Presidential Whim

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Introduction: The New Legal Literature of the Presidency

In the opening pages of his influential treatise on the presidency, the political scientist Edward Corwin made two assertions about executive power that are worth recalling in today's context. First, he observed that executive power in the United States was "indefinite as to *function*" and had retained "much of its original plasticity as regards *method*."[1] Second, he inferred from this that it was executive power that was "most spontaneously responsive to emergency conditions."[2] Where matters were indefinite, rapidly evolving, unknown or uncertain, executive power could be made to handle them because it was relatively open-ended. Legal writing about executive power might be said to exhibit the same features. Just like its subject, the legal literature of the presidency is responsive to the needs of the times, and tends to theorize for executive power the functions and methods the times seem most to demand.

It is unsurprising, then, that Corwin's treatise is known for being the first to conclude that the grant of executive power in the Article II Vesting Clause included the Lockean prerogative.[3] This famous prerogative—a "[p]ower to act according to discretion, for the publick good, without the prescription of the Law, and sometimes even against it"—must have seemed vital in the midst of World War II.[4] In fact, we have had little need for it, given the great delegations of

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[1] EDWARD S. CORWIN, THE PRESIDENT, OFFICE AND POWERS, 1787-1948: HISTORY AND ANALYSIS OF PRACTICE AND OPINION 1 (3rd ed. 1948).
[2] *Id.* at 1.
[3] Robert Scigliano, *The President's "Prerogative Power"*, *in* INVENTING THE AMERICAN PRESIDENCY , 237 (Thomas E. Cronin ed., 1989).
[4] JOHN LOCKE, TWO TREATISES OF GOVERNMENT 375 (Peter Laslett ed., 1988) (1690).

discretionary power Congress made to the President around the same time, but we will return to this point later. Each moment in our constitutional history has had its own shopping list for executive power. Alexander Hamilton wanted independence: that is, he wanted for the President to carry out the law according to his own judgment, rather than being bound to seek approval from a privy council or assembly, so that execution of the law would be "energetic" and "vigorous."[5] On the other side of the timeline, leading conservatives of the Reagan era also imagined an independent President, although their needs were different in light of the evolution of American politics and government. Thus it was Reagan conservatives, for example, who pushed the doctrine of presidential "non-enforcement"—a power to refuse to carry out what the President regarded as unconstitutional law—firmly into the mainstream.[6] They sought independence from judicial interpretation of the law in the legal advice they gave to the White House.[7] They strengthened the President's control over the administrative state by establishing centralized review from within the Executive Office of the President, and by appointing cabinet secretaries who thought of themselves as following presidential direction, rather than exercising their own statutory powers.[8] And they worked to enhance the influence of presidential

[5] Number 72, in THE FEDERALIST BY ALEXANDER HAMILTON, JAMES MADISON, AND JOHN JAY, 462–67 (Benjamin F. Wright ed., 1961). See also the remarks of James Wilson early in the Convention, 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 64–71 (Max Farrand ed., 1911).
[6] Frank Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905 (1989).
[7] Bruce E. Fein, *Promoting the President's Policies Through Legal Advocacy: An Ethical Imperative of the Government Attorney*, 30 FEDERAL BAR NEWS AND JOURNAL 406 (1983).
[8] EXECUTIVE ORDER NO. 12291, , 46 Fed. Reg. 13193 (1981); EXECUTIVE ORDER NO. 12498, , 50 FED. REG. 1036 (1985); William P. Barr, "Common Legislative Encroachments on Executive Branch Constitutional Authority, Memorandum for the General Counsels Consultative Group," in H. JEFFERSON POWELL, THE CONSTITUTION AND THE ATTORNEYS GENERAL 523–30 (1999); Peter L. Strauss, *Overseer, or the Decider - The President in Administrative Law Foreword*, 75 GEO. WASH. L. REV. 696, 702 (2006) (describing the point of view of cabinet secretaries). Relatedly, Reagan conservatives promoted a doctrine of "administrative non-acquiescence," according to which administrative agencies were not compelled to adopt a judicial interpretation of the law outside the context of the case in which it was announced. Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 681–82 (1989).

interpretation of the law by issuing greater numbers of signing statements.[9] These efforts to secure legal independence for the executive branch complemented efforts by the conservative legal movement to establish friendly precedents in the courts.[10]

Over the last decade, but especially in the last few years, a new legal literature on the presidency has emerged. It, too, responds to perceived needs, although in a somewhat different way. Unlike the many writings that have emphasized presidential independence, this body of literature tends to restrict the scope of executive power, and to emphasize its dependence, inferiority, and accountability to the other powers of government. At the center of this account are a group of moral values, including responsibility, professionalism, skill, due care, good faith, faithfulness, and honesty. Thus, to pick a few examples, we read that the presidency is an office limited by informal norms reflecting these values, which are now eroding.[11] According to other writers, the office assumes (and requires) that its occupant will possess a minimal degree of "civic virtue."[12] The Constitution's requirements that the President "faithfully execute" his office and that he "take care that the laws be faithfully executed" were intended to limit his discretion, to require him to follow standing law, and to prohibit his corrupt use of official power for private benefit.[13] Other clauses prohibit the President from corruptly receiving benefits from foreign powers or from seeking to use his foreign-policy powers for his own private ends.[14] The Vesting

[9] REPORT OF THE AMERICAN BAR ASSOCIATION TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE, 10 (2006).
[10] STEPHEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW 79–85 (2008).
[11] Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187 (2018).
[12] SUSAN HENNESSEY & BENJAMIN WITTES, UNMAKING THE PRESIDENCY: DONALD TRUMP'S WAR ON THE WORLD'S MOST POWERFUL OFFICE 6 (2020); Sanford Levinson & Mark A. Graber, *The Constitutional Powers of Anti-Publian Presidents: Constitutional Interpretation in a Broken Constitutional Order*, 21 CHAP. L. REV. 133 (2018).
[13] Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111–2192, 2117–19 (2018).
[14] John Mikhail, *The 2018 Seegers Lecture: Emoluments and President Trump*, 53 VAL. U. L. REV. 631, 655 (2019).

Clause, sometimes argued to grant the President a power to violate the law, is not a source of monarchical "prerogative," but only of a power to carry the law into effect.[15] A power to carry the law into effect implies discretion, but it is a limited discretion, and does not include refusing to execute what the President independently decides are unconstitutional laws.[16] The Constitution also provides little support for presidential management of criminal prosecutions.[17] The obligations that flow from the Take Care Clause, which can be analogized to fiduciary obligations in the law of agency, prohibit the President from pardoning himself for criminal conduct.[18] Where the President corruptly seeks to use his powers to control law enforcement, it constitutes an obstruction of justice within the meaning of federal law.[19] For these reasons (and others), in legal challenges to presidential action, courts ought to permit inquiries into the President's intent.[20]

Another branch of this literature is concerned specifically with presidential administration. Here, contrary to its traditional framing, the administrative state is described not as a threat to the rule of law, because it mixes governmental functions, but as its guarantor. This is because the distribution of power *within* the administration—between the White House and line agencies, between appointed agency heads and career civil servants, and between officials

[15] Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169 (2019); Julian Davis Mortenson, *The Executive Power Clause* (2019), https://papers.ssrn.com/abstract=3406350 (last visited Feb 7, 2020); Matthew Steilen, *How to Think Constitutionally About Prerogative: A Study of Early American Usage*, 66 BUFF. L. REV. 557 (2018).
[16] Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671 (2014); Matthew Steilen, *Judicial Review and Non-Enforcement at the Founding*, 17 U. PA. J. CONST. L. 479–568 (2014).
[17] Peter M. Shane, *Prosecutors at the Periphery The Trump Administration and Administrative Law*, 94 CHI.-KENT L. REV. 241–266 (2019); Bruce A. Green & Rebecca Roiphe, *Can the President Control the Department of Justice*, 70 ALA. L. REV. 1 (2018); Andrew McCanse Wright, *The Take Care Clause, Justice Department Independence, and White House Control*, 121 W. VA. L. REV. 353 (2018).
[18] Ethan J. Leib & Jed Handelsman Shugerman, *Fiduciary Constitutionalism: Implications for Self-Pardons and Non-Delegation*, 17 GEO. J. LAW & PUB. POLICY 463, 474–76 (2019).
[19] Daniel J. Hemel & Eric A. Posner, *Presidential Obstruction of Justice*, 106 CALIF. L. REV. 1277, 1281–82 (2018).
[20] Katherine Shaw, *Speech, Intent, and the President*, 104 CORNELL L. REV. 1337 (2019).

