

# The Departmental Structure of Executive Power: Subordinate Checks from Madison to Mueller

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*This Article examines the departmental structure of the executive branch, which facilitates, channels, and delimits the exercise of executive power. This structure is grounded in the text of the Constitution, which refers to “Department[s]” in the Necessary and Proper Clause, Appointments Clause, and Opinion Clause. The concept of the department also played a key role in the Framers’ constitutional theory of checks and balances. Public law has implemented the scheme that constitutional text and theory outlined. Legislation, case law, and executive branch practice have constructed departments within the executive branch as durable repositories of authority that distribute and rationalize power. Departmental protections against official arbitrariness have been tested in recent events, such as the Special Counsel Investigation, the effort to add a citizenship question to the census, and controversies concerning the leadership of the Consumer Financial Protection Bureau. The departmental structure of executive power must be maintained with renewed investments from each of the constitutional branches.*

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### Introduction

The Constitution vests “the executive Power” in the President.<sup>1</sup> But there is more to execution than power. This Article will show that the executive power is checked by the internal organization of the executive branch. The Constitution provides that the branch is to include “Departments”<sup>2</sup> with discrete jurisdictions, procedures, and obligations. These departments enable but also channel and constrain the discretionary authority wielded by the President, as well as that of the principal officers he appoints. The departmental structure of the Executive separates the law’s administration from the viewpoints and interests of any one official. It thereby guards against arbitrary rule and preserves public commitments across time.

The Trump Administration has thrown the contrast between the executive power and the executive departments into stark relief. President Trump has asserted that he has “the right to do whatever I want as President.”<sup>3</sup> His allies have promised a “deconstruction of the administrative state,”<sup>4</sup> railed against a bureaucratic “deep state,”<sup>5</sup> and insisted that the

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1. U.S. CONST. art. II, § 1, cl. 1.

2. *Id.*, § 2, cls. 1, 2.

3. Michael Bryce-Saddler, *While Bemoaning Mueller Probe, Trump Falsely Says the Constitution Gives Him ‘The Right to Do Whatever I Want’*, WASH. POST (July 23, 2019, 9:46 PM), <https://www.washingtonpost.com/politics/2019/07/23/trump-falsely-tells-auditorium-full-teens-constitution-gives-him-right-do-whatever-i-want/> [https://perma.cc/Y9CT-X9N3].

4. Philip Rucker & Robert Costa, *Bannon Vows a Daily Fight for “Deconstruction of the Administrative State,”* WASH. POST (Feb. 23, 2017), [https://www.washingtonpost.com/politics/top-wh-strategist-vows-a-daily-fight-for-deconstruction-of-the-administrative-state/2017/02/23/03f6b8da-f9ea-11e6-bf01-d47f8cf9b643\\_story.html](https://www.washingtonpost.com/politics/top-wh-strategist-vows-a-daily-fight-for-deconstruction-of-the-administrative-state/2017/02/23/03f6b8da-f9ea-11e6-bf01-d47f8cf9b643_story.html) [https://perma.cc/Q7C2-5WDW].

5. *E.g.*, Victor Davis Hanson, *Deep State Coup of Trump Presidency Doesn’t Seem So Far Fetched*, WASH. TIMES (Nov. 20, 2019), <https://www.washington-times.com/news/2019/nov/20/deep-state-coup-of-trump-presidency-doesnt-seem-so/>

President “alone *is* the executive branch.”<sup>6</sup> Presidential appointees have acted with disregard and sometimes open hostility to professionals within their departments.<sup>7</sup> Civil servants, in turn, have occasionally resisted presidential will.<sup>8</sup> The Executive has been divided against itself.

As unique as the Trump Administration may be, it is in some respects continuous with the “personal presidency” that has developed over the course of the past century.<sup>9</sup> Presidents have asserted and enacted directive authority over the executive branch on the basis of their claim to speak on behalf of the nation as whole.<sup>10</sup> Over time, these increasingly expansive

[<https://perma.cc/527Z-C9XE>]. For a review of and response to this critique, see Jon D. Michaels, *The American Deep State*, 93 NOTRE DAME L. REV. 1653 (2018).

6. Memorandum To: Deputy Assistant Attorney General Rod Rosenstein, Assistant Attorney General Steve Engel, From: Bill Barr, Re: Mueller’s “Obstruction” Theory (June 8, 2018), <https://int.nyt.com/data/documenthelper/549-june-2018-barr-memo-to-doj-mue/b4c05e39318dd2d136b3/optimized/full.pdf> [<https://perma.cc/7BRD-MX4P>].

7. See, e.g., Jill E. Family, *The Executive Power of Political Emergency: The Travel Ban*, 87 UMKC L. REV. 611, 615 (2019) (“One of the reasons Travel Ban One caused so much confusion, both legally and practically, is that it was not vetted through career immigration law experts in the relevant agencies.”); Nicholas Confessore, *Mick Mulvaney’s Master Class in Destroying a Bureaucracy From Within*, N.Y. TIMES MAG. (Apr. 16, 2019), <https://www.nytimes.com/2019/04/16/magazine/consumer-financial-protection-bureau-trump.html> [<https://perma.cc/8DHL-SHQM>] (“Mulvaney’s careful campaign of deconstruction [of the Consumer Financial Protection Bureau] offers a case study in the Trump administration’s approach to transforming Washington, one in which strategic neglect and bureaucratic self-sabotage create versions of agencies that seem to run contrary to their basic premises.”); Ryan McCrimmon, *Economists Flee Agriculture Department After Feeling Punished Under Trump*, POLITICO (May 7, 2019, 5:03 AM), <https://www.politico.com/story/2019/05/07/agriculture-economists-leave-trump-1307146> [<https://perma.cc/4N28-BTRK>]. See *infra* notes 364-380 for further examples.

8. Jennifer Nou, *Civil Servant Disobedience*, 94 CHI.-KENT L. REV. 349, 351 (2019) (“Bureaucrats seem to be increasingly opposing the President in their official capacity.”); Bijal Shah, *Civil Servant Alarm*, 94 CHI.-KENT L. REV. 627, 635 (2019) (“[R]esistance from the immigration bureaucracy under G.W. Bush and Obama was not only less common than resistance to Trump, but also did not provoke retaliatory political responses . . . .”); Michael D. Shear, *Leading Homeland Security Under a President Who Embraced ‘Hate-Filled Talk,’* N.Y. TIMES (July 28, 2020), <https://www.nytimes.com/2020/07/10/us/politics/elaine-duke-homeland-security-trump.html> [<https://nyti.ms/3fljgDB>] (As Acting Secretary of the Department of Homeland Security, Elaine Duke said “she did not include policy reasons in the memo [rescinding the Deferred Action for Childhood Arrivals (DACA) policy] because she did not agree with the ideas being pushed by Mr. Miller and Mr. Sessions: that DACA amounted to an undeserved amnesty and that it would encourage new waves of illegal immigration.”); Laurie McGinley, Lena H. Sun, Yasmeen Abutaleb, & Josh Dawsey, *Trump’s Pandemic Agenda Shoved Government Scientists Aside. They’re Attempting an 11th-hour Comeback*, WASH. POST (Nov. 1, 2020, 5:11 PM), <https://www.washingtonpost.com/health/2020/10/30/trump-scientists-covid/> [<https://perma.cc/NGC9-A6PM>].

9. THEODORE LOWI, *THE PERSONAL PRESIDENT: POWER INVESTED, PROMISE UNFULFILLED* 97-98, 137-153 (1985).

10. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 653 (1952) (Jackson, J., concurring) (“Executive power has the advantage of concentration in a single head in whose choice the whole Nation has a part, making him the focus of public hopes and expectations.”); Proposed Executive Order Entitled “Federal Regulation” 55 Op. O.L.C. 59, 60-61 (1981) (generally approving of White House review of agency regulations in part on the basis that “because the [P]resident is the only elected official with a national constituency, he is uniquely situated to design and execute a uniform method of undertaking regulatory initiatives that responds to the will of the public as a whole.”); The President’s Committee on Administrative Management,

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assertions of unilateral, discretionary power have challenged the durable norms and procedures of administrative agencies.<sup>11</sup> Presidents have attempted to wield the federal bureaucracy as the instrument of their “charismatic legitimacy.”<sup>12</sup> The Supreme Court has sometimes condoned these efforts. It has justified judicial deference to agencies on the basis of the democratic credentials of the “Chief Executive.”<sup>13</sup> More recently, the Court has broadened the President’s power to remove administrative officials.<sup>14</sup> Commentators argue in the same vein that the Constitution requires a “unitary executive,”<sup>15</sup> or else that bureaucratic “accountability” and “effectiveness” can best be achieved through “presidential administration.”<sup>16</sup> Some have challenged the constitutionality of administrative agencies that operate independently from the President.<sup>17</sup> Administration is either part and parcel of the President’s executive power, or it is constitutionally suspect.<sup>18</sup>

Against such dominant presidentialism, this Article contends that the constitutional structure of the department provides a foundation for the administrative state that is separate from the President’s executive power. The term “Department” appears in the Opinion Clause<sup>19</sup> and Appointments Clause<sup>20</sup> of Article II as well as in the Necessary and Proper Clause

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Administrative Management in the Government of the United States 2 (1937) (“The President is the Chief Executive and administrator within the [f]ederal system and service.”).

11. See LARRY BERMAN, *THE OFFICE OF MANAGEMENT AND BUDGET AND THE PRESIDENCY, 1921-1979*, at 74 (1979); STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO BILL CLINTON* 20, 425 (1993); Terry M. Moe & Scott A. Wilson, *The President and the Politics of Structure*, 5 *LAW & CONTEMP. PROBS.* 1, 11 (1994).

12. Daphna Renan, *The President’s Two Bodies*, 120 *COLUM. L. REV.* 1119, 1133 (2020).

13. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) (“While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make . . . policy choices.”).

14. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020); *Free Enter. Fund v. PCAOB*, 561 U.S. 477 (2010).

15. E.g., Steven G. Calabresi & Kevin Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 *HARV. L. REV.* 1553 (1992).

16. Elena Kagan, *Presidential Administration*, 114 *HARV. L. REV.* 2245, 2252 (“[T]he new presidentialization of administration renders the bureaucratic sphere more transparent and responsive to the public, while also better promoting important kinds of regulatory competence and dynamism.”); see also Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 *COLUM. L. REV.* 1, 85-106 (1992).

17. See, e.g., Neomi Rao, *A Modest Proposal: Abolishing Agency Independence in Free Enterprise Fund v. PCAOB*, 79 *FORDHAM L. REV.* 2541, 2575 (2011) (*Free Enterprise Fund* “logically implies the unconstitutionality of agency independence”).

18. *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 304 n.4 (2013) (noting that agency actions may “take ‘legislative’ and ‘judicial’ forms, but they are exercises of—indeed, under our constitutional structure they *must* be exercises of—the ‘executive Power’”).

19. U.S. CONST. art. II, § 2, cl. 1 (“The President . . . may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices . . .”).

20. *Id.* § 2, cl. 2 (“[T]he Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”).

of Article I.<sup>21</sup> In each of these contexts, “Department” means a durable organization of offices with a limited jurisdiction. It is a subdivision of a greater authority, ordinarily composed of multiple officials who together carry out the tasks within their remit.

Departments serve as bulwarks of the rule of law. They each facilitate the exercise of their principal officers’ powers, permitting delegation, specialization, and a “system” for the application of policy.<sup>22</sup> But the department’s head is also restrained by the institutional apparatus that assists her. She cannot act with disregard for the existing procedures, practices, and jurisdictional boundaries of her department. Departments establish “subordinate distributions of power” that internalize the checks and balances that exists between the legislative, executive, and judicial branches.<sup>23</sup> This scheme of “articulated governance” distinguishes regulations, adjudications, and enforcement decisions from the discretion of any one official.<sup>24</sup> Departments also further specialization and reduce the risk of error and arbitrariness. Their internal processes help to ensure that power is exercised in a regular, consistent, and reasoned fashion. And departments endure. They usually predate and then persist after any particular presidential administration, providing for the continuity of public services and purposes across time.

While the term “Department” provides an anchor for the administrative state within the Constitution’s text, the structures and norms that attach to such departments do not derive from the founding document alone. Departments are composites of public law consisting of multiple sources, including general constitutional theory, specific constitutional rules concerning official appointment and judicial review, statutory law establishing departments, and the internal rules and regulations that departments themselves generate.<sup>25</sup> This cluster of norms is traceable in part to the

21. *Id.* art. I, § 8, cls. 1, 18 (“[T]he Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”) The term “department” also appears in the 25th Amendment, which is beyond the scope of this Article. U.S. CONST. amend. XXV.

22. 1 ANNALS OF CONG. 393 (James Madison) (Joseph Gales ed., 1834) (emphasizing “system” in structure of Treasury Department); Office and Duties of the Attorney General, 6 Op. Att’y Gen. 326, 346 (1856) (“The organization of the executive departments of administration implies . . . system . . .”).

23. THE FEDERALIST NO. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961).

24. Jeremy Waldron, *Separation of Powers in Thought and Practice*, 54 B.C.L. REV. 433, 456-59 (2013); see also EDWARD RUBIN, BEYOND CAMELOT: RETHINKING POLITICS AND LAW FOR THE MODERN STATE 25-26 (2005) (describing the “articulation of structure” in the administrative state).

25. See JERRY MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 12 (2012) (defining the “administrative constitution” as including those “relatively stable patterns of institutional interaction that defined the role of Congress and the President in administration, that established the basic or

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internal logic of a constitution that contemplates jurisdictionally distinct units within the executive branch. But departmental norms are also a product of official handiwork, as judges, legislators, and executive officers have relied on the text to develop a practicable scheme of governance. In 1833, for instance, Justice John McLean held that principal officers were often required to develop a “kind of common law” to govern affairs within their department.<sup>26</sup> Attorney General Caleb Cushing introduced the term “administrative law” in 1856 to refer to opinions of the Attorney General,<sup>27</sup> which “officially define the law” within the executive departments.<sup>28</sup> These and other holdings have secured a separation between political will and legal obligation within the Executive. But departmental norms are not self-executing. They will require ongoing explication, maintenance, and enforcement from the constitutional branches if they are to continue to modulate the exercise of political power.<sup>29</sup>

This argument has implications for both formalist and functionalist understandings of executive power and the administrative state.<sup>30</sup> Formalists maintain that the Constitution’s text, as originally understood, divides all federal power into three and only three mutually exclusive categories—legislative, executive, and judicial.<sup>31</sup> This view underlies the unitary executive theorists’ conclusion that administrative agencies exercise executive power and must therefore be subject to the exclusive direction of the President.<sup>32</sup> Focus on departmental structures complicates that picture. A formalist understanding of the Executive must reckon with the way in which the President’s “executive Power”<sup>33</sup> relates to “executive Departments.”<sup>34</sup> The original public meaning and certain aspects of the Framers’

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default structure of administrative institutions, . . . [and] that confirmed the authority of senior officials to regularize administration by rule”).

26. United States v. MacDaniel, 32 U.S. (7 Pet.) 1, 15 (1833).

27. Caleb Cushing, Office and Duties of the Attorney General, 6 Op. Att’y Gen. 326, 343 (1856).

28. *Id.* at 334.

29. See Rebecca Ingber, *Bureaucratic Resistance and the National Security State*, 104 IOWA L. REV. 139, 145 (2018) (arguing that “internal actors and mechanism are inextricably, symbiotically interwoven with the external” checks provided by the constitutional branches, and thus not substituting for “the traditional separation of powers”).

30. On formalism and functionalism, see M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1136-45 (2000).

31. Lawrence Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CON. L. 155, 166, 185 (2006) (noting that formalists usually adopt originalist methods); Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CAL. L. REV. 853, 857-58 (1990).

32. See Lee S. Liberman, *Morrison v. Olson: A Formalistic Perspective on Why the Court Was Wrong*, 38 AM. U. L. REV. 313, 314-16, 353 (1989); Steven G. Calabresi & Saikrishna Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 568-70 (1994); *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 304 n.4 (2013).

33. U.S. CONST. art. II, § 1, cl. 1.

34. *Id.* § 2, cl. 1.

constitutional thought imply that executive departments might check the exercise of executive power.<sup>35</sup> But the constitutional text and context alone do not clearly specify the legal relation between power and departments. Originalist methodology then directs us to see how legal actors have “constructed” textual indeterminacies over time.<sup>36</sup> This Article shows that, since at least the mid-nineteenth century and throughout the twentieth, the three branches have understood departments to constrain the conduct of executive officers.<sup>37</sup> Even if the unitary executive theorists are correct that the President may control subordinate officers, both the subordinate officers as well as the President are limited by departmental rules.<sup>38</sup>

The argument also enriches functionalist understandings of the constitutional structure of the administrative state. Functionalists understand the Constitution to set up three overlapping authorities and hold that the core role of each branch must be preserved in the design and supervision of each federal agency and officer.<sup>39</sup> They focus less narrowly on textual requirements and more on working arrangements of government that serve constitutional values.<sup>40</sup> Departments, from this perspective, carry out the Constitution’s design of “separateness but interdependence”<sup>41</sup> among the three branches. They are within the executive branch but are created by Congress. They are governed by rules that may or may not align with the interests and preferences of the current chief executive. Departments thereby impose internal limits on the executive power.

Understanding the departmental structure of the Executive should modify functionalist conceptions of the proper relationship between constitutional branches and administrative agencies. Functionalists traditionally emphasize that the three branches must “share the reins of control” over such agencies.<sup>42</sup> This Article, by contrast, focuses on how departments

35. See *infra* Part II.

36. KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 5-9 (1999). Whittington lists “creation of executive departments” and “creation of independent regulatory commissions” in a table of constitutional constructions. *Id.* at 12. While Whittington understands construction as a political rather than legal process, I understand construction to generate legally binding rules, even if it is undertaken by actors other than courts. See Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 103-7 (2010).

37. See Part III, *infra*.

38. *United States v. MacDaniel*, 32 U.S. (7 Pet.) 1, 15 (1833); *United States v. Nixon*, 418 U.S. 683 (1974). See *infra* Part IV.

39. Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions: A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 489 (1987).

40. See Magill, *supra* note 30, at 1143-44; *Myers v. United States*, 272 U.S. 52, 291-95 (1926) (Brandeis, J., dissenting).

41. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). See also William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J. L. & PUB. POL’Y 21, 21-24 (1998).

42. Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 580 (1984). *But see* JON MICHAELS,

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themselves place controls on executive power. Though departments are created by statute and led by political appointees, they are not best understood as obedient servants of either Congress or of the President. Departments do not merely follow orders, they make orders orderly. They help to ensure that we are governed not by the will of particular officials but by fairly predictable, minimally rational, and suitably general norms.

The argument proceeds in four parts. Part I sets forth the constitutional text and theory that outline the departmental structure of executive power. Part II then shows how departmental structures were erected in the first hundred years of American public law, including through statutory law establishing departments, judicial decisions concerning executive officers, and opinions of Attorneys General concerning the scope of the President's executive power. Part III demonstrates how administrative law in the twentieth century elevated the significance of departmental norms of regular and distributed decision-making, focusing on the law of independent commissions, the binding effect of agency rules, and the requirement that agencies provide reasoned justifications for their actions. Part IV then evaluates contemporary controversies that center around the departmental structure of the executive branch: Secretary Ross' decision to add a citizenship question to the census,<sup>43</sup> constitutional and political conflicts over the leadership of the Consumer Financial Protection Bureau,<sup>44</sup> and the Special Counsel's investigation into Russian interference in the 2016 election.<sup>45</sup> Each of these cases show the continuing importance of departmental norms in restraining arbitrary power. But they also show that judicial and executive officials have failed to adequately safeguard the institutional framework that embanks political discretion. More explicit recognition of departments' independent value would further protect law's administration from arbitrary assertions of political power. Greater care for departmental norms will be necessary to ensure that our government remains one of laws and not one of persons.

### I. The Departmental Constitution: Text and Theory

This Part introduces the significance of departments in constitutional text and theory. Departments are a key structural feature of the

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CONSTITUTIONAL COUP: PRIVATIZATION'S THREAT TO THE AMERICAN REPUBLIC 57-75 (2017) (offering an account of the "administrative separation of powers" that serves similar functions to the system of checks and balances at the constitutional level).

43. See *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2569-71, 2573-76 (2019).

44. See *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020); *PHH Corp. v. CFPB*, 881 F.3d 75, 164 (D.C. Cir. 2018) (Kavanaugh, J., dissenting).

45. See SPECIAL COUNSEL ROBERT S. MUELLER III, U.S. DEP'T OF JUSTICE, 2 REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 1 (Mar. 2019). The Report nonetheless indicates that the Special Counsel was unable to reach the conclusion that President Trump "clearly did not commit obstruction of justice." *Id.* at 2.

Constitution's "arrangement of officeholders, laid out in their respective jurisdictions, selection, tenures, and duties."<sup>46</sup> The Constitution's text distinguishes between the power held by officials and the rule-bound organizations those officials operate within. However, the relationship between official power and institutional order is underspecified by the text on its face. Consulting the constitutional theory of the Framers, we learn that departments serve rule-of-law values: departments separate power from any one official's will and condition its exercise on the input of several officials with different roles and responsibilities. This theoretical background helps to explain the normative significance of the departmental structures the three branches jointly generated over the subsequent course of American legal development.

Attention to the Constitution's departmental text and background theory recasts longstanding debates concerning the relationship between the President's executive power and the administration of statutory law. Since the Founding, constitutional actors and theorists have been at odds over the President's authority over other executive branch officials.<sup>47</sup> Today's adherents to the "unitary executive theory," assert that the President may direct or remove any official within the executive branch.<sup>48</sup> "Pluralists," by contrast, insist that Congress may vest independent decisional authority in officers other than the President and insulate such officers from removal.<sup>49</sup> Building on the work of scholars such as Gillian Metzger, Daphna Renan, and Jon Michaels, this Article shifts focus from the President's authority over particular officials to the constitutional architecture within which such officials operate.<sup>50</sup> Individual officers exercise power against the backdrop of complex repositories of authority that other

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46. Karen Orren, *Officers' Rights: Toward a Unified Theory of American Constitutional Development*, 34 LAW & SOC'Y REV. 873, 879 (2000).

47. E.g., JONATHAN GIENAPP, *THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA* 125-63 (2018).

48. E.g., Calabresi & Prakash, *supra* note 32, at 593-99.

49. E.g., PETER M. SHANE, *MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY* 34-42 (2009); Peter Strauss, *Foreward: Overseer or "The Decider"?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007).

50. The Article builds on the previous work of other public-law scholars who have focused on executive structure and organization rather than the command authority of the President in relation to other officers. See generally Gillian Metzger, *The Constitutional Duty to Supervise*, 126 YALE L.J. 1836, 1880 (2015) (arguing that the President's duty to "take Care that the Laws be faithfully executed" can usually best be fulfilled through steady managerial supervision rather than direct assertions of authority); Jon 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) (arguing that the internal organization of the Executive reinstates the constitutional separation of powers); Jessica Bulman-Pozen, *Administrative States: Beyond Presidential Administration*, 98 TEX. L. REV. 265 (2019) (arguing that coordination, collaboration, and contestation between state and federal executives pluralizes the executive power). On separating the President as person from the presidency as office, see Renan, *supra* note 12, at 1133-38, and Aziz Huq, *Article II and Antidiscrimination Norms*, 118 MICH. L. REV. 47, 70-71 (2018).

