizational network, or is it the actions of one person imposing his own understanding, character, and ambitions upon the office”).
147 CORWIN, supra note 17, at 372 (emphasis in original).
148 LOWI, supra note 92, at xi; see also HEALY, supra note 95; Bruce Ackerman, The New Separation of Powers, 113 HARV. L. REV. 633 (2000).
149 Rossiter, supra note 140, at 1214.
is institutional and administrative, entrenching policy and making decision-making more professional, ongoing, and pluralistic. As Milkis cautions, these “two pillars” of presidential leadership “are not merely two sides of the same coin.”

An enduring question in political science is whether presidential power is better understood in personal or institutional terms. Richard Neustadt reoriented the field of presidential studies to the incumbent’s “power to persuade,” a direction that others developed with a focus on the personal characteristics of presidential leadership. Meanwhile, Terry Moe and others responded with a more structural and institutional account of the presidency and the nature of institutional leadership in the context of competing sources of constitutional control. Stephen Skowronek has offered something of a synthesis: individual presidents, operating in “political time,” inhabit a presidency that develops through “secular time.”

If political scientists debate the implications of the president’s personal and institutional power for American politics, the implications of the president’s duality for public law remains surprisingly understudied. As the next Parts show, our major doctrinal and theoretical disagreements and confusions track the fault lines between the president’s two bodies—that is, the dimensions of personal/impersonal, temporary/continuous, and singular/composite that comprise the president’s duality.

III. THE PERSONAL/IMPERSONAL DIMENSION

What does it mean for the Constitution to vest “the executive power” in a person? Imagine if Article III had vested the judicial power in “a Chief Justice,” rather than the courts. (The language initially drafted by the Committee of Detail was even more explicit: “The Executive Power of the United States shall be

151 Id. at 381–83 (emphasis omitted).
152 Id. at 382.
153 See Richard Neustadt, Presidential Power 153 (1960) (“[I]t is not sufficient to gesture toward the ‘institutionalized Presidency’. . . . A President is helped by what he gets into his mind”); see also James David Barber, The Presidential Character (1977).
155 Skowronek, supra note 104, at 30 (“Presidential leadership in political time . . . refer[s] to the various relationships incumbents project between previously established commitments of ideology and interest and their own actions in the moment at hand. Presidential leadership in secular time . . . refer[s] to the progressive development of institutional resources and governing responsibilities of the executive office.”); cf. Gregory L. Hager & Terry Sullivan, President-centered and Presidency-centered Explanations of Presidential Public Activity, 38 Am. J. Pol. Sci. 1079 (1994) (assessing competing approaches to understanding presidential decision-making and finding some support for presidency-centered research, but arguing that combining both approaches “allows for better theory, testing, and explanation,” id. at 1099); Lawrence R. Jacobs, Building Reliable Theories of the Presidency, 39 Pres. Stud. Q. 771, 775 (2009) (observing that “[q]uite apart from rational choice, the field of presidency research has been engaged in a decades-long, thoroughgoing, and decisive shift from personalistic and particularistic accounts to impersonal and institutional analyses,” but arguing that recent efforts toward synthesis are especially valuable).
vested in a single person. His style shall be ‘The President of the United States of America;’ and his title shall be, ‘His Excellency.’”

This Part argues that resonances of the king’s duality—in particular, traces of a personal, monarchic power—are a defining if unsettling aspect of the constitutional presidency. Vesting power in the person of the president promotes individual responsibility and dispatch, but it also augments the personal clout of one individual and creates the possibility that the immense powers of the constitutional office will be put in the service of his personal agenda. The personal/impersonal dimension thus poses vexing questions for public law about the nature of presidential discretion and the meaning of presidential leadership. It complicates questions of justiciability as well. Traces of a royal “dignity” in the person of the president sit uneasily with public law conceptions of a constitutional presidency subject to judicial review. This tension confounds understandings of the role of law—and legal advisers—as a restraint on the individual president’s discretion from within the presidency as well.

The fundamental interdependence of person and office belies efforts to make the president’s personal and official character fully severable. Any legal line cannot emerge from the president’s duality itself. Rather, in managing the president’s two bodies, public law is making (often implicit) choices about how to effectuate substantive constitutional commitments.

A. The Nature of Presidential Discretion

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

1. Presidential leadership in a constitutional government.

Perhaps the most famous Article II case, Youngstown Sheet & Tube Co. v. Sawyer (“the Steel Seizure case”), provides a rare explicit treatment of the president’s personal authority. See generally Julian Davis Mortenson, Article II vests Executive Power, Not the Royal Prerogative, 119 COLUM. L. REV. 1169 (2019) (describing the disagreement among originalists and making an important contribution to the original meaning of “executive power”). For a classic account of the competing originalist argument, see, for example, Sairakash B. Prakash & Michael D. Ramsey, The Executive Power over Foreign Affairs, 111 YALE L.J. 231 (2001).

156 The final language of this clause, vesting power in a president, did not receive separate consideration by the Convention as a whole. See CORWIN, supra note 17, at 12.

157 The argument intersects with some originalist work on the presidency, see, e.g., PRAKASH, supra note 83, at 12-25 (illuminating the varied meanings and “imprecise contours” of monarchy), but approaches it from a different perspective (and temporal frame), and draws different legal and normative implications. In contrast to the framework developed in the text, much of that scholarly debate has focused on the meaning of “the executive power” in the Vesting Clause, rather than the interdependence of constitutionalism and presidential charisma, and it has framed the inquiry in terms of Founding-era meaning rather than a dynamic constitutional and political development. See generally Julian Davis Mortenson, Article II Vests Executive Power, Not the Royal Prerogative, 119 COLUM. L. REV. 1169 (2019) (describing the disagreement among originalists and making an important contribution to the original meaning of “executive power”). For a classic account of the competing originalist argument, see, for example, Sairakash B. Prakash & Michael D. Ramsey, The Executive Power over Foreign Affairs, 111 YALE L.J. 231 (2001).

158 This dimension is related to, but analytically distinct from the singular/composite dimension discussed in Part V. One could make the office singular but impersonal or more impervious to the personal discretion of the office-holder.

159 343 U.S. 579 (1952).
dent/presidency. But while Justice Jackson’s tripartite framework for presidential power in relation to Congress has long consumed constitutional scholars, the case has been largely overlooked as an account of this central tension. A core disagreement between Justice Jackson’s concurrence and Chief Justice Vinson’s dissent is the nature of presidential leadership in a constitutional government.

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

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

The “essence” of constitutional government, for Jackson, is to temper these personal features of a charismatic presidency with the “impersonal forces which we call law.” This, then, is the constitutional problem with President Truman’s seizure of the steel mills: “[t]he executive action . . . originates in the individual will of the President” and, as a result, “represents an exercise of authority without law.”

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

160 Id. at 653–54 (Jackson, J., concurring).
161 Id. at 654.
162 Id. at 655.
163 See id. at 683 (Vinson, C.J., dissenting).
164 Id. at 708–09.
165 Id. at 701.
166 See id. at 678–79; see also Shalev Roisman, Presidential Factfinding, 72 VAND. L. REV. (forthcoming 2019) (manuscript at 40–41 n.205).
Their disagreement reveals a deep tension, but also a shared objective—to reconcile the personal power of the incumbent with the more impersonal qualities of constitutional government. For Justice Jackson, the personal president is a threat to the constitutional order; the role of constitutional law is to offer a counterweight to presidential charisma in the form of the separation of powers. For Chief Justice Vinson, the president’s individual judgment is not an extra-constitutional impulse but a facet of constitutional leadership itself. And yet, the incumbent’s judgment rests on the informed assessment of a more impersonal and deliberative institution. Chief Justice Vinson’s dissent thus embraces (at least implicitly) the president’s duality as the source of constitutional leadership—a quality of leadership that rests in part on personal judgment and in part on the collective and cumulative experience of a more impersonal office. The idea that the constitutional presidency entails this duality, a largely neglected aspect of Chief Justice Vinson’s dissent, reflects and itself anticipates a core struggle of American public law.167

The conceptual disagreement, so framed, is not limited to the president’s emergency power. It goes to the justification for executive government itself. There is an ongoing ambivalence in American constitutionalism about the centrality of the individual president and the checks that the institutional presidency imposes (such as reason-giving and an institutional separation of functions) on his charismatic leadership.

2. Presidential power and the ultra vires question.

The tension is heightened in connection to those powers constitutionally vested uniquely in the president—what some have termed the “core” or “central prerogatives” of the constitutional presidency.168 There is an under-examined but widely shared view that the president, when he exercises such powers, is using a type of authority subject to his absolute discretion. On this theory, when the president exercises the pardon power, for example, there is no sense in which he can act ultra vires. The idea underlying ultra vires action is that an “officer is an officer only so long as he acts within his powers; that when he transcends his authority he ceases to be an officer and [instead acts] only [as] a private individual.”169 If at least some Article II powers are subject to the president’s absolute discretion, then there is no circumstance under which his use of them ceases to


168 See, e.g., David J. Barron & Martin S. Lederman, The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding, 121 HARV. L. REV. 689, 726 (2008) (internal quotation marks omitted). The idea of “core” powers and the question of what types of power fall within such a core are deeply contested. See id. (discussing this debate); see also, e.g., Authority of the United States to Enter Settlements Limiting the Future Exercise of Executive Branch Discretion, 23 Op. O.L.C. 126, 1999 WL 1262049 (1999) [hereinafter, OLC Settlements Authority Op.] (“Article II . . . vests certain more specified powers directly in the President . . . and commits their exercise to the President’s unfettered discretion . . . . An analysis of the expressly named discretionary functions that . . . the Constitution commits to the President is beyond the scope of this memorandum . . . [but it includes] the President’s power to make recommendations to Congress.”).

169 WILSON, CONSTITUTIONAL GOVERNMENT, supra note 97, at 19–20. Wilson continues: “[i]t is the same understanding from the king at the top to the constable at the bottom.” Id.
be official—no sense in which the president’s conduct collapses into the impermissible behavior of a private individual.\textsuperscript{170}

Attorney General Bill Barr makes a version of this argument in a memorandum concerning the Mueller investigation, which Barr prepared before he was Attorney General. The president’s Article II powers are “absolute” and “illimitable,” argues Barr. There is no legally forbidden motive when the incumbent exercises a core power of Article II including, for Barr, the law enforcement power.\textsuperscript{171} Others have made a version of this argument in connection to President Bill Clinton’s pardons of his brother and of a personal financial benefactor and international fugitive (among others): there is no such thing as a “corrupt” purpose for a presidential pardon.

On this view, self-dealing on the part of the incumbent (at least short of bribery) is simply irrelevant to the constitutional exercise of at least some powers of the office. This approach has some affinity to, if not roots in the English understanding of the king’s two bodies as it developed in the sixteenth century. As to those prerogatives deemed inseparable from the person, like the pardon power, the king had “unfettered discretion.” For other acts, such as the issuance of proclamations, the law could impose conditions.\textsuperscript{172} Extending this theory to the presidency, the idea would be that there is some set of Article II powers that are inseparable from the person, and for which the incumbent has absolute discretion.

This approach to presidential power is in deep tension, however, with the development of legitimate authority in American public law.\textsuperscript{173} From the beginning, the institution of the presidency was designed to check purely personal self-dealing on the part of the incumbent. Public law has continued to provide a site for contestation over the meaning of public-spirited governance and the legal tools for achieving it. The debate at the Constitutional Convention focused on how structural mechanisms such as term limits and eligibility for reelection might curb personal self-dealing by individual presidents, and how impeachment might regulate it.\textsuperscript{174} Scholars also emphasize the role of the presidential oath clause, which, together with the take care clause, imposes on the individual a

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\item \textsuperscript{170} The one exception to this view that appears to be recognized, even by its strongest adherents, is bribery. As OLC has suggested, and as Josh Blackman has elaborated, the prohibition on bribery is rooted in the constitutional prohibition on any increase in the president’s compensation while he is in office and the specific reference to bribery as a ground for impeachment. See Josh Blackman, The Special Counsel’s Constitutional Analysis: The Clear Statement Rule, Lawfare, Apr. 19, 2019 (discussing Application of 28 U.S.C. 458 to Presidential Appointments of Federal Judges, 19 Op. OLC 350, n.11 (1995)).
\item \textsuperscript{171} Memorandum from Bill Barr to Rod Rosenstein, Deputy Att’y General, U.S. Dep’t of Justice & Steve Engel, Assistant Att’y General, U.S. Dep’t of Justice (June 8, 2018), https://int.nyt.com/data/documenthelper/549-june-2018-barr-memo-to-doj-mue/b4c05e39318dd2d136b3/optimized/full.pdf [hereinafter Barr Memorandum].
\item \textsuperscript{172} Holdsworth, supra note 24, at 560–61. To distinguish between these two ideas of the king’s power, lawyers “borrowed the terms ‘absolute’ and ‘ordinary,’” already in use to distinguish common law cases from equity. See id.
\item \textsuperscript{173} It is in tension with the development of legitimate power in English constitutionalism as well, for the idea of a royal prerogative illimitable by law did not survive the Glorious Revolution. For a detailed discussion, see Mortenson, supra note 157, at 1199.
\item \textsuperscript{174} See supra Part II.A; see also Daniel J. Hemel & Eric A. Posner, Presidential Obstruction of Justice, 106 CAL. L. REV. 1277, 1311–12 (2018).
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duty to “faithfully execute” the office.\textsuperscript{175} Beyond original public meaning, understandings of public-interested power have developed since the Founding through public law. The collapse of the spoils system and the emergence of conflict-of-interest prohibitions mark important steps in the regulation of power through public law. Conceptions of legitimate presidential authority cannot be fully disentangled from these developments. As positive law makes illicit conduct that was previously licit, it changes the expectations on the presidency.\textsuperscript{176}

The idea that “corrupt” presidential action is incompatible with the constitutional presidency is at the crux of Special Counsel Robert Mueller’s Report regarding presidential obstruction of justice.\textsuperscript{177} The Special Counsel reasoned that a statutory prohibition on “corruptly” obstructing a criminal proceeding, as applied to the president’s removal of the FBI Director or his attempted removal of the Special Counsel, would not unduly intrude on the president’s Article II authority because the statutory prohibition is of a piece with the president’s constitutional duty to faithfully execute the law.\textsuperscript{178}

The Special Counsel stopped short, however, of fully embracing the implications of this theory; the report leaves open the question whether corruptly removing a principal officer could constitute unlawful obstruction.\textsuperscript{179} More minimally, Mueller concludes that at least “[w]here the Constitution permits Congress to impose a good-cause limitation on the removal of an Executive Branch officer, the Constitution should equally permit Congress to bar removal for the corrupt purpose of obstructing justice.”\textsuperscript{180} If corruptly removing an officer violates the Take Care duty, however, then it should not matter whether the officer is a principal or inferior officer. Such conduct by the incumbent is \textit{ultra vires}. It ceases to be the exercise of official power. It becomes instead an unconstitutional act by the person of the president.