with different career strategies, different tenures of office, and different professional norms—creates a kind of "internal" separation of powers.[21] And contrary to the familiar framing, this literature tends to regard the President not as supplying democratic accountability to administration, but as posing a threat of arbitrary interference. In contrast, the internal separation of powers preserves long-standing agency norms against partisan interference and unethical or illegal conduct.[22] These forms of power-sharing within the administration sometimes work to reinforce the traditional, "external" separation of powers between the executive branch and Congress. Legislative leaders form alliances both inside of government and outside, in civil society, which can function in specific political contexts to channel presidential power, to slow down government, or to produce legislative change. Two leading contributors have memorably described these relationships as constituting the "thick political surround" of the exercise of governmental power.[23] This branch of the new legal literature on the presidency seems less attributable to the unique character and politics of Donald Trump. At least in part, it is a reaction to a vision of presidential control over administration laid out two decades ago and implemented in various contexts by Presidents Clinton, Bush and Obama.[24]

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[21] Rebecca Ingber, *Bureaucratic Resistance and the National Security State*, 104 IOWA L. REV. 139, 155–73 (2018); Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L. J. 346, 391–407 (2016); Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. 227 (2016); Gillian E. Metzger, *1930s Redux: The Administrative State under Seige The Supreme Court 2016 Term: Foreword*, 131 HARV. L. REV. 1, 78–85 (2017).

[22] Ingber, *supra* note 22 at 169–71.

[23] Aziz Z. Huq, *The President and the Detainees*, 165 U. PA. L. REV. 499, 575–79 (2016); Huq and Michaels, *supra* note 22 at 391. *But see* Christopher J. Walker, *Legislating in the Shadows*, 165 U. PA. L. REV. 1377 (2017).

[24] Elena Kagan, *Presidential Administration*, 114 HARVARD LAW REVIEW 2245 (2001). For an account predating the Trump presidency and emphasizing these same themes in the context of national security, see HEIDI KITROSSER, RECLAIMING ACCOUNTABILITY: TRANSPARENCY, EXECUTIVE POWER, AND THE U.S. CONSTITUTION (2015).

In many respects, the vision of the presidency laid out in this literature is compelling. As I see it, the primary problem with the vision is not whether it is adequately rooted in the constitutional text, structure, and history. It surely is. The problem with the vision is enforcement. Unlike an account of the presidency that is based on independence, an account that emphasizes dependence, faithfulness, and responsibility relies on legal limits. If those limits are unenforceable, then the vision behind it is really a matter of political ideology rather than constitutional law. This is not to deny it effect; political ideology has effect. It is to deny the particular kind of effect we associate with institutions enforcing the law—the effect at which much of this writing clearly aims. The remainder of this contribution to the Symposium considers different alternatives for enforcement in light of the basic problems posed by the Trump presidency.

The Trump presidency exhibits a particular set of pathologies that have motivated the new legal literature on the presidency. There is no doubt that writers in this line are concerned with Trump's style of leadership, and in particular with his tendency to be abrupt, reflexive, dissembling, and unilateral, deliberately walling off the personnel who best understand an issue. This is the problem of "presidential whim." Presidential whim, you might say, is the corruption of presidential independence. The problem is exacerbated by the many open-ended statutory delegations of power to the President, which constitute by far the greatest formal component of modern presidential power. Trump's leadership style has identified and exploited a structural weakness in this form of delegated authority. The most effective method for checking presidential whim and giving effect to the competing vision of the presidency laid out in the new legal literature is the enactment of procedural restrictions on the President's exercise of delegated powers. This could take the form of a presidential analogue to the Administrative Procedure Act,

requiring the President to employ something like "interagency review," or of specific procedures set out in individual statutes that delegate power to the President. A statute might impose formal requirements on the exercise of presidential power, say, by prohibiting the use of social media platforms like Twitter to exercise delegated authority. Whatever form they take, these procedural requirements can be designed to check presidential action by whim and in gross self-interest. Both political parties have strong reasons to support such legislation.

Once ex ante restrictions are in place, courts have a role to play. They can support statutory regulations of presidential power by conducting judicial review, focusing in particular on the narrow question of whether the President complied with mandatory procedures. They could require that statutory delegations of power to the President be accompanied by minimum procedures sufficient to prevent arbitrary governmental action. This would be a "procedural non-delegation doctrine," and it finds some support in history and Supreme Court precedent.

I. Ex Post Enforcement of Legal Limits

A natural place to begin thinking about enforcing legal limits on the presidency is to imagine adjudicative forums for determining whether those limits have been exceeded in a particular case. The paradigm institution is the court of law, and courts enjoy a long tradition in Anglo-American government of enforcing limits on executive power by awarding both injunctive relief and damages.[25] In the context of the chief executive and head of state, immunity while in office from criminal prosecution and civil damages suits arising out of official conduct

[25] JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 65–78 (2012); EDITH G. HENDERSON, FOUNDATIONS OF ENGLISH ADMINISTRATIVE LAW: CERTIORARI AND MANDAMUS IN THE SEVENTEENTH CENTURY 1–45 (1963).

make courts less useful.[26] Of course, the U.S. Constitution also supplies a removal proceeding conducted in Congress for officers guilty of high crimes and misdemeanors, namely, impeachment and conviction. But there are also other accountability structures in Congress that do not take the form of adjudicatory proceedings. Congressional committees serve this function, both under statutory mechanisms that require the executive branch to share information and by launching their own investigations supported by compulsory process for witnesses and documents.[27] And although much of the initiative and significant discretion regarding budgeting, spending, and appropriations has been delegated to the executive branch, Congress retains authority to oversee how federal money has been spent and to reverse some presidential spending decisions.[28] This, too, constitutes a mechanism for enforcing legal limits on the presidency.

In recent years, however, ex post mechanisms like these have become less effective when directed against the executive branch. Polarization in the electorate itself appears to have decreased the political costs to party leaders and committee chairs for refusing to investigate evidence of wrongdoing by officers and even governmental employees from the same party.[29] On the other hand, the President's position as leader of his party enables him to impose significant costs on members of Congress who use their powers to investigate the President or executive officers, or even just to speak out about their conduct. According to one sitting senator,

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[26] Randolph D. Moss, *A Sitting President's Amenability to Indictment and Criminal Prosecution, Memorandum Opinion for the Attorney General*, 24 OPINIONS OF THE OFFICE OF LEGAL COUNSEL 222 (2000); Nixon v. Fitzgerald, , 457 U.S. 731 (1982).

[27] Section 136, LEGISLATIVE REORGANIZATION ACT OF 1946, , 2 U.S. s. 190d ; McGrain v. Daugherty, , 273 US 135 (1927).

[28] JOSHUA AARON CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 61–77 (2017); Louis Fisher, *Delegating Power to the President*, 19 J. PUB. L. 251–282, 262–64 (1970).

[29] *Cf.* Neal Devins, *Party Polarization and Congressional Committee Consideration of Constitutional Questions Symposium*, 105 NW. U. L. REV. 737, 756–59, 762–68 (2011) (exploring the effect of polarization on committee proceedings and declining constitutional hearings).