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officials above, alongside, and beneath them have a duty to safeguard. Today, we would most naturally call these frameworks “institutions.”<sup>51</sup> The Constitution has its own term: they are “Departments.”

Departments provide a natural place for the administrative state in a Constitution that many scholars have seen as at best indifferent and at worst hostile to bureaucratic forms of government. Some formalist scholars and jurists see administrative law generally as constitutionally suspect,<sup>52</sup> or else assimilate administration to “executive power” and thus to the President’s discretionary control.<sup>53</sup> The conventional response from functionally minded administrative law scholars has been eloquently expressed by Jerry Mashaw: “There was a hole in the Constitution where administration might have been.”<sup>54</sup> On this view, the Constitution is mostly silent about how administration should be structured. Administrative law then emerges from legislation and from the agency rules and judicial case law that interpret it.

This Article shows instead that the term “Department” provides a home for administrative agencies within the Constitution’s text. The argument does not presume or embrace a formalist or originalist view of constitutional interpretation. But its approach is consistent with those methods to the extent that it begins with the Constitution’s text concerning “Departments” and the use of that term in the constitutional discourse of the founding period. The claim is not that the eighteenth-century constitutional text or the political theory of the Framers somehow foreordained the detailed arrangements of our administrative state. Rather, the claim is that the Constitution’s underspecified departmental structure has provided a rough-hewn foundation on which administrative law’s edifice of deliberative, rule-oriented, and institutionally dispersed decision-making has been built over the past centuries.

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51. James G. March & Johan P. Olson, *The New Institutionalism: Organizational Factors in Political Life*, 78 AM. POL. SCI. REV. 734, 751 (1984) (describing a “new institutionalism” in the social sciences that examines “the collection of institutions, rules of behavior, norms, roles, physical arrangements, buildings, and archives that are relatively invariant in the face of turnover of individuals and relatively resilient to the idiosyncratic preferences and expectations of individualism”).

52. PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 1 (2014) (arguing that administrative law is “unrecognized by the Constitution”); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1253 (1994) (“[O]ne cannot have allegiance both to the administrative state and to the Constitution.”).

53. See *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 304 n. 4 (2013); Saikrishna Prakash, *Hail to the Chief Administrator: The Framers and the President’s Administrative Powers*, 102 YALE L.J. 991, 991-92 (1993); ADRIAN VERMEULE, LAW’S ABNEGATION: FROM LAW’S EMPIRE TO THE ADMINISTRATIVE STATE 53 (2016).

54. Jerry Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 YALE L.J. 1256, 1338 (2006).

### A. *Departments in the Constitutional Text*

The text of the Constitution itself is unclear about what departments are, where they come from, and what—if any—normative significance they hold. The vagueness and ambiguity of the text require a broader examination of constitutional theory and discourse to elucidate the term’s core meaning and referents.

The term “Department” appears in Clauses 1 and 2 of Article II, Section 2. Clause 1 states: “The President . . . may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices . . . .”<sup>55</sup> Clause 2 states that the President

shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all . . . Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.<sup>56</sup>

Public law scholars rely on these Clauses to make conflicting arguments about the President’s power over the administration of law. For the unitary executive theorists, the Opinion Clause shows that the President has directive authority over “principal Officer[s]” within the branch.<sup>57</sup> The Appointments Clause likewise shows that the Constitution contemplates a hierarchical structure of official relations with the President at the apex.<sup>58</sup> The executive pluralists draw the opposite conclusions. The Opinion Clause only gives the President the power to require an “Opinion” from the principal officers, not to command them as to how to exercise their discretion.<sup>59</sup> The Appointments Clause gives a central role to Congress, rather than the President, in structuring official relations through statutory law.<sup>60</sup>

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55. U.S. CONST. art. II, § 2, cl. 1.

56. *Id.* cl. 2.

57. Akhil Reed Amar, *Some Opinions on the Opinion Clause*, 82 VA. L. REV. 647, 647 (1996) (“With the Opinion Clause, the Framers rejected a committee-style Executive Branch in favor of a unitary and accountable President, standing under law, yet over Cabinet officers.”); Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 62 (arguing that the Clause means that the President must have “a measure of substantive authority over the doings of the agency.”).

58. *Morrison v. Olson*, 487 U.S. 654, 720-21 (1988) (Scalia, J., dissenting) (inferior officers remain “under the direct control of the President”).

59. Strauss, *supra* note 49, at 717.

60. *Id.* at 723; JOSHUA CHAFETZ, *CONGRESS’S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS* 98 (2017) (the Appointments Clause “leaves to Congress the details of what departments to create and how to structure them”).

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These debates circle around without squarely addressing the common thread between both Clauses: “Departments.” Commentators have expressed a good deal of puzzlement about the term.<sup>61</sup> Constitutional case law has come to the conclusion that a “Department” as used in the Appointments Clause is any “freestanding component of the executive branch,” such as the Department of State or the Department of Treasury, and encompasses some agencies not labeled “departments,” including the Securities and Exchange Commission.<sup>62</sup> Part IV will return to that body of law. But bracket out our contemporary understanding for the moment. The text of the Constitution is mostly silent on what the departments are. Departments may have several “Officers” in them, some of whom are “principal Officers” or “Heads,” and others who are “inferior.”<sup>63</sup> The text also indicates that there are several of these “Departments,” not just one.<sup>64</sup> But the departments are not named. Nor is it immediately clear where these unnamed departments come from or who has the power to create them. The Constitution does not explicitly give to either the President, or to Congress, or to any other actor or institution the authority to create or to structure the departments referred to in Article II.

Such a crucial term deserves sustained attention. On its face, it would seem impossible to come to determinate resolutions about the power of the President and his principal officers without knowing more about these departments. That is because departments may have significant bearing on the scope and content of these officers’ powers. The principal officers in each of these departments must give the President their opinion.<sup>65</sup> If the department that an officer heads in some way shapes or even controls what he may lawfully advise the President to do, then the content of what the President may require from the officer is constrained by the department. Further, the heads of these departments, who are appointed by the President with senatorial consent, may be given legal authority to appoint inferior officers.<sup>66</sup> If the department that an officer heads influences or limits whom the head could appoint to such inferior offices, then the President’s

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61. Calabresi & Rhodes, *supra* note 15, at 1181 (the Appointments Clause “mysteriously recognizes a category of persons, ‘the Heads of Departments,’ who are mentioned in only one other place [the Opinion Clause] and are not given any other power by the Constitution”); Mashaw, *supra* note 54, at 1270-71 (“[T]he only explicit power given to the President by the Constitution with respect to executing the laws proper is the power to require reports in writing from the heads of departments—whatever ‘departments’ might be.”); Strauss, *supra* note 42, at 600 (describing the “shadowy reference to executive departments” in the Opinion Clause); Lessig & Sunstein, *supra* note 16, at 32-38 (arguing that the “executive Departments” referred to in the Opinion Clause are a subset of the “Departments” referred to the Appointments Clause, but conceding that there is no “decisive evidence” for that claim).

62. *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 511 (2010).

63. U.S. CONST. art. II, § 2, cl. 1, 2.

64. *Id.* (emphasis added).

65. U.S. CONST. art. II, § 2, cl. 1.

66. *Id.* cl. 2

authority to order the appointment of an officer to an inferior post would be to that same extent circumscribed. If the department that an officer heads incorporates procedures that prescribe the way in which decisions must be made, then the President's ability to direct the head is limited by the procedures the head must follow. And if these departmental constraints originate from Congress or from some other actor or agency, then the President's power is hemmed in by those actors, rather than by any form of self-limitation. On the other hand, if a department is an empty placeholder, signifying no legal rights, duties, or interests, then the President and other officers' discretion under the applicable legal norms would remain fully intact.

So what is a department? It would be helpful if the rest of the Constitution could give us some guidance. And, indeed, the term "Department" also appears in the Necessary and Proper Clause of Article I.<sup>67</sup> That Clause states that Congress has the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."<sup>68</sup> The first part of the Clause is the usual focus for constitutional case law and commentary, granting Congress an instrumental power to carry out the other enumerated powers with which it is vested.<sup>69</sup> But the Clause also grants Congress a broader power to effectuate "all other powers," including those vested in "any Department" of the federal government.<sup>70</sup>

This aspect of the Clause further complicates rather than clarifies Article II's references to departments. Some scholars believe that the text here refers to the very same departments mentioned in Article II, namely the subdivisions of the executive branch.<sup>71</sup> Such commentators conclude that the Clause gives Congress significant authority to structure the internal workings of law-administering agencies of the government.<sup>72</sup> Other commentators, however, believe the departments referred to in the Necessary and Proper Clause are the constitutional branches—the executive and judiciary, as well as the legislature.<sup>73</sup> These scholars then diverge on

67. *Id.* art. I, § 8, cl. 18.

68. *Id.*

69. *E.g.*, Nat'l Fed'n Indep. Bus. v. Sebelius, 567 U.S. 519, 558-60 (2012); see John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045, 1058 (2014).

70. U.S. CONST. art. I, § 8, cl. 18.

71. Strauss, *supra* note 49, at 721 ("[T]he Philadelphia Convention replaced an initial effort to define government departments in the constitutional text itself with congressional responsibility to define them under the broad language of the Necessary and Proper Clause."); *id.* at 721 n.117; Mashaw, *supra* note 54, at 1271 n.34.

72. Strauss, *supra* note 49, at 721-22.

73. Calabresi & Prakash, *supra* note 32, at 587 (Congress may use the Necessary and Proper Clause "to carry[] into execution' the power of another department of the government, such as the executive power or the judicial power"); Calabresi & Rhodes, *supra* note 15, at 1156

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whether the Clause merely confirms that Congress may passively “help” the other branches carry out their enumerated powers,<sup>74</sup> or else augments Congress’ power with respect to the other branches.<sup>75</sup> There is thus considerable but largely unacknowledged disagreement about what the Necessary and Proper Clause refers to with the term “Department.”

The text on its face therefore leaves several issues unaddressed. It does not explain what a department is. Nor does it clarify whether the departments referred to in Article II are the same as those referred to in Article I. Nor does it explain how departments are related to powers. Finally, it does not indicate which, if any, constitutional values departments further or implement. To explore these issues, this Article begins by examining the constitutional discourse of the Founding period.

### *B. Departments in Constitutional Discourse*

This Section looks to Founding-era discourse as well as drafting and ratification debates to explicate the meaning and referents of the term “Department.” While this investigation does not resolve all questions concerning departments, it does give the term some content. As used in the Constitution, a department is a specialized division of government in which officials exercise their powers. A department is thus different from a power. It is the confined rule-structure in which power operates. Given this meaning, the term department could be used to refer to the three branches of the legislature, executive, and judiciary, which Alexander Hamilton referred to as the “principal departments.”<sup>76</sup> Or it might refer to subdivisions

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n.6 (“The Constitution [in the Necessary and Proper Clause] uses the word ‘Department’ to refer to the three institutions of our national government.”); William Van Alstyne, *The Role of Congress in Determining the Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause*, 40 LAW & CONTEMP. PROBS. 104, 107 (1976) (“[The Necessary and Proper] clause assigns to Congress alone the responsibility to say by law what additional authority, if any, the Executive and the courts are to have beyond that core of powers that are indispensable, rather than merely appropriate, or helpful, to the performance of their express duties under articles II and III of the Constitution.”); John Manning, *The Supreme Court 2013 Term—Forward: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 7 (2014) (“[The] breadth [of the Necessary and Proper Clause] indicates that the people not only delegated the implementation power to Congress, but gave it precedence over the other branches in the exercise of such power.”); John Mikhail, *supra* note 69, at 1100 (“Wilson [who drafted the Necessary and Proper Clause] presumably intended to give Congress whatever instrumental power it needed to organize and regulate the other branches and agencies of the government.”); E. Garrett West, *Note: Congress’ Power over Office Creation*, 128 YALE L.J. 166, 177 (2018) (“The Necessary and Proper Clause gives sweeping authority to Congress to structure the other branches of the federal government . . . . Because the text of this grant of congressional power references the Vesting Clauses of Article II and Article III, it allows Congress to pass laws augmenting and channeling the powers of the executive and judicial branches.”).

74. Calabresi & Prakash, *supra* note 32, at 590.

75. Manning, *supra* note 73, at 7; Van Alstyne, *supra* note 73, at 107. Lessig & Sunstein, *supra* note 16, at 67-68 (1992).

76. 2 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 321 (New York) (Alexander Hamilton) (Jonathan Elliot, ed. 1936).

within the executive branch, which James Madison referred to as the “subordinate departments.”<sup>77</sup> In both uses, departments were generally understood to have normative content. They had rights or interests that were not coterminous with the powers vested in any particular officer, but rather consisted in the maintenance of a larger pattern of relationships among officers. This pattern would distribute authority among several officers to check the exercise of power. This core understanding of departments provides the groundwork for the historical development of the departmental structure of the Executive through statutory law and judicial and executive branch interpretation.

A dictionary definition roughly contemporaneous with the drafting and ratification of the Constitution defines a department as “a separate allotment; a province or business assigned to a particular person: A French term.”<sup>78</sup> The example given is “The Roman Fleets, during their command at sea, had the[i]r several stations and *departments*; the most considerable was the Alexandrian Fleet, and the second was the African.”<sup>79</sup> This definition begins to give some shape to the constitutional text. First, a department is a division of authority; it is specialized. Second, this division of authority is based on a jurisdictional grant or limitation—a territory or a subject matter that constitutes the department. Third, this separate and jurisdictionally limited authority is given to a particular officer. The head of department is thus empowered within, but limited to, his department. Though originating in French, the term “department” could be heard in English political discourse by the late eighteenth century, where it was used to refer broadly to various units of the government often headed by a

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77. 1 RECORDS OF THE FEDERAL CONVENTION OF 1781 421 (James Madison) (Max Farrand ed., rev. ed. 1937).

78. SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE DEP (1773). In French at the time, the definition, in relevant part, was “*Distribution. Etendue de pays sur la quelle on a quelque pouvoir, en vertu de la Charge ou de la commission qu’on exerce*” (“Distribution. Area of the country in which one has a certain power, in virtue of the charge or the commission one exercises.”) PIERRE RICHELET, DICTIONNAIRE PORTATIF DE LA LANGUE FRANCAISE 472 (1780) (author’s trans.).

79. Johnson, *supra* note 78, at DEP.

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particular official.<sup>80</sup> American colonial constitutional and military discourse also used the concept in this way.<sup>81</sup>

Departments were associated with the assignment of duties corresponding to personal capacity. In his influential 1781 plan for a federal constitution, the Philadelphia writer Pelatiah Webster proposed creating

three great ministers of state, who ought to be men of the greatest *abilities* and *integrity*; their business is confined to the several departments, and their attention engaged strongly and constantly to all the several parts of the same; the whole arrangement, method, and order of which, are formed, superintended, and managed in their offices, and all informations relative to their departments centre there.<sup>82</sup>

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80. *E.g.*, OLIVER MORTON DICKERSON, *AMERICAN COLONIAL GOVERNMENT, 1696-1765: A STUDY OF THE BRITISH BOARD OF TRADE IN RELATION TO THE AMERICAN COLONIES, POLITICAL, INDUSTRIAL, ADMINISTRATIVE* 107-15 (1912) (describing the role of the British Secretary of State for the “Southern Department” in colonial administration during the eighteenth century); 15 *THE PARLIAMENTARY REGISTER; OR HISTORY OF THE PROCEEDINGS AND DEBATES OF THE HOUSE OF LORDS* 52 (J. Almon ed. 1780) (“The first Lord of the Admiralty” referred to “the importance of the naval department over which he presides” [1779]); *id.* at 274 (“The Earl of *Pembroke* . . . affirm[ed] that the administration of [the army], as well as every other department civil and military, was equally weak in itself, injurious to the individuals of the profession, and destructive of the service.” [1780]); 41 *THE PARLIAMENTARY REGISTER; OR HISTORY OF THE PROCEEDINGS AND DEBATES OF THE HOUSE OF COMMONS* 379 (J. Debrett ed. 1795) (reporting 1795 speech to Parliament referring to “the office of Secretary of State for the foreign department”); 31 *THE PARLIAMENTARY HISTORY OF ENGLAND FROM THE EARLIEST PERIOD TO THE YEAR 1803*, at 942 (C.T. Hansard ed. 1818) (reporting speech to Parliament in 1796 referring to an appeal to “the honour of the gentleman at the head of that department, the barrack-master-general, for the propriety and economy of the manner in which the business is conducted”); *see also* NORMAN CHESTER, *THE ENGLISH ADMINISTRATIVE SYSTEM, 1780-1870*, at 222 (1981) (reporting that in late eighteenth- and early nineteenth-century England, “it was customary to the use terms ‘public office,’ ‘office,’ or ‘department’ as interchangeable, usage determining which word was chosen in a particular case. Thus it was usual to speak of the Colonial, Foreign, or Home Offices but of the Secretary of State for the Home Department. . . . Neither ‘office’ or ‘department’ carried the implication of covering the whole of what nowadays would be called a ministry, a term not then used with that meaning.”).

81. *E.g.*, MD. CONST. of 1776, art. XXXI (“That a long continuance in the first executive departments of power or trust, is dangerous to liberty; a rotation, therefore, in those departments, is one of the best securities of permanent freedom.”); VALLEY FORGE ORDERLY BOOK OF GENERAL GEORGE WEEDON OF THE CONTINENTAL ARMY UNDER COMMAND OF GEN’L GEORGE WASHINGTON, IN THE CAMPAIGN OF 1777-8, at 259 (Dodd, Mead & Co. ed. 1902) (“The Continental Congress . . . has been pleased to Resolve, That the Comm’r in chief or the Comm’r of a separate Department shall have full power and Authority to suspend or limit power of Granting, Furloughs . . .”).

82. Pelatiah Webster, *Dissertation on the Political Union and Constitution of the Thirteen United States of North America*, in *POLITICAL ESSAYS ON THE NATURE AND OPERATION OF MONEY, PUBLIC FINANCES, AND OTHER SUBJECTS* 162, 213 (1791). On Webster’s significance, *see* Hannis Taylor, *Pelatiah Webster: The Architect of Our Federal Constitution*, 17 *YALE L.J.* 73, 75 (1907) (Webster’s *Dissertation* provided the “‘wholly novel theory’ of federal government upon which reposes the existing constitution of the United States”); HENRY BARRETT LEARNED, *THE PRESIDENT’S CABINET: STUDIES IN THE ORIGIN, FORMATION, AND STRUCTURE OF AN AMERICAN INSTITUTION* (1923) (describing Webster as “a writer of some influence”).

He proposed a minister of finance, war, and state.<sup>83</sup> This framework for the exercise of executive power contemplated division, specialization, and internal coherence. Each department would be led by someone who was both public-interested and skilled within his assigned sphere.

The debates at the Federal Constitutional Convention confirm that “Department” referred to divisions of the government, including, in particular, the subdivisions of the executive branch. For instance, Alexander Hamilton’s “Plan of Government” gave a federal “governour” the sole power to appoint “*heads or chief* officers of the departments of finance, war and foreign affairs.”<sup>84</sup> Madison referred to debates at the Convention concerning “the arrangement of the subordinate Executive departments.”<sup>85</sup> Various other proposals at the Convention and ratification concerning presidential and executive power used the word in the same way.<sup>86</sup> For instance, the Morris-Pinckney plan proposed a “Council of State,” composed of the Chief Justice of the Supreme Court and Secretaries of Domestic Affairs, Commerce and Finance, Foreign Affairs, War, and Marine, with specific duties assigned to each.<sup>87</sup> The President could require a written opinion from each secretary, who would be “responsible for his opinion on the affairs relating to his particular Department.”<sup>88</sup> The plan’s only surviving trace in the ratified Constitution is the Opinion Clause.<sup>89</sup>

83. Webster, *supra* note 82, at 213.

84. *Constitutional Convention. Plan of Government, [June 18, 1787]*, in 4 THE PAPERS OF ALEXANDER HAMILTON 207, 208 (Syrett ed., 1962).

85. From James Madison To Edmund Randolph (31 May 1789), in 12 THE PAPERS OF JAMES MADISON 189-91, 190 (Hobson et al., eds. 1979) (“Among other subjects on the anvil is the arrangements of the subordinate Executive departments. A Unity in each has been resolved on, and an amenability to the President alone, as well as to the Senate by way of impeachment.”).

86. *E.g.*, 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 111 (Max Farrand ed., rev. ed. 1937) (George Mason) (“There is also to be a council of revision . . . formed of the principal officers of the state, I presume of the members of the Treasury Board, the Board of War, the Navy Board, and the Department for Foreign Affairs . . . .”); 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 158 (Max Farrand ed., rev. ed. 1937) (James Wilson reporting the Pinckney Plan) (“It shall be [The President’s] Duty . . . to inspect the Departments of Foreign Affairs—War—Treasury—Admiralty.”); *Objections of the Hon. George Mason*, in 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION 494, 495 (Jonathan Elliot ed., 1827) (“The President of the United States has no constitutional council, (a thing unknown in any safe and regular government.) He will therefore be unsupported by proper information and advice . . . or a council of state will grow out of the principal officers of the great departments”); *The Debates in the Convention of the State of Pennsylvania on the Adoption of the Federal Constitution*, in 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION 448 (Jonathan Elliot ed., 1827) (James Wilson) (“The President . . . will have also the advice of the executive officers in the different departments of the general government.”); *id.* at 506 (James Wilson) (“[T]he history of the diplomatic corps will evince, even in that great department of politics, the truth of an old adage, that ‘honesty is the best policy’ . . . .”).

87. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 342-43.

88. *Id.* at 344.

89. CHARLES THACH, THE CREATION OF THE PRESIDENCY, 1775-1789: A STUDY IN CONSTITUTIONAL HISTORY 124-25 (1923).

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“Department” was also used in this period in a different but related way to refer to the three constitutional branches of government.<sup>90</sup> The 1776 Constitution of Virginia stated that the “Legislative, Executive, and Judicial departments, shall be separate and distinct, so that neither exercise the powers properly belonging to the other . . . .”<sup>91</sup> Georgia and Vermont’s Revolution-era constitutions contained nearly identical provisions.<sup>92</sup> Likewise the Massachusetts Constitution of 1780 provided that “the legislative department shall never exercise the executive and judicial powers, or either of them . . . to the end it may be a government of laws and not of men.”<sup>93</sup> The provision implied a connection between departments and the rule of law, as the separation of official bodies would prevent any particular official from asserting absolute power. The concept of department was therefore part and parcel of American constitutional law prior to the ratification of the Constitution. It was not merely a synonym for “power.” The “department” referred to the official body that exercised various kinds of powers within prescribed bounds.

In his famed defense of the proposed constitution in the *Federalist*, Madison deployed this conception of departments to respond to the objection that the Constitution’s structure violated Montesquieu’s maxim of the separation of powers.<sup>94</sup> According to Montesquieu, there were “three sorts of powers,” namely the “legislative power,” “executive power,” and the “power of judging.”<sup>95</sup> These powers ought not to be united “in a single person or body of the magistracy” because such a combination would lead to “tyrannical” or “arbitrary” government.<sup>96</sup> Madison noted that critics of the proposed constitution believed that its structure betrayed Montesquieu’s theory, violating “the political maxim, that the legislative, executive, and judiciary departments ought to be separate and distinct.”<sup>97</sup>

Madison responded by distinguishing powers from departments, such that one department of government might share some of the powers held

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90. *E.g.*, GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1878*, at 140, 158 (examples of this use of department in revolutionary writings).