\textbf{B. Legal Accountability as a Two Bodies Problem}

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

The question whether the president may be compelled to present evidence in a criminal trial was first decided by Chief Justice Marshall presiding, in his capacity as circuit justice, over the treason and misdemeanor trials of Aaron Burr. Burr sought to subpoena President Jefferson for a letter written to Jefferson from General John Wilkinson, the prosecution’s chief witness. Marshall permitted the subpoena, rejecting the argument that the presidency insulates the president from his legal obligations as a citizen. In reaching this conclusion, Marshall rejected the English precedent of a royal prerogative; “the personal dignity conferred on [each first magistrate]” must be decided by reference to “the constitutions of their respective nations.” In contrast to the king, the president is (i) impeachable and (ii) “elected from the mass of the people [to which he then] returns.” The Chief Justice went on to conclude that the duties of the presidency were not so “unremitting” as to insulate the president entirely from compulsory process. Marshall reaffirmed this position in Burr’s subsequent misdemeanor trial, but qualified it with the observation that “[i]n no case . . . would a court be required to proceed against the president as against an ordinary individual.”

In response, President Jefferson authorized the partial release of the document at issue but withheld other passages.

The implications of the Burr cases for presidential immunity are contested. Marshall asserted judicial authority to compel the production of criminal evidence from the president, and Jefferson asserted presidential authority to withhold it. Relying on the Burr cases, Attorney General Wirt advised President Monroe that a subpoena for testimony could be issued against the President. Since that time, several Presidents have complied with a compulsory

183 Burr, 25 F. Cas. at 191–92.
186 Ronald D. Rotunda, Presidents and Ex-Presidents as Witness: A Brief Historical Footnote, 1975 L. FORUM I, 10.
subpoena for testimony or evidence.\textsuperscript{187} Though the practice would seem to undermine functional claims that compulsory legal process “damage[s] the Office of the Presidency,”\textsuperscript{188} the argument reemerges anew with each fight over a subpoena to the President.\textsuperscript{189}

1. Enjoining presidential power.

Following the \textit{Burr} cases, the question whether the office bestows certain immunities on the person of the president reemerged in a different context in \textit{Mississippi v. Johnson}.

The State of Mississippi sued President Andrew Johnson to enjoin him from enforcing the Reconstruction Acts of 1867. The \textit{Burr} cases featured prominently in the arguments of both sides. Just as the court could compel action by the president (the disclosure of materials) in the \textit{Burr} cases, argued the attorneys for Mississippi, so too could it compel the president to refrain from acting through the issuance of an injunction. U.S. Attorney General Stanbery countered that Chief Justice Marshall’s ruling in the \textit{Burr} cases was not only distinguishable but “a very great error.”\textsuperscript{191} When the president happens to be privy to information “in his natural capacity,” argued Stanbery, it cannot be that he must “leave his place at the head of the government . . . to attend to the business of the individual citizen.”\textsuperscript{192} According to Stanbery, Chief Justice Marshall had misapprehended the relationship between the person and the office:

“So far as the mere individual man is concerned there is a great difference between the President and a king. . . But so far as the office is concerned . . . I deny that there is a particle less dignity belonging to the office of the President than to the office of King . . . . He represents the majesty of the law and of the people as fully and as essentially, and with the same dignity, as does any absolute monarch or the head of any independent government in the world. It is not upon any peculiar immunity that the individual has who happens to be President . . . but it is on account of the office that he holds that I say the President of the United States is above the process of any court or the jurisdiction of any court to bring him to account as President.”\textsuperscript{193}

Were the court to disregard these features of the office, pressed Stanbery, it would set itself on a dangerous course. Should the president refuse to comply with the judicial order, the court would quickly find itself, by way of contempt of court, imprisoning the president and, in effect, deposing the president by judicial fiat.\textsuperscript{194}

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\textsuperscript{187} See id. at 3–9 (collecting examples).
\textsuperscript{188} See id. at 4.
\textsuperscript{189} Cf. \textit{Presidential Amenability}, supra note 185, at 7 (finding a lack of “adequate precedent for the proposition that the constitutional doctrine of the separation of powers precludes vel non the issuance of judicial subpoenas to the President,” id. at 7, but arguing that “the real problem . . . [lies] in fashioning rules which properly take into consideration the President's special status,” id. at 13).
\textsuperscript{190} 71 U.S. 475 (1866).
\textsuperscript{191} Id. at 483.
\textsuperscript{192} Id. at 483–84.
\textsuperscript{193} Id. at 484.
\textsuperscript{194} Id. at 485–87.
\end{flushright}
The Court in *Johnson* skirted this question, declining to "express[] any opinion on the broader issues discussed in argument, whether, in any case, the President of the United States may be required, by the process of this court, to perform a purely ministerial act under a positive law, or may be held amenable, in any case, otherwise than by impeachment for crime." Instead, in what has been regarded as an early form of the political question doctrine, the Court declined to review the exercise of a "purely executive and political" power by the president. Yet the Court's language—that it "has no jurisdiction of a bill to enjoin the President in the performance of his official duties"—proved susceptible of broader, still contested readings. And Attorney General Stanbery's argument about the nature of the office and the protections that it bestows on the individual continue to be used today, though the explicit connection to a monarchical office has been abandoned.

The institutional presidency ultimately provided a mechanism to check the exercise of executive power by individual presidents. Because it was technically a suit against the Secretary of Commerce, the *Steel Seizure Case* could coexist doctrinally as a judicial check on the unconstitutional exercise of power by President Truman and yet a judicial action that did not impinge on the "dignity" of the president. While the question at the heart of the *Steel Seizure Case* was the judiciary's role as a check on presidential overreach, none of the Court's opinions connected the "concern with the boundaries of presidential power to the idea of a President personally accountable within the legal system for his exercise of that power." Indeed, in *Franklin v. Massachusetts* the Court embraced precisely the opposite stance. Injunctive relief against the president himself would be "extraordinary." Much better, Justice O'Connor reasoned, to assume for purposes of standing that the incumbent would comply with an authoritative constitutional or statutory interpretation of the courts "even though [he] would not be directly bound" by it. In concurrence, Justice Scalia went even further. Scalia, in effect, recast Attorney General Stanbery's argument about prerogative power in *Johnson* as an argument about the separation of powers: That the courts cannot direct the president "to exercise the 'executive power' in a judicially prescribed fashion is implicit in the separation of powers." Yet the legality of presidential action remains reviewable, Scalia reasoned, through suits to enjoin the president's subordinates.

It is difficult to ground such an argument in the separation of powers, however. The doctrine of a royal prerogative or immunity from suit turned on the
opposite of a separation of powers; it is rooted in the dependence of royal courts on the person of the king. It was because the royal courts were the king’s courts that the king could not be sued in them. By contrast, Justice Scalia does not dispute—in fact, he embraces—the idea that the courts can review the legality of presidential action and thereby regulate the exercise of presidential power.

Wariness of enjoining the incumbent for the conduct of his presidency thus results in a legal framework under which subordinates are enjoined *in order to control the presidency*. Protecting an abstract and figurative dignitary interest of the person—an interest rooted in royal prerogative and uneasily transposed on the presidential office—leads to a doctrine that, in practice, relies on the institutional features of the presidency to subject the incumbent’s actions to legal account. The institutional presidency enables the revival of *Johnson* in *Franklin* because it blunts its impact. Yet the argument for presidential immunity appears vestigial in a legal landscape marked by judicial review of presidential action. And it gives expressive force to the idea that the institution insulates the incumbent from legal scrutiny.

2. **Executive branch legal review.**

Beyond courts, the president’s duality is at the crux of debates over legal checks inside the executive branch. The tension is perhaps starkest with respect to the White House Counsel. Is the role of the president’s chief lawyer to protect the incumbent and his policy agenda, or is it to protect the institution of the presidency, perhaps even from the incumbent himself?

Bernard Nussbaum, President Clinton’s first White House Counsel, staked out a strongly president-centered perspective—one that ultimately cost him his job. As Jeremy Rabkin recounts, “[a]fter a series of controversial interventions into the activities of various federal agencies—in each case, it seemed, simply to protect the personal reputation or political standing of Mr. Clinton—Nussbaum was forced to resign.”202 Critics argued that Nussbaum failed to appreciate that the Counsel’s obligations run to the office, not its current occupant. This position was publicly embraced by Nussbaum’s replacement, Lloyd Cutler,203 though Cutler’s own decisions in the role only underscore the difficulty of maintaining a clean separation.204 Cutler took to the press to defend a constitutional argument that any civil litigation against the President in his personal capacity must be stayed until he leaves office, an argument that does not appear to have had the support of OLC,205 and he wrote op eds and letters to the editor to defend President Clinton and the First Lady, for example, pushing back against charges of indecision by President Clinton in the selection of a Supreme Court

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204 See id. at 132.

205 Id.
nominee and defending Mrs. Clinton when a columnist suggested that her com-

During the Trump presidency, some commenters have argued that White House Counsel Don McGahn veered in the other direction: advancing the agenda of a conservative Republican presidency, while exposing the president himself to potential criminal liability. Former White House Counsel to President Obama, Robert Bauer observes that “[a]s a practical matter, there is inevitably some tension between any White House counsel’s duties to the presidency and the demands he or she faces from the particular president . . . . Typically laden with political and sometimes personal significance for a president, the most sensitive issues require the counsel to monitor closely the risks of slipping away from an institutional representation toward just protecting the Boss.”\footnote{Bob Bauer, \textit{Don McGahn as White House Counsel: An Early Appraisal}, LAWFARE (Sept. 2, 2018, 10:00 AM), https://www.lawfareblog.com/don-mcgahn-white-house-counsel-early-appraisal.}

As these episodes suggest, there is an important line between serving the person and the office. But it is inherently blurry; some tension appears inescapable.\footnote{Professor Rabkin argues that “there remains something decidedly odd about the notion that the counsel to the president serves only the presidency, not the actual president. No one suggests that the presidential press office should only defend the abstract interests of the presidency[.]” Rabkin, supra note 202, at 108.} Here are echoes of \textit{Calvin’s Case}: the presidency and the president are inseparable—to a point. And yet, every Counsel must wrestle with the question of when representing the institution requires her to resist the preferences, or even the direction of the incumbent himself.\footnote{Aaron Blake, \textit{The Trump Team Still Maintains Trump Didn’t Try to Fire Mueller. Mueller Disagrees.}, WASH. POST (Apr. 22, 2019), https://www.washingtonpost.com/politics/2019/04/22/trump-team-still-maintains-trump-didnt-try-fire-mueller-mueller-disagrees/.} Navigating that ambiguity is more a matter of judgment than law, though it is a judgment informed by the norms of the legal profession.\footnote{See Renan, \textit{The Law Presidents Make}, supra note 44, at 891–92.}

Apart from “protecting the Boss,” there remains the question whether the incumbent’s policy or ideological preferences should influence the statutory and constitutional interpretations of his presidency. Perhaps the central question that has preoccupied scholars (and practitioners) of legal advice to the presidency is the extent to which executive branch legal interpretations should reflect the preferences of the sitting president. The question has been most carefully theorized in connection to the Attorney General and the Office of Legal Counsel. Scholars have long debated whether OLC lawyers do, and whether they should, understand their role as an “advocate” advancing any reasonable argument in support of the incumbent’s objectives, or whether their role is of a more detached or impersonal legal expositor.\footnote{Randolph D. Moss, \textit{Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel}, 52 ADMIN. L. REV. 1303, 1305–06 (2000); see also John O. McGinnis, \textit{Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon}, 15 CARDOZO L. REV. 375 (1993); BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC (2010); Trevor W. Morrison, \textit{Constitutional Alarmism}, 124 HARV. L. REV. 1688 (2011); JACK GOLDSMITH, \textit{The Terror Presidency} 35–37 (2007).} Influential commenters have sought to parse legal advice oriented around the incumbent’s preferences from legal advice sensitive

\footnotesize{\textbf{\textit{Calvin’s Case}}: the presidency and the president are inseparable—to a point.}
to the institutional perspective of the presidency. While some scholars argue that
the former poses rule-of-law concerns, many understand the latter to instantiate
a core constitutional responsibility. 212

Yet the institutional orientation of the presidency cannot be fully disentan-
gled from the policy and ideological commitments of the sitting president. On
the hard and unsettled questions that routinely confront executive branch law-
yers, there is often real ambiguity and pressing moral considerations. This means
that legal review inside the presidency inevitably has to reflect someone’s ideologi-
cal and policy priors. Whether and how executive branch legal review can be
structured to promote able and honest legal analysis, while acknowledging and
creating some space for a personal moral and political judgment from the pres-
ident, is a focus of ongoing scholarly debate. 213

C. Disentangling the President’s “Public” and “Private” Character

These disagreements point to a more general problem: to what extent are the
president’s public and private character severable? In contrast to Congress or
the courts, “the President never adjourns.” 214 The duties and functions of the
presidential office are ongoing and, in important respects, under-developed and
open-ended. The question whether and under what conditions the president re-
tains a “private” character is relevant to a range of legal frameworks, including
immunities, emoluments, and impeachment. 215