Republican senators reported voting to acquit President Trump out of fear that he would use his position to prevent their reelection.[30] Polarization may have consequences, as well, for electoral accountability mechanisms, as the Republican party has allegedly sought to use its control of state legislatures to redraw federal election districts to advantage the party.[31] The problem, in short, seems to be that ex post enforcement of legal limits on the presidency through legislative and electoral processes is itself limited by partisanship and corruption—the same vices at which the new literature of the presidency is aimed. Enforcement mechanisms that depend for their effectiveness on the very values they are meant to guard can only be effective when there is a widespread attachment to the values and agreement about what conduct they permit and condemn.

Although we tend to think of adjudicatory proceedings as more resistant to the effects of partisanship, there are reasons to doubt that they can be effect in enforcing legal limits against the President. The spectacle of President Trump's impeachment trial proved irresistible to party leadership and the President's agents in the Senate, who used it largely as an opportunity for highly visible "position taking" and "message politics."[32] While there was considerable frustration among the President's opponents with the majority leader's refusal to summon additional witnesses to testify about the President's conduct, this reflected, at least in part, substantive disagreement about the scope of impeachable offenses. Tennessee Senator Lamar Alexander agreed that the evidence showed the President had withheld aid to a foreign nation in an effort to cause them to investigate his political opponent, and that such conduct was an

[30] Sherrod Brown, *In Private, Republicans Admit They Acquitted Trump Out of Fear*, N.Y. TIMES, February 5, 2020.
[31] See Rucho v. Common Cause, , 139 S.Ct. 2484 (2019); Nicholas Stephanopolous, *The Anti-Carolene Court*, 10–14, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3483321 (last visited Mar 14, 2020).
[32] *See* KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY 134–35 (2009).

"inappropriate" use of his power. But the senator disagreed this was an impeachable offense, and concluded the impeachment was simply a partisan effort to remove a democratically elected President.[33] In this sense, the Trump trial reaffirmed one scholar's earlier conclusion that "a party-political logic overwhelmed the Framer's design and created a situation in which the position that impeachment is limited to indictable offenses could not be effectively discredited."[34] Because the parties have diverged precisely on the moral values and norms governing conduct in the presidential office, it is impossible to sustain a removal proceeding on those grounds alone. The popularization of the presidential office and the popular control over party primaries (and thus the candidate-selection process) have reinforced this trend.[35] The removal of a president on a party-line vote in a summary proceeding for violating institutional norms not shared by the parties or their constituencies could only be perceived as factional and undemocratic.

Adjudicative proceedings in courts of law are hampered by a different set of problems that limit their effectiveness as devices for ex post enforcement of legal limits on the presidency. The signal cases of Marbury v. Madison and Youngstown v. Ohio, whose meaning in the administrative law context is that Congress may limit the President's discretion and that these limits may be enforced in court when individual rights have been violated, accomplish little where federal law actually grants the President broad discretion, or where one of the parties has

[33] Alexander Statement on Impeachment Witness Vote - Press Releases - United States Senator Lamar Alexander, , https://www.alexander.senate.gov/public/index.cfm?p=PressReleases&id=AA7E4960-6788-43A9-AF03-5DC456A0D448 (last visited Feb 16, 2020).
[34] Stephen M. Griffin, *Presidential Impeachment in Tribal Times: The Historic Logic of Informal Constitutional Change*, 51 CONN. L. REV. 413, 419 (2019).
[35] On the importance of the evolution of the presidential candidate selection process, see STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 41–51 (2018); James Gardner, *Presidential Selection: Historica, Institutional, and Democratic Perspectives*, *in* THE BEST CANDIDATE: PRESIDENTIAL NOMINATION IN POLARIZED TIMES (Eugene Mazo & Michael Dimino eds., 2020).

succeeded in preventing Congress from acting at all, inviting the President to assert an independent authority.[36] Moreover, there is little reason to expect that courts will accept the invitation to consider presidential intent or motive when resolving suits challenging presidential action. Just the thought of such an inquiry has made the Court squeamish.[37] The primary difficulty, however, will be the many cases of "mixed motives."[38] Will courts invalidate the president's action where there is evidence of *any* improper motive? Profound disagreement about what conduct violates the values and norms that attach to the office will inevitably give such judgments a partisan cast. Will courts instead invalidate presidential acts only where improper motives are a "but-for" cause or predominate over proper motives? This will require weighing evidence of reasons for the action, and however such a task is carried out it will invite challenges that courts are simply second-guessing the President's policy choices.[39] Where a case implicates the equal-protection component of the Fifth Amendment Due Process Clause, history and precedent will support such an inquiry. Even so, from the justices' perspective, impugning the motives of a coordinate branch of the federal government is not the same as impugning the motives of state or local actors, the core of equal protection jurisprudence.[40] The Court's current majority has already signaled its unwillingness to interfere in presidential decisions in areas like foreign policy and armed conflict, in light of the traditional deference the Court has shown to the

[36] For this framing of *Marbury* and *Youngstown*, see Harold H. Bruff, *Judicial Review and the President's Statutory Powers*, 68 VA. L. REV. 1, 8–13 (1982). For a study of how the Taney Supreme Court read statutory delegations of power to grant wide and judicially unreviewable discretion to executive officers, see MASHAW, *supra* note 26 at 210–16.
[37] *See* NIXON V. FITZGERALD, *supra* note 27 at 756.
[38] Andrew Verstein, *The Jurisprudence of Mixed Motives*, 127 YALE L. J. 1106, 1134–43 (2017); John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970). For concerns similar to those expressed above about inquiries into presidential intent, see Shaw, *supra* note 21 at 1381–82, 1386.
[39] This was a principal argument in President Trump's trial brief for the impeachment. TRIAL MEMORANDUM OF PRESIDENT DONALD J. TRUMP, 2, 24 (2020).
[40] Nat. Fedn. of Indep. Business v. Sebelius, , 132 S. Ct. 2566, 2579 (2012).

political branches.[41] And in areas like enforcement of the Emoluments Clauses, where there are not yet well-formed, mature judicial doctrines, it will be relatively easy for federal courts to dismiss lawsuits on justiciability grounds, as one court already has. There is little reason at this point to suspect emoluments suits of becoming the cornerstone of a new judicial enforcement of presidential limits.[42]

II. Prospects for Ex Ante Enforcement

In addition to ex post enforcement in Congress or courts of law, however, there is the prospect of ex ante enforcement of presidential limits. By "ex ante enforcement" I mean primarily federal statutes that channel or routinize the exercise of presidential power, here in an effort to promote the moral values at the core of the new legal literature on the presidency. Indeed, I believe that ex ante enforcement provides the best chance for giving legal effect to the institutional vision expressed in this body of writing. But even if you are more sanguine about ex post enforcement, it makes sense to consider ex ante mechanisms. Nothing that follows will turn on rejecting the ex post use of courts or Congress; in fact, I will argue that appropriately designed ex ante mechanisms will increase the likelihood of judicial enforcement of presidential limits, by rendering judicial review largely procedural.

