The future of the U.S. Presidency
hat will be the legacy of the Trump presidency? Was this administration uniquely tumultuous because of Donald Trump’s personality and beliefs? Or are there other external forces or circumstances at work that might presage a repeat of this divisive term of office? Bolch Judicial Institute Director and American Law Institute President DAVID F. LEVI led a panel discussion on these issues on Jan. 7, 2021 — one day after a mob stormed the U.S. Capitol in an effort to disrupt certification of the 2020 election. Even as panelists discussed long-standing historical debates over the role of the Office of the President and ideas for better regulating presidential power, the preceding day’s events cast a long shadow.

Panelists were: DAVID KENNEDY, Pulitzer-prize winning historian, Professor of History, Emeritus, at Stanford University, and editor of the Oxford History of the United States; DAPHNA RENAN, a Professor of Law at Harvard Law School who studies the norms and legal restraints that apply to the president and ideas for better regulating presidential power, the preceding day’s events cast a long shadow. Perhaps we can place President Trump in a historical context. David, have we seen a president like this before, and what do you make of this presidency?

DAVID LEVI: Let’s start with the history. That’s always a good place to start, and it gives us some context, maybe some comfort. Perhaps we can place President Trump in a historical context. David, have we seen a president like this before, and what do you make of this presidency?

DAVID KENNEDY: History is about change. If there’s a thread that runs through this, it has to do with the incommensurate pace and character of the evolutionary pathways of the institution of the presidency on the one hand and all the ambient changes in society and the economy on the other. Let’s start with some numbers. Joe Biden is president number 46. All but three presidents have been white, Protestant males. Only 17, barely one-third, have been re-elected to a second term, which suggests something about the instability of our political system. Five presidents have been elected without a popular majority vote, or I should say technically where the popular vote and the Electoral College vote were not in agreement.

But of all those numbers through which we might think about the presidency, one number is the most important: the number one. One, because the president is the single national elected official whose constituency is the nation at large. All the other elected officials in Washington, D.C. — 435 in the House, 100 in the Senate — are elected by local constituencies and have local responsibilities and obligations. The presidency is the institutional place where responsibility for the country as a whole, the nation as a whole, is invested. Precisely for that reason, the institution of the presidency, from the moment of its conception in the Philadelphia Constitutional Convention of 1787, has been controversial.

Theodore White — a famous journalist who wrote several volumes on various presidential races — once summed up a lot of this controversy when he said the supreme duty of the president is to protect us all from each other’s congressman. It’s a jocular way to put it, but it sums up the structural issue of the presidency.

James Wilson and Alexander Hamilton were the two most prominent spokespersons for the strong executive in the Constitutional Convention. Wilson once said that nothing was more perplexing in that convention than trying to figure out the method for choosing the president. Madison’s...
notes on the Constitutional Convention reaffirm that; a lot of ink was spilled and oxygen was consumed trying to sort through the various election proposals. Hamilton, in Federalist Number 70, said “[a] feeble Executive implies a feeble execution of the government… and a government ill executed, whatever it may be in theory, must be in practice a bad government” — a very robust statement about the desirability of a strong executive.

That’s not exactly what we got, at least not in the early days of the presidency. Here are some further telling numbers: Article I, the first Article of the Constitution, deals with the legislature. It has 51 paragraphs. Article II addresses the executive — note its placement, after the discussion of the legislature — and has 13 paragraphs. The disparity in those numbers gives us some clue as to how agonized and, in the end, poorly resolved were the discussions at that Constitutional Convention about the relationship of the legislature to the executive.

Into the 1830s, nominations for the presidency were made by congressional caucuses. It was some version of a parliamentary system in which — though we now find it a little archaic and strange — the president was thought to be, to some degree, a creature of the legislature.

That all changed in the 1830s, with the first convention that nominated a presidential candidate. In a harbinger of a theme that has surrounded the presidency and indeed our political culture generally for the last two centuries, nominating conventions to the presidency were thought to be a way to democratize the process. They would allow decision-making beyond Congress and let all party affiliates meet and nominate a candidate. But the last convention that went to a second ballot to nominate a presidential candidate was in 1952. Conventions have long since outlived whatever political function or utility they had in our political system.