91. VA. CONST. of 1776, art. III.

92. GA. CONST. of 1777, art. I; 1786 VT. CONST. of 1786, ch. II, art. VI.

93. MASS. CONST. of 1780, art. XXX.

94. THE FEDERALIST NO. 48, at 323 (James Madison) (Jacob E. Cooke ed., 1961).

95. MONTESQUIEU, *THE SPIRIT OF THE LAWS*, at 156-67 (Anne M. Cohler et al., eds. 1989).

96. *Id.* at 157. *See* W.B. GWYN, *THE MEANING OF THE SEPARATION OF POWERS: AN ANALYSIS OF THE DOCTRINE FROM ITS ORIGIN TO THE ADOPTION OF THE UNITED STATES CONSTITUTION* 108 (1965) (for Montesquieu “the separation is necessary to achieve government under law and to avoid arbitrary government in which the momentary untrustworthy will of the ruler is sovereign”).

97. THE FEDERALIST NO. 47, at 323 (James Madison) (Jacob E. Cooke ed., 1961).

primarily by another.<sup>98</sup> He observed that Montesquieu’s “meaning . . . can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution, are subverted.”<sup>99</sup> By distinguishing governmental functions from governmental institutions—powers from departments—Madison could shape Montesquieu’s constitutional ideal of separated power into a workable arrangement of distinct but interrelated political divisions.<sup>100</sup> It was possible in principle to distinguish certain kinds of powers from one another and desirable that they not all be aggregated together. Placing different functions in different groups of officers reduced the power held by any one and directed power’s exercise towards the public interest.

Departments were not merely conceptual divisions but had a real existence. Madison insisted that more would be required to maintain the separation of powers than “a mere demarcation on parchment of the constitutional limits of the several departments.”<sup>101</sup> He observed that the legislative power under the Articles of Confederation had a tendency unduly to expand its powers into the executive and judicial realms despite textual assurances to the contrary. Thus, “as all these exterior provisions are found to be inadequate, the defect must be supplied, by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.”<sup>102</sup> Interior structure was the realm of departmental organization. This structure was built to channel the flow from the “legitimate fountain of power,” namely the people.<sup>103</sup> As Justice John Marshall would later put it in *Marbury v. Madison*,<sup>104</sup> “[t]his original and supreme will organizes the government, and assigns, to different departments, their respective powers.”<sup>105</sup> Departments articulated the fluid sovereignty of the people into permanent reservoirs of regular political and legal authority.

This system organized offices into “rivalrous” groups,<sup>106</sup> so as to keep each body of officials within their proper jurisdiction. Madison thus maintained that

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98. See Julian Davis Mortenson, *Article II Vests the Executive Power, Not Royal Prerogative*, 119 COLUM. L. REV. 1170, 1260 (2019) (describing distinction between separation and distribution of powers).

99. THE FEDERALIST NO. 47, at 325-26 (James Madison) (Jacob E. Cooke ed., 1961).

100. M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 102-04 (2nd ed. 1998) (describing Montesquieu’s novel combination of the separation of powers with a scheme of checks and balances).

101. THE FEDERALIST NO. 51, at 347-48 (James Madison) (Jacob E. Cooke ed., 1961).

102. THE FEDERALIST NO. 51, at 347 (James Madison) (Jacob E. Cooke ed., 1961).

103. THE FEDERALIST NO. 49, at 339 (James Madison) (Jacob E. Cooke ed., 1961).

104. 5 U.S. (1 Cranch.) 137 (1803).

105. *Id.* at 176.

106. Michaels, *supra* note 42, at 231.

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[t]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. . . . Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.<sup>107</sup>

These famous passages take on a new complexion when we bring into focus the departmental concepts on which they rely. Madison referred to the officials who “administer each department.” The department is thus separate from the particular officials who operate within it as well as the particular powers vested in those officials. When Madison emphasized keeping these departmental units “in their proper *places*,”<sup>108</sup> he recognized that each department operated over a limited jurisdiction. Most importantly, reference to the “the constitutional rights of *the place*,”<sup>109</sup> rather than the constitutional rights of an officer, suggests that the department itself has legal interests beyond the power exercised by its members. The official who administered the department might abuse his power in a way that undermined the lasting interests of his department. He might give up his power to other actors or misuse it to further private rather than public aims.

Madison thus emphasized the need to guard the department against its own occupants and leadership. To achieve that security, the constitutional structure among the principal departments had been modeled on lower levels of government organization:

This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power; where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other; that the private interest of every individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the state.<sup>110</sup>

At the Philadelphia Convention, Madison had made the same parallel in describing how the people might guard against the danger that “those

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107. THE FEDERALIST NO. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961).

108. *Id.*

109. *Id.*

110. *Id.*

charged with the public happiness might betray their trust.”<sup>111</sup> The solution was to

divide the trust between different bodies of men, who might watch and check each other. In this they wd. be governed by the same prudence which has prevailed in organizing the subordinate departments of Govt., where all business liable to abuses is made to pass thro’ separate hands, the one being a check on the other.<sup>112</sup>

He may have had in mind here the various treasury boards established under the Articles of Confederation.<sup>113</sup> That model would come up for discussion again in the legislative creation of the Department of Treasury in the first Congress, which is discussed in Part III. For now, however, the important point is that Madison envisioned both the principal departments established by the Constitution, and certain subordinate departments within the Executive, as distributing power among officers so as to prevent its abuse. The constitutional rights of each department would be secured by arranging offices within them so that no one could undermine the interests of the institution. Just as the three principal departments would divide, coordinate, and struggle over the exercise of power, so too the subordinate departments would minimize the danger of arbitrary decision-making.

Hamilton similarly thought of the principal and subordinate departments of government in tandem.<sup>114</sup> The “[c]onstitution of the executive department”<sup>115</sup> would be continuous with the larger constitutional structure as a means of organizing and exercising power. Hamilton did not, however, prioritize internal coordination or checks within the executive department in the way Madison did. Rather, he defended the virtues of the “unity of the executive,” arguing that “decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man, in a much more eminent degree, than the proceedings of any great number.”<sup>116</sup> This conception of the executive branch emphasized speed and command over thoroughness and deliberation. However, it is worth noting that even Hamilton

111. 1 RECORDS OF THE FEDERAL CONVENTION OF 1781, at 421 (Madison) (Max Farrand ed., rev. ed. 1937).

112. *Id.* at 421-22.

113. JOHN A. FAIRLIE, THE NATIONAL ADMINISTRATIVE ORGANIZATION OF THE UNITED STATES OF AMERICA 93-95 (1905) (describing various versions of the “Treasury board” under the Articles of Confederation).

114. THE FEDERALIST NO. 72, at 486 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (“The administration of government, in its largest sense, comprehends all the operations of the body politic, whether legislative, executive or judiciary, but in its most usual and perhaps its most precise signification, it is limited to executive details, and falls peculiarly within the province of the executive department.”).

115. THE FEDERALIST NO. 67, at 452 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

116. THE FEDERALIST NO. 70, at 472-73 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

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recognized the importance of “stability” in the executive branch.<sup>117</sup> He feared that transitions from one administration to another would “create a ruinous mutability in the administration of government.”<sup>118</sup> He therefore initially interpreted the Appointments Clause as requiring senatorial consent to removal.<sup>119</sup> Hamilton sought both to maintain the President’s discretionary power and to ensure the executive department’s institutional durability.<sup>120</sup> While he underscored the importance of a unified command within the executive branch, he also emphasized the need for an official corps whose competent members would remain beyond the President’s electoral term.

### *C. The Text Reconsidered: Outlines of the Institutional Executive*

The previous Section demonstrated that the constitutional concept of the department generally meant a jurisdictionally limited organization of offices. The concept could be used to refer to the three constitutional branches as well as to subdivisions of the executive branch. In each case, departments served as means to distribute and channel power so as to ensure its responsible exercise. With this general understanding in mind, we can reassess the use of the term in Articles I and II. Considered on the whole, the Constitution’s departmental text contemplates an institutionally differentiated executive power that is grounded in statutory authority. It suggests that power ought generally to circulate through jurisdictionally bounded organizations of offices that inform, direct, and restrict it. But this broad vision leaves much about the relation between departments and power underdetermined. Subsequent constructions of the legislative, executive, and judicial branches would be necessary to specify the departmental structure of the Executive.

As used in the Opinion Clause,<sup>121</sup> the term “Department” plainly refers to the subordinate agencies within the executive branch. The Clause explicitly concerns “executive Departments,” thus excluding the judicial or legislative departments.<sup>122</sup> Because it refers to several departments, not one, the Clause must refer to the components of the executive branch rather than the branch as a whole.

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117. THE FEDERALIST NO. 72, at 487 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

118. *Id.* at 486.

119. THE FEDERALIST NO. 77, at 515 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). Hamilton apparently changed his views on removal in the course of debates on the removal power in the first Congress, which is discussed in the next Part. GIENAPP, *supra* note 47, at 154-55.

120. Jeremy D. Bailey, *The New Unitary Executive and Democratic Theory: The Problem of Alexander Hamilton*, 102 AM. POL. SCI. REV. 453, 459-61 (2008).

121. Again, the Opinion Clause states that the President “may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices.” U.S. CONST. art. II, §2, cl. 1.

122. *Id.*

The normative significance of the Opinion Clause is that it affirms but structures the President's discretionary powers. The Clause recognizes a limited presidential right of direction, by empowering him to "require the Opinion" of the principal officers.<sup>123</sup> It implies that, on some matters at least, the President is to decide unilaterally with the non-binding advice of subordinate executive officials. The Clause in this way serves an "information-gathering function" for the President.<sup>124</sup> The performance of that function is only possible, however, if the principal officers are capable of forming and forthrightly communicating independent views to the President. If their written opinions could not depart from the President's own, the information they communicated would have no value to the president's decision-making. Opinions that merely parroted the President's, irrespective of the merits of the issue under consideration, could only serve to obscure the clear lines of public accountability which Hamilton understood Article II to create.

The term department in the Opinion Clause distinguishes the duties of high-ranking executive branch officials. The Clause recognizes that "the principal Officers in *each* of the executive Departments" are bound by the "Duties of their *respective* Offices."<sup>125</sup> This indicates that principal officers are to operate within their own jurisdictions of law-administration, performing special obligations that flow from their position as leaders of the organizations that administer those jurisdictions, rather than from the President. By referring to these discrete departmental duties, the Clause dispels the possibility of an undifferentiated executive, determined solely by the President's powers and duties.

Contrary to the view of some unitarians, then, the Opinion Clause does not "augment the unified, hierarchical executive."<sup>126</sup> The slight power to get an opinion from a subordinate would hardly "augment" a much greater purported power to direct subordinates' actions. To the contrary, the fact that the Opinion Clause is a remnant of the proposal for a council of state<sup>127</sup> implies that the Framers intended to preserve a measure of differentiation, plurality, and deliberation within the executive branch without undermining ultimate presidential responsibility or setting in

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123. *Id.*

124. Tara Leigh Grove, *Presidential Laws and the Missing Interpretive Theory*, 168 U. PA. L. REV. 877, 897 (2020).

125. U.S. CONST. art. II, § 2, cl. 1 (emphasis added).

126. Calabresi & Rhodes, *supra* note 15, at 1206. *See also* Calabresi & Prakash, *supra* note 32, at 584.

127. Thach, *supra* note 89, at 119; 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 342-44.

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constitutional stone a specified group of counselors.<sup>128</sup> The Clause can indeed be understood to “clarify” and “exemplify” the President’s executive power, including his position at the apex of one of the three coordinate branches.<sup>129</sup> But it at the same time acknowledges the existence of more particular “Duties” reposed in the principal officers, which the President would have to respect. The duties of the principal officers seem to be fixed by some authority other than the President, and tied to their departmental assignments. Both the Appointments Clause and Necessary and Proper Clause strengthen the inference that these duties are to be grounded in legislation.

The referent of “Departments” in the Appointments Clause<sup>130</sup> is not quite so textually clear as in the Opinion Clause. The Clause permits Congress to vest the appointment of “inferior Officers” in “Heads of Departments” without specifying that these are the very same “executive Departments” that the Opinion Clause refers to rather than the constitutional branches or some other governmental institutions. The Court held in *United States v. Germaine*<sup>131</sup> that the term department in the Opinion and Appointments Clauses “clearly means the same thing.”<sup>132</sup> There has nonetheless been some scholarly dispute about whether there is a meaningful distinction between the “executive Departments” referred to in the Opinion Clause and other departments that are not, strictly speaking, “executive,” but rather implement Congress’ enumerated powers.<sup>133</sup> The

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128. See Martin Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1798 (1996) (arguing that the Opinion Clause “advances balance insofar as it marks the checking function of a specified source of counsel”).

129. Amar, *supra* note 57, 652, 658-59.

130. U.S. CONST. art. II, § 2, cl. 1 (The President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments”).

131. 99 U.S. 508 (1878).

132. *Id.* at 511. However, in *Ex Parte Siebold*, 100 U.S. 371 (1879), the Court seemed to acknowledge more ambiguity in the meaning of the Appointments Clause: “It is no doubt usual and proper to vest the appointment of inferior officers in that department of the government, executive or judicial, or in that particular executive department to which the duties of such officers appertain.” *Id.* at 397. The problem with reading the Clause as referring both to the principal and subordinate departments is that it would create redundancies. The “Head” of the executive department as a whole is the President, but “the President alone” is already an alternative holder of appointment power under the Clause. Regardless, the Court’s uncertainty about the issue within a short span of time is telling. It is an artefact of a constitutional discourse that used the generic term “department” to refer to distinct institutions at multiple levels of the constitutional order.

133. Lessig & Sunstein, *supra* note 16, suggest that the “executive Departments” referred to in the Opinion Clause are those that carry out the president’s inherent executive power, whereas the “Department[s]” referred to in the Appointments Clause also included “nonexecutive,” administrative departments as well, the latter carrying out Congress’ enumerated powers. *Id.* at 32-38. As they note, relying on the scholarship of James Hart, this reading has significant support in the statutes creating the first departments in 1789, which labeled both the Departments

Supreme Court held in *Free Enterprise Fund v. PCAOB*<sup>134</sup> that “Department” in the context of the Appointments Clause refers to any “freestanding component of the Executive Branch,” while explicitly reserving judgment concerning the meaning of the term in the Opinion Clause.<sup>135</sup>

The constitutional theory of departments recovered in the previous Section does not resolve these persistent ambiguities. It does, however, underscore other structural implications of the Appointments Clause. First, the Clause gives the legislature what Madison called “*partial agency* in” the Executive, thus instituting the scheme of checks and balances.<sup>136</sup> The Clause indicates that “Heads of Department” are offices “to be established by Law.”<sup>137</sup> Such heads must then be appointed by the President, with the advice and consent of the Senate, indicating that two of the principal, constitutional departments have a role to play in creating and staffing the offices which lead the subordinate departments within the Executive. It therefore cannot be said that these subordinate departments are solely governed or constituted by the President.<sup>138</sup>

The Clause also combines executive hierarchy<sup>139</sup> with the possibility of organizing departments to require coordination between officers. Congress has the power to vest department heads with the appointment of “inferior Officers,” or else to vest their appointment “in the President alone,”

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of Foreign Affairs and War “an Executive Department,” whereas Treasury only a “Department,” and termed both the Secretary of War and of Foreign Affairs “a principal officer,” whereas the Secretary of the Treasury was styled a “head of department.” Act of July 27, 1789, ch. 14, § 1, 1 Stat. 28, 29; Act of Aug. 7, 1789, ch. 7, § 1, 1 Stat. 49, 50; Act of Sept. 2, 1789, ch. 12, § 1, 1 Stat. 65, 65; JAMES HART, *THE AMERICAN PRESIDENCY IN ACTION 1789*, at 243 (1948). Calabresi & Prakash, *supra* note 32, at 628, argue that these distinctions are “entirely meaningless” based on the fact that such terms were used interchangeably in the ratification debates. It seems rather unlikely, however, that the phrasing of the statutes establishing the great departments would have precisely mapped onto the distinctions between the Opinion and Appointments Clauses purely as a matter of coincidence. And, given that Congress created reporting requirements for Treasury that connected it more closely to the legislature, Mashaw, *supra* note 54, at 1285-86, the differences in constitutional and statutory text may indeed signal recognition of a constitutional distinction between some purely executive functions and others subject to greater congressional influence. Notwithstanding these possibilities, the argument here does not rely on a demarcation between executive departments and non-executive departments. Styled “executive” or not, departments within the executive structure exercise of executive power.

134. 561 U.S. 477 (2010).

135. *Id.* at 511, 511 n.11.

136. THE FEDERALIST NO. 47, at 325 (James Madison) (Jacob E. Cooke ed., 1961).

137. U.S. CONST. art. II, § 2, cl. 2.

138. A point recognized in the unitary view of Saikrishna Prakash, *Framged Features of the Constitution’s Unitary Executive*, 45 WILLAMETTE LAW REVIEW 702, 713-14 (2009). An important gap in Prakash’s analysis is the point that departmental structures may go beyond the creation of offices to require that the Executive follow certain procedures, in ways that may frustrate or change the president’s implementation of substantive legal requirements. See Part III.A, *infra*.

139. See Metzger, *supra* note 50, at 1880 (arguing that the Appointments and Opinion Clauses, alongside the Take Care Clause, “signal[] that hierarchical supervision within the executive branch is an important structural principle”).

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or in “the Courts of Law.” These options permit significant flexibility and a fairly complex organizational set-up. A simple hierarchy would be qualified in cases where the law created several officers with shared responsibilities or each with discrete authority over different aspects of a process.<sup>140</sup> In either case, one officer would not be neatly beneath another in a chain of command, but rather would have their own claims to authority alongside and equal to others over certain matters. Even more so, if inferior officers within an executive department were appointed by a court of law, which sits in a separate constitutional branch, it would not be obvious that such officers would be subject to direct presidential control or the command of a head of an executive department.<sup>141</sup> The President’s role in appointing department heads assures that there is some role for hierarchy within the executive structure. But there might also be a place for deliberation, contestation, and comity, depending on how Congress elects to structure and empower the inferior offices within executive departments.

The central role of Congress in structuring the Executive is the concern of the Necessary and Proper Clause. Even unitary theorists acknowledge that the Clause broadly empowers Congress to “structure the executive department” as a whole by creating and organizing offices.<sup>142</sup> As will be shown in Part III, Congress has acted on this power from the very first Congress by creating executive departments, assigning their jurisdictions and powers, organizing their offices, and setting out how they are to operate. But the text itself is ambiguous concerning what precisely the Necessary and Proper Clause refers to with the term “Department.” It is not immediately clear whether it refers to the three constitutional branches, to the subordinate departments within the Executive, or to both.

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140. The statute establishing the Treasury Department includes the latter arrangement. Act of Sept. 2, 1789, ch. 12, § 1, 1 Stat. 65, 66. That procedure and its significance are discussed at Part III.A, *infra*. The independent commission statutes, discussed in IV.A, follows the former, shared-agency structure, though at the level of the principal rather than inferior officers.

141. See, e.g., *Morrison v. Olson*, 487 U.S. 654, 661-63 (1988) (describing and ultimately upholding as constitutional provisions of the Ethics and Government Act providing for appointment of a Special Counsel by a “special court,” with the Special Counsel only removable by the Attorney General only for cause). This issue of the removability of court-appointed executive officers arose recently when Attorney General William Barr sought to remove U.S. Attorney Geoffrey S. Berman, who had been appointed to his position by the United States District Court of the Southern District of New York. Berman cited his appointment by the court to suggest Barr could not remove him. Benjamin Weiser et al., *Clash Over U.S. Attorney Who Investigated Trump Associates Sets Off Crisis*, N.Y. TIMES (June 19, 2020), <https://www.nytimes.com/2020/06/19/nyregion/us-attorney-manhattan-trump.html> [https://nyti.ms/3fFzZBh]. Berman shortly thereafter agreed to step down “in light of Attorney General Barr’s decision to respect the normal operation of law” and appoint Berman’s office’s Deputy U.S. Attorney as Acting U.S. Attorney. Reuters Staff, *Stand-off with Attorney General Barr ends, as New York prosecutor agrees to resign*, REUTERS (June 20, 2020), <https://www.reuters.com/article/us-usa-justice-newyork-barr-berman-idUSKBN23R0VZ> [https://perma.cc/ZLB8-5FF5].

142. Calabresi & Rhodes, *supra* note 15, at 1168.

The first of these possibilities has much to recommend it.<sup>143</sup> As the previous Section has shown, “department” was commonly used in the founding period to refer to the constitutional branches. Further, interpreting “Department” to refer to the three branches makes sense of this part of the Clause: it clarifies that Congress has the power to provide the legislative means for the coordinate branches to carry out their respective constitutional powers, complementing Congress’s Article III power to establish inferior courts<sup>144</sup> with a similar power with respect to Article II.<sup>145</sup> The latter power includes the authority to create subordinate departments within the Executive that shape how, under what conditions, and on what subjects the executive power may be exercised. If we instead interpret “Department” in this Clause to refer to the subdivisions of the executive branch, it seems that we must treat this term as a “drafting error.”<sup>146</sup> That is because the Constitution does not create any subordinate executive departments. Powers are, by contrast, vested in the legislative, judicial, and executive branches. Since the Clause is coherent if we read “Department” to refer to the branches, we should arguably avoid interpreting the Clause as instead empowering Congress to implement constitutional powers vested in departments that the Constitution did not create.<sup>147</sup> The legislative history of the Constitutional Convention also provides some evidence that the Necessary and Proper Clause was not drafted with the subordinate

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143. I am grateful to John Mikhail for helping me to think through these issues.

144. U.S. CONST. art. III, § 1.

145. Calabresi & Rhodes, *supra* note 15, make much of the distinction between Article III, Section 1, which vests the “judicial Power in one Supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish,” and Article II, Section 1, which vests the “executive Power” in “a President of the United States.” I do not accept but do not here challenge their conclusion that the grant of the “executive Power” to the President is necessarily exclusive. Compare Peter M. Shane, *The Originalist Myth of the Unitary Executive*, 19 U. PENN. J. CONST. L. 323, 361 (2016). Regardless, Congress’ power to create subordinate executive institutions, the procedures of which bind the discretion of any actor within them, remains comparable with respect to the judiciary and executive branches, irrespective of whether Congress may distribute the constitutional *power* of the Executive itself.

146. Mashaw, *supra* note 54, at 1271 n.34.

147. See Antonin Scalia & John F. Manning, *A Dialogue on Statutory and Constitutional Interpretation*, 80 GEO. WASH. L. REV. 1610, 1613-15 (2012) (interpretations that yield facially “absurd” results should be avoided).

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executive departments in mind.<sup>148</sup> The ambiguous use of the term department in the founding era, however, leaves lingering uncertainty.<sup>149</sup>

In the end, it does not matter a great deal for our purposes whether the Necessary and Proper Clause refers to the three principal departments alone, to unnamed executive departments, or to both. Under any of these constructions, the Clause strengthens the inference suggested by the Opinion and the Appointments Clauses that Congress has the power to structure the executive branch by creating subordinate departments within it. Those exercises of statutory authority generate official relationships and procedural requirements that specify and constrain the way in which executive power is exercised. Our next task, then, is to examine how legislation, as well as subsequent case law and official practice, have carried the Constitution's departmental text and theory into effect.