One of the most common objections to government under President Trump has focused on what we might call "presidential whim." Where the delegation of discretionary authority to

[41] Trump v. Hawaii, , 138 S. Ct. 2392 (2018).
[42] Blumenthal v. Trump, , slip op. (2020); Citizens for Responsibility and Ethics in Washington v. Trump, , slip op. (2019); Brad Kutner, *Full Fourth Circuit Set to Rehear Emoluments Fight* (2019), https://www.courthousenews.com/full-fourth-circuit-set-to-rehear-emoluments-fight/ (last visited Feb 27, 2020). In contrast, district courts have issued injunctions against the President in litigation over executive funding of the border wall. See El Paso Cnty v. Trump, , slip op. (2019); Trump v. Sierra Club, , 588 U.S. ____ (2019).

the President is unencumbered by procedural requirements, and the President is able to take action without reflection or consultation to ensure that he is guided by reason and policy, his choices may result from other causes: impulse, fear, prejudice, or desire, just to name a few. In a recently discovered essay, the late legal philosopher H. L. A. Hart distinguished two kinds of choices. In one kind, he wrote,

> we merely indulge our personal immediate whim or desire. Will you have a martini or sherry? You choose a martini, and I ask why: you reply, 'Because I like it better—that's all.' Here . . . the chooser accepts no principle as justifying his choice: he is not attempting to do something which he would represent as wise or sound or something giving effect to a principle deserving of rational approval and does not invite criticism of it by any such standards.[43]

Hart contrasted this sort of choice with what he called "discretion." In contrast to whim, discretion was regarded as "an intellectual virtue," and its exercise required a degree of development or maturity, so that "the judgment or discernment to be exercised in choice is ripe."[44] Hart thought this distinction important for understanding the authority vested in public officers. "When we are considering the use of discretion in the Law we are considering its use by officials who are holding a responsible public office." Such officials were expected to "choose responsibly having regard to their office and not indulge fancy or mere whim."[45] Hart's essay dates from the mid-twentieth century, but this contrast between discretion and other, less salutary forms of choice is deeply embedded in American legal thought. One prominent academic has argued that for early Americans, "discretion" connoted not just choice, but the wisdom to

[43] H. L. A. Hart, *Discretion*, 127 HARV. L. REV. 652, 657 (2013).
[44] *Id.* at 656–57.
[45] *Id.* at 657.

appropriately manage things, especially oneself.[46] Of course, a concern with whim is also present in other legal traditions, and sometimes goes under other names, such as "arbitrariness" or "prerogative."[47]

President Trump's decision-making is criticized in particular for being abrupt, reflexive, and unilateral—vices related to "whim" in just the sense above. On January 27, 2017, a single week after the President had assumed office, he issued Executive Order 13769, "Protecting the Nation from Foreign Terrorist Entry into the United States."[48] Most of the public referred to it as "the Muslim ban," since it appeared to fulfill a promise from candidate Trump to order a "total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what the hell is going on."[49] One day later, on January 28, a lawsuit was filed seeking a stay of enforcement of the President's order, which was immediately granted, but in the interim thousands of people had been affected, including a significant number of lawful immigrants and permanent residents who were detained in airports.[50] As Susan Hennessey and Benjamin Wittes have reported, the order was issued "without meaningful consultation with affected federal agencies, and without anything beyond cursory legal review."[51] The Department of Justice had given it "a facial review . . . for obvious illegality," but national security agencies had apparently not reviewed its substance.[52] The Department of Homeland Security learned of

[46] H. Jefferson Powell, *The Political Grammar of Early Constitutional Law*, 71 N.C. L. REV. 949, 996 (1992).
[47] Timothy Endicott, *Arbitrariness*, 27 CAN. J. L. JURIS. 49, 54, 70 (2014); George P. Fletcher, *Some Unwise Reflections about Discretion*, 47 LAW AND CONTEMPORARY PROBLEMS 269, 282 (1984).
[48] EXECUTIVE ORDER 13769, "PROTECTING THE NATION FROM FOREIGN TERRORIST ENTRY INTO THE UNITED STATES," , 82 Fed. Reg. 8977 (2017).
[49] Jenna Johnson, *Trump calls for "total and complete shutdown of Muslims entering the United States,"* WASHINGTON POST, December 7, 2015.
[50] Peter Baker, *Travelers Stranded and Protests Swell Over Trump Order*, THE NEW YORK TIMES, January 29, 2017; Michael D. Shear, Nicholas Kulish & Alan Feuer, *Judge Blocks Trump Order on Refugees Amid Chaos and Outcry Worldwide*, THE NEW YORK TIMES, January 28, 2017.
[51] HENNESSEY AND WITTES, *supra* note 13 at 36.
[52] *Id.*

the order shortly before its release, while the Pentagon and intelligence services were not meaningfully consulted at all. In effect, the President had abandoned the normal process of consulting and integrating the viewpoints of relevant executive agencies before establishing a major policy, known as "the interagency process." The result, conclude Hennessey and Wittes, was to give a major national security decision "as little process as the modern presidency has ever seen."[53] But the pattern continued: the President's ban on transgender members in the armed services, announced by Twitter; his volte-face on the issue of North Korea; the abrupt withdrawal of U.S. armed forces from Syria, a policy that shocked senior military officers and members of Congress; and the unpredictable replacement of senior advisors, jettisoned for upsetting the President or for crossing swords with his children. In these acts and others, Hennessey and Wittes see "the attempt to conduct a presidency by whim and will."[54]

The attack on the interagency process and the effort to conduct the presidency by whim have political value. From the perspective of electoral constituencies supporting the President, "The lack of consultation was evidence of . . . responsiveness" to their interests.[55] But abandoning consultation also imposes costs, principally on the effectiveness of the President's policies. Order 13769 was revoked in the shadow of lawsuits premised on its discriminatory character, a defect that might have been corrected by a slower, more deliberate interagency process. As it was, the President and his spokesmen were left to deny that the Order intentionally discriminated against Muslims, despite his public pronouncements as a candidate. Political scientist Daniel Drezner has argued that the President's decision-making has been "badly

[53] HENNESSEY AND WITTES, *supra* note 13 at 39.
[54] *Id.* at 52.
[55] *Id.* at 37. The President's memorandum in the impeachment trial surprisingly featured several attacks on the interagency process in foreign policy. TRIAL MEMORANDUM OF PRESIDENT DONALD J. TRUMP, *supra* note 40 at 2,32.

impaired" by "temper tantrums, his short attention span and his poor impulse control."[56] He subjects his advisors to spontaneous verbal abuse, sometimes in view of the public, often lashing out simply because he happened to see something on TV. The President has fashioned these behaviors into a self-consciously maintained management style. According to Drezner, "Trump disdains any form of strategic planning. As one of his advisors explained, 'He gets frustrated when there *is* a plan.' . . . 'There's an animosity towards planning.'"[57] In areas like foreign policy, where the President has been delegated extensive authority by Congress, Trump has been able to effect major policy shifts unilaterally, and, using his control over the Republican party, to prevent Congress from taking action to limit or reverse his decisions. Many foreign service personnel who resisted these shifts from inside the State Department have since left government, rather than face the President's "unrelenting" attacks.[58]

President Trump's ability to act on whim is greatly enhanced by the dozens of federal statutes delegating power to the President.[59] Thus, for instance, Executive Order 13769 purported to rest on authority delegated to the President by the Immigration and Nationality Act.[60] The Act requires every foreign "alien" seeking admission to the United States to be detained before entry and examined by an immigration officer to determine admissibility, but reserves to the President a power to suspend entry "of any aliens or of any class of aliens . . . for such period as he shall deem necessary" whenever he finds their entry "would be detrimental to the interests of the

[56] Daniel W. Drezner, *Immature leadership: Donald Trump and the American presidency*, INTERNATIONAL AFFAIRS, 5–6.
[57] *Id.* at 7.
[58] *Id.* at 12–13.
[59] *Cf.* Fisher, *supra* note 29 at 273 (citing a legislative study that found 1100 statutes under which the President was obligated to act).
[60] *See* EXECUTIVE ORDER 13769, "PROTECTING THE NATION FROM FOREIGN TERRORIST ENTRY INTO THE UNITED STATES", *supra* note 49.