Let’s go forward about a century from the Constitutional Convention to a doctoral thesis entitled “Congressional Government,” written by a young student at Johns Hopkins University, Woodrow Wilson, published in 1885. I think it’s possible to read the title as an oxymoron; he thought Congress was incapable of coherent government. He wanted more power vested in the executive. He’s famous for having said, among other things, “The president is at liberty both in law and conscience to be as big a man as he can.” There was a whole body of criticism and political practice that emerged in Wilson’s time and was directed toward strengthening the executive as distinguished from the Congress as a potent force in our governmental system.

There are a few more big changes, all which began in the so-called Progressive period, the first two decades or so of the 20th century. I’m going to describe these changes as the “three Ps”: programs, publicity, and primary.

First, programs. Theodore Roosevelt brought forward this platform called the “Square Deal” when he ran on the Progressive Party ticket in 1912. This is the point of origin where modern presidents become the voices for coherent policy programs and the vessels into which hopes are poured for the actual accomplishment of those programs. That kind of coherent campaigning and promising in the 19th century was relatively absent, but it becomes a standard feature of politics in the 20th and 21st centuries. We get the “Square Deal” from Theodore Roosevelt, the “New Deal” of the 1930s, the “Fair Deal” in the 1940s; some would say today we get the “Ordeal.” We see in the early 20th century the beginnings of something that’s been with us ever since — where the presidency becomes the focus of all kinds of political aspirations for coherent across-the-board policymaking to a degree that was not true in the 19th century.

Second, publicity. Wilson was famous for using publicity to mobilize public opinion, specifically to overrun congressional opinion to pass that famous set of progressive reforms in his first administration. That was facilitated, of course, by the emergence of mass-circulation newspapers, like those of William Randolph Hearst and Joseph Pulitzer. Similarly, Franklin Roosevelt mastered the radio as an instrument of political communication and mobilization of public opinion. Radio was then superseded by television. John F. Kennedy essentially renders obsolescent press conferences as a method of informing print journalists by televising the press conferences. Who needed to read the morning newspaper or watch the evening news if they’d seen it live on television already? Then, of course, in our own time, we have the absolutely exponential explosion of instruments of communication thanks to social media and the fragmentation of the mainstream media. So we have invested our major political hopes in the presidency, and yet at the same time we have disintermediated a lot of the ways the president communicates with the public at large through the evolution of various technologies.
I’ll add the third P now: primaries. The first binding presidential primary, I believe, was held in Oregon in 1910. For the next 50 or 60 years, maybe another dozen states got into the primary election business. By the 1970s, virtually every state has a primary or a caucus nominating system, which has further democratized the presidency and moved it in a plebiscitarian direction, as James Wilson and Hamilton dreamt about two and a half centuries ago. In an odd sense, we’ve come back to the idea that the presidency should be the single most potent actor in our system and should be the creature of the people at large, not intermediating institutions, like the press, the fourth estate, or the Congress.

DAVID LEVI: Daphna, you’ve written about what you have called the president’s two bodies, drawing on a term that’s often applied to the medieval king or kingship. This is the idea of the charismatic individual leader, a person versus the Office of the President or the presidency. You’ve also written extensively about the norms that, at least before this president, have applied to the president and the presidency. Where do we go from here?

DAPHNA RENAN: American constitutionalism consists of two quite foundational, quite conflictual, but ultimately interdependent understandings of the presidency — what we might think of as the president’s “two bodies.” On one view, the presidency is an individual. It’s a he, maybe one day a she. This understanding of presidential power is individualistic along three dimensions: It’s personal.

Ever since George Washington embodied the idea of an institution that was still in the making, we’ve had this deep tension, these competing impulses between a personal or charismatic president on the one hand and a more impersonal and deliberative presidency on the other.

The individual arrives in office with a particular set of ideological, political, and moral commitments, and his constitutional obligation is to execute this particular vision of policy and governance. It’s temporary or presentist. The characteristics of the office are ephemeral. The commitments that one president makes shouldn’t disable the governance and policy discretion of his successors. And it’s singular or unitary.