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148. Draft IX from the Committee on Detail, where the final version of the Necessary and Proper Clause first appears, does not mention such subordinate departments elsewhere, but only refers to the “Duties of his [the president’s] Department.” 2 RECORDS OF THE FEDERAL CONVENTION, at 168, 172 (Max Farrand ed., rev. ed. 1966); William Ewald, *The Committee of Detail*, 28 CONST. COMMENT. 197, 271 (2012). Draft IV, where a fragment of the Necessary and Proper Clause first appears, only used “departments” to refer to the “legislative executive and judiciary.” 2 RECORDS OF THE FEDERAL CONVENTION, at 138, 144 (Max Farrand ed., rev. ed. 1966); Ewald, *supra*, at 270-71. The subordinate executive departments are mentioned in Draft VII, however, which says the President has a duty to “inspect the Departments of foreign Affairs — War — Treasury — Admiralty.” 2 RECORDS OF THE FEDERAL CONVENTION, at 158 (Max Farrand ed., rev. ed. 1966). Draft VII also refers to the president’s “Department.” *Id.* Since we are missing the folio page from this draft where the Necessary and Proper Clause would be located, Ewald, *supra* at 271, it is possible that the Necessary and Proper Clause in that draft used the term “department,” just like the final version that appears in Draft IX. However, it is unlikely that James Wilson, who composed Draft IX and gave particularly “great care” to the Necessary and Proper Clause, would have included in that Clause a reference to subordinate departments that were nowhere named or even mentioned elsewhere in the same draft. Mikhail, *supra* note 69, at 1047.

149. One might read the Opinion Clause as vesting dormant constitutional powers in the executive departments, which Congress puts into effect when it creates those department by law. These constitutional powers might include all those necessary for the principal officers to fulfill their constitutional duty to render the President an opinion in writing on their official duties. The evidence for this view exists, but it is scant. *See* 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 86, at 448 (“The President . . . will have also the advice of the executive officers in the different departments of the general government.”). Here, James Wilson related “departments” to the “government” in the same way he did in the Necessary and Proper Clause. But because Wilson here referred “executive officers” in these departments who advise the President, it is clear that he had in mind the executive departments referred to in the Opinion Clause of Article II rather than the three constitutional branches. *But see id.* at 439 (referring to the “mode of constituting the legislative and the executive departments of the general government”). In any event, if the Framers meant to say that the subordinate executive departments have constitutional powers, they surely could have said so more directly and expressly. Perhaps, in keeping with the general purpose of this part of the Necessary and Proper Clause, Mikhail, *supra* note 69, at 1050, the term “Department” here sweeps broadly to include both the three branches and any subordinate departments that are found, by fair construction, to hold implied constitutional powers.

## II. Departments in Public Law, 1789-1856

The previous Part recovered a constitutional understanding of the department as an organization of offices that distributes power so as to temper its exercise. Madison understood departmental structure to operate both on the level of the three branches and within the Executive.<sup>150</sup> But there was also considerable indeterminacy in the constitutional text concerning how the executive departments would relate to the branches and what constitutional role, if any, the departments would play. That indeterminacy is itself significant. It suggests that, while the Framers thought about the internal organization of the executive branch in relation to the overall constitutional structure, they were unable or reluctant to specify clearly the terms of their interaction. The Framers might have doubted their ability to determine the appropriate assignment of offices and relations, or had a healthy respect for the discretion of the political branches, or recognized unforeseen demands and challenges of the future. Intentionally or not, they left the specific content of executive-departmental structures, and their attendant rule-of-law values, open to future liquidation and construction.<sup>151</sup>

This Part examines how the three principal departments established by the Constitution—the legislative, executive, and judicial departments—created and gave normative content to the subordinate executive departments between the first Congress in 1789 and the landmark opinions of Attorney General Caleb Cushing in the 1850s. The branches embroidered the rudimentary constitutional text concerning departments into a robust public law of departments that included statutory law, case law, and executive branch legal interpretation. Congress’s creation of the first executive departments in 1789 established the longevity of these institutions beyond their officeholders and instituted checks and balances within some of them. The Supreme Court’s jurisprudence on officers’ rights and executive power acknowledged that binding law could emerge from within the practice of subordinate departments. And opinions of the Attorney General recognized that the executive department had to be committed to norms of

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150. See discussion *supra* pp. 15-17.

151. On liquidation, see generally William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019), explaining Madison’s theory that the meaning of indeterminate constitutional text can be “liquidated” or clarified when the constitutional branches engage in a deliberate course of historical practice that results in a publicly acknowledged settlement. The full set of departmental norms this article develops do not all meet Baude’s test for liquidation, given that many of them developed piecemeal and implicitly, rather through deliberate, publicized agreement among the branches with public sanction. Some particular powers and obligations related to the term “Department” do meet the test, such as Congress’ primacy in creating departments, discussed *infra*, at pp. 25-26, as well as, arguably, the power of departments to issue regulations binding on the President, discussed *infra*, at pp. 60-61. Others, such as the distribution of decisional authority among multiple officials, can be understood to fall under the broader formalist rubric of constitutional construction. See WHITTINGTON, *supra* note 36, at 9 (noting that constitutional constructions need not explicitly raise textual questions).

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regularity, system, and coordinate decision-making if the President's authority over the branch were to have real effect.

A common thread emerges from the branches' understanding of departments: exercises of discretionary power within the executive branch operate in, through, and against a set of norms that generally predate and endure beyond any particular officeholder. Departments make discretionary powers operative while at the same time restraining their exercise. While the subordinate executive departments within the executive branch generate their own internal law, this law is ultimately secured by the constitutional authority of the principal departments jointly to influence the workings of government. Because the branches shared this view of departmental constraints, this history provides a "gloss" on the internal structure of the executive branch.<sup>152</sup> This gloss not only confirms Congress' broad authority structure the Executive through the creation of departments. More than this, the first hundred years of administrative law condones bureaucratic forms of executive organization, denies the President unfettered discretion control over legal questions within the executive branch, and recognizes the binding force of agency regulations.

### A. "Records, Books, and Papers": Statutory Creation of Departmental Constraints

As members of the first Congress used and applied the constitutional text, they sought to "fix" and "construct" its meaning, generating shared understandings that would shape constitutional discourse and government moving forward.<sup>153</sup> The legislative creation of the first departments within the Executive gave further content to the institutional arrangements the Constitution had outlined. Congress organized the executive officialdom to canalize each officer's power.

Constitutional law has largely focused on a single "decision of 1789," namely the effort to clarify the President's power to remove executive officers.<sup>154</sup> This "decision" was supposedly made by writing the statute creating the Department of Foreign Affairs in a way that assumed the President had constitutional authority to remove the Secretary without the consent of the Senate.<sup>155</sup> In *Myers v. United States*, the Supreme Court interpreted this statute as a construction of the Constitution.<sup>156</sup> *Myers* was famously

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152. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring); Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 417-30 (2012).

153. GIENAPP, *supra* note 47, at 1-19.

154. *Myers v. United States*, 272 U.S. 52, 142 (1926).

155. *Id.* at 111-14.

156. *Id.* at 136.

qualified in *Humphrey's Executor v. United States*,<sup>157</sup> which held that Congress could properly condition the removal of officers in agencies that performed “quasi legislative” and “quasi judicial” duties.<sup>158</sup> Most recently, in *Seila Law v. CFPB*,<sup>159</sup> the Court reaffirmed *Meyer's* interpretation of the decision of 1789 as recognizing the President's general constitutional power to remove principal officers.<sup>160</sup> The meaning of the decision of 1789 nonetheless remains contested, as scholars disagree about whether the legislative text and history evince any constitutional “decision” concerning the removal power.<sup>161</sup>

This preoccupation with the question of removal distracts from three other, arguably more fundamental congressional decisions. The first was simply to assert authority over the creation of departments.<sup>162</sup> The constitutional text is not explicit that Congress is the branch that shall create departments, though it enables Congress to vest the appointment of inferior officers in “Heads of Departments.”<sup>163</sup> With its creation of the Departments of Foreign Affairs, War, and Treasury, Congress assumed preeminence as the institution that structures executive power through the creation of such departments.<sup>164</sup> This assertion also found support in the Necessary and Proper Clause.<sup>165</sup> As discussed in Part II, that Clause gives

157. 295 U.S. 602 (1935).

158. *Id.* at 629.

159. 140 S. Ct. 2183 (2020).

160. *Id.* at 4.

161. Edward Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 27 COLUM. L. REV. 353, 362 (1927) (“a mere fraction of a fraction, a minority of a minority, of the House, can be shown to have attributed the removal power to the President on the grounds of executive prerogative”), accord DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789-1801, at 36-41 (1997). That reading of the legislative history has been disputed. See Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021 (2006). But recent research by Jed Shugerman casts further doubt on the conclusion that the legislative history was at all decisive on the constitutional question of removal. See Jed Handelsman Shugerman, *The Indecisions of 1789: Strategic Ambiguity and the Imaginary Unitary Executive (Part I)* (June 22, 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3596566](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3596566) [<https://ssrn.com/abstract=3596566>].

162. Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211, 239 (1989) (“The real decisions of 1789 are those embodied in the statutes establishing the ‘great departments’ of government.”).

163. U.S. CONST. art. II, § 2, cl. 2.

164. Casper, *supra* note 162, at 233 (“In the House of Representatives . . . that the principles of the organization for the executive offices should be settled by legislation was taken for granted.”).

165. In the course of debates concerning the removal power in the Department of Foreign Affairs, representatives sometimes invoked the Necessary and Proper Clause to underscore Congress's authority to structure the exercise of executive power. Representative Thomas Hartley argued that where the Constitution is “silent” on matters such as removal, it leaves the resolution of the issue to “the discretion of the legislature. If this is not the case, why was the last clause of the eighth section of the first article inserted? It gives power to Congress to make all laws necessary and proper to carry the Government into effect.” 1 ANNALS OF CONGRESS 481 (Joseph Gales ed., 1834). Representative Richard Bland Lee argued that Congress could make a decision concerning the removal power because:

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Congress authority to specify the way in which the law would be carried out within the executive branch.<sup>166</sup> That power fairly implies a power to create subdivisions within the Executive that would allocate various functions and jurisdictions and determine relations between certain executive officers.

The second decision was to provide for the continuity of departments beyond the term of the officers who led them. The way Congress purportedly sought to resolve the Constitution's ambiguity concerning the President's removal power was to write the statute creating the Department of Foreign Affairs in manner that assumed the President held power to remove the Secretary.<sup>167</sup> The statute provided:

That there shall be in the said department, an inferior officer, to be appointed by the said principal officer . . . who whenever the said principal officer shall be removed from office by the President of the United States, or in any other case of vacancy, shall during such vacancy have the charge and custody of all records, books and papers appertaining to the said department.<sup>168</sup>

When the President removes the principal officer, it falls to an inferior officer to hold the departmental records. Congress thus affirmed the need for departmental continuity in the same clause in which it arguably underscored the President's powers of direction. A department would not vanish when the appointed secretary resigned or was removed. It would endure beyond the official life of the principal officer or any other person within the department. The department's continuity was based on "records, book, and papers," the written documents that are the stuff of modern, bureaucratic government.<sup>169</sup> The files needed to be preserved in this manner

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the Constitution vests in Congress the power to make all laws necessary and proper to carry into execution the powers vested by the Constitution in the government of the United States or any officer or department thereof. . . . [T]he Constitution vests the power of removal, by necessary implication, in the government of the United States. Have not Congress, therefore, the power of making what laws they think proper to carry into execution the powers vested by the Constitution in the Government of the United States?

*Id.* at 524. John Vining argued that Constitution granted the power of removal "either as incidental to the executive department, or under that clause which gives to Congress all powers necessary and proper to carry the Constitution into effect. This being the case, we are at liberty to construe, from the principles and expressions of the Constitution, where this power resides." *Id.* at 512.

166. Strauss, *supra* note 49, at 722 ("It is on this basis [The Necessary and Proper Clause] that Congress creates the detailed structures of government"); *accord* Calabresi & Rhodes, *supra* note 15, at 1168.

167. For scholarly disagreement on the significance of this provision for the president's constitutional power of removal, see sources cited in note 161, *supra*.

168. An Act for Establishing an Executive Department, to be denominated the Department of Foreign Affairs, ch. 4, § 2, 1 Stat. 28, 29 (1789).

169. See MAX WEBER, *ECONOMY AND SOCIETY* 225 (Guenther Roth & Claus Wittich, eds. 1968) ("[B]ureaucratic organizations, or the holders of power who make use of them . . .

because they represented the department's knowledge and its history. Any future secretary, in carrying out the President's policy or conducting any other business, would need to know what the department had done before, what resources it had its disposal, who its personnel were, how its offices were organized, and so on. In the event of removal or vacancy, this body of material was to be entrusted to an inferior officer. Congress thus relied on the *subordinate* officialdom as the trustee of institutional knowledge. It implicitly recognized that the political leadership of the department would come and go, and often depend upon knowledge held by lower-ranking officials who occupied their posts before the leaders had entered theirs.

Congress further articulated this organizational principle with its detailed structuring of the Treasury Department, which provided not only for a Secretary, but also an Assistant Secretary, Comptroller, Auditor, Treasurer, and Register.<sup>170</sup> Here we see the collective dimension of departments, the fact that they assemble officers together to perform public tasks. The statute provided that central departmental functions relating to the dispersal of funds required the coordinate action of several officials.<sup>171</sup> The Comptroller also had the responsibility to hear appeals from persons dissatisfied with the Auditor's examination or certification of their accounts.<sup>172</sup> Madison believed these duties were "not purely of an Executive nature," but instead also "partake of a Judiciary quality."<sup>173</sup> Congress in this way constituted the Treasury as an intricate set of official relationships that replicated within this subordinate department the checks and balances that existed at the level of the three branches. As Jerry Mashaw has argued, "[t]he independent functions of officers within the Treasury . . . seemed to respond to what we now recognize as 'separation-of-functions' protections within agencies to assure fairness in the adjudication of claims."<sup>174</sup> These arrangements should not be thought of only as protections for individual claimants, however. They also implemented a broader structural concern to distribute and regularize the exercise of public power.

Congress chose to circumscribe and check discretion within the Treasury in order to avoid official corruption in the exercise of one of the central powers of the early federal government.<sup>175</sup> During debates in the House of Representatives, Madison said he

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acquire through the conduct of office a special knowledge of facts and have available a store of documentary material peculiar to themselves.").

170. An Act to establish the Treasury Department, ch. 12, § 1, 1 Stat. 65, 65 (1789).

171. *Id.* §§ 3, 4.

172. *Id.* § 5.

173. 1 ANNALS OF CONG. 611-12 (Joseph Gales ed., 1834).

174. Mashaw, *supra* note 54, at 1288-89.

175. MAX EDLING, A REVOLUTION IN FAVOR OF GOVERNMENT: ORIGINS OF THE U.S. CONSTITUTION AND THE MAKING OF THE AMERICAN STATE 206-20 (2003) (describing Treasury's role in fulfilling the Federalists' demand for a modern fiscal state).

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wished, in all cases of an Executive nature, that the committee should consider the powers that were to be exercised, and where that power was too great to be trusted to an individual, proper care should be taken so to regulate and check the exercise, as would give indubitable security for the perfect preservation of the public interest, and to prevent that suspicion which men of integrity were ever desirous of avoiding.<sup>176</sup>

Recall that in the Constitutional Convention and in the *Federalist* Madison had drawn an analogy between the importance of checks and balances in the “subordinate distributions of power” and in the “distribution of the supreme powers of the state.”<sup>177</sup> He may have had in mind the various treasury boards established under the Articles of Confederation, which included officers such as Comptroller, Treasurer, Auditor, and Register, alongside the head of the Board.<sup>178</sup> Madison now successfully argued to revise those arrangements by parceling out specific powers among officers, rather than putting “the aggregate of these powers” in the hands of a board.<sup>179</sup> In this way, “the offices might be so constituted as to restrain and check each other.”<sup>180</sup> He emphasized “the advantages arising from energy, system, and responsibility” in creating a single head of the department but then distributing particular functions to other officers within that department.<sup>181</sup>

Creating such a “system” of official decision-making would align governmental acts with the interests of the public by preventing any one actor from acting unilaterally or for a private purpose. This coordinate scheme would be formally consistent with a “chain of dependence” running up to the President, which Madison emphasized in congressional debates over the President’s removal power.<sup>182</sup> The President could control the discretion of executive officers within the bounds of law. But where the law imposed other constraints on how these subordinate officers related *to one another* in the performance of their respective duties, the scope of the President’s command authority over each of them would be limited by such subordinate checks.

The decisions of 1789 thus went far beyond the question of removal. Congress asserted power to create separate departments within the Executive to carry out the law. Such departments could be composed of

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176. 1 ANNALS CONG. 392 (Joseph Gales ed., 1834).

177. THE FEDERALIST NO. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961); see also 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 421 (James Madison) (Max Farrand ed., rev. ed. 1937) (drawing an analogy between constitutional “plan of Govt.” and the “organiz[ation] [of] the subordinate departments of Govt.”).

178. FAIRLIE, *supra* note 113, at 93-94.

179. 1 ANNALS OF CONG. 393 (Joseph Gales ed., 1834).

180. *Id.*

181. *Id.*

182. *Id.* at 499, quoted in *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 498 (2010).

multiple officers, and the relations between these officers could be determined by law. The departments would endure beyond the officers who led them, and their decision-makers were to have access to records of the department held in the hands of the subordinate officials who remained in place after the previous principal officer had left. The first Congress in this way created the scaffolding for a modern, differentiated, rule-bound, and knowledge-based form of government, in which power would pass through the hands of multiple officials and reside in departments that would outlive their officers. Congress did not thereby establish that any department must, as a matter of constitutional law, have a certain kind of organization, or be governed by statutory provisions that specify official relationships within it. Instead, Congress confirmed the more basic principle that Madison had expressed in the drafting of the Constitution: statutory law could, and in certain spheres should, structure executive departments in such a way as to prevent the abuse of executive power. Where Congress created such structures, they attained constitutional significance as restraints against arbitrary rule.

*B. “A Kind of Common Law”: Law through Discretion in the Executive Departments*

The Supreme Court’s early jurisprudence on executive power complemented Congress’ departmental construction. It subjected executive officials to legal control, but also carved out a space for discretionary decision-making in which political accountability would govern. This form of discretionary power, however, gave rise to its own kind of law. The directives of the President and his officers became binding within their spheres of authority. The executive department as a whole, and the subordinate departments within it, generated an internal law that converted political power into binding legal rights and obligations.

The emergence of law from executive discretion began at the very origins of our constitutional jurisprudence: *Marbury v. Madison*.<sup>183</sup> *Marbury* is of course most well-known for the conclusion that the judiciary may review and determine the constitutionality of legislative acts as an incident to its power to decide “Cases” and “Controversies.”<sup>184</sup> Among scholars of administrative law, it is equally famous for its discussion of the reviewability of executive acts under the prerogative writ of mandamus.<sup>185</sup> Mandamus permits the courts to compel official performance of a “ministerial”<sup>186</sup> act,

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183. 5 U.S. (1 Cranch) 137 (1803).

184. U.S. CONST. art. III, § 2.

185. *E.g.*, Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1 (1983).

186. *Marbury*, 5 U.S. (1 Cranch) at 158.

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but denies them any right to interfere in a matter committed to the officer's "executive discretion."<sup>187</sup> Justice Marshall explained that a "political act" is one "belonging to the executive department alone, for the performance of which, entire confidence is placed by our constitution in the supreme executive."<sup>188</sup> But Justice Marshall denied that "every act of duty, to be performed in any of the great departments of government, constitutes such a case."<sup>189</sup> He dismissed outright the possibility that the "heads of departments are not amendable to the laws of their country."<sup>190</sup> *Marbury* in this way constitutes subordinate executive departments as amalgams of political and legal responsibility, accountable vertically to the orders of principal officers and the President, and laterally to the principal legislative and judicial departments.

The Court's subsequent mandamus jurisprudence elaborated this dichotomy. In *Kendall v. United States ex rel. Stokes*,<sup>191</sup> it held that mandamus would lie to compel the Postmaster General to credit a private contractor as required by the Solicitor of the Treasury under the latter's statutory authority to examine the accounts in question.<sup>192</sup> The Court here continued to draw a binary distinction between "political duties imposed upon many officers in the executive department" and duties that "grow out of and are subject to the control of the law."<sup>193</sup> In *Decatur v. Paulding*,<sup>194</sup> the Court relied on the same distinction in refusing to compel the Secretary of the Navy to pay out a pension to Decatur, the widow of a deceased officer.<sup>195</sup> In declining to force the Secretary's hand, the Court recognized his departmental position:

The head of an executive department of the government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion. . . . The interference of the Courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief.<sup>196</sup>

This nascent administrative law of the early nineteenth century showed respect both for the discretion vested in the President and his principle officers and for the legal relations by which the Constitution and Congress had

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187. *Id.* at 166.

188. *Id.* at 164.

189. *Id.*

190. *Id.*

191. 37 U.S. (12 Pet.) 524 (1838).

192. *Id.* at 610.

193. *Id.*

194. 39 U.S. (14 Pet.) 497 (1840).

195. *E.g.*, Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1 (1983).

196. *Id.*

marked out their power. *Decatur* suggested that part of the reason the courts would not interfere in the discretionary activities of the executive department was to avoid the “mischief” of disrupting orderly commands within the branch. The regularity of the executive department needed to be maintained rather than intermixed with inconsistent and sporadic interventions from a coordinate branch. Discretion was to be respected in order to permit its responsible and consistent exercise.

This logic became explicit in *United States v. MacDaniel*,<sup>197</sup> where the government sought to recover a balance charged against a clerk of the Navy Department.<sup>198</sup> The clerk had contended that the government owed him compensation for official duties that offset the balance.<sup>199</sup> Affirming judgment for the defendant clerk, the Court observed “that the duties in question were discharged by the defendant, under the construction given to the law by the [S]ecretary of the [N]avy,”<sup>200</sup> and only thereafter had “a new head of the department give[n] a different construction.”<sup>201</sup> In his remarkable but now largely forgotten opinion for the Court,<sup>202</sup> Justice John McLean concluded that the clerk was entitled to his compensation under the Secretary’s prior interpretation:

A practical knowledge of the action of any one of the great departments of the government, must convince every person that the head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law; but it does not follow, that he must show a statutory provision for everything he does. No government could be administered on such principles. To attempt to regulate, by law, the minute movements of every part of the complicated machinery of government would evince a most unpardonable ignorance on the subject. Whilst the great outlines of its movements may be marked out, and limitations imposed on the exercise of its powers, there are numberless things which must be done, that can neither be anticipated nor defined, and which are essential to the proper action of the government. Hence, of necessity, usages have been established in every department of the government, which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits. And no change of such usages can have a retrospective effect, but must be limited

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197. 32 U.S. (7 Pet.) 1 (1833).

198. *Id.*

199. *Id.*

200. *Id.* at 13-14.