United States."[61] Other statutory regimes delegate broad powers to the President in matters of foreign tariffs, declarations of emergency, and the use of armed force.[62] Delegations such as these are not governed by a framework statute that sets out procedures the President must follow to invoke his authority. The Supreme Court has held the President is not subject to the Administrative Procedure Act, which covers rulemaking and adjudication by federal agencies, on grounds that he is not an "agency" within the meaning of the Act.[63] Nor are there any statutory procedures that attend the issuance of presidential proclamations or executive orders, the legal forms by which the President exercises much of his statutory authority.[64] (*A fortiori*, there are no statutory procedural requirements for issuing presidential memoranda or similar guidance documents.) The interagency process is also "an informal one not governed by statutory procedures."[65] And although many federal statutes delegate authority to the President on condition that he make certain factual findings, a recent study concludes that "there does not appear to be any sort of generally applicable, formal process for how the President finds facts."[66]

Though unstructured delegations of power to the President are common, they are not constitutionally necessary. Indeed, it would be difficult to sustain the proposition that Congress generally lacks a power to require the President to follow certain procedures in the exercise of delegated authority. The text of the Necessary and Proper Clause grants such a power to

[61] 8 U.S.C. s. 1225.
[62] *See* Tariff Act of 1922, 42 Stat. 858; Reciprocal Tariff Act of 1934, 48 Stat. 943; Trade Expansion Act of 1962, 76 Stat. 872; Foreign Trade Agreements, 19 U.S.C. s. 1351; National Emergencies Act, 50 U.S.C. s. 1621(a), 1622, 1631; War Powers Resolution, 50 U.S.C. ss. 1541-49.
[63] Administrative Procedure Act, 5 U.S.C. ss. 551, 553-54; Franklin v. Massachusetts, , 505 US 788, 796 (1992).
[64] Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539, 552–53 (2004).
[65] Bruff, *supra* note 37 at 16.
[66] Shalev Roisman, *Presidential Factfinding*, 72 VAND. L. REV. 825, 874, 892–94 (2019).

Congress nearly in express terms.[67] The Supreme Court has affirmed, in cases known to every law student, that Congress may subject the President and principal executive officers to procedural requirements imposed by law.[68] The Court rested its refusal to apply the Administrative Procedure Act to the President on grounds of statutory silence and respect for a coordinate branch—principles of statutory interpretation—not on a constitutional bar.[69] A number of federal statutes currently require the President to consult with administrative personnel or to consider certain factors before making a policy decision.[70] From an early period in our history, Congress also imposed procedural rules on officers over whom the President is thought to have significant authority, such as federal prosecutors.[71] Modern statutes sometimes delegate power to a particular officer, rather than to the President, in an effort to insulate that officer's decision-making from presidential control; implied in such a delegation, at the very

[67] *See* U.S. Const., art. I, s. 8, cl. 18 ("Congress shall have power . . . to make all laws necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or any Department or Officer thereof."). Here, arguably, both the "foregoing Powers" and the "all other Powers" clauses are relevant, insofar as delegations to the President are commonly in areas where he enjoys a colorable claim of concurrent authority. *See* John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045 (2013).

[68] Hamdan v. Rumsfeld, (2006) (Part IV); Youngstown Sheet & Tube Co. v. Sawyer, , 343 US 579, 587–88 (1952); Marbury v. Madison, , 5 US 137 (1803) ("This is not a proceeding which may be varied, if the judgment of the executive shall suggest one more eligible; but is a precise course accurately marked out by law, and is to be strictly pursued."). *See also* Kendall v. United States ex rel. Stokes, , 37 US 524, 612–13 (1838) ("[I]t would be an alarming doctrine, that congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the constitution; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President.").

[69] FRANKLIN V. MASSACHUSETTS, *supra* note 64 at 800–01; see also Dalton v. Specter, , 511 US 462 (1994).

[70] See, e.g., 19 U.S.C. s. 1981(c)(1)(A), cited in Roisman, *supra* note 67 at 893 & n.302.

[71] Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 283 (1989) (describing early congressional regulation of investigatory procedures). Even in "The Jewels of the Princess of Orange," where Attorney General Taney famously describes "the district attorney as under the control and direction of the President, in the institution and prosecution of suits in the name and on behalf of the United States," it is conceded that an attorney for the United States has the power to discontinue a suit "except insofar as his powers may be restrained by particular acts of Congress." 2 Op. Att'y Gen. 482 (Dec. 28, 1831), in POWELL, *supra* note 9 at 50, 52, 54.

least, is a rejection of decisional procedures that would return control to the President.[72] Here we might cite those legal challenges to administrative action premised on the occurrence of "ex parte" contact between the White House and an agency, though only some have found success.[73] The Supreme Court would likely test these limitations by the principle laid out in its executive privilege cases, forbidding only the "unwarranted impairment of another branch in the performance of its constitutional duties."[74] In contrast, the strongest assertions by the executive of a power to ignore procedural requirements imposed by statute occur in areas of independent constitutional authority, such as foreign policy, rather than delegated power.[75] Even these, however, are couched in terms of statutory interpretation, rather than outright defiance.[76]

This constellation of authorities and practices does not establish that Congress should be understood to have, in every instance, a power to lay down procedures that the President must follow in exercising his authority (including constitutional authority). Although I will not argue the point here, this is likely not the case.[77] But it does show that our tradition is at odds with a

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[72] *See* Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263–323, 276–93, 317 (2006); Strauss, *supra* note 9 at 710–11; DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS 158 (1999) (showing that "divided government is associated with authority being delegated to spheres further from the president's control"). Of course, a significant precedent pointing in the opposite direction is President Andrew Jackson's successful resistance to a statute vesting in the Secretary of the Treasury an authority to remove federal funds from the national bank. *See* Strauss, *supra* note 9 at 706.

[73] PETER L. STRAUSS ET AL., GELLHORN AND BYSE'S ADMINISTRATIVE LAW 453–54, 523–24, 981–84, 986–90 (12th ed. 2018).

[74] Cheney v. United States Dist. Court for DC, , 542 US 367, 390 (2004).

[75] *See, e.g.*, The President's Compliance with the "Timely Notification" Requirement of the National Security Act, 10 Op. O.L.C. 159 (Dec. 17, 1986), in POWELL, *supra* note 9 at 483.

[76] *See id.* at 483 ("We now conclude that the vague phrase 'in a timely fashion' should be construed to leave the President wide discretion . . . .").

[77] *See* Public Citizen v. Department of Justice, , 491 US 440, 484–85 (1989) (distinguishing congressional regulation of powers the text commits exclusively to the President). For my argument that Congress may regulate presidential "prerogatives" to the extent that it does not undermine the President's independence of judgment in the exercise of his powers, see Steilen, *supra* note 16 at 652–54. Procedural regulation of certain prerogatives, such as the veto and pardon, would pose a risk of undermining presidential independence from Congress.

definition of the "executive power" vested by Article II that would include within its scope an indefeasible authority to establish the procedures by which federal law is to be carried out.[78] Alternatively, if the Necessary and Proper Clause, as Jack Goldsmith and John Manning have suggested, "[i]n a quite literal sense . . . gives Congress a form of executive power," then we should regard it as granting the *procedural* component of executive power—the power to decide how to do what the law requires be done.[79] When Congress lets this power go unexercised, the President's executive authority will imply some discretion to select procedures he thinks best, consistent with the Constitution and other applicable law; but when Congress exercises the power, its statutes may narrow the President's discretion by excluding some procedures or requiring others.[80] This appears to be a consensus view among academic lawyers with recent executive-branch service, both in Republican and Democratic administrations.[81]

But we can probably go further than this. Not only is congressional regulation of delegated authority generally consistent with the Constitution's separation of powers, appropriately designed procedural requirements will almost surely advance the political values at the heart of the doctrine. One of the principal insights of the new literature on presidential administration is the constitutional relevance of the internal structure of the executive branch and of administrative agencies themselves.[82] Dividing power along different administrative "axes"