1. Variants on the problem.

As discussed in more detail below, the Court has recognized an absolute im-
munity from civil liability for conduct within “the ‘outer perimeter’ of [the pres-
ident’s] official responsibility.” 216 But when does the president’s conduct fall be-
yond this “outer perimeter”? As to the behavior itself, Clinton v. Jones 217
presented the easy case because the allegations of sexual misconduct involved
the person of the president prior to his term in office. 218 Though it recognized
that any legal proceedings would need to be structured to accommodate the in-
cumbent’s schedule and duties of office, the Court declined to adopt a presiden-
tial immunity from damages actions pertaining to the incumbent’s “unofficial”
conduct. Moving from sexual misconduct to the related allegations of defama-

212 See Morrison, supra note 141; The Constitutional Separation of Powers Between the President &
213 I have developed competing models and offered my own assessment of the stakes in Renan, The Law
Presidents Make, supra note 44, at 885–902.
215 See Jurecic, supra note 6 (discussing implications for the PRA as well as litigation involving presidential
policy); see also Knight First Amendment Inst. at Columbia Univ. v. Trump, 302 F. Supp. 3d 541 (S.D.N.Y.
2018).
218 The case concerned four counts (a combination of federal and state law claims) brought in a civil action
by Paula Corbin Jones against William Jefferson Clinton. The Court noted that only the fourth count—for
defamation relating to statements allegedly made by Clinton’s agents—“arguably may involve conduct within
the outer perimeter of the President’s official responsibilities,” and that this question was not before the
Court. See id. at 686.
tion and retaliation in Jones, however, demonstrates how quickly the legal difficulties emerge. The Court declined to weigh in on the question whether a separate claim, concerning alleged misconduct by President Clinton after he took office, would be justiciable.219

Impeachment presents the same question from the other side. If the sitting president cannot be sued civilly for alleged abuses of office, he can be impeached for them.220 With respect to the presidency, a longstanding debate concerns the question whether personal misconduct can amount to an abuse of office actionable under the Impeachment Clause.221 This question was deeply contested during the proceedings to impeach President Clinton for sexual misconduct with a White House intern, and his lies under oath to cover it up. Commenters debated whether President Clinton’s behavior amounted to personal indiscretions, perhaps “disgraceful” but not impeachable,222 or whether his misconduct “gravely damage[d] the capacity of the President to lead,” and thereby undermined his fitness for office.223 In a post-Me Too legal and political culture, it might be that the President’s sexual indiscretions with a White House intern inside the Oval Office become more recognizable as an abuse of the powers of the office—an argument that did not gain much traction during the Clinton controversy.

The problem of disentangling the private and public character of the president emerges in interpretations of the Emoluments Clauses as well. A spate of recent cases challenge President Trump’s receipt of payments by foreign, federal and state governments in connection with his and the Trump Organization’s ownership of the Trump International Hotel in Washington. Defending the President, the Justice Department has argued that an “emolument” must arise out of “an office or employ” in the sense that it “must be predicated on services rendered in an official capacity.”224 The plaintiffs in these cases argue that the term should be interpreted more broadly but that, in any event, any official/unofficial distinction simply collapses as applied to the President: “When the President interacts with domestic governments or foreign nations, he does not do so as an ‘ordinary citizen,’ but as a head of state whom they have a powerful incentive to influence in any way possible.”225

Ultimately, the legal line between the president’s private and public character is “insoluble in its own terms.”226 Instead, that line should be constructed in light

219 See id.; id. at 686 & n.3.
220 Indeed, the availability of impeachment is one of the main arguments in favor of absolute immunity in Nixon v. Fitzgerald.
222 See, e.g., Statement of Arthur M. Schlesinger, Jr., Prof. of History, City Univ. of NY, at 98, in Congr. Hearings on Clinton Impeachment.
223 Id. at 95.
224 Memorandum in Support of Defendant’s Motion to Dismiss at 32, District of Columbia, 315 F. Supp. 3d 875 (No. 17-cv-1596).
225 Memorandum of Law in Support of Plaintiffs’ Opposition to Motion to Dismiss at 38, District of Columbia, 315 F. Supp. 3d 875 (No. 17-cv-1596). The courts of appeals have dismissed these cases for lack of standing.
226 Cf. Levinson, supra note 42, at 1316 (“[T]he problem of framing constitutional transactions is insoluble in its own terms.”)
of the substantive constitutional interests at stake. What patterns of presidential behavior are most threatening to constitutional norms, such as anti-corruption norms? And should public law create a zone of privacy for the incumbent notwithstanding this embeddedness? A doctrine that confronts these questions explicitly might not be more determinate than one that attempts to parse official from unofficial presidential conduct. But it would be more attentive to what is constitutionally at stake.\(^{227}\)

2. Illuminating the stakes: public law’s shifting response on presidential papers.

Just such a shift—from an effort to disentangle the president’s private and public character to a reckoning with the institutional interests at issue—transformed how public law handles presidential papers. And, in so doing, it made possible a form of institutional precedent that had eluded earlier understandings of such materials as the personal property of individual presidents.

For nearly two hundred years, presidential papers were treated as the personal property of individual presidents.\(^{228}\) As President Taft explained in lectures delivered shortly after he left office, much of what “goes through [the office of the President], signed either by the President or his secretaries, does not become the property or a record of the government unless it goes on to the official files of the department to which it may be addressed. The President takes with him all the correspondence, original and copies, carried on during his administration.”\(^{229}\) President Washington created this precedent when he left office. He initially took the papers of his presidency with him to his home in Mount Vernon, Virginia. In his will, he bequeathed these papers to a nephew.\(^{230}\)

Following Washington’s example, every president until Richard Nixon understood his presidential records to be his personal property.\(^{231}\) Early presidents bequeathed these papers to family or sold them. Some even deliberately destroyed these papers both during and following their presidencies.\(^{232}\) President Franklin Roosevelt conceived of the presidential library as a way to preserve and

\(^{227}\) Cf. id. ("the choice of frames would no longer seem mysteriously independent of courts’ and theorists’ best understandings of constitutional provisions, but instead would follow instrumentally from those understandings").

\(^{228}\) See Final Report of the National Study Commission on Records and Documents of Federal Officials 13 (March 31, 1977) [hereinafter “Report on Records”].


\(^{230}\) See Nixon v. U.S., 978 F.2d 1269, app. (D.C. Cir. 1992). Washington’s papers became the focus of the only early case on the status of presidential papers by way of a copyright dispute. Justice Story, riding circuit, premised his ruling in Folsom v. March on an understanding of the President’s papers as his personal property, see 9 F. Cas. 342, 345–46 (1841), even as he acknowledged that the public might have an interest in the publicity of presidential materials that “embrac[e] historical, military, or diplomatic information.” Id. at 347; see also Jonathan Turley, Presidential Papers and Popular Government: The Convergence of Constitutional and Property Theory in Claims of Ownership and Control of Presidential Records, 88 CORNELL L. REV. 651, 682 (2003) (“What is striking about Justice Story’s ruling is that he structured the entire decision in property, rather than constitutional, principles.”).

\(^{231}\) See Report on Records, supra note 228, at 13 (“Traditionally, Presidents have regarded the papers they accumulate while in office as their personal property.”); see also Nixon v. U.S., 978 F.2d at 1280 (“[E]very past President has treated these materials as private papers to hold, give away, withhold from others, transfer for consideration or bequeath as he saw fit.”).

\(^{232}\) A detailed historical appendix on the practices of every President from Washington through George H.W. Bush is included at Appendix, Nixon v. United States, 978 F.2d 1269 (D.C. Cir. 1992) [hereinafter “Presidential Records App.”].
make public the materials of the presidency.233 And Congress enacted legislation in 1955 that facilitated these arrangements (though it did not require them).234 Presidents continued, however, to leave office with the papers of their presidencies. President Roosevelt himself famously left his successor only the Map Room papers relating to the “conduct and conclusion of World War II, which President Truman continued to use,” and President Eisenhower left his successor only a “satchel containing a series of orders and instructions to be of assistance in the event of nuclear attack or other national crisis.”235 Through two centuries, then, presidents and their increasingly burgeoning staff created “records of governance and policy,”236 and treated this precedent of the presidency as their personal property. A 1951 legal memorandum from the Office of the Solicitor General (in its capacity as predecessor to what is today OLC) advised President Truman that any “dichotomy [between the ‘official’ and ‘personal’ papers of the President] appears difficult to effectuate. In the activities of the President, the personal and the official are inextricably intertwined.”237

Against this backdrop, Richard Nixon, when he resigned from office, directed government archivists to send to a storage repository near his home in California some 42 million pages of documents and hundreds of tape recordings of conversations from the Oval Office.238 Before releasing the materials, President Ford asked Attorney General William B. Saxbe for legal advice regarding their ownership. Documenting the practice of every President since Washington, the Attorney General concluded that the vast majority of the papers were properly considered the personal property of the former President.239 Two days after the Attorney General issued his opinion, the Administrator of General Services, Arthur F. Sampson, announced an agreement with President Nixon, which gave Nixon the right after three years “to withdraw from deposit . . . any or all of the materials . . . and to retain [them] for any purpose.”240 The agreement also provided for the initial storage and subsequent destruction of the tape recordings pursuant to Nixon’s direction.241

Congress responded with the Presidential Recordings and Materials Preservation Act.242 Signed by President Ford just months after Nixon’s resignation,

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234 Id. at 9–11.
235 Presidential Records App., supra note 232, at 1295.
236 Turley, supra note 230, at 686 (arguing that this “proprietary view of presidential records” should have been rejected at the outset, id., but suggesting that the “blurred line between public and private functions” in the early republic likely contributed to this approach, id at 680).
237 July 24, 1951 Memorandum re: The President’s Papers, at 3 (received pursuant to a FOIA request to OLC and on file with author). The memorandum continues: “While the White House Central File includes, among others, an ‘Official’ and a ‘Personal’ file, these classifications are fairly arbitrary; moreover, both are dwarfed by the “General File,” which likewise contains material of personal, official, and mixed nature.” Id.
241 Id.
Title I of the Act directed the Administrator of General Services to take custody of Nixon’s presidential papers and tape recordings and to promulgate regulations for their processing and access. The statute was designed specifically to abrogate the Nixon-Sampson agreement. Nixon challenged the statute in court, arguing that it violated the separation of powers and the presidential privilege, as well as his First and Fourth Amendment rights and the guarantee against bills of attainder.

Nixon v. Administrator of General Services sidestepped the question of ownership of presidential records but it opened the door to a new approach to presidential papers. In defending the statute, the Ford administration and then the Carter administration emphasized that, in addition to historical and public interest, such materials comprise important precedent for the institutional presidency. The Solicitor General’s brief described how “officials of the succeeding administration found it necessary to review portions of the presidential materials from appellant’s administration concerning [Strategic Arms Limitation Talks (SALT)] negotiations with the Soviet Union, our relations with the People’s Republic of China, the Vietnamese negotiations concluded in 1973, and negotiations regarding the Middle East situation. Some important documents, such as memoranda of conversations between appellant and foreign leaders, can be found only in the materials at issue here.” Former presidents, the Solicitor General argued, should not be permitted “to stop up the flow of information to the incumbent and his staff. The government should not be required to start from scratch each time a new President assumes office.”

The Supreme Court heeded the administration’s concerns. Writing for the majority, Justice Brennan reasoned that “[a]n incumbent President should not be dependent on happenstance or the whim of a prior President when he seeks access to records of past decisions that define or channel current governmental obligations.” Nor should “the American people’s ability to reconstruct and come to terms with their history” turn on such matters of happenstance.

The Nixon-Sampson agreement and the litigation that it spawned ignited congressional interest in the ownership of presidential papers. In 1978, Congress enacted the Presidential Records Act (PRA), repudiating two centuries of practice and declaring for the first time that presidential records are the property of the United States. The PRA establishes an affirmative obligation on the incumbent to ensure that “the activities, deliberations, decisions, and policies that

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243 Nixon, 433 U.S. at 433; see also id. at 493–94 (Powell, J., concurring) (discussing legislative history).
246 See id. at 34–35.
247 Nixon, 433 U.S. at 453.
248 See id.
249 44 U.S.C. § 2202 (“The United States shall reserve and retain complete ownership, possession, and control of Presidential records[].”); Testimony at the hearings included detailed discussions of incumbent administrations unable to discern the foreign policy commitments of prior administrations because they were only contained in the outgoing president’s papers. See Presidential Records Act of 1978: Hearings before a Subcommittee of the Committee on Government Operations, H. Rep., 95th Cong., Second Session on H.R.
reflect the performance of the President’s constitutional, statutory, or other official or ceremonial duties are adequately documented and that such records are preserved and maintained as Presidential records.” The statute requires the incumbent to consult with the Archivist prior to the destruction of any presidential records. And it establishes procedures for the initial withholding and eventual release of presidential papers to the public. It also creates special-access procedures for an incumbent administration, as well as Congress and the courts, to access a former president’s records before they become publicly available.

The PRA thus recognizes that there are institutional interests in the confidentiality of presidential deliberations—especially close in time to the deliberations at issue. But the statute attempts to balance these interests against the need for government actors and eventually the public to access and understand the decisions of the presidency.

Told from the two-bodies perspective, we might say that the PRA amounts to a formal recognition of a more latent and gradual development: the shift away from a wholly personal understanding of the president’s decisional materials. The PRA reflects and itself entrenches the idea that presidential papers are a form of institutional precedent crucial to constitutional and political understandings of the office.