201. *Id.* at 14.

202. The opinion is cited by Caleb Cushing in *Office and Duties of the Attorney General* 6 Op. Att’y Gen. 326, 342 (1856), discussed *infra* Part III.C, and described as the “leading case” on customary administrative law in one of the first American treatises on administrative law, BRUCE WYMAN, *PRINCIPLES OF THE ADMINISTRATIVE LAW GOVERNING THE RELATION OF PUBLIC OFFICERS* 295 (1903).

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to the future. Usage cannot alter the law, but it is evidence of the construction given to it; and must be considered binding on past transactions.<sup>203</sup>

This passage is a harbinger of several fundamental aspects of administrative law in the present day: the principle that an agency must follow its own rules,<sup>204</sup> the presumption against retroactivity of agency regulations,<sup>205</sup> and the concept of an “internal administrative law”<sup>206</sup> that emerges from agency practice. The Court begins from the observation that a head of department must exercise discretion and ends with the conclusion that the “usage” of the department is “a kind of common law” and is “binding on past transactions.”<sup>207</sup> Law emerges from discretion, and the department gains increasing definition from this internal law that issues from the department’s leadership.

Departmental structure then consisted not only in specific statutory requirements but also in administrative rules that had crystallized from the routine exercise of discretion. In *United States v. Eliason*,<sup>208</sup> the Court accordingly held that army regulations issued by the Secretary of War constructing appropriations acts were “binding upon all within the sphere of [the President’s] legal and constitutional authority.”<sup>209</sup> Similarly, in *United States v. Bailey*,<sup>210</sup> the Court concluded that Treasury regulations could

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203. *MacDaniel*, 32 U.S. (7 Pet.) at 14-15.

204. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 265 (1954). To be discussed in greater detail below *infra* Part IV.C.

205. *Bowen v. Georgetown U. Hosp.*, 488 U.S. 204, 208 (1988). See discussion in Cass Sunstein & Adrian Vermeule, *The Morality of Administrative Law*, 131 HARV. L. REV. 1924, 1944 (2018).

206. MASHAW, *supra* note 25, at 1-17. The phrase seems to have been coined by WYMAN, *supra* note 202, at 14. In Wyman’s understanding:

the internal law is all based upon the discretion of a given officer; if he in his discretion promulgates a regulation he may in his discretion waive that regulation. The internal law of the administration is then no more than the usual order of the exercise of that discretion in the ordinary case; in the extraordinary case direct action can be taken notwithstanding.

*Id.* at 16. Wyman nonetheless approved of the holding of *MacDaniel* as an example of the force of “unwritten rules.” *Id.* at 295. He cites in that same section a decision from the Comptroller relying on “national executive common law.” *Id.* at 296-97, quoting *Lost Bond Case*, 5 Lawrence, 197 (1884).

207. *MacDaniel*, 32 U.S. (7 Pet.) at 15.

208. 41 U.S. (16 Pet.) 291 (1842).

209. *Id.* at 302. Though this seems like the best interpretation of this passage, the pronouns create some ambiguity about whose “sphere” we are talking about, revealing continuing uncertainty in the case law regarding the relation between the “President,” “the executive” and a head of department. See *id.* (“The power of the executive to establish rules and regulations for the government of the army is undoubted; the power to establish, necessarily, implies the power to modify or to repeal, or to create anew. The Secretary of War is the regular constitutional organ of the President for the administration of the military establishment of the nation; and rules and orders, publicly promulgated through him, must be received as the acts of the executive, and as such are binding upon all within the sphere of his legal and constitutional authority.”).

210. 34 U.S. (9 Pet.) 238 (1835).

form the basis for a perjury indictment, where the regulation authorized a state justice of the peace to take affidavits concerning claims against the United States.<sup>211</sup> These and other cases recognized the ways in which the discretionary power vested by law in department heads could generate norms with the force of law.<sup>212</sup> The original binary distinction between legal duties and political discretion thus gave way to the third category: legal duties that originated from the exercise of executive discretion. Such duties specified the norms of the department that had been outlined by constitutional text and statutory law.

*C. “Solidarity of Responsibility”: The Attorney General’s Constitution of the Executive*

This transformation of personal discretion into institutional norms transpired in part from the way the courts interpreted statutory law and executive branch practice. But it can also be seen in the internal law of the executive branch. Scholars have previously examined how executive departments in the nineteenth century exercised their discretion, often independent of the President,<sup>213</sup> to interpret constitutional provisions,<sup>214</sup> establish regular procedures for claims adjudication,<sup>215</sup> and give “concrete meaning to the Constitution’s framework” governing Indian affairs.<sup>216</sup> This Part examines the broader construction of the norms and relations of the Executive in several antebellum opinions of Attorneys General. These opinions have long provided early footholds for administrative law scholarship on the President’s power to control and supervise subordinate officers within the executive department.<sup>217</sup> They conventionally showcase the alternative unitary and pluralist conceptions of executive power, which respectively assert that the President has control over all official discretion

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211. *Id.* at 257.

212. *E.g.*, United States *ex rel.* Riverside Oil Co. v. Hitchcock, 190 U.S. 316, 324-25 (1903) (denying petition for a writ of mandamus against Secretary of Interior concerning his adjudication of land selections) (“Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty, to decide as he thought the law was, and the courts have no power under these circumstances to review his determination by mandamus or injunction.”). For other cases and discussion, see the classic treatment in JOHN DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES 284-98 (1927).

213. Sophia Lee, *Our Administered Constitution: Administrative Constitutionalism from the Founding to the Present*, 167 U. PA. L. REV. 1699, 1718 (2019).

214. *Id.* at 1726-27.

215. MASHAW, *supra* note 25, at 259-82.

216. Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1019, 1041-42 (2015); *see also* Maggie Blackhawk, *Federal Indian Law as a Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1811 (2018) (“[A]dministration of treaties with Native Nations revealed nascent bodies of administrative law. . . . Courts upheld treaties against delegation challenges and deferred to Department of Interior interpretations of treaty provisions.”).

217. EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787-1957 80-81 (4th rev. ed. 1957); Strauss, *supra* note 42, at 606; Kevin Stack, *The President’s Statutory Powers*, 106 COLUM. L. REV. 263, 265 (2006). HAROLD H. BRUFF, BALANCE OF FORCES: SEPARATION OF POWERS LAW IN THE ADMINISTRATIVE STATE 456 (2006).

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within the department or permit each official to exercise the discretion confided in her by law. These opinions reveal a more nuanced interplay between unitary power and departmental structure. Even those opinions that showcased the strongest view of the President's control acknowledged an important role for coordinate action, systematic organization, and rule-bound official conduct. When the Executive is thought of not merely as a power but as a department—not only as a person but as an organization of offices—even a devotee of the President's prerogatives must acknowledge normative and practical considerations that constrain the decisional authority of the President and his principal officers.

The Attorneys General's opinions from this period are of more than historical or theoretical interest. They show Attorneys General concurring or at least acquiescing in the legislature and judiciary's understanding that statutory law governing executive departments bound the President. He could not act contrary to statutory duties, and statutory authority was relevant to determining the scope of the President's executive power. In addition, these opinions evince an understanding of the executive branch as generating its own law through the exercise of discretion and through deliberation between officers. Even Attorney General Caleb Cushing, the strongest of unitary executive theorists, constructed the Opinion Clause to contemplate forms of joint responsibility between the President and principal officers.

The Judiciary Act of 1789 established the office of “attorney-general for the United States,” who was to be “learned in the law.”<sup>218</sup> The Attorney General not only had the duty to prosecute suits involving the United States, but also to “give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments.”<sup>219</sup> This provision paralleled and augmented the Opinion Clause of Article II.<sup>220</sup> It merely mirrored that Clause insofar as it imposed a statutory duty on the Attorney General—corresponding to the President's constitutional power—to provide his opinion to the President on matters concerning the Attorney General's department. But the Act further provides that the Attorney General had the duty to provide his advice when “requested” by other department heads. Here we see another example of statutory law extending the barebones requirements of constitutional text to create networks of departmental coordination. The statute sets up a relation of officers within the principal executive department. The statute assigns to the Attorney General a special role in legal interpretation

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218. An Act to establish the Judicial Courts of the United States, ch. 20, § 35, 1 Stat. 73, 93 (1789).

219. *Id.*

220. U.S. CONST. art. II, § 2, cl. 1.

and practice, and expects that the President and the other heads of department would seek out his advice on legal matters relevant to each of their jurisdictions.

Much of the early law of executive power consequently took the form of opinions from the Attorney General. The “first great Attorney General,” William Wirt, who served from 1817 to 1829,<sup>221</sup> offered a narrow conception of the President’s directive authority. Wirt advised President Monroe that he had “no power to interfere” with a Treasury officer’s settlement of accounts, where statute assigned that particular officer the performance of that task: “were the President to perform it, he would not only be not taking care that the laws were faithfully executed, but he would be violating them himself.”<sup>222</sup> Statutory law could divest the President of power to dictate or influence the decisions of subordinate officials by assigning duties to those officials specifically.

Eight years later, Attorney General Roger Taney expressed nearly the opposite view of the President’s authority over the executive department.<sup>223</sup> He determined that the President had the power to order a district attorney to discontinue a prosecution to condemn jewels that allegedly had been unlawfully imported after being stolen from the Princess of Orange. Taney ascribed to the President a far-reaching power under the Take Care Clause to intervene in this case, not only on the basis of specific legal authority, but also in service of such broad and uncodified values as “the interest of the country” and “the purpose of justice.”<sup>224</sup>

But Taney did not rest the argument on bare constitutional text alone. He understood the President’s power of command to flow from a departmental relation of officers, which had been established by statute: “the act of May 15, 1820, which directs the district attorney to conform to the directions of the agent of the Treasury . . . shows that, in the discharge of his official duties, he is to be subject to the direction of the executive department.”<sup>225</sup> The Act Taney referred to was styled “An Act for the Better Organization of the Treasury Department.”<sup>226</sup> It provided that the President would “designate an agent of the Treasury” with responsibility to “direct and superintend” proceedings for the recovery of chattels and monies for the use of the United States.<sup>227</sup> The Act specifically obliged district attorneys to “conform to . . . direction and instructions” from the agent.<sup>228</sup> Taney in this way relied on a statutory scheme for the organization of officers

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221. ALBERT LANGELUTTIG, *THE DEPARTMENT OF JUSTICE OF THE UNITED STATES* 3 (1927).

222. *The President and the Accounting Officers*, 1 Op. Att’y Gen. 624, 625 (1823).

223. *The Jewels of the Princess of Orange*, 2 Op. Att’y Gen. 482 (1831).

224. *Id.* at 487.

225. *Id.* at 490-91.

226. Ch. 107, 3 Stat. 592 (1820).

227. *Id.* § 1.

228. *Id.* § 7.

within the Treasury Department to assert that the President could direct the district attorney. The attorney was subject to the direction of the President because he was subject to the direction of an official within the Treasury who, by law, was to be designated by the President. This argument had little to do with the President's constitutionally vested powers, instead relying on the organization that statutory law imposed on the executive department. To be sure, Taney's more forceful underlying argument was that the President's constitutional obligation to faithfully execute the laws included directive powers over prosecutorial duties. But this constitutional claim was buttressed by the more tailored statutory and departmental claim that Congress had structured official relations within the Treasury to give the President powers of direction and control over the particular officer in question.

Taney's more expansive, unitary view of the President's authority over the executive department won out in the aftermath of Andrew Jackson's war on the Second Bank of the United States.<sup>229</sup> However, subsequent opinions of the Attorney General combined a broad conception of presidential authority with respect for regularity within the department as its necessary counterpart. Aspects of Wirt's more pluralistic view then reentered the executive branch's internal law.

In 1855, President Pierce asked for the opinion (in writing) of Attorney General Caleb Cushing as to whether "instructions issued by the Heads of Department, within their respective jurisdictions" were "valid and lawful, without containing express reference to the direction of the President."<sup>230</sup> The question itself is telling. First, it shows the chief executive and his officers continuing to puzzle over the proper scope of the President's authority and the structure of the executive branch more than a half century after the Constitution was enacted. The Delphic words of the Constitution on the subject of executive power left many quandaries unresolved, requiring the input of doctrine, historical experience, and official discourse to liquidate their meaning. Second, note the question's reference to the principal officers' "respective jurisdictions." The legal discourse of executive power had come to embrace the jurisdictional conception of the subordinate departments which had animated discussions of the principal departments in the founding era. Each of the subordinate departments operated within specific subject-matter spheres, as determined by law. And the question posed was whether these department heads could act on their own, without "express reference" to the direction of the President.

Cushing answered in the affirmative, concluding from case law and executive practice that the President's direction was generally presumed in

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229. LEONARD D. WHITE, *THE JACKSONIANS: A STUDY IN ADMINISTRATIVE HISTORY* 39-40 (1954).

230. *Relation of the President to the Executive Departments*, 7 Op. Att'y Gen. 453 (1856).

the acts of the heads of departments. He then went further, however, in offering a famously maximalist understanding of the unitary executive:

I hold that no Head of Department can lawfully perform an official act against the will of the President; and that will is by the Constitution to govern the performance of all such acts. If it were not thus, Congress might by statute so divide and transfer the executive power as utterly to subvert the Government, and to change it into a parliamentary despotism, like that of Venice or Great Britain, with a nominal chief executive utterly powerless,—whether under the name of Doge, or King, or President, would then be of little account, so far as regards the question of the maintenance of the Constitution.<sup>231</sup>

The position even of President Jackson had not been so expansive. His view, expressed in correspondence with Treasury Secretary William J. Duane over the removal of deposits from the Second Bank, had been that a principal officer could refuse to comply with the direction of the President, but the President then was at liberty to remove him.<sup>232</sup> Cushing went a step further and determined that it would be unlawful for a principal officer to act contrary to the President's wishes. Ensuring the unity and integrity of the executive department, as a whole, required that all executive officers' acts be understood to flow from the President's will.

But alongside this unitary and hierarchical understanding of the Executive, Cushing went on to acknowledge joint forms of responsibility among the President and principal officers. He acknowledged that there would be situations where the President would rely on the written opinion of a secretary to act, or where the secretary and President would jointly reach a resolution as to what to do. In these cases, "responsibility" would be "shared in common" between the President and heads of department:

[W]hile there is a general solidarity of responsibility for public measures . . . yet the weight of historical responsibility, and perhaps legal, may be shifted, partially from one to another, according as the determination is governed by the written direction of the President or by the written advice of the head of Department.<sup>233</sup>

Even though the heads of the department could not lawfully act contrary to the President's directive, nonetheless this did not mean that they had no independent agency in the formulation of executive policy. The President's decision would often involve deliberation between officers, a "conference

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231. *Id.* at 469-70.

232. WHITE, *supra* note 229, at 36-37.

233. 7 Op. Att'y Gen. at 478 (1856).

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and comparison of thought” to determine the best course of action.<sup>234</sup> Cushing, the ultimate unitary executive theorist, could not escape the discursive pull of the Opinion Clause, which presupposed principal officers’ power to exercise and communicate to the President an independent judgment concerning their official duties.<sup>235</sup>

The result was a paradoxical conception of presidential power in the executive department. The President’s will stood behind all acts within the branch, and heads of department were under a constitutional obligation to exercise their discretion in conformity with the President’s will. And yet, when a secretary asked for advice from the President, or the President from a secretary, and they jointly exercised judgment over what to do, in these cases official solidarity and collective responsibility arose. That kind of coordinate and deliberative decision-making was formally compatible with Cushing’s theory of the Executive because the act that issued had to be treated as one that the President ordered, agreed to, or otherwise acquiesced in. But if responsibility for such acts was “shared” among officers within the executive department, “perhaps” even in a “legal” sense,<sup>236</sup> then the President’s solitary will did not truly define what the executive department was or what it did. Instead, government action became a cooperative endeavor where officials reasoned together about what to do.

In a separate opinion on the *Office and Duties of the Attorney General*,<sup>237</sup> Cushing further developed this “constitutional theory” of the executive department. At first blush, this theory strikes a note of presidential absolutism:

That theory . . . requires unity of executive action, and of course, unity of executive decision, which, by the inexorable necessity of the nature of things, cannot be obtained by means of a plurality of persons wholly independent one of another, without corporate conjunction, and released from subjection to one determining will.<sup>238</sup>

The President was practically a legal dictator within the executive department. And yet, Cushing acknowledged the limits of this principle, as articulated in the mandamus case law: “where the law has directed them to perform certain acts, and where the rights of individuals are dependent upon on those acts . . . a head of department is an officer of the law,” rather than a “political or confidential minister[]” of the president.<sup>239</sup> In addition

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234. *Id.*

235. U.S. CONST. art. II, § 2, cl. 1. See Part II.C, *supra*.

236. 7 Op. Att’y Gen. at 478 (1856).

237. Office and Duties of Attorney General, 6 Op. Att’y Gen. 326 (1854).

238. *Id.* at 342-43.

239. *Id.* at 344.

because departments “are created by law” and “most of their duties may be prescribed by law,” Congress could “interpose by legislation concerning them.”<sup>240</sup> The reach of the President’s determining will might then be quite limited, depending on the exactness of Congress’ legislative requirements and whatever decisional procedures it required.

In what may very well be the first use of the term “administrative law” in U.S. legal discourse, Cushing offered as evidence for his constitutional theory a “series of expositions of the rule of administrative law by successive Attorneys General.”<sup>241</sup> If the Attorney General were merely a servant of the President, however, these opinions concerning the scope of the President’s power would mean little. They would not represent an independent view of the President’s authority, but rather articulate the interests of the Attorney General’s political master. Cushing, however, did not understand the Attorney General as a purely executive officer in carrying out such duties. When giving “his advice and opinion in questions of law to the President and the heads of departments . . . the action of the Attorney General is quasi judicial. His opinions officially define the law, in a multitude of cases, where his decision is in practice final and conclusive.”<sup>242</sup> Because both public officers and private persons relied on the Attorney General’s opinions to assess their legal rights and duties, the Attorney General had to act impartially rather than as an advocate for the government to determine the law’s meaning and application. Cushing attested that, though the Judiciary Act had not made the Attorney General’s opinion binding, “the general practice of the Government has been to follow it in part” because of “the great advantage, almost necessity, of acting according to uniform rules of law in the management of public business: a result only attainable under the guidance of a single department of assumed special qualifications and official authority.”<sup>243</sup>

Cushing thus identifies not one, but two, sources of “unity” within the executive department: the political direction of the President, and the legal direction of the Attorney General. The Office of the Attorney General retains independent rights and duties, anchored in “the solemn responsibilities of conscience and of legal obligation.”<sup>244</sup> Individual Attorneys General do not opine against a blank slate, but rather must contend with the settled usage established by their predecessors.<sup>245</sup> Those opinions might be

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240. *Id.*

241. *Id.* at 343.

242. *Id.* at 334.

243. *Id.*

244. *Id.*

245. On precedent and rule-of-law values in the Attorneys General’s antebellum administrative interpretations, see Jerry L. Mashaw and Avi Perry, *Administrative Statutory Interpretation in the Antebellum Republic*, 2009 MICH. ST. L. REV. 7, 44-48.

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reversed, but not without argument.<sup>246</sup> The executive department is thus defined as an amalgam of law and politics. If the principal department as a whole is unified, it is because the President adheres to the “administrative law” pronounced by the Office of the Attorney General, and the Attorney General exercises the interpretive discretion the law affords him to preserve the President’s constitutional powers. Unity arises not merely from the President’s will but also from “order, correspondence, and combination of parts, classification of duties, in a word, system.”<sup>247</sup> A unitary executive could only be achieved through cooperation and mutual responsiveness between political power and legal norms.

Like Madison, Cushing argues that the departmental structure of the Constitution enjoined a systematic allocation power, both at the level of the three principal branches and within the subordinate departments of the Executive. But this allocation of power meant that legal authority would be vested in other actors within the branch besides the President, namely the Attorney General and other department heads. Cushing himself played a lead role in fostering this institutional development of the Executive, proposing the creation of a new law department in 1854.<sup>248</sup> With the Department of Justice’s creation in 1870, vertical authority relations of superior and subordinate officer came to be complimented by horizontal relations among a professional corps of officers.<sup>249</sup> The structure of decision-making within the executive department would have to heed legal and political constraints other than the opinion of the President as to the law and the will of the President as to his politics. The system of the subordinate departments emerged as a microcosm of the constitutional structure that articulated and then reassembled public power.

### III. Departments in Administrative Law, 1887-2010

Public law in the first half of the nineteenth century established a law-bound, internally differentiated executive branch. American state building then took great strides during the Civil War and Reconstruction. The War catalyzed the growth of federal administrative capacity.<sup>250</sup> Reconstruction

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246. See Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1475-1520 (2010) (showing that the Attorney General and subsequently the Department of Justice’s Office of Legal Counsel have treated their prior opinions as precedential and arguing that a weak form of stare decisis ought to apply to such opinions).

247. 6 Op. Att’y Gen. at 346 (1856).

248. See Jed Shugerman, *The Creation of the Department of Justice: Professionalization Without Civil Rights or Civil Service*, 66 STAN. L. REV. 121, 134 (2014).

249. *Id.* at 149 (“[T]he creation of a department under the Attorney General was . . . the structural reform that would promote professional independence by removing federal lawyers from the politicized departments and placing them under more professional leadership.”).

250. RICHARD FRANKLIN BENSEL, *YANKEE LEVIATHAN: THE ORIGINS OF CENTRAL STATE AUTHORITY IN AMERICA, 1859-1877*, at 94-237 (1990).

gave rise to a landmark welfare and regulatory agency, the Bureau of Freedmen, Refugees and Abandoned Lands.<sup>251</sup> The constitutional conflict between President Andrew Johnson and a Radical Republican Congress also had implications for the future of administrative law, as Congress sought to limit the President's ability to remove officers within the executive branch so as to retain legislative control over Reconstruction.<sup>252</sup> This Article does not consider this period in further detail, however. The special legal issues raised at the intersection of the armed insurrection of the Confederacy, the emancipation of slaves, and the military occupation of the South are simply too complex and morally freighted to subsume within a broad study of the departmental structure of the Executive. They deserve separate treatment. This Part will rather pick up after Reconstruction, beginning with the emergence of the modern administrative state in the late nineteenth century.

Despite the major milestones of the first three quarters of the nineteenth century of public law, that period was a world apart from contemporary governance. Prior to the rapid growth of bureaucratic capacity around the turn of the twentieth century, federal law was implemented through a patchwork of authorities that supplemented but did not displace the central roles of extant judicial and political institutions.<sup>253</sup> The national government was staffed through political patronage, relied on fee-based compensation,<sup>254</sup> and was barely separated from the private realm. Such a government can be understood as a sort of "proto-administrative state,"<sup>255</sup> lacking the trappings of modern bureaucracy but laying the basis for such a system in the years to come. It was arguably not yet a "state" in the modern sense, since there was as yet no permanent, professional officialdom to represent and enact the sovereign will of a still inchoate American "public."<sup>256</sup> When scholars speak of the "administrative law" of this period,

251. Seminally, W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA, 1860-1880, at 219-36 (Free Press ed. 1998 [1935]). For an account of the Bureau's significance for contemporary scholarship on the administrative state, see Karen M. Tani, *Administrative Constitutionalism at the "Borders of Belonging": Drawing on History to Expand the Archive and Change the Lens*, 167 U. PA. L. REV. 1603, 1610-21 (2019). On Du Bois' account of Bureau in the context of the Progressive theory of the administrative state, see BLAKE EMERSON, THE PUBLIC'S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE DEMOCRACY 66-72 (2019).