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[78] See Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L.J. 2280, 2282, 2308–10 (2005) (arguing in favor of a defeasible implied executive power to complete legislative schemes).
[79] *Id.* at 2307.
[80] United States v. Midwest Oil Co., 236 U.S. 459 (1915), is not to the contrary. There the Supreme Court held that statutes opening federal lands to mineral development should be read in light of a long-standing presidential practice of withdrawing lands exercised under his statutory authority to manage public lands.
[81] *See* Goldsmith and Manning, *supra* note 79 (asserting that the President's "completion power" is "defeasible" by congressional regulation); Bruff, *supra* note 37 at 51; Roisman, *supra* note 67 at 894 & n.303; JEFFERSON POWELL, THE PRESIDENT AS COMMANDER IN CHIEF: AN ESSAY IN CONSTITUTIONAL VISION 102, 107 (2014).
[82] Michaels, *supra* note 22 at 230.

enables bureaucratic resistance to presidential policy-making, but it also shapes presidential policies by subjecting them to reform by a variety of bureaucratic constituencies, each with different interests and different formal and functional powers.[83] What Bruce Wyman long ago described as the "internal law" of each agency is the product of professional norms, culture, and long-standing practice, and these work to constrain the exercise of power channeled through that agency.[84] This "internal" separation of powers is, in essence, a form of power-sharing within the executive branch, and, like the "external" separation of powers—the separation of the constitutional branches by their function—power-sharing within the executive branch tends to limit power and to promote liberty.[85] Indeed, there are reasons to think that an internal, administrative separation of powers may be more effective than an external one alone. A leading modern criticism of the Madisonian theory of separation of powers, which awards each constitutional branch with powers to resist encroachments by the others, is that the interests of members of Congress and the President do not generally align with their constitutional branch, but with their political party and constituency; if they share a political party, then, they are more likely to cooperate than they are to resist and check one another. In contrast, the interests of agency personnel (particularly career civil servants) do seem to connect to their agency or to their particular role within it, giving them reason to use their formal powers to resist others.[86] If that's correct, then by mandating presidential consultation with a diffuse group of administrators, Congress can better advance the goals of separating power. This should also satisfy critics of the

[83] Michaels, *supra* note 22; Huq and Michaels, *supra* note 22; Ingber, *supra* note 22.
[84] *See* BRUCE WYMAN, THE PRINCIPLES OF THE ADMINISTRATIVE LAW GOVERNING THE RELATIONS OF PUBLIC OFFICERS 4–5 (1903); MASHAW, *supra* note 26 at 252–54.
[85] Laurence Claus, *Montesquieu's Mistakes and the True Meaning of Separation*, 25 OXF J LEG STUD 419, 424–26 (2005) (analyzing separation of powers as fundamentally concerned with sharing powers).
[86] Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARVARD LAW REVIEW 2311–2386 (2006); Ingber, *supra* note 22.

administrative state who prefer a traditional, "external" separation of legislative and executive power, since it rests on statutory enactment, rather than giving Congress a direct role in administration by legislative veto.[87]

Even if Congress enjoys such a power, however, it is another thing to use it, and commentators have pressed the argument that it would be bad policy to subject the President to statutory procedural regimes. In resisting application of the Administrative Procedure Act to the President, one distinguished academic suggested that "the underlying principle that executive action must have a rational basis may be inappropriate for presidential actions, in view of the burdens on the decision-making process that it imposes and the lesser need for close substantive review of a politically accountable official."[88] On the contrary, he thought, "broad delegations to the President are often entirely appropriate or even necessary," as the example of emergency powers proved.[89] Narrowing these delegations by crabbed interpretation could "deprive the President of a legitimate need for flexibility to respond to future events."[90] The present context suggests, however, that each of these arguments is enthymematic, incorporating a suppressed reference to the norms and policies that have guided most modern presidential decision-making. The erosion of these informal constraints places the arguments in an entirely new light.

So, for example, in a context where the President regularly employs interagency review before making major policy decisions, an additional, statutory layer of procedural requirements might reasonably be described as an unwarranted burden (depending on what was required and the context); but where, to the chagrin of agency personnel and executive branch lawyers, the

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[87] *See* Christopher J. Walker, *Restoring Congress's Role in the Modern Administrative State 2018 Survey of Books Related to the Law: Reviews*, 116 MICH. L. REV. 1101–1122 (2017).
[88] Bruff, *supra* note 37 at 24.
[89] *Id.* at 27–28.
[90] *Id.* at 30.; see also KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 45–46 (1969).

President has consciously thrown off interagency consultation, a statute requiring him to engage in that very process cannot reasonably be described as unduly burdensome, since it would simply reinstate the previous, voluntary practice.[91] For similar reasons it could not be unduly burdensome to restrict the use of social media platforms like Twitter to announce major presidential policy decisions. Moreover, as Professor Hart suggested in his study of "discretion," quoted above, delegations in modern government have generally assumed the officer will possess a certain degree of judgment, discernment, development, and maturity.[92] If it is intrinsic to limited government that delegated choices be shaped into something more than expressions of whim, then a statutory mandate to do so must be regarded as due and necessary. As Hart might put it, a statutory interagency process could ensure that the President was exercising true "discretion."

Nor does the President's political accountability render such requirements unnecessary. In fact, President Trump has sought to build popular support by publicly *rejecting* these procedures as devices of bureaucratic control. Sometimes this is framed as making government more "responsive" to popular will by eliminating bureaucratic interference.[93] But popular support for a "presidency by whim and will" cannot confer legitimacy on arbitrary governmental action.[94] As Publius described the theory of "public opinion" that underlay the Constitution, "it is the reason, alone, of the public that ought to control and regulate the government. The passions

[91] In another part of his article, Professor Bruff appears to endorse this proposal—as he puts it, "to force the White House to consult with agencies having relevant program responsibilities, and with counsel." Bruff, *supra* note 37 at 57.
[92] Hart, *supra* note 44.
[93] HENNESSEY AND WITTES, *supra* note 13 at 52–53.
[94] When challenged in court, arbitrary acts do not survive rational basis review even if they are the result of a democratic process. See, e.g., Cleburne v. Cleburne Living Center, Inc., , 473 US 432 (1985); Romer v. Evans, , 517 US 620 (1996).

ought to be controlled and regulated by the government."[95] Responsiveness to "the reason of the public" is achieved by a participatory and reflective presidential policy-making process, not by a slapdash one. On these assumptions, a statutory regime incorporating interagency procedures would enhance, rather than degrade, the popular legitimacy of presidential policies.

The "presidency by whim and will" also suggests reappraising the argument that broad, unstructured delegations are necessary for flexibility and effective policy. Hennessey and Wittes argue persuasively that under President Trump the effect has been precisely the opposite. Acting reflexively and without consulting relevant agencies has undermined several of President Trump's core policies: "The irony is that Trump regularly pays a huge price for [his] vision of the presidency. Mostly it's a price in effectiveness."[96] The flexibility delegated to the President cannot be used effectively without guidance. In the absence of professional guidance, an unstructured delegation becomes simply a blank space, increasing the likelihood of an ineffective response. In a context where courts of law resist scrutinizing presidential decision-making, expansive delegations also function to provide cover for arbitrary, reflexive, or unlawfully discriminatory acts. If the law does not require consultation with agency personnel, and does not impose a restrictive substantive standard, then Presidents will be able to manufacture grounds for invoking delegated power. Perhaps the most striking example of this behavior is precisely the one adduced above: declarations of national emergency. President Trump has been able to use a "manufactured emergency" to shift military appropriations to fund a physical barrier at the southern border.[97] A statutory regime mandating interagency review prior to such a declaration

[95] Number 49, in THE FEDERALIST BY ALEXANDER HAMILTON, JAMES MADISON, AND JOHN JAY, *supra* note 6 at 351; Colleen A. Sheehan, *Madison and the French Enlightenment: The Authority of Public Opinion*, 59 WM. & MARY Q. 925, 948 (2002).
[96] HENNESSEY AND WITTES, *supra* note 13 at 51.
[97] Robert L. Tsai, *Manufactured Emergencies*, 129 YALE L.J.F. 350, 352–54 (2020).