On the other account, the presidency is an institution. This view is more impersonal. It’s more permanent — or, at least, indefinite — and it’s composite. As an institution, the constitutional Office of the Presidency is comprised of certain features. These include deliberative practices, substantive commitments, and institutional restraints that aren’t fully within the control of any one occupant. This also means that the characteristics of the office are more stable and continuous. Internal practices and executive branch precedents that form under one incumbent continue to govern his successors. Statutes enacted under one president are defended in court by later presidents. Finally, the institutional presidency is a composite. These other actors protect and even augment presidential power, even as they entrench limits on the will of the sitting president.

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These two understandings of the presidency have a pre-history in the doctrine of the king’s two bodies. In recognizing the person of the king as distinct from the institution of kingship, the king’s duality provided a crucial building block in the creating of the modern state. But there’s also this unfinishedness, this enduring inseparability to the two bodies that we see reenacted in different terms in the context of the U.S. presidency.

The two bodies play a role in how we understand the legitimacy of presidential power by equivocating on the idea of the president. The president means two different things; it has two distinct bundles of attributes. That makes it possible for constitutional and political argument to obscure ways in which each body creates unease by emphasizing attributes that adhere in the other body and by suggesting or implying that those attributes pertain to the constitutional president as a whole. Even as it obscures presidential power in this way, however, the duality is also constitutive of a presidential office that embodies aspects of each.

What we see across constitutional history and across constitutional law are different variants on this tension. A key debate at the Constitutional Convention was, how do we construct an office that creates some space for individual responsibility and personal judgment while resisting self-dealing or the corruption of public power. This tension recurs in a different form for progressive thinker-reformers in the debates about how we structure the Executive Office of the President: How do we facilitate policy leadership through the person without making the office too contingent on any one man’s whim? We see it throughout our

1 The argument draws from Daphna Renan, The President’s Two Bodies, 120 Colum. L. Rev. 1119 (2020).
public law doctrine as well. Even within the same case, the Supreme Court’s separate opinions are often proceeding from what are incommensurable and often unarticulated starting points relating to the individual president and the institutional presidency.

My argument is that there’s no final answer between these two bodies. Public law theory can’t somehow solve or move beyond the president’s duality, but it can make it central. And, in doing so, we can better understand the nature of the problems, the structure of our disagreements, and the constituted reality of the office.

What does this mean for this particular president and our current constitutional moment? On one level, I think President Trump tried to disrupt a longstanding precept when it comes to the duality — that maintaining some conceptual and constitutional space for the person’s moral and policy leadership must not collapse into the use of public power for purely private gain. Trump’s insistence — in his actions and his rhetoric — that this is a distinction without a difference flies in the face of centuries of constitutional and political development.

At the same time, the Trump presidency brings into view some problematic developments of the duality if this continues to be a constitutional goal. Public law has become ever more protective of the personal charge of the president in controlling administration, even as there’s this deep reluctance to adjudicate the personal responsibility of the president for the decisions of his administration. The result is a potentially potent mix of personal control and personal impunity when it comes to presidential power.

Relatedly, at the crux of the Trump presidency is what we might think of as a problem of “acoustic separation” with respect to the two bodies. There is a separation between the anti-constitutional commitments that the incumbent as a human being conveys — policy in furtherance of religious animus or retaliation for political dissent, for example — and the official conduct that courts or Congress are expected to check. There’s a danger for a working system of legal and political accountability with a president who can avow one thing as the person and then purport to do something different entirely as the institution.

One thing I think we’ve seen in the last couple years is a Court coming to appreciate this danger, both for the legitimacy of the office of the president and also for the legitimacy of the Court itself.

Finally, the Trump presidency illuminates a more structural change if we think about it in relation to the king’s two bodies. With the king, there was the real person and the fictive, immortal body. This second body becomes a way for lawyers and jurists to justify constitutionalism as a custodian of an indefinite public good. An impersonal, even continuous public interest in turn is what creates a space for legal incursions on the mystical crown. It allows constitutionalism to check the personal power of the monarch. With the American presidency, the impersonal, the immortal body, it’s become institutionalized. It’s real. It’s populated by thousands of individuals. But the fictive or mythical idea of sovereignty has become deeply personalized. Public law theory and doctrine justify a profound re-imagining of our national commitments every four years through the charismatic legitimacy of the president.

In that sense, the Trump presidency is really of a piece with a much more long-term development in the presidential office, even as it illuminates for us what happens when you take this vision to its quite horrifying extremes.