252. See WHITTINGTON, *supra* note 36, at 113-56. The significance of the struggle between Johnson and Congress over the Tenure of Office Act, which led to Johnson's impeachment, is discussed in *Myers v. United States*, 272 U.S. 52, 166-73 (1926). Justice Taft arguably gives short shift to the constitutional significance of the Act and Johnson's subsequent impeachment for the construction of Congress's power to limit the President's power to remove executive officers.

253. STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920, at 39-46 (1982).

254. NICHOLAS PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780-1940, at 1-3 (2013).

255. JON D. MICHAELS, CONSTITUTIONAL COUP: PRIVATIZATION'S THREAT TO THE AMERICAN REPUBLIC 28 (2017).

256. See EMERSON, *supra* note 251, at 61-66.

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therefore, they are referring to a field whose existence was only dimly perceived by legal actors at the time.<sup>257</sup> By tracing this pre-history, the previous Part has shown the broader constitutional background from which modern administrative law emerged in the late nineteenth and twentieth century.

This Part turns to that body of law as it developed from the creation of the Interstate Commerce Commission in 1887 up to early twenty-first-century administrative law. Examining administrative law from the perspective of departmental norms contributes to contemporary debates in administrative law scholarship. Adrian Vermeule has argued that the classical constitutional framework led ineluctably to the abandonment of legal controls within the executive branch and its administrative apparatus.<sup>258</sup> But the development of internal law and the creation or subordinate checks within executive departments refutes this notion. Nor is it the case that administrative law arose out of statutory law's whole cloth, without any further constitutional impetus. Instead, legal officials relied on the Constitution's departmental text and structures to transform the exercise of executive discretion into various forms of binding law.

That ongoing process of departmental construction has taken place within core doctrines of modern administrative law as it has developed since the Progressive Era. Over this period, the existence, importance, and workings of the administrative state have become a matter of prolonged and self-conscious legal concern. The task has been to digest and assimilate the expanding administrative apparatus into the preexisting constitutional framework, so that it could be legitimated, grasped, and delimited. This Article does not argue that administrative law has embraced a "fractal separation of powers," that replicates within agencies the tri-partite scheme among the constitutional branches.<sup>259</sup> Departmental principles are far more flexible. They order executive discretion so that its exercise exhibits the general, predictable, and rational features of law. Executive power at

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257. Administrative law only emerged as a distinct legal subject in the United States in the early twentieth century, with the work of scholars like Bruce Wyman, Frank Goodnow, and Ernst Freund. See generally WILLIAM C. CHASE, *THE AMERICAN LAW SCHOOL AND THE RISE OF ADMINISTRATIVE GOVERNMENT* (1982).

258. ADRIAN VERMEULE, *LAW'S ABNEGATION: FROM LAW'S EMPIRE TO THE ADMINISTRATIVE STATE* 6 (2016) ("[T]he running conflict between law's empire and the administrative state is more or less at an end. The conflict ended not by conquest . . . but instead by unilateral surrender, an abnegation of authority by the law. The law itself has decided to bow to the administrative state, to leash itself—in Francis Bacon's image—'under the throne.'").

259. *Id.* at 86, arguably referring to Michaels' view of the administrative separation of powers. See MICHAELS, *supra* note 255, at 57-63.

once gains the force of law and becomes subject to legal evaluation and control.<sup>260</sup>

This development has occurred through specific statutory enactments and doctrinal moves. The Supreme Court has held that the executive branch includes “Departments,” such as the Securities and Exchange Commission, that are governed by norms of expert, deliberative decision-making and are not fully subject to the President’s political control.<sup>261</sup> Reason-giving requirements in the judicial review of agency action have extended these norms across all executive agencies, distributing authority among subordinate agency officials who have the necessary competence to generate such reasons.<sup>262</sup> That assignment of roles and responsibilities is supported by the bedrock principle that administrative agencies must follow their own regulations.<sup>263</sup> Even the President is bound by agency rules so long as they are in force.<sup>264</sup> Together, these principles separate the administrative institutions that implement the law from the singular will of the political appointees who lead them. These institutions subject official acts to shared norms, regular procedures, and collective reasoning.

We might understand these legal developments either as ongoing constructions of the Constitution’s departmental text or as working governance arrangements that make the principle of checks and balances operative within the administrative state. Both the first, formalist approach and second, functionalist one lead to the same conclusion: our constitutional order recognizes that subordinate departments secure the rule of law against arbitrary power. That constitutional role requires greater protection from the judiciary and other officials, as Part IV will show.

#### *A. Independent Commissions within the Executive Branch*

It may seem peculiar to paint administrative law as centrally concerned with departments since the field has its modern origins in institutions that are labeled “commissions” rather than departments.<sup>265</sup> The commission structure, however, privileged coordinate forms of decision that were always already present within departmental structure of the Executive, providing an institutional ballast to assertions of political will by the

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260. See Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law Before and After the APA*, in *ADMINISTRATIVE LAW FROM THE INSIDE OUT: ESSAYS ON THEMES IN THE WORK OF JERRY L. MASHAW* 163 (Nicholas R. Parrillo ed., 2017).

261. *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 511 (2010).

262. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1977); *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

263. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 265 (1954); Cass Sunstein & Adrian Vermeule, *supra* note 205, at 1956.

264. *United States v. Nixon*, 418 U.S. 683, 695 (1974).

265. ROBERT WIEBE, *THE SEARCH FOR ORDER, 1877-1920*, at 222 (1967).

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President and his principal officers.<sup>266</sup> This process began with Congress' creation of the Inter-State Commerce Commission (ICC) in 1887,<sup>267</sup> which came to be seen as the paradigmatic institution of the Progressive regulatory state.<sup>268</sup> By the first decade of the twenty-first century, the Supreme Court had recognized that such "independent" commissions were nonetheless "Departments" within the Executive in the sense of the Appointments Clause.<sup>269</sup> The executive branch thus incorporated institutions not subject to political control by the President.

The ICC was composed of a board of five commissioners, appointed to staggered terms, with a requirement of party balance.<sup>270</sup> Congress originally placed the Commission in the Department of the Interior,<sup>271</sup> but shortly thereafter reconstituted it as a standalone agency.<sup>272</sup> The commissioners each were appointed in the same way as a head of department.<sup>273</sup> This structure elevated to the apex of the Commission the coordinate authority relations that Madison and Cushing had recognized as elements internal to departmental organization. Such arrangements privileged comity, deliberation, and reasoned decision-making above secrecy, energy and dispatch.<sup>274</sup> Unlike the principal officers of the great departments created in 1789, however, commissioners of the ICC could be removed by the President only for "inefficiency, neglect of duty, or malfeasance in office."<sup>275</sup> That restriction on removal affirmed that commissioners were not political instruments of the President, but rather experts making reasoned decisions on the basis of a documented record.<sup>276</sup>

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266. Stephen Skowronek, *The Conservative Insurgency and Presidential Power*, 122 HARV. L. REV. 2070, 2085-89 (2009).

267. An act to regulate commerce (Interstate Commerce Act), ch. 104, § 11, 24 Stat. 379, 383 (1887) (repealed 1978).

268. SKOWRONEK, *supra* note 253, at 136-160, 249; I. L. Sharfman, *The Interstate Commerce Commission: An Appraisal*, 47 YALE L.J. 915 (1937); SAMUEL DECANIO, DEMOCRACY AND THE ORIGINS OF THE AMERICAN REGULATORY STATE 149, 178-79 (2015).

269. *Free Enter. Fund*, 561 U.S. at 511.

270. An act to regulate commerce § 11.

271. An act to regulate commerce §§ 18, 21.

272. Act of Mar. 2, 1889, ch. 382, §§ 7-8, 25 Stat. 855, 861-62. For a discussion of the history, see Marshall J. Breger and Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1129-1130 (2000).

273. An act to regulate commerce § 11.

274. *Illinois Cent. R. Co. v. Interstate Commerce Comm'n*, 206 U.S. 441, 454 (1907) (describing the Commission as a "tribunal appointed by law and informed by experience"); Report of the Senate Select Committee on Interstate Commerce, S. Rep. No. 46-1, at 208-215 (1886). The Senate Report relied on testimony that emphasized that the Commission would be "composed of men of broad, liberal views who will be impartial toward the transportation as well as the shipping interest," *id.* at 211, decide by "deliberation and discussion," *id.* at 211, and have "the power to employ experts," *id.* at 210.

275. An act to regulate commerce § 11.

276. See HERBERT CROLY, PROGRESSIVE DEMOCRACY 363-71 (1915).

The commission structure introduced with the ICC won explicit constitutional sanction in *Humphrey's Executor*,<sup>277</sup> where the Court upheld similar removal restrictions on the members of the Federal Trade Commission (FTC). In doing so, the Court sought to separate the Commission from the President and to align it with the coordinate branches:

Such a body cannot in any proper sense be characterized as an arm or an eye of the executive . . . to the extent that it exercises any executive function, as distinguished from executive power in the constitutional sense—it does so in the discharge and effectuation of its quasi legislative or quasi judicial powers, or as an agency of the legislative or judicial departments of the government.<sup>278</sup>

The opinion here draws on a tradition of departmental reasoning that dates back to the *Federalist*. As Madison argued, each of the principal departments exercised a core power.<sup>279</sup> But each also exercised some portion of the powers located in the main in the other departments, so as to check the unilateral exercise of power by any one of them. The FTC's quasi-legislative and quasi-judicial functions thus placed it within, but on the periphery of, the executive and in continuous dialogue with the other branches. The Commission was “not wholly disconnected from the executive department, but . . . was created by Congress . . . as an agency of the legislative and judicial departments.”<sup>280</sup>

*Humphrey's Executor* left the structural location of independent commissions ambiguous, creating the specter of a “headless ‘fourth branch’ of the Government.”<sup>281</sup> The Court recognized this uncertainty in *Buckley v. Valeo*,<sup>282</sup> stating that “Departments” within the meaning of the Appointments Clause “are themselves in the Executive Branch or at least have some connection with that branch.”<sup>283</sup> It was not until the twenty-first century, however, that the Court held that independent regulatory agencies were indeed “Departments” within the meaning of the Appointments Clause. In *Free Enterprise Fund*, the Court held that it was unconstitutional for Congress to make the members of the Public Company Accounting Oversight Board removable only for cause by members of the Securities and Exchange Commission, who the parties stipulated could only be

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277. 295 U.S. 602 (1935).

278. *Id.* at 628.

279. THE FEDERALIST NO. 47 at 323 (James Madison) (Jacob E. Cooke ed., 1961).

280. *Humphrey's Executor*, 295 U.S. at 630.

281. The President's Committee on Administrative Management, *Administrative Management in the Government of the United States* 32 (1937).

282. 424 U.S. 1 (1976).

283. *Id.* at 127.

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removed for cause.<sup>284</sup> The opinion was a victory for proponents of the unitary executive theory, as it insisted upon the constitutional significance of maintaining the President's control over the administrative apparatus through a "chain of command."<sup>285</sup>

The Court nonetheless rejected the petitioners' argument that the Securities and Exchange Commission was "not a 'Department[t]' like the 'Executive departments' (*e.g.*, State, Treasury, Defense)," and thus that Congress could not vest the Board's appointment in the Commission.<sup>286</sup> The Court held that the Commission was indeed a "Department" because that categorization was

consistent with the common, near-contemporary definition of a 'department' as a 'separate allotment or part of business; a distinct province, in which a class of duties are allotted to a particular person.' . . . Because the Commission is a freestanding component of the Executive Branch, not subordinate to or contained within any other such component, it constitutes a 'Department[t]' for the purposes of the Appointments Clause.<sup>287</sup>

In reaching this conclusion the Court adopted the reasoning of Justice Scalia's concurring opinion in *Freytag v. Commissioner of Internal Revenue*,<sup>288</sup> where he had argued that the Court should adopt the "ordinary meaning" of "Department[]," which did not "connote size or function (much less cabinet status), but separate organization—a connotation that still endures even in colloquial usage today ('that is not my department')."<sup>289</sup>

This holding leads to a paradoxical amalgam of hierarchical control and coordinate restraint that now should be familiar in executive-departmental reasoning, from Hamilton and Madison, through Justice McLean and Cushing, and now including Justice Scalia and Chief Justice Roberts. To insist that independent commissions are within the executive branch is also to concede that the President's legal and practical control over the execution of the law is not total.<sup>290</sup> Because independent commissions are usually governed by a board, and because the board members are

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284. 561 U.S. 477, 487 (2010).

285. *Id.* at 498.

286. *Id.* at 510.

287. *Id.* at 511.

288. 501 U.S. 868, 892 (1991) (Scalia, J., concurring in part and concurring in the judgment).

289. *Id.* at 920.

290. *Cf. Intercollegiate Broad. Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1341-42 (D.C. Cir. 2012) (holding that the Library of Congress is a "Department" and "component of the Executive Branch" for some purposes, given its share in "powers . . . to promulgate copyright regulations, to apply the statute to affected parties, and to set rates and terms," even though it is also, in other respects, a "congressional agency.").

removable only “for cause,” the treatment of such commissions as executive departments dissociates these departments from the will of the chief executive. The independent commission therefore stands as a testament to the distinction between the executive power and the executive department. Commissions are “component[s] of the Executive Branch” that the President may not exclusively control.<sup>291</sup> In Part V, this Article will examine the latest chapter in the law of independent commissions, *Seila Law*,<sup>292</sup> where the Court left the independent commission structure in place, while misunderstanding its significance.

### *B. Structures of Reason-giving: Departments as Commissions*

The administrative state that took form over the twentieth century was not to be composed entirely of independent commissions. Far from it. Independent agencies like FTC and SEC stand alongside and are dwarfed by departments like Health and Human Services or Homeland Security.<sup>293</sup> The last Section has shown that courts now treat such commissions as departments, assimilating them in some respects to the structure of the executive branch as a whole. This Section focuses on the other side of the coin—that the executive departments are in many respects treated as commissions. Reliance on expertise and coordinate authority have become central throughout the agencies that populate the executive branch, irrespective of their label. Our administrative state prizes reason-giving.<sup>294</sup> The practice of reason-giving requires discussion and deliberation between officials rather than orders that are to be obeyed without need for justification.

The dynamic was originally captured in the famous *Morgan Cases*. In *Morgan I*,<sup>295</sup> the Supreme Court attempted to impose a requirement that the Secretary of Agriculture personally review the evidence in settings rates, rather than leave this decision to the judgment of a trial examiner and acting secretary. The Court famously stated that “[t]he one who decides must hear.”<sup>296</sup> This statement appealed to a judicial model of administrative decision-making, in which the Secretary would conduct trial-like hearings and reach his own conclusion on the basis of the evidence presented. But after several more rounds of review, the Court in *Morgan IV*<sup>297</sup>

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291. *Free Enter. Fund*, 561 U.S. at 511.

292. 140 S. Ct. 2183 (2020).

293. Jennifer L. Selin & David E. Lewis, *Sourcebook of the United States Executive Agencies*, Administrative Conference of the United States 27-28 (2d ed. 2018).

294. *See generally* JERRY MASHAW, *REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY: HOW ADMINISTRATIVE LAW SUPPORTS DEMOCRATIC GOVERNMENT* (2018).

295. *Morgan v. United States*, 298 U.S. 469 (1936).

296. *Id.* at 481.

297. *United States v. Morgan*, 313 U.S. 409 (1941).

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stepped back from its close scrutiny of the agency's internal process.<sup>298</sup> It denied that it was ordinarily appropriate for the judiciary to police the kind and degree of attention the ultimate decision-maker had given to the issue, concluding that "the integrity of the administrative process must be . . . respected."<sup>299</sup>

The Court thus acknowledged the value of what Kenneth Culp Davis subsequently dubbed the "institutional decision," which is a "decision made by an organization and not by an individual or solely by an agency head."<sup>300</sup> Institutional decisions distribute authority across multiple officials along the agency's hierarchy, such as the initial adjudicator or examiner, the person or body who hears appeals, and the person or persons who head the agency. The advantage of such an institutional decision is that it

provides a system of internal checks and balances which is lacking when final decisions are made by individuals. Two minds are better than one; the second may catch the errors and rectify the faults of the first, as well as provide an interplay between the two that neither alone could furnish.<sup>301</sup>

The institutional decision is thus the modern iteration of Madison's system of subordinate checks, which was adopted in the statute creating the Treasury Department. The downside of this system is that it may undermine the ability of private parties to gain a hearing of their concerns with the ultimate decision-maker, since the official who initially adjudicates their complaint does not exclusively determine the final decision.<sup>302</sup> The personal method of decision-making allows for such direct interaction, but at the expense of broader-based input, expertise, and review.

Modern administrative law pushes agencies in the direction of reaching institutional decisions rather than decisions dictated by the agency head. The Administrative Procedure Act of 1946,<sup>303</sup> which serves as the constitutional charter for the administrative state,<sup>304</sup> diffuses authority throughout executive departments and thus qualifies the discretion of principal officers. It provides for review of "final agency action,"<sup>305</sup> and defines an "agency" as "each authority of the Government of the United States,

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298. *Id.*

299. *Id.* at 422.

300. Kenneth Culp Davis, *Institutional Administrative Decisions*, 48 COLUM. L. REV. 173, 173 (1948).

301. *Id.* at 193.

302. *Id.* at 195-97.

303. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 5372, 7521 (2018)).

304. WILLIAM N. ESKRIDGE, JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 10-11 (2011).

305. 5 U.S.C. § 704 (2012).

whether or not it is within or subject to review by another agency,” with certain exceptions.<sup>306</sup> These authorities may be styled commissions, boards, traditional executive departments, or components of such departments. Regardless of title, the key feature of an agency, according to a leading commentary, is that it is “the center of gravity for the exercise of substantial power against individuals.”<sup>307</sup> The APA recognizes that statutory law assigns decision-making authority to many different actors in the executive branch, and subjects particular offices and institutions within subordinate departments to direct judicial control. That judicial control in turn renders decision-makers within departmental hierarchies accountable to norms other than the political dictates of superior officers in a chain of command.

As administrative law has generalized the expectation that all agencies “demonstrate an adequate reasoning process,”<sup>308</sup> the plural decision-making structure of commissions has gained greater traction within the traditional executive departments. The statutory and judicial demand that agencies adequately explain themselves encourages a separation of functions and distribution of responsibilities capable of generating, applying, and communicating such reasons.<sup>309</sup> The executive power of the President and principal officers to dictate outcomes is then constrained and informed by the diffusion of responsibilities within various offices and bureaus in an agency’s organization chart. The notion that the “Chief Executive” or the “Head of Department” should exercise the final word persists, but it sits uneasily alongside horizontal and coordinate structures of collective action.

Consider, for example the APA’s requirement that formal adjudicatory decisions be supported by “substantial evidence,”<sup>310</sup> a standard originating in judicial review of the Interstate Commerce Commission.<sup>311</sup> In *Universal Camera Corp. v. NLRB*,<sup>312</sup> the Court interpreted this to mean that the courts should take into account “the record as a whole,” including the findings of the agency’s initial decision-maker.<sup>313</sup> Given this standard of review, as well as the practical challenge of reassessing the merits of every initial decision, agency heads face significant costs in rendering decisions contrary to their initial adjudicators. Authority is consequently

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306. *Id.* § 551.

307. James Freedman, *Administrative Procedure and the Control of Foreign Direct Investment*, 119 U. PA. L. REV. 4-12 (1970), cited in RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 1.2 (5th ed. 2010).

308. MASHAW, *supra* note 25, at 35, 78-90.

309. *Id.* at 78-90.

310. 5 U.S.C. § 706(2)(E) (2018).

311. Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Model of Review*, 111 COLUM. L. REV. 939, 962 (2011).

312. 340 U.S. 474 (1951).

313. *Id.* at 490.

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shared between the lower-ranking official who hears the case and the agency head who has ultimate responsibility for the decision. To be sure, such systems of administrative adjudication may generate serious and systemic inaccuracies that existing quality control efforts have failed to master.<sup>314</sup> The point is not that the system guarantees correct results. Instead, the point is that a system that requires the agency to supply a reason will tend to allocate authority between several officials within the agency who offer, assess, and potentially reassess those reasons.

The APA's "arbitrary" or "capricious" standard for informal rulemaking and adjudication creates similar incentives.<sup>315</sup> In *Citizens to Preserve Overton Park v. Volpe*,<sup>316</sup> the Court interpreted the APA's judicial review provisions to require that review "be based on the full administrative record that was before the Secretary at the time he made his decision."<sup>317</sup> The agency cannot rely on "'post hoc' rationalizations."<sup>318</sup> Review based on the preexisting record requires such records to be made and maintained, and disclose information that supports the decision.<sup>319</sup> The ultimate decision-maker is unlikely to make and compile the record personally given that such a process is time and resource intensive as well as below her paygrade.<sup>320</sup> Instead, these tasks will require the input of many other officials within the agency who can bring relevant scientific and policy knowledge to bear.<sup>321</sup>

*Overton Park* requires that review of the record under the arbitrary and capricious standard must be "searching and careful" but "narrow."<sup>322</sup> In a series of cases, the Court and the D.C. Circuit have elaborated this

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314. See generally Daniel E. Ho, Cassandra Handan-Nader, David Ames & David Marcus, *Due Process and Mass Adjudication: Crisis and Reform*, 72 STAN. L. REV. 1 (2020).

315. 5 U.S.C. § 706(2)(A) (2018).

316. 401 U.S. 402 (1971).

317. *Id.* at 420.

318. *Id.* at 419.

319. JEFFREY LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 330 (6th ed. 2018) ("A . . . function of the rulemaking record is to provide the agency decisionmaker with enough information to decide whether a final rule is warranted, and if so, what provisions it should contain.").

320. U.S. Dep't of Justice, Env't and Nat. Res. Div., Guidance to Federal Agencies on Compiling the Administrative Record 3 (Jan. 1999), [http://environment.transportation.org/pdf/programs/usdoj\\_guidance\\_re\\_admin\\_record\\_prep.pdf](http://environment.transportation.org/pdf/programs/usdoj_guidance_re_admin_record_prep.pdf) [https://perma.cc/R7H3-T2ST] (advising agencies to "include all documents and material prepared, reviewed, or received by agency personnel and used by or available to the decision-maker, even though the final decision-maker did not actually review or know about the documents and materials"); see Leland E. Beck, Agency Practices and Judicial Review of Administrative Records in Informal Rulemaking, Report to the Administrative Conference of the United States 26-56 (May 14, 2013).

321. See William F. Pedersen, Jr., *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 66-70 (1975); *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008) (holding that rulemaking record must include "technical studies and data upon which the agency relies") (internal quotations omitted).