(in addition to the current process for legislative veto) would subject "fabricated or exaggerated" claims about the scope of a problem to professional scrutiny. Even if it did not prevent manufactured declarations of emergency, such a process might shape the emergency response to answer actual public-policy problems.

What are the political prospects of actually enacting such a statute? Surely we must assume they are poor, since President Trump would oppose it. But there are also reasons to think some prospect of passing a bill does exist, especially if Trump leaves office. To begin with, Republican congressmen have in fact supported legislation narrowing grants of discretion to the President.[98] This should not be entirely surprising. Although President Trump now appears to have strong control over the Republican party membership in Congress, there do remain some Republican members critical of the President, at least on certain issues.[99] Moreover, both parties have an incentive to impose procedures on presidential decision-making that regularize the exercise of delegated authority, insofar as a "process presidency" is less threatening to the party out of power. This is similar to an account that has been developed to explain the embrace of judicial review: it acts as a check on the power of the majority party and thus limits the potential downside.[100] Nor does a "presidency of whim and will" advance either party's platform, since such a President is only loosely tethered to a particular agenda or set of policies. A process presidency strengthens congressional party leadership against outside popular forces, who would use the presidency simply to disrupt the system.

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[98] Regina Zilbermints, *As many as eight GOP senators expected to vote to curb Trump's power to attack Iran*, THEHILL, February 13, 2020.
[99] Toluse Olorunnipa, *Republicans deliver rare rebuke of Trump, slamming his Syria withdrawal decision*, WASHINGTON POST, October 7, 2019.
[100] J. Mark Ramseyer, *The Puzzling (In)Dependence of Courts: A Comparative Approach*, 23 THE JOURNAL OF LEGAL STUDIES 721–747 (1994); Matthew C. Stephenson, *"When the Devil Turns …": The Political Foundations of Independent Judicial Review*, 32 THE JOURNAL OF LEGAL STUDIES 59–89 (2003).

III. New Prospects for Judicial Review: Procedural Review and Procedural Non-Delegation Doctrine

Finally, I want to consider how statutory procedural regimes might affect the prospects for ex post judicial review. There are reasons to think that procedural regulation of delegated power will increase the likelihood and effectiveness of judicial review, although the balance of reasons is contestable. First, judicial review of whether the president has complied with procedures mandated by statute—what we can call "procedural review"—is generally less amenable to challenge for being partisan or a second-guessing of presidential policy; thus, we should expect that federal courts will be more willing to enforce procedural regulations of delegated presidential power. On the other hand, conducting procedural review will require a court to consider the course of presidential decision-making, inviting an assertion of deliberative process privilege.[101] Secondly, judges inclined to non-delegation doctrine—as conservative judges today increasingly seem to be—may be willing to enforce a procedural version of that doctrine, for which one can discover some support in the Supreme Court's jurisprudence.[102] The core idea in "procedural non-delegation doctrine" is that the Constitution requires congressional delegations of policy-making power to be accompanied by procedural requirements guiding or restricting the exercise of executive discretion. The difficulty, of course, will be saying what requirements should suffice. Let us briefly consider each of these prospects for judicial review.

First, procedural review: In a handful of cases, federal courts have heard challenges to administrative action based on the President's alleged failure to observe procedures mandated by

[101] *See, e.g.*, Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103 (1948) (Jackson, J.).
[102] *See* Kenneth Culp Davis, *A New Approach to Delegation*, 36 THE UNIVERSITY OF CHICAGO LAW REVIEW 713 (1969).

statute.[103] The cases are too few to be called a doctrine. This may be because delegations to the President accompanied by a significant procedural regime (as well as a right of judicial review and an injury sufficient to establish constitutional standing) are relatively uncommon. Nevertheless, after reviewing one such failed challenge, Professor Harold Bruff thought it showed "a court can review for compliance with procedures prescribed by statute," and that by reviewing the President's course of decision-making, "the court can help to enforce the President's accountability to Congress and the public for the decision."[104] In other words, Bruff thought procedural review promoted the rule of law and democratic accountability, two key political values behind separation of powers doctrine. In another well-known case, Portland Audubon v. Endangered Species Committee, a federal court of appeals enforced a prohibition on presidential interference in a formal administrative adjudications.[105] The decision turned on statutory interpretation: the statute's requirement that a committee decision be made "on the record" triggered the Administrative Procedure Act's prohibition on ex parte contact by the President.[106] Yet another APA case with relevance here is the Supreme Court's recent decision in Department of Commerce v. New York, concerning an order by the Secretary of Commerce to add a question about citizenship to the federal census.[107] There the Court found that extra-record discovery, ordered by the district court, "reveal[ed] a significant mismatch between the decision the Secretary made and the rationale he provided."[108] In the context of the APA, which required a "reasoned explanation" for agency action, "accepting contrived reasons would defeat the

[103] *See, e.g.*, Portland Audubon Soc'y v. Endangered Species Comm., 984 F.2d 1534 (9th Cir. 1993); Sneaker Circus, Inc. v. Carter, 566 F.2d 396, 402 (2d Cir. 1977); No Oilport! v. Carter, 520 F. Supp. 334 (W.D. Wash. 1981).
[104] Bruff, *supra* note 37 at 49.
[105] *Portland Audubon*, 984 F.2d at 1546.
[106] *See id.*; Strauss, *supra* note 9 at 710.
[107] 139 S. Ct. 2551 (2019).
[108] *Id.* at 2575.

purpose of the enterprise."[109] The deference the Chief Justice had shown to presidential policy on other occasions melted away, leaving the Court to vindicate "[r]easoned decisionmaking under the Administrative Procedure Act."[110] Is there any reason to think the Court would decline to enforce similar procedural requirements imposed by federal statute on the President himself? As long as the issue was delegated power, and not an independent source of constitutional authority, it is hard to see what the distinction would be.

A more likely problem would be obtaining discovery of the necessary evidence. Ironically, in *Department of Commerce* the Supreme Court concluded that the district court's decision to order extra-record discovery was "premature" and erroneous; since the evidence had become part of the litigation record, however, the Court could not ignore it.[111] Other cases are unlikely to benefit from a similar fortuity, and we should expect the current Supreme Court to be receptive to assertions of executive privilege. In United States v. Nixon, the Court held that the President's general interest in the confidentiality of executive branch deliberations justified a "presumptive privilege for presidential communications," but that this should be weighed against the rule of law and "due process of law in the fair administration of criminal justice" to determine discoverability.[112] Accounts vary of the precise weight of the presumption. William Barr, then serving as Assistant Attorney General in the Office of Legal Counsel, advised that only a strong and specific justification could overcome it, at least in the case of requests by Congress.[113] A district court considering an assertion of privilege by President Obama required

[109] *Id.* at 2576.
[110] *Id.*
[111] *Id.* at 2574.
[112] United States v. Nixon, , 418 US 683, 708–09, 713 (1974); see Jonathan Shaub, *Executive Privilege Is No Reason for the Senate to Ignore John Bolton*, LAWFARE, January 27, 2020 (distinguish assertions of privilege based on a specific harm with those based on generalized institutional interests).
[113] Congressional Requests for Confidential Executive Branch Information, 13 Op. O.L.C. 153 (June 19, 1989), in POWELL, *supra* note 9 at 515, 517.

the demonstration of specific need.[114] Writing just before publication of United States v. Nixon, Watergate special prosecutor Archibald Cox surveyed the history of executive privilege and concluded that "[f]rom the beginning the courts have exercised the right to decide what papers they should require from the Executive Branch for use in the administration of justice," and that "[t]he Executive has sometimes denied the right, but it has always acquiesced in judicial orders."[115] According to Cox, then, obstacles to judicial discovery of confidential executive deliberations have rarely been insurmountable. Here, the putative need will not be as strong as that in grand jury proceedings or criminal trials, but probably greater than the archival interests asserted in the presidential papers litigation.[116] The material discovered will surely intrude less on the executive branch than the production in United States v. Nixon—indeed, in some cases a plaintiff's need could presumably be satisfied by disclosure of the *fact* of the President's consultation, rather than its substance, a matter generally not protected by evidentiary privilege at all. Congress might also be able to forestall the President's resort to privilege by mandating the government make reports of its procedural compliance to a congressional committee. Though executive branch lawyers protest these requirements, they are well known, and the President waives executive privilege with respect to documents or testimony publicly provided to Congress.[117]

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[114] *See* Comm. on Oversight v. Holder, slip op. at 3, 5, Case 1:12-cv-01332-ABJ (D.D.C. Aug. 20, 2014), Not Reported in Fed. Supp., 2014 WL 12662665.