David Levi: Terry, you’ve written about the presidency and populism, and a tension that both Daphna and David have talked about, which is how to have an effective president who is programmatic and addresses the problems of the nation on the one hand without having a president that’s going to destroy the democracy on the other hand, or that we might fear would have so much power that that’s a possibility. So how do we negotiate that tension?

Terry Moe: There’s no doubt that President Trump’s personality, which is bizarre in many different ways, influences his behavior and has helped to explain some of the threat he poses to American democracy. But it’s important, in general, not to over-personalize politics and not to over-personalize the presidency. It’s the natural thing to do. There’s only one president, and it’s natural to think that this person’s unique characteristics are going to have a big effect on what that person does as president. But that’s often a mistake, and it completely misses the bigger picture of what’s going on.

In particular, it misunderstands why we face a crisis of democracy in this country. To see that, let’s consider how Trump became president in the first place. His rise to power was propelled by a white backlash to diversity but also by disruptive socioeconomic forces — globalization, technological change, and immigration, most notably — that brought economic harm and cultural anxiety to tens of millions of Americans. These are serious problems that our government has for decades been entirely ineffective at dealing with. The result has been a surge of
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TERRY MOE

populist anger against “the system” — a system that just doesn’t work for them, in their view — and a surge in support for a strongman who can attack that system, our democratic system, and get things done on his own, democracy be damned. These are the conditions that Trump took advantage of in getting himself elected president, and these are the conditions that have shaped his populist, anti-democracy presidency.

The way to understand Trump, then, is not simply as a bizarre personality. He’s a populist demagogue, and he does what populist demagogues have long done throughout history and across nations, from Juan Perón to Huey Long to Viktor Orbán to George Wallace. Populist demagogues rely upon a common playbook. They all do basically the same kinds of things. They embrace the role of strongman. In Trump’s words, “Only I can fix it.” They attack democratic institutions, the media, the courts, the integrity of our electoral system. They lie, and they wage war on the truth. They demonize the “other” — minorities, immigrants, foreigners — and use them as scapegoats to blame for our country’s problems. They threaten to put their opponents in jail. They purposely create anger, division, and grievance.

These are all things that Trump has been doing for four years — but the fact is, these things are not unique to Trump. And they’re not just due to his personality. Why do all populist demagogues do these kinds of things? They do them because they work in stirring up populist support at a time of growing populist anger. It’s a formula that works, and it’s a formula that Trump has been following.

This formula is dangerous to democracy — and so, inevitably, is populism itself. Here’s the big problem for the United States: Trump has been defeated, but his populist base — which is big, angry, anti-system, and powerful — is still there, and so are the disruptive socioeconomic forces, globalization and all the rest, that gave rise to that populist anger. Other populist leaders are going to come along and take advantage of all that. They will continue to wage war on democracy. Our crisis of democracy is not over just because Trump lost this election.

What can be done? The solution lies in having a government that can do a more effective job of meeting the needs and concerns of its people, but especially those people who are the most alienated. One way to pursue that is through new programs for immigration reform, for job training, healthcare, childcare, infrastructure, investment in rural communities, and so on. All of these things can help to defuse some measure of the populist anger and win some people back. But more fundamentally, we need institutional reforms that will give our government a greater capacity for effective performance. Our government is inherently ineffective. It’s ineffective for reasons that go back to the Constitution. People don’t like to hear this, but our Constitution was designed 230 years ago by people who had absolutely no idea what a modern society would look like and the kinds of challenges a government would need to face, the kinds of problems it would need to solve. What we need are modernizing reforms that can give us a government for modern times capable of taking on modern problems.

For that, the presidency is the key. Presidents alone are focused on the national interest, and they are obsessed with their legacies. They want to be great. The way to be great is to solve big, important national problems in ways that work. That’s why, traditionally, presidents have been champions of effective government. This is the promise that presidential power has to offer our country: Presidents can make government more effective, and we need to take advantage of that in our institutional reforms.