322. 401 U.S. at 416.

standard into a robust reason-giving requirement.<sup>323</sup> This “hard look” review requires relatively intense scrutiny of the agency’s reasoning process.<sup>324</sup> Drawing a “rational connection between the facts found and the choice made”<sup>325</sup> will require a division of labor among agency officials in which relevant information can be marshalled, analyzed, and composed to determine and justify a course of action. Arbitrariness review remains deferential to agency expertise and policy judgment.<sup>326</sup> But even in cases where courts exercise a relatively soft touch in reviewing the decision, reasoning from lower-level officials may be necessary to shore up an otherwise shaky record.<sup>327</sup> “Staff reports” sometimes become a focal point for review, as challengers will criticize the underlying data generated and inferences made by the subordinates.<sup>328</sup> Judicial review in this way empowers various professionals within the agency: the lawyers who have the special competency to interpret the text, structure, and purpose of the statute; scientists and engineers who can set forth feasible courses of action; and economists who can assess the impact of regulatory alternatives on social welfare.<sup>329</sup> Operating under the shadow of judicial review, these professionals engage in a “dialogue inside the agency.”<sup>330</sup>

Regulations, then, do not usually spring like Athena from the head of department. They arise from the input of multiple offices within as well as without the agency.<sup>331</sup> Many regulatory proposals are drafted by a “team’

323. *Motor Vehicle Mfrs. Ass’n of the U.S. Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

324. Peter L. Strauss, *Considering Political Alternatives to “Hard Look” Review*, 1989 DUKE L.J. 538, 539.

325. *Motor Vehicle Mfrs. Ass’n of the U.S. Inc.*, 463 U.S. at 29.

326. Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 MICH. L. REV. 1355, 1362 (2016).

327. *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 104 (1983) (citing “staff reports” in concluding agency action not arbitrary and capricious). I chose *Baltimore Gas* because it is taken to be representative of “thin rationality review” as opposed to “hard look review.” Gersen & Vermeule, *supra* note 326, at 1359. Even thin review, it seems, is thick enough to take subordinates’ reports into account. Staff reports may also work against the agency. See *Mobil Pipe Line Co. v. FERC*, 676 F.3d 1098, 1099, 1102-1105, 1103 n.2 (D.C. Cir. 2012) (Kavanaugh, J.) (relying in part on conclusions of “expert staff” to reject decision of FERC as “unreasonable,” while acknowledging that “the Commission . . . is by no means obliged to heed the advice of its expert staff. In this case, we cite the economic and legal analysis of Federal Energy Regulatory Commission’s expert staff only because we find it so persuasive”).

328. *Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 737 F.2d 1095, 1121 (D.C. Cir. 1984).

329. See Adrian Vermeule & Elizabeth Magill, *Allocating Power Within Agencies*, 120 YALE L.J. 1033, 1051-54 (2011).

330. E. Donald Elliot, *Chevron Matters: How the Chevron Doctrine Redefined the Roles of Congress, Courts, and Agencies*, 16 VILL. ENVTL. L.J. 1, 12 (2005).

331. *E.g.*, INTERNAL REVENUE SERV., INTERNAL REVENUE MANUAL, CHIEF COUNSEL REGULATION HANDBOOK, 32.1.6 REVIEW, APPROVAL, AND PUBLICATION OF REGULATIONS (Nov. 13, 2019), [https://www.irs.gov/irm/part32/irm\\_32-001-006](https://www.irs.gov/irm/part32/irm_32-001-006) [<https://perma.cc/DSB6-BGEA>]; FED. HIGHWAY ADMIN., FEDERAL HIGHWAY ADMINISTRATION RULEMAKING MANUAL 7-11

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or ‘work group’ composed of representatives from all the agency subunits that have an interest in the outcome of the rulemaking process.”<sup>332</sup> Draft rules generally go through agencies’ “internal clearance process,” which is often “quite contentious, as different units within the same agency can have a stake in the policy and very different take on how it should look.”<sup>333</sup> An agency may assign each office that plays a part in drafting a rule a “unique area[] of responsibility” with respect to certain legal or policy issues, thus requiring that each office’s concerns within its jurisdiction be taken seriously.<sup>334</sup> The rule, to borrow Madison’s phrase, “pass[es] thro’ separate hands”<sup>335</sup> of many officials within an agency before it is presented to the one who possesses the formal statutory authority to propose and finalize it.

This internal structure can empower the head by helping to gather and process information about the costs and benefits of various alternatives as well as political and legal obstacles.<sup>336</sup> Agency heads typically coordinate offices and functions within their agencies so as to fulfill their own political purposes and official duties, attempting to decrease the information costs of their decisions. These efficiency gains cost the head some leeway, however. Once the head puts a procedure in place, she creates legitimate expectations that she will not remove it arbitrarily or ignore the information it generates.

This cost to the head’s discretion in turn is a benefit to the durable rules and practices that constitute the department. The departmental infrastructure outlined in statute gains increasing solidity as power flows through its channels. This structure subjects the head’s decisions to the input of subordinates who operate under norms and incentives peculiar to their own position within the institution and the professional norms that attach to those roles. In some cases, the department head’s failure to respect existing processes and staff jurisdiction has rendered agency action

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(July 2000), <https://www.transportation.gov/sites/dot.dev/files/docs/FHWARulemaking%20Manual.pdf> [<https://perma.cc/6TOP-NZJL>].

332. Thomas O. McGarity, *The Role of Government Attorneys in Regulatory Agency Rulemaking*, 61 *LAW & CONTEMP. PROBS.* 19, 20 (1998); see also Sidney Shapiro, Elizabeth Fisher & Wendy Wagner, *The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy*, 47 *WAKE FOREST L. REV.* 463, 491-501 (2012).

333. RACHEL AUGUSTINE POTTER, *BENDING THE RULES: PROCEDURAL POLITICKING IN THE BUREAUCRACY* 33 (2019).

334. BLAKE EMERSON & CHERYL BLAKE, *PLAIN LANGUAGE IN REGULATORY DRAFTING*, REPORT FOR THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 26-27 (Dec. 8, 2017), [https://www.acus.gov/sites/default/files/documents/Plain%20Regulatory%20Drafting\\_Final%20Report.pdf](https://www.acus.gov/sites/default/files/documents/Plain%20Regulatory%20Drafting_Final%20Report.pdf) [<https://perma.cc/AG7Q-LULV>].

335. 1 *RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 421 (James Madison) (Max Farrand ed., rev. ed. 1937).

336. Jennifer Nou, *Intra-Agency Coordination*, 129 *HARV. L. REV.* 421, 451-72 (2015).

unlawful.<sup>337</sup> More routinely, subordinate checks are likely to act as a gentle but persistent restraint on decisions that go against the information and norms held within the lower ranks of the agency.

The complexity of the modern executive branch is such that inter-departmental distributions of authority operate alongside these intra-departmental checks. Agencies sometimes share authority over adjudication,<sup>338</sup> rulemaking,<sup>339</sup> and myriad other administrative functions. They must work together when their responsibilities and powers impinge on one another and “overlap.”<sup>340</sup> These inter-agency arrangements may be fairly “cooperativ[e],”<sup>341</sup> with the relevant agencies seeking a mutually agreed upon solution or distribution of responsibilities.<sup>342</sup> At other times they become “adversarial,”<sup>343</sup> as when agencies sharply disagree over who has authority on a given issue or how a shared authority ought to be deployed.<sup>344</sup> In either case, the diffusion of authority across multiple departments provides a partial surrogate for the separation of powers among the branches. As James Wilson observed in his discussion of the constitutional separation of powers, “there ought to be a mutual dependency, as well as a mutual independence. . . . [T]he proceedings of each . . . are liable to be examined and controlled by one or both of the others.”<sup>345</sup> This amalgam of dependency and independence operates at the agency level too, as multiple actors must sign off on decisions over which they have concurrent jurisdiction, or else resort to a third-party, such as another agency, the White House, or the courts, to resolve the dispute.<sup>346</sup> While such arrangements are likely to impose significant costs in taking action, they can ensure that multiple

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337. See, e.g., *Tummino v. Torti*, 603 F. Supp. 2d 519, 523 (E.D.N.Y. 2009) (finding FDA’s denial of petition for non-prescription availability of Plan B was arbitrary and capricious in part because it “wrested control over the decision-making . . . from staff that normally would issue the final decision”). See Lisa Heinzerling, *The FDA’s Plan B Fiasco: Lessons for Administrative Law*, 102 GEO. L.J. 962, 981-82 (2014) (“In the Plan B matter . . . the institutional decision-making structure was disrupted by political interventions . . .”); see also *Saget v. Trump*, 375 F. Supp. 3d 280 (E.D.N.Y. 2019) (finding the Secretary of Homeland Security’s termination of Temporary Protected Status to be arbitrary and capricious in part because she “departed from past agency practices without explanation and was improperly influenced by the White House”).

338. Bijal Shah, *Uncovering Coordinated Interagency Adjudication*, 128 HARV. L. REV. 805, 830-50 (2015).

339. Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1165 (2012).

340. Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201, 208.

341. Freeman & Rossi, *supra* note 339, at 1138.

342. *Id.* at 1161-65 (describing the pervasive use of the “memorandum of understanding,” where agency responsibilities overlap).

343. Daniel A. Farber & Anne Joseph O’Connell, *Agencies as Adversaries*, 105 CAL. L. REV. 1375, 1385 (2017).

344. *Id.* at 1404-45.

345. JAMES WILSON, *Lectures on Law*, in 1 COLLECTED WORKS OF JAMES WILSON 299 (Robert Green McCloskey ed., 1967).

346. Farber & O’Connell, *supra* note 343, at 1408-16.

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interests and viewpoints are considered, and check the exercise of power by any one institution to prevent abuse.<sup>347</sup> The executive branch, in other words, includes its own internal, subordinate checks in which power is partially distributed and partially shared.

We cannot say, however, that the distribution of power within the administrative state is truly “isomorphi[c]” with the separation of powers between the branches, neatly replicating Montesquieu’s tripartite scheme.<sup>348</sup> That is in part because the executive branch is headed by a President, rather than by a plural body that would mirror the plurality of the sovereign people. As Wilson himself argued, in accord with Hamilton, “[t]he executive power, in order to be restrained, should be *one*,”<sup>349</sup> allowing the public to control the execution of the law by their selection of a single responsible President. The administrative state has thus come to combine unitary, hierarchical, political control by the President with the subordinate checks provided by departmental organization, norms, and responsibilities. The rise of “presidential administration” as a theory and practice of government has enhanced the authority of politically accountable leaders to dictate outcomes within and across the subordinate departments.<sup>350</sup> Regulatory review at the White House’s Office of Management and Budget, in particular, asserts political ownership, accountability, and influence over agency policy.<sup>351</sup> The President or his subordinates sometimes also rely on the unity of the executive branch under the Chief’s auspices to “pool” powers vested in particular agencies.<sup>352</sup> These moves reduce the influence of departmental decision-making strictures and may enhance the significance of uncodified political considerations.

The landmark case of late twentieth-century administrative law, *Chevron v. Natural Resources Defense Council, Inc.*,<sup>353</sup> is representative of this uneasy combination of political and bureaucratic discourses in law’s administration. There the Court justified deference to agencies’

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347. See Gersen, *supra* note 340, at 246 (“[T]he preservation of concurrent jurisdiction helps avoid premature termination of checks on behavior that competing agents can produce.”) See Farber & O’Connell, *supra* note 343, at 1425-28.

348. See Jon Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 556 (2015).

349. WILSON, *supra* note 345, at 293.

350. See generally Kagan, *supra* note 16; Jerry L. Mashaw & David Berke, *Presidential Administration in a Regime of Separated Power: An Analysis of Recent American Experience*, 35 YALE J. ON REG. 549 (2018). See also Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 920 F.3d 1, 34 (D.C. Cir. 2019) (“Presidential administrations are elected to make policy. And ‘[a]s long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration.’”) (citations omitted) (quoting *Nat’l Ass’n of Home Builders v. EPA*, 682 F.3d 1032, 1043 (D.C. Cir. 2012)).

351. Kagan, *supra* note 16, at 2285-90.

352. See Daphna Renan, *Pooling Powers*, 115 COLUM. L. REV. 211, 226, 234 (2015).

353. 467 U.S. 837 (1984).

“reasonable” interpretations of statutory ambiguities, first, on the ground that “the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies.”<sup>354</sup> But the Court went on to note that the

agency . . . may . . . properly rely upon the incumbent administration’s views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such . . . choices.<sup>355</sup>

On the one hand, the judiciary defers to the agency to the extent that it offers a “detailed and reasoned” explanation for its resolution of difficult technical and policy questions. On the other hand, the judiciary defers to the agency on the grounds that the agency has made a political decision under the direction of the President, who is “accountable to the people.” The former rationale is departmental, relying on the capacity of the agency as an institutional decision-maker to digest information, deliberate, and issue a reasoned judgment. The latter rationale is about discretionary political power and electoral accountability.

There is no logically necessary incompatibility between decisions motivated by presidential directive and those informed by the deliberation of subordinates.<sup>356</sup> In principle, departmental structure might complement presidential authority. The President could fulfill his constitutional “duty to supervise” law-administration, not by micromanaging agency decisions for relatively short-term political payoffs, but instead by maintaining and improving systems of agency management that enable presidential policy implementation.<sup>357</sup> Decisions ideally would be vetted by the knowledge subordinates communicate and the norms and values that inhere in their official roles. But there is no guaranteed alignment between these two value-systems. Presidents may and often do fail to see that their policy goals are likely to be implemented, not by imposing centralized political control over agencies, but rather by fostering institutional competence,

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354. *Id.* at 865.

355. *Id.*

356. *See* *Sierra Club v. Costle*, 657 F.2d 298, 408 (D.C. Cir. 1981).

357. *See* Metzger, *supra* note 50, at 1929; *see also* Ronald C. Nyhan, *Changing the Paradigm: Trust and Its Role in Public Sector Organizations*, 3 ANN. REV. PUB. ADMIN. 87, 88 (2000) (reviewing extensive literature on a “trust-based model” of public administration which “proposes that increased participatory decisionmaking, specifically empowerment, feedback, and collective management decisions, will lead to increased trust and positive organizational outcomes”); CHESTER I. BARNARD, *THE FUNCTIONS OF THE EXECUTIVE* 233 (1938) (“Without . . . up-and-down-the-line coordination of purposeful decisions, general decisions and general purposes are mere intellectual processes in an organizational vacuum, insulated from realities by layers of misunderstanding.”).

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information sharing, and a sense of trust between careerists and appointees.<sup>358</sup>

Whether the Executive achieves workable integration between its powers and its departments depends on whether the hierarchical structure of political direction is adequately sensitive to input from subordinates, and whether the institutional decision-making process is duly responsive to the political judgments of agency leadership. In the balance of forces within state and civil society, political control gets the benefit of the President's unique claim to represent "the will of the public as a whole."<sup>359</sup> Subordinate checks, on the other hand, depend on a number of contingent factors, such as: the procedures Congress imposes, the internal law agencies generate, the judiciary's defense of these rules when political officials deviate from them, and the President and principal officers' willingness to exercise enlightened self-restraint.

### *C. An Agency Must Follow Its Own Rules: Departmental Constraints on Principal Officers and Presidents*

The law of public officers in the nineteenth century recognized that departmental regulations were "binding upon all within the sphere" of the President's constitutional authority.<sup>360</sup> They could serve as a "kind of common law."<sup>361</sup> Those cases tied the binding force of regulations to departmental structure, which required principal officers to control their department but at the same time required this control to be exercised in a regular and consistent fashion. Similarly, opinions of the Attorney General acted as an internal law of the executive branch, thus complicating the unitary picture of discretionary control by the President. In the twentieth century, administrative law confirmed and strengthened these principles. The President himself may not act contrary to a rule promulgated by one of the heads of departments so long as that rule remains in force. The constitutional structure of the executive department then checks the President's executive power.

It is a foundational and uncontroversial principle of administrative law that an agency must generally follow its own rules.<sup>362</sup> As noted in Part III, this principle has antecedents in the nineteenth-century law of

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358. WILLIAM G. RESH, *RETHINKING THE ADMINISTRATIVE PRESIDENCY: TRUST, CAPITAL, AND APPOINTEE-CAREERIST RELATIONS IN THE GEORGE W. BUSH ADMINISTRATION* 68-69, 144 (2015).

359. Proposed Executive Order Entitled "Federal Regulation" 55 Op. O.L.C. 59, 60-61 (1981).

360. *United States v. Eliason*, 41 U.S. (16 Pet.) 291, 302 (1842).

361. *United States v. MacDaniel*, 32 U.S. (7 Pet.) 1, 15 (1833).

362. Thomas W. Merrill, *The Accardi Principle*, 74 GEO. WASH. L. REV. 569, 569 (2006); Sunstein & Vermeule, *supra* note 205, at 1956.

officers.<sup>363</sup> But the contemporary foundations are *Arizona Grocery v. Atchison, Topeka & Santa Fe Ry. Co.*<sup>364</sup> and *United States ex rel. Accardi v. Shaughnessy*.<sup>365</sup> *Arizona Grocery* held that the ICC could not “retroactively” repeal a rate prescription that had been made in its “quasi legislative capacity” through an exercise of its “quasi judicial” function.<sup>366</sup> This holding was grounded in the Court’s observation that, when the Commission prescribes rates, it “speaks as the Legislature, and its pronouncement has the force of statute.”<sup>367</sup> It is noteworthy that the opinion enforces differentiation between agency proceedings. It does not treat the Commission as a black box, but rather distinguishes different fora where various kinds of powers can be exercised. *Arizona Grocery* displays a departmental logic that treats agencies as articulated institutions rather than as personal, discretionary agents.

Likewise, in *Accardi*, the Court understood internal departmental structures to constrain department heads’ conduct. It held that the Attorney General had violated regulations of the Department of Justice by announcing the deportation of the petitioner before the Board of Immigration Appeals (BIA) had ruled on his case.<sup>368</sup> The Court observed that “[r]egulations with the force and effect of law supplement” the statutory requirements for suspension of deportation, requiring “decisions at three separate administrative levels below the Attorney General.”<sup>369</sup> These regulations conferred on the BIA the “discretion and power conferred on the Attorney General by law,” making the Board’s decision final unless reviewed by the Attorney General.<sup>370</sup> Based on these procedural regulations, the Court concluded:

The clear import of broad provisions for a final review by the Attorney General himself would be meaningless if the Board were not expected to render a decision in accord with its own collective belief. In unequivocal terms the regulations delegate to the Board discretionary authority as broad as the statute confers on the Attorney General; the scope of the Attorney General’s discretion became the yardstick of the Board’s. And if the word “discretion” means anything in a statutory or administrative grant of power, it means that the recipient must exercise his authority according to his own understanding and conscience. This applies with equal force to the Board and the Attorney General. In short, as long as the regulations remain

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363. *MacDaniel*, 32 U.S. (7 Pet.) at 14.

364. 284 U.S. 370 (1932).

365. 347 U.S. 260 (1954).

366. 284 U.S. at 389.

367. *Id.* at 386.

368. 347 U.S. at 265-66.

369. *Id.*

370. *Id.* at 266 (citing 8 C.F.R. § 90.3(c) (1949)).

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operative, the Attorney General denies himself the right to sidestep the Board or dictate its decision in any manner.<sup>371</sup>

In order to credit the Attorney General's statutory authority over deportation decisions, the Court had to give full effect to the Attorney General's regulations concerning the delegation of that authority. The Board had to make a decision "in accord with its own collective belief" because the Attorney General had vested them with his authority to act on *his own* belief.<sup>372</sup>

The personal dictate of the officer in this way becomes the collective judgment of a group, and flexible discretion hardens into organizational routine. As Thomas Merrill puts it, "under *Accardi*, officials exercise discretion in such a way as to bind themselves."<sup>373</sup> The importance of this principle is not only that it binds the issuing official or office but that regulations can empower other, subordinate officers within a department to exercise independent judgment. *Accardi* erects walls inside the agency. If a regulation has the force of law, that means that subordinates who are empowered by the regulation may rely on it to resist contrary commands of their principals.

Despite *Accardi's* central place in administrative law, scholarly commentary remains uncertain about its legal basis and justification. Some of the case law suggests that the principle is rooted in due process.<sup>374</sup> Merrill argues that *Accardi* follows from the legislative nature of the agency's action, which makes it binding on all, including the agency itself.<sup>375</sup> Elizabeth Magill provides a positive explanation, suggesting that *Accardi* enables agencies to "credibly commit" to policy positions, thus increasing the likelihood of private compliance with the policy.<sup>376</sup> Cass Sunstein and Adrian Vermeule argue that the doctrine is "rooted in ambient thinking about the internal morality of law . . . which forbids 'a failure of congruence between the rules as announced and their actual administration.'"<sup>377</sup>

In contrast to these perspectives, this Article grounds *Accardi* in the departmental structure created by Article II. While departments are governed by their principal officers, they have an existence independent from the will of those officers. They are constituted by stable rules and the patterns of official relationships those rules maintain. *Accardi* constructs the constitutional principle that departments are separable from their heads by denying that the will of the head is always dispositive of what officers

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371. *Id.* at 266-67.

372. *Id.*

373. Merrill, *supra* note 362, at 570.

374. *See* Bridges v. Wixon, 326 U.S. 135, 153 (1945).

375. Merrill, *supra* note 362, at 596-97.

376. Elizabeth Magill, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859, 874 (2009).

377. Sunstein & Vermeule, *supra* note 205, at 1956.

within the department must do. This is not to deny that *Accardi* facilitates credible commitment, furthers rule-of-law values, honors quasi-legislative delegations from Congress, and at least sometimes promotes due process. But these advantages are not merely “ambient,” or grafted on by judicial lawmaking. They instead flow from the longstanding departmental norms of public law, which treat the organization and processes of the executive branch as providing genuine legal constraints on political leadership. The relevant norms are not borrowed from judicial and legislative values that are otherwise foreign to the executive branch. They are rather internal to what the *execution* of law itself requires under our administrative constitution.

These constraints apply not only to the principal officers in the subordinate executive departments, but also to the President himself. In *United States v. Nixon*,<sup>378</sup> the Court affirmed denial of the President’s motion to quash a subpoena of White House tapes by the Special Prosecutor, issued under the authority of regulations issued by the Attorney General. The Court held that the regulations were legally binding, even on the President: “So long as this regulation remains in force the Executive Branch is bound by it, and indeed the United States as the sovereign composed of the three branches is bound to respect and to enforce it.”<sup>379</sup> The District Court for the District of Columbia had previously concluded that it had been unlawful for the Attorney General to fire the Special Prosecutor without the finding of “extraordinary impropriety” required by the regulation.<sup>380</sup> The Supreme Court now held that those same regulations were binding on the President’s conduct. The regulations thus reallocated decisional authority from the President and his principal officer to subordinate officials. The will of the President could not defeat the regular norms of executive departments.

Enthusiasts for unitary executive power tend to think *United States v. Nixon* rested on bad reasoning. On Akhil Amar’s view, “separation of powers militated against judicial intervention in an essentially intra-executive dispute. Given that [the Special Prosecutor] was Nixon’s subordinate, wasn’t the case, in essence, *Nixon (inferior) vs. Nixon (real)*?”<sup>381</sup> This Article has shown that this is the wrong way to think about the constitutional structure of the executive branch. Our constitutional tradition teaches that the executive power is constrained by the rules that constitute the executive departments. Nixon might instruct the Attorney General to change the regulations governing the Special Counsel and remove the Attorney

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378. 418 U.S. 683 (1974).

379. *Id.* at 695-96.

380. *Nader v. Bork*, 366 F. Supp. 104, 108 (D.D.C. 1973) (“The firing of Archibald Cox in the absence of a finding of extraordinary impropriety was in clear violation of an existing Justice Department regulation having the force of law and was therefore illegal.”).