And yet, the personalized understanding of presidential papers through much of this nation’s history set in motion and continues to reinforce a system of presidential libraries that makes it exceedingly difficult for outside observers to discern a consistent presidential practice. Presidential papers are strewn across more than a dozen presidential libraries and the Library of Congress, with no

10998 and Related Bills 319–20 (1978) (discussing President Kennedy’s difficulties discovering U.S. commitments to the French government during the Suez crisis of 1956 because these commitments were only documented in President Eisenhower’s papers; President Nixon’s difficulty discovering representations to the Russians during the SALT talks of the Johnson administration; and President Nixon’s own removal from office of presidential papers relating to assurances to the South Vietnamese government).
251 Id. § 2203(c).
252 See id. § 2205(2). Incumbent administrations establish procedures with NARA for the retrieval of copies of records of prior administrations pursuant to this authority. See, e.g., Memorandum from Mary B. DeRosa, Deputy Counsel to the President, to Sharon Fawcett, Assistant Archivist, Office of Presidential Libraries (Feb. 6, 2009), available at https://www.archives.gov/files/press/press-releases/aotus-to-sens-mccaskill-carper.pdf. (“Since this [request from an NSC policy staffer for records from the George W. Bush Library] is the first such request submitted by a member of the NSC staff during the Obama administration, I am writing to you to establish a routine procedure for handling such requests.”).
253 Passage of the PRA was aided by the incumbent. President Carter embraced the position that his presidential papers are public property, and he supported enactment of the PRA—though he opposed a competing bill as unnecessarily intrusive on presidential deliberation. In a signing statement, Carter emphasized his campaign promise “to make the Presidency a more open institution.”
254 Of course, this is not to suggest that the legal structure of the PRA is unproblematic. The PRA channels many forms of public inquiry through FOIA, which means that archivists at PRA libraries must screen records piecemeal and out of context, creating huge backlogs in the public release of presidential records. See ANTHONY CLARK, THE LAST CAMPAIGN: HOW PRESIDENTS REWRITE HISTORY, RUN FOR POSTERITY & ENSHRINE THEIR LEGACIES (2015) (observing that the papers of PRA-governed presidencies “will not be fully opened for 100 years or more,” id. at 21, and arguing that this results in part from how the PRA structures record processing and in part from resources being directed to the museum features of presidential libraries, id. at 22–30).
systematic way to trace developments in presidential law and policy across administrations.255 Presidential libraries themselves often operate as shrines of personality, reifying the charismatic president in popular and political culture even as they maintain the records of an institutional presidency.256

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The story of presidential papers provides a conceptual bridge between two dimensions of the president’s duality—the personal/impersonal and the temporary/continuous axes. Public law’s rejection of presidential papers as the personal property of individual presidents made possible their use as an instrument of continuity in governance—that is, as a precedent of the indefinite institution.

IV. THE TEMPORARY/CONTINUOUS DIMENSION

Political scientists have long debated the foundations of presidential power: can we better understand the presidency by looking to the ephemeral characteristics of individual presidents or to an ongoing institutional environment?257 The question is surprisingly undertheorized, however, as a matter of public law. Consider this threshold issue: why should the decisions of a particular president survive his presidency? On an exclusively personal account, it is not clear that they should. The incumbent possesses Article II power only during his tenure in office. The authority underlying those decisions ceases with the end of his term. In contrast to Congress’s power to enact legislation that, by design, will outlast the enacting Congress, the president lacks a “big-C” constitutional mechanism for continuity in governance.

Notwithstanding the incumbent’s temporary status, however, the presidency needs some way to integrate the decisions (both substantive and procedural) of prior presidents. These decisions generate invaluable information about how the presidency has been conducted and the consequences of the choices made. They also affect innumerable individuals, both inside the government and beyond. This means that some presidential decisions create hugely consequential reliance interests, both domestically and abroad. Following the practice of prior presidents can have political advantages for the incumbent as well, and it can provide a source (though not an unqualified source) of legitimacy or acceptability for conduct the incumbent desires to continue.

Presidential practice is thus a core component of presidential power; it supplies the incumbent with institutional continuity and the capacity to govern in a manner that others in the system deem “respect-worthy.”258 And yet, if elections matter, if representative democracy means something for the presidency, then a

255 By contrast, there is a long history of publishing legal opinions from the Attorney General and now the Office of Legal Counsel. For a discussion of this practice, and the decline of written opinions in recent administrations, see Renan, The Law Presidents Make, supra note 44.

256 See Clark, supra note 254; see also Cong. Research Serv., The Presidential Libraries Act and the Establishment of Presidential Libraries (2015); cf. David Demarest Lloyd, Presidential Papers and Presidential Libraries, 8 Manuscripts 1, 8 (1955) (noting that putting libraries in the president’s hometown enables researchers to understand “first-hand, that Independence, Missouri or Abilene, Kansas does not leave the same mark upon the personality of a man as Hyde Park, New York or Fremont, Ohio.”).

257 See supra note 47 and accompanying text.

258 See Michelman, supra note 44.
new president must be able to revisit, refine, or repudiate some of the decisions of his predecessors. He needs to have some say, maybe substantial say in the law and policy of his presidency. This is the challenge of presidential precedent: Make it too entrenched through the institution and you inhibit the authority of the current leader. Make it too unstable, too focused on the person, and the president cannot execute the powers of an indefinite institution.

This Part argues that the presidency gained capacity, legitimacy, and the means for continuity in governance through the institution. And yet, public law reveals an ongoing, profound ambivalence over the function of the institution in maintaining consistency across individual presidencies. The role of the incumbent in implementing a particular policy and ideological vision collides with understandings that the institution creates stable and durable national commitments.

A. The Means of Continuity in Presidential Governance

The institution provides the means through which the decisions of a sitting president become the indefinite law and policy of the presidency. It creates a source of precedent crucial for (though not legally binding on) individual presidents. And it legitimizes the exercise of ongoing presidential power. Presidential practice also provides a legal precedent through which jurists and executive branch lawyers have augmented the scope of presidential power over time.

1. Executive orders as an instrument of indefinite presidential power.

The institutional presidency has developed various forms of precedent, with differing means of entrenchment. A longstanding norm, for example, treats executive orders as binding unless and until revoked or amended by a successor.259 Presidents since Washington have exercised this authority.260 The incumbent can alter or undo his predecessors’ orders (just as Congress can reverse prior legislation). And some executive orders are so altered.261 But executive orders and proclamations have effected significant, lasting policy and structural change—including the Louisiana Purchase, the Emancipation Proclamation, the desegregation of the military, and the creation of federal agencies like the EPA.262

Some executive orders, over time, have assumed a quasi-constitutional status similar to the “super statutes” that scholars have theorized in the legislative context.263 For example, Executive Order 12,333, initially issued under President Reagan, structures the governance of foreign intelligence and establishes both

261 See Sharece Thrower, To Revoke or Not Revoke? The Political Determinants of Executive Order Longevity, 61 AM. J. POL. SCI. 642, 643–44 (2017) (“Of the 6,158 executive orders issued between 1937 and 2013, 18% are amended, 8% are superseded, and 25% are revoked.”).
authorities and restraints for specific actors such as the Attorney General and the NSA. These practices have become deeply entrenched features of the American presidency and the foreign intelligence collection conducted under Article II. “Twelve-triple three” authority, as it is often called, provides stability in the structure of foreign intelligence collection and a legal framework for collection practices rooted in the incumbent’s Article II power but implemented on an indefinite basis by a massive intelligence bureaucracy.

With respect to domestic regulatory policy, the framework of “regulatory review,” also commenced under Reagan by executive order, has become a defining feature of administrative practice, even as it has evolved under subsequent presidents. What was so “dramatic” and “surprising” about Executive Order 12866, issued by President Clinton, was just how much continuity it preserved with the earlier and, at the time, quite controversial Executive Orders on regulatory review issued by President Reagan. Regulatory review by OIRA, a part of the Executive Office of the President, has become so entrenched in our legal culture that some scholars have suggested that independent agencies, which are not subject to the same executive oversight, should receive more stringent scrutiny in the courts to compensate for the absence of this sort of regulatory review.

Procedures have developed over time to distinguish presidential orders with indefinite, binding force from others types of presidential rhetoric. Process and publicity help to legitimate what, in effect, is a form of unilateral law-making by the presidency. Most of those procedural requirements developed inside the presidency itself. For instance, Executive Order 11030, issued by President Kennedy in 1962, requires that every proposed order undergo a legality review by the Attorney General (a function since delegated to the Office of Legal Counsel). This and a requirement for interagency consultation has been further refined through presidential norms.

When incumbents have resisted calls to institutionalize presidential decision-making and the issue achieves political salience, Congress has also intervened. For example, a surge of executive orders under FDR, and the controversy that some of them sparked, prompted Congress to proceduralize the practice. A contemporaneous committee of the American Bar Association found that some orders are “buried in the files of the government departments, some are confidential and are not

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267 See Moe & Howell, supra note 154, at 852; Mayer, supra note 262.
269 President Roosevelt issued close to 1,000 executive orders between March 1933 and October 1934. See Erwin N. Griswold, Government in Ignorance of the Law—A Plea for Better Publication of Executive Legislation, 48 HARV. L. REV. 198 (1934); see also Report of the Special Committee on Administrative Law, 57 ANN. REP. A.B.A. 539, 553 (1934) (observing that this “volume is, conservatively estimated, greater than the total of the preceding four year period, during which 1004 orders were approved, most of them not having an important legislative character”).

46
published, and the practice as to . . . . [the] publication of orders is not uniform.”

Meanwhile, “[t]he comparatively large number of recent orders which incorporate provisions purporting to impose criminal penalties by way of fine and imprisonment for violation is without numerical precedent in the history of the government.”

Roosevelt initially dismissed calls for more systematic publicity of executive orders as an unwanted “government newspaper.” The issue gained political and legal traction, however, when the government asked the Supreme Court to dismiss a pending criminal case involving the National Industrial Recovery Act because the lawyers discovered days before oral argument that the executive order “had omitted the offense charged.” The Federal Register Act of 1935 required for the first time that executive orders and agency regulations be published in the Federal Register.

Executive orders thus illuminate how two aspects of the institutional presidency reinforce each other: through institutionalizing the structure and process of presidential law-making, the presidency makes more legitimate or acceptable a form of indefinite presidential power—one that begins as the decision of an individual but survives the incumbent as the law and policy of a continuous institution.

2. Presidential practice as a source of legal precedent.

Presidential practice also provides a source of legal precedent for the constitutional powers of the office. Presidential practice is the principal mechanism through which jurists and executive branch lawyers develop—and augment—the content and reach of presidential power. “Historical gloss,” as it is often called, becomes the means through which Article II authority incorporates the precedent of prior presidents as law—or at least as evidence of constitutionality. Though a tool for interpreting power across the branches, gloss plays a distinctive role with respect to the presidency. The constitutional contours of the presidential office are not really knowable in the abstract or in the imaginings of a Founding moment. The scope and sweep of Article II authority has grown dramatically in response to political, economic, and social change. The

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institutional presidency supplies the working legal understandings of presidential authority, over time and in iterative interactions with Congress.\textsuperscript{277}

Presidential practice thus becomes a source of constitutional meaning rooted in the institution, through which the incumbent acquires authority. Gloss shapes how courts understand presidential authority and its legitimate or respect-worthy limits. Gloss also plays an especially important role inside the presidency, where it informs the many questions of presidential authority that do not reach the courts. Legal opinions by the Attorneys General and the Office of Legal Counsel about the scope of presidential power develop in response to new calls for authority from individual presidents. As scholars have explained, OLC’s legal advice tends more often to be put in the form of written, formal “opinions” of the office when it permits presidential action than when it prohibits it.\textsuperscript{278} Those opinions, in turn, become a legal precedent of the presidency, governed to a point by its own norms of stare decisis.\textsuperscript{279} They provide the legal material through which expanded conceptions of presidential power are formed.

\textbf{B. Institutional Consistency and the Incumbent’s Mandate for Change}

Notwithstanding the role of the institution in augmenting the scope and sweep of presidential power, legal doctrine increasingly interprets Article II to require the personal control of the incumbent. \textit{Free Enterprise Fund v. Public Company Accounting Oversight Board}\textsuperscript{280} makes this move explicit. Writing for the majority, Chief Justice Roberts reasons that the president “cannot . . . choose to bind his successors by diminishing their powers, nor can he escape responsibility for his choices by pretending that they are not his own.”\textsuperscript{281} Even as the institutional presidency provides a source of precedent foundational to current understandings of presidential power, then, the role of the institution as a means of consistency and entrenchment—that is, as a restraint on the incumbent’s personal control and policy discretion—remains deeply contested.

\textit{1. Administrative stability and the incumbent’s policy and ideological vision.}

Jurists and administrative law scholars have long debated the conflicting public law impulses for stability in executive branch law and policy on the one hand and, on the other, democratic responsiveness through the sitting president. This conflict is at the crux of enduring disagreements about the role of administrative law in constraining administrative policy change and the special solicitude that the case law and theory sometimes affords those decisions with the personal imprimatur of the president.\textsuperscript{282} At its core, the debate concerns the capacity of presidential elections to imbue individual presidents with a mandate for programmatic and ideological change, and the legal implications of such a mandate

\begin{footnotesize}
\textsuperscript{277} See, e.g., NLRB v. Noel Canning, 573 U.S. 513 (2014). \textit{But see id.} at 593 (Scalia, J., concurring in the judgment).
\textsuperscript{278} See Morrison, supra note 211.
\textsuperscript{279} See Morrison, supra note 141.
\textsuperscript{280} 561 U.S. 477 (2010); \textit{see also} Myers v. United States, 272 U.S. 52, 117 (1926).
\textsuperscript{281} \textit{Free Enterprise Fund}, 561 U.S. at 497; \textit{see also} Morrison v. Olson, 487 U.S. 564, 713 (Scalia, J., dissenting).
\textsuperscript{282} See Nzelibe, supra note 14 (collecting and critiquing this scholarship and case law).
\end{footnotesize}
in the context of national administrative governance. Does something about the distinctive political character of the incumbent give him a unique authority to advance his particular policy and moral vision through the administrative state? Or must policy change be justified on more rational and technocratic grounds? Framing this tension as one of presidential versus administrative government (as it is often debated) somewhat obscures the issue, for technocracy can exist inside the presidency as well.

Instead, a defining ambivalence of the modern state concerns the charismatic legitimacy of administration through the individual of the president, notwithstanding the apparatus of a more rational bureaucracy—both inside the White House and in the agencies—that is capable of producing stable policy and consistent legal interpretations. The danger, increasingly realized, is that the personal presidency “can, as it grows stronger, cancel itself out across administrations.” As Jerry Mashaw and David Berke observe, the individual president’s control over administration “has become sufficiently powerful that erasing a prior Administration requires little more than determination—and perhaps a dash of ruthlessness.” The “regulatory whiplash” of recent years is not simply a threat to values of regularity or predictability in governance. It is a challenge to the idea of popular authorship itself. As Jessica Bulman-Pozen argues, the stark “policy reversals of a hyperpartisan age render vivid the simplistic view of democratic accountability” that has long underwritten the strongest defenses of presidential administration. These erratic swings in American public policy and national commitments underscore the costs of presidential direction even as they call into question the resilience of anything resembling a durable presidential mandate.