People think the lesson of the Trump years is the opposite, that presidents need to be much more constrained. And there’s truth to that, as far as it goes. We do have reason to fear presidential power, because it’s very dangerous in authoritarian hands. In our book, Presidents, Populism, and the Crisis of Democracy, my co-author William Howell and I propose some major constraints that are very much needed. Among them are drastic restrictions on the number of presidential appointments; insulating the Department of Justice and intelligence agencies from direct, total presidential control; restricting the president’s emergency powers; and totally eliminating the pardon power.

But we can’t just constrain presidents. If we tie presidents up in knots, we’re going to get a less effective government. What the nation needs is more effective government if we are to succeed in defusing the populist threat to democracy. For that, we need to take advantage of the promise of the presidency, not just react to the fear. We can expand presidential power in careful, selective, non-dangerous ways. One significant proposal in our book is universal fast-track authority as a means of legislative decision-making: Presidents would have the author-
ity to craft legislative proposals and, because they are the champions of effective government, they would have incentives to craft coherent, well-justified proposals that actually promise to address social problems. They would send these proposals to Congress, and Congress would be required to vote up or down on them, without changes, in a majoritarian fashion in a set period of time, say 90 days. This would streamline the legislative process and make legislation much more central to our government. Congress would still have the authority to pass its own legislation, which the president could veto if he wanted to; but universal fast-track would really make a difference for the way our government functions.

The biggest obstacle is the Republican party, which will be dedicated to blocking all these programs and reforms that are designed to counter the populist threat. The Democrats are the ones that need to do it. We don’t say that out of partisanship; this is just reality. Democrats will need big majorities in the House and the Senate. President Biden doesn’t have that, but there isn’t any substitute for trying to move in this direction.

Populism and the socioeconomic sources of populist anti-system anger are the key challenges of our time. They really are, and they need to be defused if our democracy is going to survive. Trump’s personality, bizarre and perverse though it is, tells us almost nothing about all that and hides the fundamental forces that are really driving America’s crisis of democracy. This crisis isn’t first and foremost about Donald Trump. It’s about populism and about populism’s threat to democracy.

DAVID LEVI: Jack, you’ve written from a different point of view as a government lawyer and as one of the key people thinking about the legal arrangements around the presidency and the departments. You have a new book that proposes a series of reforms to address some of the problems that we’ve talked about and that became evident during the Trump presidency. Can you talk about your proposals and what you see as the most critical things that we need to do?

JACK GOLDSMITH: Trump is a classic populist demagogue, and he evinces all of the classic characteristics of a populist demagogue. But I do think Trump has some unique personality traits that have been consequential. And it’s been a shock to the system, because the system — for some of the reasons Terry mentions and some other reasons — was not prepared for that.

There is a danger of over-constraining the presidency. In our book, After Trump, Bob Bauer and I are very much not in favor of fundamentally weakening the presidency. We believe that the presidency is the engine that makes separation of powers work, and that the fundamental problems that populism presents are going to require strong presidential leadership or will only be fixed with strong presidential leadership.

But we have a different focus. We don’t propose ways to fix the populist problem as Terry does; we assume for purposes of our argument that there are going to be populist presidents potentially as far as the eye can see, or at least populist pressures on the presidency. Those could come from the right or the left. Given that, what can be done to fix some of the abuses that a populist presidency presents to our government?

It’s important to be clear on the types of challenges Trump presented to presidential accountability and the rule of law. Trump did not commit the abuses of his predecessors. Unlike President Obama, he wasn’t engaged in super aggressive exercises of administrative power. Trump did a little bit of that, but not as much as Obama. Trump also was not as aggressive in terms of war powers innovation as his predecessors. He did not engage in Commander-in-Chief override of statutes, a very aggressive use of constitutional power, the way President George W. Bush did. In general, in many respects, Trump was actually quite incompetent at exercising the powers of the presidency.

Trump’s characteristic abuses were of lawful power that violated norms. The famous 1970s reforms of the presidency following Watergate, the Church Commission, and the Vietnam War, involved some legal reforms, but many were norm-based. In other words, these constraints operated not by law or legal restrictions; norms enforced informal social sanctions. Trump just ran through these. He did so in a way, as Daphna notes, that mixed his public duties with his private self-interests. These were his characteristic norm-breaking moves. Not disclosing his taxes or finances; profiting off his business and mixing that with public office; intervening in cases in the Justice Department to protect himself; urging the Justice Department to prosecute his political opponents; using control over diplomacy and law enforcement to nudge foreign powers to help him win the election; exercising the pardon power in ways that are, in some respects, not unlike the extreme abuses of prior presidents, but in other ways, far beyond what the prior presidents have done.

