

The Virtuous Executive

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Introduction

Perhaps reflecting concern over the expanding powers of the presidency, and in particular the abuses of the presidency of Donald Trump, recent scholarship around Article II has increasingly focused on the *duties* of the president,¹ in particular the duty to “take Care that the Laws be faithfully executed,” for which there remains no generally accepted theory of its meaning.² Some have argued that it incorporates principles of fiduciary obligation.³ Others have argued for a presidential duty of deliberation.⁴ Still others have explored the scope of permissible enforcement discretion.⁵ And beyond the legally binding text of the Constitution, scholars have articulated the vital role of non-legal norms in operationalizing the

¹ See Matthew Steilen, *Presidential Whim*, 46 Ohio N.U. L. Rev. 489, 490–92 (2020).

² Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. Pa. L. Rev. 1835 (2016).

³ Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 Harv. L. Rev. 2111 (2019).

⁴ Shalev Roisman, *Presidential Law*, 105 Minn. L. Rev. 1269 (2021); Shalev Roisman, *Presidential Factfinding*, 72 Vand. L. Rev. 825 (2019).

⁵ Patricia L. Bellia, *Faithful Execution and Enforcement Discretion*, 164 U. Pa. L. Rev. 1753 (2016); Evan D. Bernick, *Faithful Execution: Where Administrative Law Meets the Constitution*, 108 Geo. L.J. 1 (2019); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 Vand. L. Rev. 671 (2014).

Take Care Clause and the rest of Article II.⁶

These efforts are all vital, but they are also incomplete to the extent that they focus on the presidency in the abstract—as an office with clearly defined powers and responsibilities, irrespective of the individual occupying the office. To fully understand the relationship between these “two bodies”⁷ requires examining how the president’s character—the president’s virtues and vices—influences the powers of the office. In this paper I argue that certain character traits, what I call the *executive virtues*,⁸ play an essential role in the proper functioning of Article II and the broader separation of powers and that this has concrete implications for constitutional law, including how Congress and the courts can and should check executive power.⁹

Part I describes what executive virtues are and explains their importance,

⁶Daphna Renan, *Presidential Norms and Article II*, 131 Harv. L. Rev. 2187 (2018); David E. Pozen, *Self-Help and the Separation of Powers*, 124 Yale L.J. 2, 16–20 (2014).

⁷See Daphna Renan, *The President’s Two Bodies*, 120 Colum. L. Rev. 1119 (2020).

⁸In this respect, this paper can be seen as part of the broader literature on virtue ethics in law. See generally Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, 34 *Metaphilosophy* 178 (2003) (an early application of virtue theory to legal theory); G. Alex Sinha, *Virtuous Lawbreaking* 5–10 (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3682170 (collecting recent examples of virtue jurisprudence). However, my interest in using the concepts of virtue and vice is less in making jurisprudential points about the nature of executive power and constitutional law than it is in developing a practical framework for analyzing the constitutional importance of presidential character.

⁹There is some recognition in recent literature of the importance of presidential character, but it remains underdeveloped. For example, in his recent book on presidential demagoguery in American history, Eric Posner identifies character as a key distinguishing feature between the demagogue and the “statesman” (or “ordinary politician”), including amorality and narcissism as characteristics of the former and virtue and prudence as characteristics of the latter. Eric A. Posner, *The Demagogue’s Playbook* 10 (2020). Sanford Levinson and Mark Graber argue, with a particular focus on Donald Trump, that “The Constitution presupposes at least some version of what we call ‘Publian presidents,’ presidents with the character and capacity necessary to exercise the vast powers conferred by Article II.” Sanford Levinson & Mark A. Graber, *The Constitutional Powers of Anti-Publian Presidents: Constitutional Interpretation in A Broken Constitutional Order*, 21 *Chapman L. Rev.* 133, 138 (2018). And Matthew Steilen, in his overview of the recent literature on presidential power, characterizes it as centering around “a group of moral values, including responsibility, professionalism, skill, due care, good faith, faithfulness, and honesty.” Steilen, *supra*, at 491. None of these authors, however, attempts to develop a systematic taxonomy of presidential character or its implications for executive power, the goal of this project.

both in terms of capturing the original understanding of Article II and as a consequence of the ever-increasing power and discretion of the president. Part II offers a preliminary list of the main executive virtues, virtues like loyalty, honesty, justice, and judgment. Part III describes how the requirement of executive virtue can be operationalized in constitutional law, whether in the courts, Congress, the executive branch itself, or the public. Part IV considers several objections as to the workability of a character-based approach to Article II.

At the outset it is important to situate this project within its contemporary political context. There is no point denying the influence of the Trump presidency on this project. Trump's extreme character defects and the damage they caused to the country and its constitutional system were the impetus for this project. And the possibility of Trump running for president, and winning, in 2024, makes it that much more vital to have a clear understanding of whether, on a characterological level, he can adequately discharge the duties of the presidency (if it's not obvious already, my view is that he does not).

But as I hope will become clear, my development of a theory of executive virtue has no inevitable partisan or presentist bias.¹⁰ For example, it supports a revisionist defense of the Clinton impeachment. And more importantly, it highlights how executive character vices exist in high-profile politicians across the political spectrum.¹¹ There is no point on the political spectrum that is immune to the appeal of strongmen, demagogues, and authoritarians. My hope is that a clear articulation of the personal characteristics of such individuals can play a role, however small, in helping democracy resist them.

¹⁰Here I join other analysts of the Trump administration in the attempt to use examples from that administration to generate more general insights. Katherine Shaw, *Speech, Intent, and the President*, 104 Cornell L. Rev. 1337, 1343 n.18 (2019) ("Although all of these examples involve legal challenges to policy initiatives of the Trump administration, it is my hope that the analysis and proposals I offer here are durable enough to transcend this particular administration.").

¹¹The rise and fall of New York governor Andrew Cuomo is a case in point. See Alan Z. Rozenshtein, *What Andrew Cuomo's Resignation Reveals About the State of American Democracy*, Lawfare (Aug. 16, 2021).