And yet, the personal presidency is the means through which American public law has recognized some connection between administration and sovereignty in a system of policy-making and re-making that increasingly operates without Congress. It is also public law’s response to the concern that administrative problems often require some value judgment, and persistent unease about une-
lected bureaucrats exercising such moral authority over American life. If technocracy all the way down is either unappealing or unachievable, then we cannot entirely write out the charismatic president. The challenge for public law is to recognize and hold both commitments at once. How public law manages this duality decides the capacity of the administrative state to make durable national commitments, grounded in science and data, even as it retains some conceptual and legal space for a more transient presidential judgment.292

2. Litigation settlements and presidential discretion.

Less studied in the scholarship, but of considerable significance in practice, is the question whether the executive branch can bind the discretion of individual presidents through consent decrees or other litigation settlements.293 In a painstaking opinion, OLC determined that litigation settlements can limit the statutory authority of the executive branch but that they may not interfere with those powers that Article II vests “directly in the President.”294 Thus, for example, OLC concluded that a proposed consent decree that would require the Departments of Navy and Energy to seek certain appropriations from Congress was unconstitutional because no executive branch official, including the sitting president, could agree to limit “the President’s discretion to make whatever legislative proposals he or his successors deemed desirable.”295 OLC reasoned that the Recommendations Clause “commits the President to exercise his personal discretion,” and “[t]he President may not divest himself of his constitutional obligation to judge personally which recommendations should be made to Congress.”296

The relationship between statutory authority and the president’s constitutional power is more interconnected, however, than the OLC opinion suggests. And the potential for profound conflict between the commitments of the ongoing institution and the ephemeral ideological and policy attachments of individual presidents has been an important feature in litigation settlements involving the executive branch.297 Litigation during the 1980s over a school desegregation consent decree between the federal government and the Board of Education for the City of Chicago, entered in 1980 in response to the Justice Department’s enforcement of the Civil Rights Act of 1964, is illustrative. The consent decree

292 For a perspective on what such an accommodation might look like, see Stephenson, supra note 118.
295 Id. at 29 (quoting Letter for Steven S. Honigman, General Counsel, Dep’t of the Navy, and Robert R. Nordhaus, General Counsel, Dep’t of Energy, from Walter Dellinger, AAG, OLC, Sept. 12, 1995).
296 Id. at 29; see also Shane, supra note 293, at 249.
297 See Citizens for a Better Environment v. Gorsuch, 718 F.2d 1117, 1136 (D.C. Cir. 1983) (Wilkie, J., dissenting) (“So long as a consent decree remained in force, no new policy spurred by a change in administrations (or prompted by a desire to avoid a change in administrations) could take effect without the prior blessing of the court. Conversely, the consent decree provides the executive with a vehicle for avoiding responsibility for its programs.”).
obligated “[e]ach party . . . to make every good faith effort to find and provide every available form of financial resources adequate for the implementation” of a court-approved school desegregation plan agreed to by the parties.298 Over a period of years, the City of Chicago expended approximately $120 million to effectuate various elements of the plan and continued to budget for its ongoing implementation.299 When President Reagan took office, however, he sought to dismantle the U.S. Department of Education (the relevant federal funding source for the decree) and to cut desegregation assistance to local educational agencies through direct grants.300 His administration also undertook more specific efforts, including through exercise of the presidential veto, to limit funding for the Chicago desegregation plan in particular.301 The Chicago Board of Education took the federal government to court, arguing that the executive branch was in violation of the decree. The district court agreed, finding that the executive branch “could not in good faith, having entered into the Consent Decree, work actively to make financial resources unavailable” for its implementation.302

Emphasizing the personal discretion of the president in the constitutional structure, the Justice Department argued that interpreting the consent decree to prohibit these activities violates Article II and the separation of powers.303 Underscoring the impersonal and continuous qualities of the presidency, the district court countered that “the Executive Branch itself properly exercised its own constitutionally assigned power when it chose to enter into the Consent Decree,” and that “[e]nforcement of the Executive Branch’s own voluntary decision is not an unwarranted ‘disruption’ of the exercise of its powers.”304

Palpably uneasy with the conflict between the ongoing legal commitments contained in a consent decree and the sitting president’s discretion to shape his budget and legislative agenda, the Seventh Circuit sought in a series of decisions to skirt the constitutional issue. It first construed the consent decree narrowly to avoid the constitutional questions,305 and subsequently rejected the remedy ordered by the district court without deciding whether the findings of bad faith were sustainable.306 Even as it reversed some aspects of the district court’s rulings, the Seventh Circuit offered the presidency this rebuke: The conduct at issue, “while perhaps within constitutional limits, . . . do[es] not befit a signatory

300 See id. at 274–75.
301 The President vetoed a bill “the only substantive provision of which was a $20 million appropriation to enable [the Secretary of the Department of Education] to comply with the Consent Decree,” and the Reagan administration undertook extensive efforts (including proposed legislation and Committee report drafting) to prevent Congress from making the funds restrained by the district court available to the Chicago Board of Education for implementing the consent decree. United States v. Board of Educ. of City of Chicago, 588 F. Supp. 132, 208–12, 237–39 (1984).
302 Id. at 282 (emphasis in original).
303 OLC developed these arguments in an internal memorandum to the White House Counsel, arguing that the issue goes “to the heart of presidential authority.” Memorandum from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, for Michael J. Horowitz, Counsel to the Director and General Counsel, Office of Management and Budget, Re: Chicago School Case, Aug. 9, 1984 (on file with author).
305 See United States v. Board of Educ. of City of Chicago, 717 F.2d 378, 383 (7th Cir. 1983).
306 See United States v. Board of Educ. of City of Chicago, 744 F.2d 1300 (7th Cir. 1984).
of the stature of the United States Department of Justice,” the judicial opinion concludes, “[t]he Executive Branch initiated this critical litigation and bears a continuing shared and special responsibility for its eventual outcome, regardless of changes in personnel and ideology that will inevitably accompany the passage of time.” Implicit in this logic is a shift from the legality of the individual president’s discretion to the morality of abandoning the shared project of desegregation in Chicago’s schools that the institution of the executive branch itself had commenced.

3. The institutional duty to defend statutes that the incumbent opposes.

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

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

Making the president’s duality central to these disagreements suggests a reinterpretation of the practice. The nature of the duty to defend, and the rules for when and how it applies, are inescapably contested and imprecise because the commitments of the institutional presidency are so directly at odds with the commitments of the personal president. The debate is not one of norms versus

307 Id. at 1308.
308 The institutional presidency itself has limited the practice of such consent decrees pursuant to DOJ policy, commenced under Attorney General Meese. See Memorandum from Edwin Meese III, Attorney General to All Assistant Attorneys General, Re: Department Policy Regarding Consent Decrees and Settlement Agreements, March 13, 1986. But, underscoring the two bodies, the force of these restrictions appears to vary under individual presidents, as reflected in the OLC opinion issued under President Clinton, see supra note 294.
309 See generally Renan, Presidential Norms, supra note 8, at 2198–2202. (collecting OLC opinions and literature).
311 See generally Renan, Presidential Norms, supra note 8, at 2201. (collecting sources).
no-norms, but of two competing norms of the presidency, one directed at institutional consistency and the other at the personal character of the incumbent’s leadership. So understood, the practice suggests an effort at accommodation. Lawyers for the presidency recognize the significance of the duty to defend—as a matter of presidential precedent and also as a way to protect the interests of the institution. As a result, institutional actors like OLC have articulated a strong presumption in favor of the presidency’s defense of statutes in court, and Justice Department litigators often work to reinforce it. Congress too has weighed in, requiring public notice when the presidency declines to defend the constitutionality of a statute. In these ways, the institutional presidency provides a default rule. The practice also retains, however, some conceptual and constitutional space for the incumbent to exercise moral leadership—to decline to defend in court a statute that he concludes is truly illegitimate. Debate over how to interpret particular episodes is inescapable, and often affected by commenters’ political and policy priors. But a more categorical approach would fail to recognize some role for the personal moral leadership of the incumbent in directing executive government—a moral authority that sits uneasily with, but is nevertheless deeply entrenched in constitutional understandings of the presidency.

C. Transient Occupants of an Indefinite Office

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

1. Executive privilege and the problem of multiple presidents.

Hamilton famously cautioned that the possibility of former presidents “wandering among the people like discontented ghosts” was a reason to preserve the incumbent’s eligibility for re-election. With the emergence of term limits, the issue has re-emerged in a variety of “small c” constitutional norms governing presidential transitions, such as the norm restricting a president-elect’s pronouncements on foreign policy to ensure that the United States has “only one president at a time.” The issue implicates legal practice as well, for example, with respect to the executive privilege assertions of former presidents. Does the presidential privilege follow the individual when he leaves office, or does it instead belong to the permanent institution?

313 THE FEDERALIST NO. 72.
314 See, e.g., Uri Friedman, It’s Official: America Has Two Presidents at One Time, THE ATLANTIC (Dec. 23, 2016) (describing the norm and compliance with it by prior presidents of both parties, but reporting breaches by president-elect Donald Trump).
The Court’s decision in *Nixon v. Administrator of General Services* reveals an effort to accommodate the two bodies. Former President Nixon asserted executive privilege in response to the passage of the Presidential Recordings and Materials Preservation Act, the legislation enacted by Congress to govern the disposition of Nixon’s presidential papers. President Carter (as well as his immediate predecessor, President Ford) supported the statutory framework that Nixon challenged as a violation of the presidential privilege. Individual presidents thus took competing positions on the presidential privilege and whether it was appropriately invoked to prevent review of President Nixon’s papers by the institution of the presidency (through the Archivist).

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

The majority rejected both of these poles, charting instead an intermediate approach between them. The privilege, urged Justice Brennan, “is not for the benefit of the President as an individual, but for the benefit of the Republic.” This means that the privilege survives any individual’s presidency. It also means that the current administration “is in the best position to assess the present and future needs of the Executive Branch,” and so the fact that President Carter opposed Nixon’s claim of presidential privilege “detracts from the weight” of Nixon’s assertion of the privilege. Justice Brennan’s framework for assessing a former president’s claim of executive privilege is analogous to the famous tripartite structure developed by Justice Jackson in the *Steel Seizure* case to assess presidential power in relation to Congress. A claim of executive privilege is strongest when the former president and the incumbent act in concert. When

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316 *Nixon*, 433 U.S. at 502 (Powell, J. concurring in part and concurring in the judgment).
317 *Id.* at 518 (Burger, J., dissenting) (emphasis added).
318 *Id.* at 524.
319 *Id.* at 449 (quoting Brief for Federal Appellees at 33, *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977)).
320 *Id.; see also id.* at 451 (“The expectation of the confidentiality of executive communications … has always been limited and subject to erosion over time after an administration leaves office.”).
the former president’s assertion of the privilege contravenes the incumbent’s position, his power to claim the privilege might be understood to be at its lowest ebb.\footnote{Cf. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).} At one level, Justice Brennan is accommodating two individual presidents—the incumbent and the former office-holder, whose presidential papers are at issue. More fundamentally, though, Justice Brennan is integrating the two bodies of the presidency. President Nixon has some claim to the papers. It is not wholly irrelevant that these are the materials of his presidency. And yet, his personal interest in these papers is not equal to the weight of the institution—the interests of an indefinite office expressed through the current office-holder.

Taking a step back, the two-bodies framework also explains why the question of executive privilege, when it pertains to the work product of a prior president, has continued to be so vexing. The idea that the sitting president speaks for the continuous institution, and is perhaps best positioned to assess the needs of the office, runs into the concern that the person runs his presidency and has a distinct stake in the work and confidentiality of his administration. Justice Brennan’s effort at accommodation retains some irreducible ambiguity and individual presidents have continued to grapple with the role of a former president when his work in office is at issue.\footnote{See generally Martha Joyn Kumar, Executive Order 13233 Further Implementation of the Presidential Records Act, 32 PRES. STUD. Q. 194 (2002).} Yet neither a legal framework that erases the individual nor one that eclipses the institution seems wholly satisfying. The privilege exists to sustain an ongoing institution. But individual presidencies cannot be fully disentangled from the person.

2. Temporarily unfilled office: the problem of presidential inability.

The debates over presidential inability, meanwhile, illuminate the enduring challenge of a permanent branch of government so closely intertwined, at any point in time, with one “Body mortal.” Periods of presidential disability have created considerable legal uncertainty and even concealment on the part of individual presidents.