These are all things that, frankly, had been under-regulated. As a scholar of the presidency for the past 25 years, one of the things I’ve learned from the Trump presidency, one of the things he’s called into stark relief, is just how
much these norms depended upon assumptions about the general reasonableness of a president. One might think that we don’t have to worry about this issue once Trump is gone. I don’t think Joe Biden is going to present these problems at all, and to the extent he does, it won’t be to nearly the same degree. But these are problems that should be fixed now. We can’t rely on the norms snapping back.

Our book presents a series of reforms that take basically two forms. One is statutory reforms to regulate things that used to be regulated by norms but that can and should be regulated by statute, by enforceable legal restrictions.

For example, we believe that presidential tax disclosure can be legally mandated. Same with conflict-of-interest rules. The rules on foreign interference in elections need to be to be tightened up. And the pardon power can be regulated, at least to the extent it’s being used for bribery and obstruction of justice. These reforms reflect prevailing norms before the Trump presidency and in theory have bipartisan support. So it’s at least conceivable that we could see statutes on these matters. And there’s actually interest in Congress, mostly on the Democratic side, for this.

The second set of reforms are internal to the executive branch. It’s hard to statutorily regulate the presidency with regard to some matters because the Constitution gives the president control over these matters. So, for most issues related to DOJ independence, special counsels, and non-politicization of law enforcement, we propose a series of reforms to strengthen the norms there.

I’m actually skeptical, or at least I don’t see how we’re going to bring about the changes that Terry contemplates, precisely because we’re in this populist moment. But that said, there have been quick, sharp, and unexpected changes throughout American history, so it’s conceivable.

I’ll end on an optimistic and a pessimistic note. The optimistic note is that there’s more of a consensus than people appreciate about how norms and laws should constrain the president and his subordinates. These norms and laws have operated with much more consequence than people have realized. All you have to do is read Volume 2 of the Mueller Report. Trump was trying to get his senior subordinates to basically fire [then-Attorney General Jeff] Sessions to un-recuse and the like — one after the other after the other just refused to do so, through a combination of norms and legal constraints and obstruction of justice statutes. In that and other contexts, norms are much more consequential and can be made more consequential than we realize.

The pessimistic point is that at some point the law runs out. If Trump had in 2017 surrounded himself with the lawyers he surrounded himself with later on, and if he were a more clever president, and if he were more sophisticated in wielding executive power and not so self-defeating, he could have been much, much, much more destructive. At some point, we may see a more clever president — who is elected on a populist platform, who has the support of a large chunk of the country that insists on these populist mandates — and law and norms are going to run out in its ability to constrain. Bauer and I have no illusions that law and norms can ultimately fix this problem. Ultimately, there are larger, structural things that need to be done to ensure that we get the right kind of president exercising the right kind of powers in office. I have to say I’m unfortunately very pessimistic about the possibility of larger structural reform.

DAVID LEVI: Thank you all. You’ve offered wonderful insight. I’m an optimist. Maybe that’s based more on my personality than anything else. But for almost 20 years as a U.S. district judge in the Eastern District of California, I had the opportunity to pick a lot of jurors. When you talk with everyday Americans chosen at random from the Central Valley, you hear a lot of inspirational stories from people about how they’re living their lives and taking care of their parents, or their children or other people, and it’s extremely moving. You get a sense of a society that has a huge amount of deep patriotism and love of country. I just don’t think Americans want to see this democracy destroyed. Whatever it takes to preserve it and protect it and make it better, I think that’s what the American people want. We may not be around to see the rest of the story, but I think it’s going to be a good one.

Just hours after the horrible attack on the Capitol, our congressional representatives returned to the floor and finished the work of counting the Electoral College votes. Our courts stood firmly for the rule of law. Many people worked very hard to ensure the fairness, security, and sanctity of our elections process. And I think anybody who hears the four of you has to give some consideration to the fact that our great universities and institutions also are doing magnificent work to focus on these problems and find solutions. Thank you. You give us great hope.