[115] Archibald Cox, *Executive Privilege*, 122 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 1383, 1392–93 (1974). *Cf. id.* at 1404 ("If one looks at what was done and confines the words to the events, nothing appears which even approaches a solid historical practice of recognizing claims of executive privilege based upon an undifferentiated need for preserving the secrecy of internal communications within the Executive Branch.").

[116] Nixon v. Administrator of General Services, , 433 US 425 (1977); CHENEY V. UNITED STATES DIST. COURT FOR DC, *supra* note 75 at 383–84.

[117] *See* Nixon v. Sircia, 487 F.2d 700, 758-61 (D.C. Cir. 1973).

Second, procedural non-delegation doctrine: Conventionally understood, non-delegation doctrine prohibits Congress from delegating legislative power, understood to be a nearly standardless discretion to promulgate the rules binding society; in contrast, delegations that "lay down an intelligible principle to which the person or body authorized [to act] is directed to conform" are held not to constitute an unlawful delegation of legislative power.[118] The doctrine is almost surely a modern invention.[119] Nevertheless, one can identify other strands of non-delegation thought from a relatively early period in American history—strands which never quite amounted to a legal doctrine, or were abandoned too early in their youth. Thus, for example, in the earliest decision of Supreme Court to take up the question of delegation, Wayman v. Southard, Chief Justice Marshall drew a distinction between "powers" (*plural*) that he thought "strictly and exclusively legislative," and "powers" (again, *plural*) that the legislature might "delegate to others."[120] Here the assumption seems to be that Congress possesses many powers (as opposed to one kind of power, legislative power *singular*), which we denominate "legislative" because they are vested in the legislature, but only some of which the Constitution requires Congress to exercise itself. (Something like this has been occasionally suggested of the taxing power, for instance: that it must remain with the legislature itself.[121])

Another, related strain of non-delegation thought has focused on procedure rather than substantive standards and principles. One can see evidence of its influence in Schechter Poultry v. United States, where the Court complained not only of the broad scope of rule-making authority conferred on the President, but of the absence of any "administrative procedure" for

[118] JW Hampton, Jr., & Co. v. United States, , 276 US 394, 409 (1928).
[119] *See generally* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3512154 (last visited Mar 6, 2020).
[120] Wayman v. Southard, , 23 US 1, 42–43 (1825).
[121] National Cable Television Assn., Inc. v. United States, , 415 US 336, 40–42 (1974).

exercising that authority.[122] Conversely, a delegation of broad authority to the President to stabilize wages was upheld by a three-judge district court on grounds that the exercise of this power (by a sub-delegee) was "subject to the administrative procedure provisions of the Administrative Procedure Act."[123] The court presumed that any further sub-delegations would "provide for administration and procedures" that accorded with "general fairness" and avoided "gross inequity."[124] One can see traces of a procedural non-delegation thought, as well, looking from another angle: from the practice of early Congresses of delegating power accompanied by highly specific instructions for its exercise, and from the disputes that arose when open-ended delegations of foreign policy power were proposed.[125] But why should the Constitution *require* delegations to be bound to specific procedures? Procedures can narrow discretion, of course; an appropriate procedure might confine the President to an accepted role like finding facts on which the exercise of some power has been conditioned.[126] More generally, without some procedure there can be no way of confining the executive to the particular function the legislature intended to confer. All sorts of policies might animate a President's decision to exercise a delegated power confined simply to "the national interest."[127] There can be no guarantee that in exercising such a power the President does not trench on matters (as Marshall put it) "strictly and exclusively legislative."

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[122] ALA Schechter Poultry Corp. v. United States, , 295 US 495, 533 (1935); see Fisher, *supra* note 29 at 266 (describing procedural defects identified by the Court in the Panama Refining case).
[123] Amalgamated Meat Cutters & Butcher Work. v. Connally, , 337 F. Supp. 737, 761 (1971).
[124] *Id.* at 763.
[125] *See* MASHAW, *supra* note 26 at 41–48; Fisher, *supra* note 29 at 253–57.
[126] *See* Davis, *supra* note 103 at 725 ("the non-delegation doctrine should gradually grow into a broad requirement . . . that officers with discretionary power must do about as much as feasible to structure their discretion through appropriate safeguards and to confine and guide their discretion through standards, principles, and rules.").
[127] *Cf.* ALA SCHECHTER POULTRY CORP. V. UNITED STATES, *supra* note 123 at 552–54 (Cardozo, J., concurring) (arguing that the delegation at issue in the case permitted the President to regulate broad areas of business practice by empowering him to enact codes of fair competition).

A procedural non-delegation doctrine requires that statutes channel Presidential authority through certain procedures in order to confine the jurisdiction of the delegation. What procedure would suffice to satisfy such a doctrine? Justice Scalia's warning in *Mistretta* comes to mind, namely, that conventional non-delegation doctrine was judicially inadministrable because the question of whether the executive should have policy-making authority was one of degree, rather than principle.[128] Isn't the question of the appropriate procedure for the exercise of delegated authority also one of degree? There is a principle at issue here. If there is no power in government to act arbitrarily, then there can be no authority in the legislature to delegate arbitrary power. As Kenneth Culp Davis once suggested (although in defense of a different non-delegation doctrine), "the criterion for determining the validity of a delegation should be the totality of protection against arbitrariness."[129] There must be enough procedure to ensure that a delegated power is what it purports to be: a power to do a particular sort of thing, to take particular steps, to address a particular danger or opportunity—not a power to take appropriate steps, as long as they are related to the subject of the delegation and thought "in the national interest." Statutory mandates that subject the exercise of delegated presidential power to consultation with a diverse range of agency personnel can satisfy this procedural requirement. Professor Gillian Metzger has argued that the practice of delegating powers requires the administrative state, which, as she explains it, means "sufficient bureaucratic apparatus and supervisory mechanisms to adequately oversee execution of these delegated powers."[130] As she presents it, the constitutional obligation to structure government flows from the President's obligation to oversee the administration of federal law. But the requirement to structure

[128] Mistretta v. United States, , 488 US 361, 415–16 (1989).
[129] Davis, *supra* note 103 at 726.
[130] Metzger, *supra* note 22 at 89.

government surely has sources in Article I as well as Article II. It also flows from the prohibition on congressional delegations of arbitrary power to any governmental officer, including the President.

Conclusion

Edward Corwin thought that executive power under the U.S. Constitution "retained much of its original plasticity as regards method." The President retained a discretion to choose the means he thought best to carry into effect powers delegated to him by statute. Though he acknowledged it had limits, Corwin thought this important in an uncertain environment that demanded flexibility from government. The problem of presidential whim throws into doubt the balance struck by Corwin, and by many other commentators. Presidential flexibility has become a habit of spontaneous, reflexive, toxic, and injurious response. The vision set out in the new legal literature on the presidency—one based on moral values of responsibility, professionalism, good faith, and faithfulness—cannot be enforced by courts alone engaging in substantive review. It will require joint action by the political parties in Congress, to place procedural restrictions on the President in the exercise of powers delegated to him. Both parties have good reason to embrace a presidency with such limits. If they do, they will clear the way for limited and effective forms of judicial review of the President's action.