Article II provides that “[i]n Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President[.]”\footnote{U.S. Const. Art. II, sec. 1, para. 6.} Prior to the Twenty-Fifth Amendment, a central legal question concerned the words “the same” in this paragraph: was it the office of the President that devolved to the Vice President, or only its powers and duties?\footnote{Herbert Brownell, Jr., Presidential Disability: The Need for a Constitutional Amendment, 68 YALE L.J. 189 (1958).} And, if it was the office, could the person of the president regain the office after it devolves to the Vice President? The second (and more consequential) question was complicated by the precedent that early practice established around the first. When William Henry Harrison became the first President to die in office in 1841, debate centered on whether Vice President John Tyler becomes the president or instead serves as “acting President” for the duration of the term. Tyler declared his legal
status to be President. Though initially disputed,\textsuperscript{325} Tyler’s claim to the presidential office quickly became the accepted precedent and followed practice of the presidency.\textsuperscript{326} It was not until 1881 that the presidency confronted the question whether a temporarily disabled president could resume the office after it devolves to the vice president. When President James Garfield was shot by an assassin, he spent eighty days in a coma before he passed. After sixty days, the president’s Cabinet voted that Vice President Chester Arthur should assume the powers of the presidency. But the Cabinet divided on the question whether, in so doing, the Vice President becomes the President.\textsuperscript{327} By a vote of four to three, the Cabinet concluded that Arthur would assume the office of President and “thereby oust Garfield from office.”\textsuperscript{328} As a result, the Cabinet resolved that Arthur should first consult with Garfield. The President’s physician advised that such consultation might kill the President and, in any event, Vice President Arthur “emphatically declined” to assume the powers of the presidential office under these conditions.\textsuperscript{329} As a result of Garfield’s inability, “officers were unable to perform their duties because the President was unable to commission them; there was a serious deterioration in the country’s foreign relations[,]” and litigation was contemplated by “the Central Pacific Railway . . . for a writ of mandamus directing . . . Arthur to assume the President’s duties and appoint an Auditor of Railway Accounts since Garfield was unable to do so.”\textsuperscript{330} Yet unease that the Vice President’s exercise of presidential power might in effect oust the sitting president led those close to Garfield to “minimize the need for an active President . . . [and] to refuse to recognize the full extent of his disability.”\textsuperscript{331} The office of the president was again physically occupied but functionally vacant in 1919 in the six months after President Woodrow Wilson suffered a stroke. Wilson’s condition was initially “concealed not only from the public but also from the Congress and members of the Cabinet,” while the President’s wife, physician, and secretary controlled access and directed information.\textsuperscript{332} A “sort

\textsuperscript{325} When Whigs in the House sought to impeach Tyler, the charges listed him as “John Tyler, Vice-President, acting as President,” see Ruth C. Silva, Presidential Inability, 35 U. DET. L.J. 139, 152 (1957), and various members of the Twenty-seventh Congress recognized him only as “a Vice President exercising presidential power,” id. at 152.

\textsuperscript{326} See Brownell, supra note 324, at 193; see also JOHN D. FEERICK, THE TWENTY-FIFTH AMENDMENT (1992).

\textsuperscript{327} Brownell, supra note 324, at 193.

\textsuperscript{328} Id.; see also Silva, supra note 325, at 140 (documenting that the Secretaries of State, of War, and of the Navy though Arthur could temporarily discharge presidential duties, while the Attorney General, the Secretary of the Treasury, the Postmaster General, and the Secretary of the Interior thought that “Arthur's exercise of presidential power would be equivalent to removing Garfield from office.”)

\textsuperscript{329} Brownell, supra note 324, at 194. Arthur was in an especially politically precarious situation because Garfield’s assassin “had proclaimed his loyalty to Arthur and to Stalwartism,” giving rise to rumors that the assassination had been orchestrated by those sympathetic to the “Stalwart wing” of the Republican party.

\textsuperscript{330} Silva, supra note 325, at 141.

\textsuperscript{331} Id. at 141.

\textsuperscript{332} FEERICK, supra note 326, at 13. Feerick provides an extensive exposition of the periods of presidential inability that predate the Twenty-Fifth Amendment and the legal uncertainty that they created in JOHN D. FEERICK, FROM FAILING HANDS: THE STORY OF PRESIDENTIAL SUCCESSION (1965).
of regency” was established around Mrs. Wilson. Political scientist Ruth Silva argues that “the entire problem was handled largely on the basis of personal loyalty,” not public interest. Given the substantial constitutional uncertainty over whether Wilson could resume the office if it were to devolve, Vice President Thomas Marshall refused to exercise any powers of the presidency. Fusing the personal and the institutional, Marshall “told his secretary that he ‘would assume the presidency’ only upon [a] resolution of Congress and with the written approbation of Mrs. Wilson and Dr. Grayson [the president’s physician].”

The impact of the individual’s disability on national governance was again considerable.

Congressional committees held extensive hearings and considered various proposals in response to President Wilson’s inability and again after President Eisenhower suffered both a heart attack and a stroke in office. But Congress was unable to settle on a legal mechanism for how to displace the person of the president to ensure the continuous functioning of the presidency. President Eisenhower himself directed the Justice Department to conduct a legal study of presidential disability and proposed a constitutional amendment to Congress. The Eisenhower Administration’s plan opposed other proposals, then in circulation, for some sort of inability commission to decide whether a presidential disability exists. Attorney General Herbert Brownell argued to Congress, and later on the pages of the *Yale Law Journal*, that such proposals misconstrued the objective of a constitutional amendment, which was “for [the] unquestioned continuity of executive power and leadership.”

The “physical and mental capacity one needs to serve as President,” Brownell urged, is “far more than a matter of medical findings by a group of learned physicians.” An inability commission would be “an affront to the President’s personal dignity” and it could “give a hostile group power to harass the President for political purposes.” Implicitly invoking the interdependence of the personal and the institutional presidency, Brownell argued that a judgment on presidential inability must be the Vice President’s and the Cabinet’s to make because “the public would accept the Cabinet’s opinion as reflecting the views

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333 Silva, supra note 325, at 144.
334 Id. at 145.
335 Brownell, supra note 324, at 194.
336 Silva, supra note 325, at 146.
337 FEERICK, supra note 326, at 15 (“United States participation in the League of Nations was defeated in the Senate; numerous government vacancies went unfilled; twenty-eight bills became law by default of any action by the President; foreign diplomats were prevented from submitting their credentials to the President; letters and notes to the White House either went unanswered . . . and, in many other ways, the business of government was brought to a standstill in 1919 and 1920.”); see also Silva, supra note 325, at 146–47.
338 Proposals included “either separately or in combination the Vice President, Cabinet, Congress, Supreme Court, or an inability commission.” FEERICK, supra note 326, at 52–54.
339 See Brownell, supra note 324, at 197.
340 See Silva, supra note 325, at 162–69.
341 Brownell, supra note 324, at 198; see also Hearing before the Special Subcommittee on Study of Presidential Inability of the House Committee on the Judiciary, 85th Cong., 1st sess. 17 (1957).
of persons close to the President and alert to any unconstitutional attempt to 
deprive him, even temporarily, of his powers."

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

The way out of the constitutional conundrum was to cede some power of 
the personal president to the executive branch. The Twenty-Fifth Amendment 
provides a mechanism for the president to transfer his powers to the Vice Pres-
ident, serving in an acting capacity and, pursuant to section 4, for the Vice Pres-
ident and a majority of “the principal officers of the executive departments” to 
unseat a president as a result of his inability to fulfill the duties of the office. If 
the president contests the inability, section 4 provides a mechanism for Con-
gress to resolve the disagreement.

As a mechanism to ensure the continuity of the institution during temporary 
episodes of personal disability, the Twenty-Fifth Amendment provides an im-
portant constitutional corrective. By clarifying that temporary devolution of 
presidential power does not oust the incumbent from office, the Amendment 
has made it possible for individual presidents to prepare—and for the institu-
tional presidency to regularize—instruments that temporarily delegate the pow-
ers of the presidential office to the vice president. But the intractable force of 
the charismatic president in the American constitutional experience suggests that 
section 4 of the Amendment, which empowers executive branch leadership to 
override the judgment of the sitting president as to his competency, is and must 
be exceedingly limited in practice. Barring extreme conditions—and perhaps 
even under such circumstances—it would be enormously difficult for the insti-
tutional presidency to unseat the incumbent against his will and maintain the 
sociological legitimacy of the office. What such a devolution of power would 
look like itself raises a host of thorny and unresolved legal questions. To the 
extent that the institutional presidency is empowered in practice to check the

343 Id. at 200.
344 Id. at 204.
345 Feerick, supra note 326, at 56.
346 U.S. Const., Amdt. 25, sec. 3-4. It also provides a mechanism for the Vice President’s replacement. See 
Id., sec. 2.
347 Id. Each of these provisions has roots in the Eisenhower plans. See Brownell, supra note 324.
348 See Fallon, supra note 312, at 1795 (defining sociological legitimacy).
349 For a thoughtful analysis of these unresolved legal issues, see Yale Law School Rule of Law Clinic, 
sitting president, it is as a result of its composite feature—a dimension of presidential power to which the next Part turns.\textsuperscript{350}

V. THE SINGULAR/COMPOSITE DIMENSION

Article II vests power in a single individual. At least in the context of contemporary governance, however, the execution of presidential power requires a collective. This “one versus many” dimension of the president’s duality gives rise to longstanding and quite current controversies about the nature of presidential power. Perhaps most fundamentally, we lack clarity on the nature of the composite: are senior White House officials—and even agency leaders—the “alter egos” of the incumbent, there to implement his individual will, or are they subordinates of a different character, supervised by but not fully subservient to the person of the president?\textsuperscript{351} This question is at the crux of enduring disagreements about a “unitary” executive.\textsuperscript{352} As recent episodes underscore, we lack as well a legal theory for when and how the president speaks for the presidency. The question has implications for checks and balances; for those institutions that hold presidential power to legal and political account must be able to discern the policy and conduct of a presidency. It also has implications for substantive constitutional commitments, especially in a time when the president regularly expresses racial and religious animus and declares his personal impunity. Finally, the one-vs.-many is the axis along which many of our disagreements over legal remedies for presidential misconduct turn. Because these cases underappreciate the interdependence of the president’s two bodies, however, they create a doctrine that both under- and overprotects presidential power.

A. The Process of Presidential Decision-Making

A central question of Article II is how the president acts with the force of law: Do edicts made at the whim of the incumbent comprise binding U.S. policy or, alternatively, is some process of the institutional presidency required? It is perhaps remarkable that centuries into the American republic, we lack a clear answer to this question. The trappings of legislative lawmaking, by contrast, are established in our constitutional text, and they rely on a form of collective action

\textsuperscript{350} Cf. \textit{Ash Carter, Inside the Five-Sided Box: Lessons from a Lifetime of Leadership in the Pentagon} 202 (2019) (observing that “[o]ne nightmare scenario . . . is the idea of a mentally disabled president deciding to launch a nuclear attack” but emphasizing that “the high-ranking leaders, civilian and military, who surround every president and would be aware of his intentions, are overwhelmingly likely to be sensible, ethical, and strong-willed individuals [unlikely to] robotically follow the unlawful orders of a clearly deranged president”).

\textsuperscript{351} For classic competing views, compare \textit{Myers v. United States}, 272 U.S. 52 (1926), with \textit{Humphrey’s Ex’r v. United States}, 295 U.S. 602 (1935).

\textsuperscript{352} Compare, e.g., \textit{Steven G. Calabresi & Saikrishna B. Prakash, The President’s Power to Execute the Laws}, 104 \textit{Yale L.J.} 541 (1994) (defending a strongly unitary view on originalist grounds), and \textit{Lawrence Lessig & Cass R. Sunstein, The President and the Administration}, 94 \textit{Columbia L. Rev.} 1 (1994) (rejecting originalist argument but defending executive unitariness on functional grounds), with \textit{Peter L. Strauss, Presidential Rulemaking}, 72 Chi.-Kent L. Rev. 965, 984–86 (1997) (arguing congressional authority delegated to agencies is not given to president), and \textit{Kevin M. Stack, The President’s Statutory Powers to Administer the Laws}, 106 \textit{Columbia L. Rev.} 263, 267 (2006) (arguing presidents only have authority to direct administrative action where such authority is expressly conferred by statute); \textit{Cary Coglianese, Presidential Control of Administrative Agencies: A Debate over Law or Politics?}, 12 \textit{U. Pa. J. Const. L.} 637, 645–46 (2010) (“any theoretical difference between influence and control, or between oversight and decision will not be observed in practice.”).
that is inherently distinguishable from the utterings of any single member. But what happens when the president pronounces foreign policy or a law enforcement directive by tweet? Has he issued a legal order binding on subordinates? Has he established U.S. policy? The issue has taken on new urgency in the Trump administration because the President’s statements so often contradict the conduct and avowed commitments of his administration. But the current controversies illuminate a deeper problem: we lack a legal theory for when and how the president binds the presidency.

On one account, what matters is the individual’s will. When the president has spoken on a matter, his words carry legal force irrespective of the process undertaken to inform his judgment (or the absence of any process at all). Article II vests the executive power in a single person; he has no obligation to make decisions through a collective. On the other view, the presidency imposes certain procedural or deliberative duties on the incumbent; these institutional features are what make the exercise of presidential direction “respect-worthy”—including to those who must implement the president’s command. These duties derive from social practice. But they also instantiate certain moral commitments or values. Some scholars trace these commitments to the “big C” Constitution. Others root them in “small c” norms of constitutional morality. When institutions inside the presidency regularize presidential decision-making and promote reason-giving, for example, they may advance Fullerian rule-of-law principles or deliberative constitutional values. The president’s two bodies thus give rise to competing understandings of how the president “makes law”—that is, under what conditions the president can bind other actors in a composite presidency.

1. Constitutive facets of real (or effective) power.

If presidential power concerns more than formal (and perhaps unusable) power, however, then a theory of presidential lawmaking must recognize how the two bodies interact. Whether presidential rhetoric has binding force is answered on the ground by those who surround the incumbent—the other actors of a composite institution. Presidential rhetoric loses real or effective power if those who comprise the presidency choose to ignore it.

353 See Renan, Presidential Norms, supra note 8, at 2240; cf. Michelman, supra note 44.
354 See, e.g., Kent et al., supra note 175, at 2121; Rossman, supra note 166.
356 See also Renan, Presidential Norms, supra note 8, at 2223–29 (documenting norms and institutions comprising deliberative obligation of the presidency, in particular in connection to significant national security decision-making).
357 On the shift from formal theories of presidential power to those more sensitive to real or effective power, see, e.g., Richard H. Pildes, Law and the President, 125 HARV. L. REV. 1381, 1392–93 (2012) (reviewing ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC (2010)) (observing that “[f]or many decades, legal scholarship on presidential power was confined to assessing how much formal legal power the President should be understood to have, as a matter of constitutional interpretation],” and celebrating emergent focus on “actual (rather than formal) scope of presidential power”).
For political scientist Richard Neustadt, this was “the essence of the problem[;] . . . ‘powers’ are no guarantee of power, clerkship is no guarantee of leadership.” Neustadt’s focus on the personal influence of the president, however, under-appreciates the role of the institution in both blunting presidential power and protecting it. Institutional practice can offer a means for those inside the presidency to push back on the incumbent’s personal judgment: by rejecting his unmediated rhetoric as a presidential decision and demanding a more formal process. Thus, for example, President Trump’s tweet that “the United States Government will not accept or allow . . . Transgender individuals to serve in . . . the U.S. Military” was regarded by his subordinates as empty rhetoric, barring a more formal directive to the Secretary of Defense.

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

2. Presidential power as a question of institutional design.

Presidential power is thus inseparable from the actors and institutional processes that develop to execute it. By regularizing decision-making, promoting deliberation, and facilitating information collection, the institution can make the exercise of presidential power more respect-worthy to actors both internal and external to the presidency. Yet the design of presidential power can also work to stifle dissent, promote tunnel vision, or impede energetic reform. An incumbent who ignores or is inadequately attentive to the design of presidential decision-making risks clipping his own constitutional sails—as did President Obama in his stated goal of meaningfully addressing drug sentencing disparities through the pardon power.

Scholars argue that the atrophy of the pardon power under recent presidents is due to changes in the structure of the pardon and clemency process inside the Justice Department—changes that made this advisory function more opaque,

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358 See NEUSTADT, supra note 153, at 10.
360 See generally Rachel E. Barkow & Mark Osler, Designed to Fail: The President’s Deference to the Department of Justice in Advancing Criminal Justice Reform, 59 WM. & MARY L. REV. 387, 425–41 (2017).
more responsive to prosecutorial interests, and more attenuated from the Attorney General’s direct responsibility.\textsuperscript{361} This diminished power was especially stark under Obama because the President personally embraced a strong commitment to exercise the pardon power to address drug sentencing disparities. But the President never quite managed to translate this personal goal into a robust presidential practice, at least in part because of ongoing problems with the design of the institutional process.\textsuperscript{362} Concerns with the DOJ process ultimately led White House staff to support an extra-governmental process, whereby advocacy groups and pro bono lawyers vetted individual candidates for clemency.\textsuperscript{363} But the relationship between this external process and the internal structures of clemency review were never fully worked out.\textsuperscript{364} As a result, implementation of the president’s policy was slow to get off the ground, halting, and limited in its reach.\textsuperscript{365}

Sustained efforts to revitalize the pardon power have long focused on new ways to institutionalize it—including through a structure inside the Executive Office of the President or the advisory function of an independent board (as some states have done).\textsuperscript{366} Commentators emphasize, however, the need for some institutional restraint on the exercise of the president’s individual discretion. A personal pardon power is a structurally weaker power. It is structurally weaker in the sense of capacity; it cannot be exercised with the same regularity, given the many other demands on the incumbent’s time.\textsuperscript{367} It is also structurally weaker in the sense of legitimacy.\textsuperscript{368} Pardons like those by President Clinton and, more recently, by President Trump contribute to a sense of the pardon power as a “a remnant of tribal kingship” at odds with the principles of a constitutional democracy, especially “if ordinary people have no hope of similar favor.”\textsuperscript{369} If narrow self-dealing is in tension with how public law understands the legitimate exercise of presidential authority, then it points to another justification for the collective. By introducing a network of actors beyond the incumbent, the institution operates as a check (of course, an imperfect one) on self-dealing by the individual.

\textsuperscript{363} Barkow & Osler, supra note 360, at 429.
\textsuperscript{365} See Barkow and Osler, supra note 360, at 435.
\textsuperscript{366} See Barkow, supra note 361; John Dinan, The Pardon Power and the American State Constitutional Tradition, 35 POLITY 389 (2003); Ruckman, supra note 361.
\textsuperscript{367} Ruckman, supra note 361, at 468 (“If the bureaucracy is functioning properly, a steady flow of recommendations (and, yes, grants) should be expected, regardless of what the presidential calendar looks like. And, in fact, for most our nation’s history, that was exactly the case.”).
\textsuperscript{368} I mean this in both the sociological and moral dimensions of legitimacy. See Fallon, supra note 312, at 1794–95 (on these two senses of legitimacy).
\textsuperscript{369} Love, supra note 361, at 5.
Even as the pardon power shows the role of the institution in constituting legitimate presidential authority, it also underscores an irreducible interdependence between the composite and the person of the president. Consider the question whether the presidency can pardon the incumbent. If the president pardoned himself, but on the advice of and pursuant to a process attributed to a collective, would the self-pardon be constitutional? Though the question remains contested, there is a sound basis to doubt the constitutionality of such a pardon. The Office of Legal Counsel itself concluded that a presidential self-pardon would be inconsistent with the “fundamental rule that no one may be a judge in his own case,” and scholars have supplemented this argument with structural, textual, and historical accounts. Ford’s pardon of Nixon, however controversial and politically costly, is different from a Nixon pardon of Nixon. It is different in constitutionally meaningful terms; we cannot fully pry apart the person and the institution of the presidency.

B. The Nature (and Sources) of Presidential Intent

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

A purely institutional approach to the presidency—one that ignores the intentions of the incumbent—sits uneasily with a unitary understanding of the office, which usually focuses on the will of the individual and understands the executive branch as there to do his bidding. Meanwhile, if the institutional presidency is central to governance—if its deliberative processes regularize and discipline presidential decision-making—then public law needs some way to decide when or at what point the incumbent’s personal motives have become sufficiently attenuated from the decisions of the presidency.

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

1. President- versus presidency-based doctrine.

The majority opinion, authored by Chief Justice Roberts, embraces an impersonal, thoroughly institutional presidency. Any anti-Muslim animus of the sitting president is nearly irrelevant to the doctrinal question whether the presidential proclamation violated the First Amendment. So long as the institutional presidency has put forward a national security purpose, and in light of what the majority perceived to be a rigorous institutional process, the court need not assess whether the president himself intended to ban Muslims. Though plaintiffs in the case, along with their amici curiae, established an extensive record of statements from President Trump avowing interest in a Muslim ban and expressing anti-Muslim animus, directing his subordinates to implement such an anti-Muslim policy, and connecting earlier iterations of the presidential proclamation to that objective, the majority did not find those statements probative. Rather, the majority discounted “the significance of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility.”

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

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

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375 *Hawaii*, 138 S. Ct. at 2418.
freedom. For Justice Sotomayor, then, the presidential proclamation was “con- 
taminated” by the incumbent’s “impermissible discriminatory animus against Is-
lam and its followers.”

Justice Breyer’s dissent (joined by Justice Kagan) suggests a middle approach 
between these presidency- and president-based perspectives: the institutional 
presidency can operate as a check on the animus-driven objectives of a sitting 
president. But the doctrinal question is *has it here?* This is a factual question for 
courts to resolve. And the implementation of the proclamation’s “elaborate sys-
tem of exemptions and waivers,” by other actors of a composite presidency, 
provides relevant evidence. “For one thing,” Justice Breyer reasons, “the rele-
vant precedents—those of Presidents Carter and Reagan—would bear far less 
resemblance to the present Proclamation” if the government is not meaningfully 
implementing these case-by-case exemptions.” And, if the government is not 
implementing the exemption and waiver system specified in the Proclamation, 
then the argument that the Proclamation *is* in fact the incumbent’s desired 
“‘Muslim ban’ . . . becomes much stronger.” For Justice Breyer, then, there is 
both a person and an institution at the crux of Article II. The challenge, in adju-
dicating presidential authority, is to understand their interdependence—to give 
conceptual and doctrinal content to an intermediate approach that rejects either 
an exclusively personal or an exclusively institutional presidency.

2. Accommodating the Two Bodies.

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

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

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376 *Id.* at 2440 (Sotomayor, J., dissenting).
377 *Id.* at 2430 (Breyer, J., dissenting); *see also id.* (“Indeed, one might ask, if those two Presidents 
thought a case-by-case exemption system appropriate, what is different about present circumstances 
that would justify that system’s absence?”).
378 *Cf.* Manning, supra note 47, at 2431 (“every theory of [statutory] interpretation involves a question of 
legislation and a question of adjudication”).
recognizes the possibility of an un-institutional decision, one rooted in the incumbent’s personal animus.

With respect to adjudication, an intermediate approach—that is, an approach primarily focused on the institution, but sensitive to the possibility that the personal president could be legally salient—requires further elaboration of why the incumbent’s role matters in the first place. Is the court engaged in routine legal interpretation—discerning the legal purpose of a legal instrument, such as a presidential proclamation or executive order? If so, courts might want to assume that the order was developed through the regular, institutional process and that institutional sources (such as DOJ briefs) are more probative of legal meaning than unfiltered presidential speech.

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

A theory of adjudication should also ask whether it is desirable for courts to play some role in regulating the incumbent’s rhetoric. Under Chief Justice Roberts’ approach, the incumbent’s expressed desire for and commitment to effectuate a “Muslim ban” is legally irrelevant. The dissents, by contrast, interpret the incumbent’s rhetoric as relevant to a legal accounting of the presidential policy at issue. If avowed animus from the person of the president is uniquely pernicious in our constitutional culture, in part because of the out-sized role that the person of the president has come to play in American politics, then we might think that courts should play some role—perhaps especially an indirect one—in checking presidential rhetoric that threatens substantive constitutional commitments. By heightening judicial scrutiny of the policy outputs that follow anti-Muslim speech on the part of the president himself, courts do two things. They recognize the possibility of a legal connection between avowed animus on

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379 As Lisa Manheim and Kathryn Watts show, presidential orders are increasingly at the crux of litigation involving executive power, challenging an earlier legal framework that focused on presidential action through the agencies. Lisa Marshall Manheim & Kathryn A. Watts, Reviewing Presidential Orders, 86 U. CHI. L. REV. (forthcoming 2019).

380 See Katherine Shaw, Beyond the Bully Pulpit: Presidential Speech in the Courts, 96 TEX. L. REV. 71, 100–02 (2017); see also Grove, supra note 268.

381 Cf. 138 S.Ct. at 2418 (“we must consider not only the statements of a particular President, but also the authority of the Presidency itself”)

382 For analogous defenses of an indirect role for judges in enforcing constitutional norms, see Matthew Stephenson, The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs, 118 YALE L.J. 2, 7–25 (2008); Renan, Presidential Norms, supra note 8, at 2263.

383 This suggestion qualifies a claim made by Jeffrey Tulis on whether law can regulate the rhetorical presidency. Tulis argues that popular rhetoric can be entirely prohibited, as he says it was in the early Republic, or it can be permitted always. But he suggests that “the discretion needed to mediate between [these two poles] is itself antithetical to law and regular procedure.” TULIS, supra note 113, at 203.
the part of the incumbent and the policies of his presidency. At least as import-
portant, courts serve an expressive function; they recognize that avowed ani-
mus on the part of the incumbent is a basis for vigilance from courts to protect
religious minorities—not in spite of but because he is president.

C. Legal Liability and the One vs. Many

The relationship between the individual and the composite is also at the crux
of disagreements and confusions relating to the president's criminal and civil
liability. This set of questions emerges from debates over the personal “dignity”
of the king—as detailed above. In the context of current governing arrange-
ments, however, the one-vs.-many axis comes to the fore of the conceptual and
doctrinal difficulties.

1. Investigating (and indicting?) the president.

The incumbent’s immunity from the criminal process reemerged in a series
of cases involving President Nixon, who had taken personal possession of the
tape recordings sought by special prosecutors investigating Watergate.385 When
it reached the Supreme Court, United States v. Nixon presented one of the most
important confrontations between the person and the institution in American
constitutional development.386 President Nixon argued that the Court lacked ju-
risdiction to decide the case because the special prosecutor simply disagreed with
a decision ultimately within the constitutional authority of the incumbent to
make; “if the decision below were allowed to stand it could no longer fairly be
contended that the President of the United States is ‘master in his own
house.’”387 In their reply brief, the President’s attorneys went further: “It will
not do to say . . . that ‘the President is the head of the Executive Branch[’] . . .
Instead, as the Court said in Johnson, ‘the President is the Executive Branch.’”388

The Supreme Court rejected this argument, holding that it could properly
resolve the dispute between the President and the special prosecutor. But its
decision somewhat awkwardly blends together understandings of the institution
and the person—focusing in part on the personal intentions of the President
and individual Attorneys General, as revealed through their public statements
and congressional testimony, to abide by the delegation of independent authority
to the special prosecutor. Moreover, the Court seems almost to collapse any

385 When the issue came before the District of Columbia Circuit, the court rejected the argument for pre-
rogative rooted in the king's two bodies: “Though the President is elected by nationwide ballot, and is often
said to represent all the people, he does not embody the nation's sovereignty . . . Sovereignty remains at all
times with the people, and they do not forfeit through elections the right to have the law construed against
and applied to every citizen.” Nixon v. Sirica, 487 F. 2d 700, 711 (1973) (en banc). A framework for legal
accountability “would be rendered capricious—and very likely impotent,” the court of appeals cautioned,
“if jurisdiction vanished whenever the President personally denoted an Executive action or omission as his
own.” Id. at 709.
distinction in institutional status between the special prosecutor and the president: “that both parties are officers of the Executive Branch,” the Court reasons, “cannot be viewed as a barrier to justiciability.”

The Court’s outcome finds firmer footing if it is reinterpreted as an accommodation between the person and the institution of the presidency—one that recognizes some fundamental interdependence and yet emphasizes the centrality of the institution for public law. The incumbent and the presidency are in an important sense inextricable. But the incumbent is neither the whole of the institution, nor is the incumbent unable to precommit to be bound by other parts of the institution. Indeed, such precommitments -- though not undoable -- are nevertheless crucial to the vitality of the institution itself.

The Court’s opinion hints at this possibility in its discussion of the Accardi principle but fails to develop it. The salience of the Accardi principle in Nixon is not really about the personal intentions of the incumbent or his Attorneys General to abide by the special prosecutor regulation. It is that public law recognizes such a regulation as binding unless formally rescinded. That constraint on the personal whim of the incumbent is a significant way in which the presidency preserves legitimate authority. The second aspect of the Court’s constitutional holding thus follows from the first: that “neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified presidential privilege of immunity from judicial process under all circumstances.”

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

Adopting a strongly personal frame, the Office of Legal Counsel has concluded that a sitting president cannot be indicted. With striking resonances to the logic of James I—that the body politic renders the body natural inviolable—OLC reasoned in 1973: “[T]he President is the symbolic head of the Nation. To wound him by a criminal proceeding is to hamstring the operation of the whole

389 Nixon, 418 U.S. at 697.
390 Cf. Brief for the United States at 43–44, Nixon, 418 U.S. 696 (No. 73-1766) (“[I]t stands the doctrine of separation of powers on its head to suggest that it precludes the Judiciary from giving full force and effect to the allocation of authority within the Executive Branch under an arrangement that was designed by the Attorney General and approved by the President as indispensable to forestall a further erosion of faith in the Executive Branch.”).
391 418 U.S. at 706.
governmental apparatus, both in foreign and domestic affairs.” President Nixon pressed a similar position before the Supreme Court, arguing that “[t]he functioning of the executive branch ultimately depends on the President’s personal capacity. . . . If the President cannot function freely, there is a critical gap in the whole constitutional system.” And President Trump’s lawyers have echoed these arguments in current debates.

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

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

Shorn of the rhetoric of a person embodying the whole of national government, moreover, the duty of the person to the institution might look quite different. Where real criminal exposure rises to the level of inhibiting the work of the presidency, perhaps the incumbent’s obligation is to voluntarily exercise section 3 of the Twenty-Fifth Amendment and thereby provide for the continued

392 Presidential Amenability, supra note 185, at 29. OLC reaffirmed the position that the president cannot be indicted in 2000. That opinion identified three types of burdens on the presidency: “(a) the actual imposition of a criminal sentence of incarceration, which would make it physically impossible for the President to carry out his duties; (b) the public stigma and opprobrium occasioned by the initiation of criminal proceedings, which could compromise the President’s ability to fulfill his constitutionally contemplated leadership role with respect to foreign and domestic affairs; and (c) the mental and physical burdens of assisting in the preparation of a defense for the various stages of the criminal proceedings, which might severely hamper the President’s performance of his official duties.” Id. at 222.

393 Brief for the Respondent at 96, United States v. Nixon, 418 U.S. 683 (1974) (Nos. 73-1766, 73-1834); see also Alexander M. Bickel, The Constitutional Tangle, NEW REPUBLIC, Oct. 6, 1973 (arguing that the president cannot be indicted because the presidency embodies “the continuity and indestructibility of the state”).

394 Reply Brief for the United States at 32–33, Nixon, 418 U.S. 683 (1974) (Nos. 73-1766, 73-1834). Documents of the Watergate task force reveal that the team was divided on the question whether a sitting president could be indicted. See, e.g., Memorandum from Rotunda to Starr.

395 See, e.g., Freedman, supra note 394, at 50–51 (“Rather than degrading the office . . . the incumbent’s amenability to prosecution enhances the reputation of the Presidency and reflects the nation’s hopes” because subjecting the President to criminal prosecution “legitimates his or her good character as a republican leader.”).
functioning of the presidency. At a minimum, the question today is not whether the president is amenable to criminal process but at what point such process unduly interferes with the institution of the presidency. Claims of impending damage to the institution have been made at every step toward legal accountability.

2. Civil damages and the presidency.

The president’s amenability to civil liability also has prompted a distinctive “jurisprudence of the presidency.” Here, again, disagreements among the jurists, at their core, are disagreements about the relationship between the person and the institution of the presidency. Because the cases underappreciate the interdependence of the president’s two bodies, however, they create a doctrine that both under- and overprotects presidential power.

Nixon v. Fitzgerald held that absolute immunity from damages liability predicated on official acts is “a functionally mandated incident of the President’s unique office.” Ordinarily, the absolute immunity inquiry is function-specific. Fitzgerald, however, rejected a function-specific account of the presidency, reasoning that “[i]n many cases it would be difficult to determine which of the President’s innumerable ‘functions’ encompassed a particular action.” Embracing the view of Justice Story that the person of the president must enjoy “in civil cases at least . . . an official inviolability,” the Court reasoned that the president alone is responsible for the “enforcement of federal law,” “the conduct of foreign affairs,” “and management of the Executive Branch.” In contrast to other executive officials, such as governors or cabinet officers, who enjoy only qualified immunity, “the singular importance of the President’s duties” and his “unique status under the Constitution” meant that “diversion of his energies by concern with private lawsuits would raise unique risk to the effective functioning of government.”

According to the dissenters, the majority misconstrued the nature of the office and the extent to which it protects the individual from legal scrutiny. “Attaching absolute immunity to the Office of the President,” argued Justice White,

397 Nixon v. Fitzgerald, 457 U.S. 731, 793 (1982) (White, J., dissenting) (disagreeing with the majority’s reliance on Mississippi v. Johnson and other historical materials for the proposition that there is a “special jurisprudence of the Presidency”).
399 Id. at 749.
400 Id. at 757.
401 Id. at 749 (quoting 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1563 (1st ed. 1833)).
402 Id. at 750.
403 Id. at 750–51.
“is a reversion to the old notion that the King can do no wrong.” Neither original meaning nor public policy justified so “clothing the Office of the President with sovereign immunity [and] placing it beyond the law.”

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

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

This approach to civil damages would resolve some of the doctrinal and conceptual confusions that the current legal framework creates. When the Court decided Nixon and Harlow, it had already ruled, in Butz v. Economou, that Cabinet officers do not enjoy absolute immunity from civil damages. A significant question in Harlow—though not one clearly marked by the Court—was where and how to draw the boundary of the constitutional presidency. Do senior presidential aides fall inside of the line, but Cabinet members outside of it? For the Majority, such a legal rule was untenable; “[m]embers of the Cabinet are direct subordinates of the President,” the majority reasoned, “frequently with greater responsibilities, both to the President and to the Nation, than White House staff.” As a result, the Court created a constitutional presidency centered only on the person.

Such a conception of the presidential office, however, fails to understand the nature of presidential power and the role of the institution in executing it.

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404 Id. at 766–67 (White, J., dissenting). On the connection between the king's two bodies and the doctrine of sovereign immunity, see Seidman, infra note 22, at 431–45.
405 457 U.S. 800 (1982).
406 See id. at 825–27 (Burger, C.J., dissenting) (“The President cannot personally implement a fraction of his own policies and day-to-day decisions, id. at 825, and “Whatever may have been the situation beginning under Washington, Adams, and Jefferson, we know today that the Presidency functions with a staff that exercises a wide spectrum of authority and discretion and directly assists the President in carrying out constitutional duties,” id. at 825–26 n.4).
408 Harlow, 457 U.S. at 809.
As Chief Justice Burger, writing only for himself, pressed in dissent: “the President cannot personally implement a fraction of his own policies and day-to-day decisions”; “[t]he function of senior Presidential aides . . . is an integral, inseparable part of the function of the President.”\textsuperscript{409} Every significant function of the presidency involves actors beyond the president. If absolute immunity is important to protect a specific presidential function, then that particular function is not really protected when immunity extends only to the president himself. At the same time, if Cabinet members and presidential aides can fulfill that function shielded by qualified (not absolute) immunity, then the presidency does not require absolute immunity for the incumbent either. A doctrine that shrouds the person of the president, and only this person, in absolute immunity recreates a form of ministerial responsibility reminiscent of the king’s two bodies—an idea that sits uneasily with the commitments of American public law.

VI. CONCLUSION: UNDERSTANDING THE CONSTITUTIONAL PRESIDENCY

The president’s duality is a defining ambiguity of American public law. To understand the constitutional presidency as it exists, we need to recognize the role that both bodies are playing. There is no all-in solution to the two bodies problem. Public law engages the president’s duality at a more granular level, as it must. Resisting any simple prescription, this conclusion suggests several patterns and themes that come into view when we make the president’s two bodies central to our understandings of the presidency.

The two-bodies perspective illuminates a limitation in how American constitutional theory has engaged questions of presidential prerogative. The legal debate has largely focused on the meaning of “executive power” in the Vesting Clause of Article II. The foregoing brings into view the significance of the rest of that Clause—not just as a matter of formalist interpretation but also as a matter of real or effective power. What does it mean to vest any sort of tremendous institutional power in a single person? And how do we reconcile that constitutional commitment with others—including those constitutional commitments that have developed over time to make the exercise of presidential power legitimate or “respect-worthy” for a changed polity?\textsuperscript{410} From this perspective, the personal or charismatic power of the individual retains an unreconstructed foothold in aspects of our practice. We see this most vividly in the president’s immunity from injunctive relief and in arguments that a president cannot act \textit{ultra vires} when he exercises power directly vested in his person. These aspects of our practice are difficult to justify under American public law as it has developed. They are problematic precisely because they seem to rely so heavily on ideas of a personal, monarchic authority at the expense of institutional constitutional commitments—such as holding presidential power to legal account or imposing limits on self-dealing.

\textsuperscript{409} Id. at 824–28.

\textsuperscript{410} Cf. Michelman, supra note 44.
Teasing apart the analytic fault lines between the two bodies also reveals how distinct ideas about presidential power interact in the making of the constitutional office. The idea of a “unitary” executive, pursuant to which the incumbent can direct the discretion of any subordinate (the singular/composite axis), need not travel together with the idea of a presidential mandate, pursuant to which the temporary occupant can advance his particular policy and ideological vision of the state. A strongly unitary executive might instead implement the policy and ideological commitments of another actor (such as Congress). Meanwhile, the president might advance his particular policy and political agenda and assume responsibilities of moral leadership but nevertheless exercise power checked and channeled through the institutions of administrative government. Current approaches to presidential power tend to fuse these ideas, however. The result is fewer checks and balances on the presidency than either idea on its own would seem to support. Discretion accretes to the person of the president; presidential power is personalized. The constitutional office, however, risks becoming unmoored from features of accountability that might restrain either the presidential-mandate or the unitary-executive idea on its own.

These relationships are not intrinsic in the two bodies. They are constructed over time by different actors in furtherance of specific interests. The two bodies thus create a space for political disagreements to be cloaked in doctrinal terms in reliance on a mystical distinction.

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

Even as the president’s duality provides a rhetorical tool to negotiate—and obscure—political commitments, it also constitutes our constitutional understandings of the office. Start with the institutional presidency. The idea of a presi-
dency distinct from the person is an organizing tenet of American constitutionalism. Chief Justice Roberts is in the grips of this ideological construction when he says that the Court adjudicates the authority not of a person but of a presidency. Just as the king’s two bodies allowed a child to hold land, the idea of “the presidency” works to protect and enable individual presidents. Yet it also situates individual presidents in a broader system of constitutional constraint. Statutes construct the features of an office in time and over time. Executive branch lawyers serve the institution, not the individual. They build institutional memory and rely on presidential precedent; they develop norms of fidelity to something bigger, something more permanent than the transient inhabitant. This legitimates the conduct of the person even as it creates an idea of legitimacy that requires something more than personal whim and self-interested governance. To justify presidential authority as we have come to understand it, in terms of its scope and reach, the presidency needed to develop the means for non-arbitrary governance. Deliberative capacity, norms of legal accountability, and the instruments of continuity in governance developed through the institution.

If these are the functions of the institutional presidency, why does American constitutionalism hold on to the personal president? There is a stubborn resilience to this body. This is in part because of the ways in which our accounts of political accountability, at least at the national level, have become wrapped up in the individual of the president. Whether inescapable in the nature of contemporary problems or contingent on our hyper-polarized times, Congress is rarely the actor driving policy change. American constitutional democracy looks to the executive branch and justifies the responsiveness of the executive by invoking the personal political authority of the incumbent. It is also because our understandings of legitimacy require something more than technocratic rule-following—especially in the morally laden, hugely consequential, and genuinely uncertain domains that presidential action regularly inhabits. And it is because of some unshaken, maybe unshakable desire for moral leadership from the person of the president. The personal president—as a symbolic stand-in for democracy without congressional policy-making, as a pragmatic response to the problem of political party coordination, as a reflection of some not fully worked out claim to presidential virtue—continues to exact a role in the constitutional imagination, with real effects on public law.

It is in both these senses—the distortive and the constitutive—that the president’s two bodies comprise an ideology of presidential power. Efforts to integrate the two bodies, to manage this duality have taken the form of constitutional amendment, statutes, judicial precedent, and presidential norms. These aspects of our public law define the institution of the presidency and, in so doing, they refine the personal power of individual presidents. This is the story of the

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414 Cf. Claude Lefort, *The Permanence of the Ideologico-Political?*, in *POLITICAL THEOLOGIES* 186 (2006) (“The formula that makes the king an emperor in his own kingdom contains a contradiction: it makes a gesture toward both an unlimited authority and a limited authority; it indicates that modern monarchs’ tacit acceptance that their might is restricted by the might of others has not done away with the fantasy of imperial might—a fantasy that has been revived again and again throughout the ages.”).
Twenty-Fifth Amendment and of the Presidential Records Act. It helps to explain the staying power of Chief Justice Vinson’s dissent in the Steel Seizure case, and to unpack the significance of Justices Breyer and Kagan’s dissent in Trump v. Hawaii. It makes sense of the resilience of Justice Brennan’s framework for executive privilege in the context of multiple presidents.

The legal rules differ, and they should. But what these legal and theoretical schema share is an assessment of the substantive constitutional interests at stake, and how to understand the president’s two bodies in light of them. The question of how to manage the president’s duality thus emerges from close engagement with those underlying substantive commitments, not independently of them. Put differently, the legal lines between the president’s two bodies do not emerge from the president’s duality itself. It is in the ingenuity of constitutional argument that they are created and, over time, revised.415

Even as this project illuminates the power of public law in integrating the president’s two bodies, it also reveals the limits of law and legal methods in managing this duality. In those times when the sitting president repudiates the institutional presidency as it exists, then the presidency itself must be assessed. Public law offers a set of tools to structure contestation over the nature of presidential authority, the expectations for governance, and the role of legality (both judicial review and internal legal advisers) in holding presidential conduct to account. But it cannot solve the two bodies problem. It cannot definitively settle the terms of that relationship. Neither can the person of the president. When the institution has lost the support of elites and the public, the constitutional presidency has been transformed. The sitting president is uniquely positioned to fuel such reassessment. But the incumbent alone does not decide the nature of the presidency. Presidential charisma is both inseparable from American constitutionalism and itself governed, however incompletely, by choices that jurists and lawyers make about how to construct the president’s duality.

415 Cf. Hutson, supra note 32, at 123.