381. Akhil Reed Amar, *Nixon’s Shadow*, 83 MINN. L. REV. 1405, 1406 (1999).

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General if he did not comply. But he could not act contrary to the rules while they were on the books. Otherwise regulations would not have the force of law. They would be subject to unilateral presidential suspension. A presidential power to act contrary to regulation would undermine the system of subordinate checks which Madison envisioned and which the subsequent development of public law has put in place. By requiring the President to effectuate the rescission of a regulation before he can act contrary to it, departmental norms restrain and publicize the exercise of executive power.

The end of Nixon's presidency itself has constitutional significance. *United States v. Nixon* contributed to his resignation, yielding evidence that Congress considered in drawing up articles of impeachment.<sup>382</sup> His exit in disgrace ought to be, and has been, understood as an executive acquiescence in the departmental constraints Congress, the Courts, and the Justice Department itself had imposed. After Nixon, at least up until the tenure of William Barr,<sup>383</sup> there has been a strong norm of "prosecutorial independence from the President" endorsed by Attorneys' General and by the Senate that has confirmed them.<sup>384</sup> That norm is grounded in the departmental structure of executive power, which separates the institutions of government from the will of the President. This distinction requires renewed protection.

### IV. Departmental Norms in Relief

The previous parts have mapped the departmental structure that statutes, case law, and executive branch interpretations have built on the scaffolding of the Constitution's text. This Part will show how this structure has been challenged during the Trump Administration and argue for its reinforcement.

Departmental structure has been tested by personalistic understandings of the Executive. At least since the Reagan Era, unitary theorists of the Executive have resisted any constraint on the President's authority to

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382. Fred H. Altshuler, *Comparing the Nixon and Clinton Impeachments*, 51 HASTINGS L.J. 745, 749 (2000). William Van Alstyne, *A Political and Constitutional Review of United States v. Nixon*, 22 UCLA L. REV. 116, 130 (1974).

383. See William P. Barr, Attorney General, U.S. Dep't of Justice, Remarks by Attorney General William P. Barr at Hillsdale College Constitution Day Event (Sept. 16, 2020), <https://www.justice.gov/opa/speech/remarks-attorney-general-william-p-barr-hillsdale-college-constitution-day-event> [<https://perma.cc/YB3L-PNQ7>] (arguing for political control over prosecutorial decisions); Susan Hennessey & Benjamin Wittes, *What Bill Barr Said and What It Means*, LAWFARE (Sept. 17, 2020), <https://www.lawfareblog.com/what-bill-barr-said-and-what-it-means> [<https://perma.cc/7FHA-V4JX>] (describing speech as "a defense of Barr's politicization of the department's work," including his effort "to serve Trump's personal and political interests in attacking investigations of himself").

384. Bruce A. Green & Rebecca Roiphe, *Can the President Control the Department of Justice*, 70 ALA. L. REV. 1, 22 (2018).

administer the law.<sup>385</sup> They deny that Congress has power to condition the removal of officials on good cause and maintain that the President may command any official as to how she is to exercise her discretion.<sup>386</sup>

President Trump has taken this view to the indefensible extreme, asserting that “I have the right to do whatever I want as President.”<sup>387</sup> But less extreme personalistic understandings of the presidency were already in circulation in previous administrations, including those of Presidents George W. Bush and Barack Obama. Political appointees in the Bush Administration were notorious for undermining, interfering with, and suppressing the judgment of staff scientists at agencies like the Environmental Protection Agency, the Fish and Wildlife Service, and the Food and Drug Administration.<sup>388</sup> The political leadership of the Civil Rights Division of the Department of Justice under President Bush likewise broke from longstanding departmental norms in rejecting career officials’ recommendations regarding pre-clearance under the Voting Rights Act, and also by unlawfully considering political ideology in certain appointment decisions.<sup>389</sup>

The Obama Administration in some instances also undermined independent departmental judgments and concentrated authority in the White House and in political appointees. Consider the administration’s decision in implementing the Affordable Care Act to use a permanent appropriation for tax refunds to fund cost-sharing payments to health insurers.<sup>390</sup> Career civil servants initially concluded that the appropriation could not be used in this way, but were overruled by White House officials and their departments’ leadership.<sup>391</sup> In this case, the failure to adhere to the independent judgment of legal officials within the relevant departments arguably undermined adherence to statutory requirements.<sup>392</sup> Obama’s presidentialism seems also to have further deformalized the administrative

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385. Skowronek, *supra* note 266, at 2075-6.

386. Calabresi & Prakash, *supra* note 32, at 597.

387. Michael Bryce-Saddler, *While bemoaning Mueller probe, Trump falsely says the Constitution gives him ‘the right to do whatever I want’*, WASH. POST (July 23, 2019), <https://www.washingtonpost.com/politics/2019/07/23/trump-falsely-tells-auditorium-full-teens-constitution-gives-him-right-do-whatever-i-want/> [<https://perma.cc/B5LR-Z6E5>].

388. See generally Sidney A. Shapiro, *Political Science: Regulatory Science after the Bush Administration*, 4 DUKE J. CONST. L. & PUB. POL’Y 31 (2009).

389. Heidi Kitrosser, *Accountability and Administrative Structure*, 45 WILLAMETTE L. REV. 607, 645-47 (2009).

390. Matthew B. Lawrence, *Disappropriation*, 120 COLUM. L. REV. 1, 35 (2020); HOUSE COMM. ON ENERGY & COMMERCE (MAJORITY STAFF) & HOUSE COMM. ON WAYS & MEANS (MAJORITY STAFF), JOINT CONGRESSIONAL INVESTIGATIVE REPORT INTO THE SOURCE OF FUNDING FOR THE ACA’S COST SHARING REDUCTION PROGRAM, at 51-52 (2016).

391. Joshua Blackman, *Presidential Maladministration*, 2018 U. ILL. L. REV. 398, 434-40 (2019).

392. See Nicholas Bagley, *Legal Limits and the Implementation of the Affordable Care Act*, 164 U. PA. L. REV. 1715, 1732-35 (2016).

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state. White House review of environmental regulations was often “ad hoc and chaotic rather than predictable and ordered.”<sup>393</sup> Numerous “czars” coordinated policy from the White House outside of the ordinary departmental structures, thus “mak[ing] presidential influence over agencies opaque to political accountability and legal controls.”<sup>394</sup>

While such presidentialism has been a bipartisan creation, the Trump Administration has rapidly accelerated the destruction of departmental norms in service of maximal political discretion. In one strikingly symbolic case, then-Environmental Protection Agency Administrator Scott Pruitt unlawfully constructed a “soundproof privacy booth”<sup>395</sup> in his government office to “deter eavesdroppers.”<sup>396</sup> Hostility towards administrative legality has been far more than symbolic, however. President Trump has removed several Inspectors General who police executive branch conduct.<sup>397</sup> In its effort to end temporary protected status for Haitian immigrants, the Trump Administration’s Department of Homeland Security “departed from past agency practices without explanation and was improperly influenced by the White House.”<sup>398</sup> The response to the Covid-19 pandemic has seen frequent “friction” and “sparring” between the White House and the medical professionals at the Centers for Disease Control, undermining confidence in data integrity.<sup>399</sup> A recent executive order aims to remove civil service protections for administrative officials who exercise policy-making functions, thus subjecting them to the president’s political

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393. Lisa Heinzerling, *Inside EPA: A Former Insider’s Reflections on the Relationship between the Obama EPA and the Obama White House*, 31 PACE ENVTL. L. REV. 325, 325 (2014).

394. Aaron J. Saiger, *Obama’s “Czars” for Domestic Policy and the Law of the White House Staff*, 79 FORDHAM L. REV. 2577, 2583 (2011); see also Mashaw & Berke, *supra* note 350, at 592-94.

395. U.S. Gov’t Accountability Office, Opinion Letter on U.S. Environmental Protection Agency Installation of Soundproof Privacy Booth (Apr. 16, 2019), <https://www.gao.gov/assets/700/691272.pdf> [<https://perma.cc/7UTP-NL6W>].

396. Evan Halper, *EPA Chief Scott Pruitt Broke Law with \$43,000 Phone Booth, Investigators Find*, L.A. TIMES (Apr. 16, 2018), <https://www.latimes.com/politics/la-na-pol-pruitt-phone-booth-20180416-story.html>.

397. Kanishka Singh, *Trump Fires State Department Inspector General in Latest Broadside Against Watchdogs*, REUTERS (May 16, 2020), <https://www.reuters.com/article/usa-trump-inspector-general-idUSKBN22S0A1>.

398. *Saget v. Trump*, 375 F. Supp. 3d 280, 345 (E.D.N.Y. 2019).

399. Lenny Bernstein, Josh Dawsey & Yasmeen Abutaleb, *Growing Friction Between White House, CDC Hobbles Pandemic Response*, WASH. POST (May 15, 2020), [https://www.washingtonpost.com/health/growing-friction-between-white-house-cdc-hobbles-pandemic-response/2020/05/15/0e63978e-9537-11ea-82b4-c8db161ff6e5\\_story.html](https://www.washingtonpost.com/health/growing-friction-between-white-house-cdc-hobbles-pandemic-response/2020/05/15/0e63978e-9537-11ea-82b4-c8db161ff6e5_story.html) [<https://perma.cc/US2H-5BM3>]; Sheryl Gay Stohlberg, *Trump Administration Strips C.D.C. of Control of Coronavirus Data*, N.Y. TIMES (July 14, 2020), <https://www.nytimes.com/2020/07/14/us/politics/trump-cdc-coronavirus.html> [<https://nyti.ms/309Xtsi>].

directive.<sup>400</sup> In these and many other cases,<sup>401</sup> the President and his heads of department have relied on their political discretion to undermine subordinate officials whose authority is rooted in disciplinary knowledge and professional standards.

This Part will consider in greater detail three relatively recent examples in which departmental norms have been put under strain: the *Census Case*, challenges to the leadership structure of Consumer Financial Protection Bureau, and the Special Counsel investigation into Russian interference in the 2016 election. These cases underscore the importance of departmental structure, as well its under-enforcement by today's judicial, executive, and legislative officials. The cases show that departmental norms are not self-executing or inherently resistant to hierarchical control. It is in the nature of both constitutional constructions and functional-constitution arrangements that they are open to revision, to fortification or erosion, depending on how legal actors understand and apply the indeterminate provisions and values of the Constitution in the present.<sup>402</sup> The

400. Exec. Order No. 13,957, 85 Fed. Reg. 67,631 (Oct. 21, 2020). For criticism of the order, see Donald P. Moynihan, *Trump's Plan to Remove Merit from the Merit System*, THE HILL (Oct. 28, 2020), <https://thehill.com/blogs/congress-blog/politics/523101-trumps-plan-to-remove-merit-from-the-merit-system> [<https://perma.cc/Q8U8-W286>].

401. See, e.g. Jacob Carter et al., *Science Under Siege at the Department of Interior: America's Health, Parks, and Wildlife at Risk*, UNION OF CONCERNED SCIENTISTS 1 (Dec. 2018) <https://www.ucsusa.org/sites/default/files/attach/2018/12/science-under-siege-at-department-of-interior-full-report.pdf> [<https://perma.cc/P6TV-UB5A>] (“During the first two years of the Trump Administration, Secretary of the Interior Zinke has . . . oversee[n] relentless attacks on science, ranging from suppressing and sidelining the work of department scientists to systematically refusing to act on climate change.”); Christopher Flavelle, Lisa Friedman & Peter Baker, *Commerce Chief Threatened Firings at NOAA After Trump's Dorian Tweets*, *Sources Say*, N.Y. TIMES (Sept. 9, 2019), <https://www.nytimes.com/2019/09/09/climate/hurricane-dorian-trump-tweet.html> [<https://perma.cc/T3U7-5AHR>] (“The Secretary of Commerce threatened to fire top employees at the federal scientific agency responsible for weather forecasts last Friday after the agency's Birmingham office contradicted President Trump's claim that Hurricane Dorian might hit Alabama . . . .”); Edward Wong & David Sanger, *Pompeo Faces Political Peril and Diplomats Revolt in Impeachment Inquiry*, N.Y. TIMES (Nov. 4, 2019), <https://www.nytimes.com/2019/11/04/us/politics/mike-pompeo-ukraine-state-department.html> [<https://perma.cc/E3NN-C3Z7>] (“Pompeo is facing a revolt in the State Department. Confidence in his leadership has plummeted among career officials, who accuse him of abandoning veteran diplomats criticized by Trump and letting the president's personal political agenda infect foreign policy.”); Evan Osnow, *Trump vs. the "Deep State: How the Administration's Loyalists are Quietly Reshaping American Governance"*, NEW YORKER, <https://www.newyorker.com/magazine/2018/05/21/trump-vs-the-deep-state> [<https://perma.cc/W8A4-B3WJ>] (“hundreds of State Department employees have been banished to a bizarre form of bureaucratic purgatory”); Sheila Kaplan, *Stephen Hahn, F.D.A. Chief, Is Caught Between Scientists and the President*, N.Y. TIMES (Aug. 10, 2020), <https://www.nytimes.com/2020/08/10/health/stephen-hahn-fda.html> [<https://nyti.ms/30N4lgR>] (“Many medical experts — including members of his own staff — worry about whether [FDA Commissioner Stephen] Hahn, despite his good intentions, has the fortitude and political savvy to protect the scientific integrity of the FDA from the president.”).

402. See Grégoire C.N. Webber, *Originalism's Constitution*, in THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 147, 174 (Grant Huscroft & Bradley Miller eds., 2011) (describing a constitutional construction as having the status of a “superstatute” or a “superprecedent”); Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225, 231 (describing functionalism's use of an “evolving

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normative content of departments arises not from crystal clear textual requirements but from a cluster of legal rules, interpretations, and understandings that have accreted among the branches over time. As a consequence, legal officials have agency and responsibility in the present to preserve departmental norms and the underlying rule-of-law values they serve. Departments only serve to check and temper the exercise of executive power if the officials who safeguard them, both within and without the Executive, recognize the distinction between the constitutional interests of the President and his appointees, on the one hand, and the “constitutional rights of the place[s]” that they superintend, on the other.<sup>403</sup> These case studies show that this distinction between departments and power is fraying, and offer some ways in which it might be reinforced.

### A. *The Census Case*

In *Department of Commerce v. New York*,<sup>404</sup> the Court set aside Secretary of Commerce Wilbur Ross’ decision to add a citizenship question to the decennial census. With different majorities signing on to separate parts of Chief Justice Roberts’ opinion, the Court concluded that, while the Secretary’s decision was supported by sufficient evidence in the administrative record, the explanation given was pretextual. Both aspects of the holding engage questions of departmental structure. However, unlike Judge Furman’s opinion in the district court below,<sup>405</sup> Chief Justice Roberts’ opinion failed to adequately safeguard the integrity of agency decision-making processes. The case would have been a welcome opportunity for the Court to apply the *Accardi* doctrine and require agency leadership to give due consideration to the viewpoints of subordinate officials within their department. Instead, Chief Justice Roberts largely hewed to a personalistic understanding of the Commerce Secretary’s discretion that disregarded both the formal rules of the Secretary’s department and the functional constraints that reasoned deliberation ought to have imposed on the Secretary’s reasoning.

The district court below had held that the Secretary’s decision was invalid because it violated the Census Act, was arbitrary and capricious, and rested on a pretextual justification.<sup>406</sup> The conclusion that the decision was

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standard” to resolve structural-constitutional issues); Jack M. Balkin, *Constitutional Crisis and Constitutional Rot*, 77 MD. L. REV. 147, 151 (2017) (describing “constitutional rot” as a “process of decay in the features of our system of government that maintain it as a healthy democratic republic”).

403. THE FEDERALIST NO. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961).

404. 139 S. Ct. 2551 (2019).

405. *New York v. Dep’t of Commerce*, 351 F. Supp. 3d 502 (S.D.N.Y. 2019), *aff’d in part, rev’d in part sub nom.* *Dep’t of Commerce v. New York*, 139 S. Ct. 2551 (2019).

406. *Id.* at 635-65.

arbitrary and capricious rested on several foundations, but for our purposes two are of primary interest. First, Judge Furman found that the stated basis for the decision ran “counter to the evidence” before the Secretary.<sup>407</sup> Secretary Ross asserted that there was no evidence the citizenship question would “materially decrease response rates.”<sup>408</sup> Judge Furman found, to the contrary, that “[t]he Administrative Record is rife with both quantitative and qualitative evidence, from the Census Bureau itself, demonstrating that the addition of a citizenship question to the census questionnaire would indeed materially reduce response rates among immigrant and Hispanic households.”<sup>409</sup> Factual findings from Census Bureau staff were cornerstones of the record that contradicted the Secretary’s decision.<sup>410</sup> By taking the Bureau’s conclusions seriously, Judge Furman honored the departmental value of reason-giving, which distributes authority within an agency between the ultimate decision-maker and subordinates who inform and ought to discipline the decision-maker’s judgment.

The district court also found that the decision was arbitrary and capricious because the Secretary had violated both the Office of Management and Budget’s (OMB) Statistical Policy Directives and the Census Bureau’s Statistical Quality Standards by not conducting pre-testing of the citizenship question.<sup>411</sup> The government had argued that the Bureau’s statistical standards “are not binding on the Secretary himself,”<sup>412</sup> relying on a D.C. Circuit holding that “that an agency is not bound by the actions of its staff if the agency has not endorsed those actions.”<sup>413</sup> Relying in part on *United States v. Nixon*, Judge Furman first noted that the government had acknowledged that the OMB Directives were binding.<sup>414</sup> He then observed that the Bureau’s own standards “were the product of a formal rule-making type process” and “have been ‘endorsed’ by the Commerce Department, as demonstrated by the consistent adherence to them until Secretary Ross’s decision.”<sup>415</sup> Consequently, they likely were binding on the Secretary. In addition, these standards were “consistent with the standards prevailing in the fields of survey design and administration” and “therefore are independently relevant to the analysis of whether his decision was substantively reasonable as the APA requires.”<sup>416</sup> This aspect of the district court’s ruling recognized the way in which the overall structures of the

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407. *Id.* at 649.

408. *Id.* at 647.

409. *Id.*

410. *Id.* at 647-49.

411. *Id.* at 657-58.

412. *Id.* at 658.

413. *Id.* at 659 (quoting *Comcast Corp. v. FCC*, 526 F.3d 763 (D.C. Cir. 2008)).

414. *Id.* at 658.

415. *Id.* at 659.

416. *Id.*

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executive department, including OMB regulations, could bind the conduct of the Secretary. The Census Bureau's own standards, consistently adhered to by secretaries over time, could generate what Justice McLean in *MacDaniel* had called "a kind of common law"<sup>417</sup> within the subordinate department. The Secretary was thus constrained on every side by departmental norms.

The Supreme Court did not follow the district court in these aspects of its arbitrary and capricious analysis, though it affirmed the district court's conclusion that the Secretary's decision had been pretextual. A majority of the Court agreed with Chief Justice Roberts' conclusion that the Secretary's judgment reasonably weighed the Bureau's "inconclusive" analysis against "the value of obtaining more complete and accurate citizenship data."<sup>418</sup> The Justices in the minority on this question agreed with the district court below that the Secretary's explanation was unsupported by the record.<sup>419</sup> Justice Breyer concluded that Ross could point to "nothing significant"<sup>420</sup> to rebut the Bureau's conclusion that asking the question would lower the response rate and "no evidence"<sup>421</sup> to counter the Bureau's finding that asking the question would lead to less accurate citizenship data.

Leaving aside the merits of this dispute for the moment, note that both the majority and the dissenters all acknowledged that the Secretary was compelled by law to engage to some extent with the reasoning and concerns from subordinates within his department in justifying his decisions. Chief Justice Roberts did not deny that the Secretary was "required to consider the evidence and give reasons for his chosen course of action."<sup>422</sup> The bedrock administrative law principles of reasoned decision-making and review on the record obliged the official with statutory discretion to respond to the input of lower ranking officials with knowledge about the subject-matter of his action. Had the Secretary's explanation altogether ignored the express findings of Bureau officials, that would presumably have failed even Chief Justice Roberts' paper-thin review of the Secretary's decision.

Despite this formal acknowledgment that a modicum of engagement with the reasoning of subordinates was necessary, however, Chief Justice Roberts failed to accord that departmental structure the respect it deserved. His opinion here, like his opinion in *Free Enterprise Fund*,<sup>423</sup>

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417. *United States v. MacDaniel*, 32 U.S. (7 Pet.) 1, 15 (1833).

418. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2571 (2019).

419. *Id.* at 2584 (Breyer, J., concurring in part and dissenting in part).

420. *Id.* at 2590.

421. *Id.* at 2592.

422. *Id.* at 2571.

423. *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 499-500 (2010) (describing Justice Breyer's dissent as a "paean to the administrative state" and arguing that "[t]he Framers did not rest our liberties on . . . bureaucratic minutiae," such as "relationships between one agency or

ribbed the Bureau’s “bureaucratise”<sup>424</sup> and portrayed Justice Breyer dissenting opinion as “subordinating the Secretary’s policymaking discretion to the Bureau’s technocratic expertise.”<sup>425</sup> There is no doubt that Justice Breyer was willing to take a fairly hard look at the Secretary’s reasoning. But his opinion and the district court’s ably and exhaustively demonstrated that the Secretary simply had no basis in the record, other than generalized uncertainty, for choosing to ask the citizenship question rather than rely only on administrative records. It would have been one thing if the magnitude of harm to the census response rate was unknown, but nonetheless a citizenship question would generate useful data for the Secretary’s purported purpose of enforcing the Voting Rights Act. However, there was no such benefit side of the ledger that Ross could point to beyond his own say so.<sup>426</sup> The information put forward by subordinates roundly contradicted him.<sup>427</sup>

One can understand the Chief Justice’s worry about “technocratic expertise” gaining the upper hand over the “value-laden” judgment of politically accountable agency heads.<sup>428</sup> Administrative policymaking often involves serious value choices rather than technical judgments. But the departmental structure this Article has unearthed provides a more fundamental reason to respect the judgment of subordinate officials beyond their expertise. The constitutional structure of executive decision-making limits political officers’ jurisdiction to the department they head. Where statutory law and executive branch practice have given content to those departments—creating subordinate offices, requiring procedures to be followed, generating binding regulations, specifying qualifications—all of that content must carry weight when the decision-maker exercises her discretion. It is not merely because there is freestanding value to expert decision-making that the Secretary should pay close attention to subordinate officials in the Bureau of the Census—though surely expertise has its place. Expertise has further legal and indeed constitutional significance because such specialized knowledge is part and parcel of the departmental structure of the Executive. Where the head makes a decision that finds no support in the administrative record, he undermines the departmental order that enables and delimits his authority. Our jurisprudence would be well served by requiring due respect from power holders for the reasoning and judgment of

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department and another,” which Justice Breyer emphasized), quoting *id.* at 524 (Breyer, J., dissenting).

424. *Dep’t of Commerce*, 139 S. Ct. at 2570.

425. *Id.* at 2571.

426. *Id.* at 2592-93.

427. *New York v. Dep’t of Commerce*, 351 F. Supp. 3d 502, 650 (S.D.N.Y. 2019) *aff’d in part, rev’d in part*, 139 S. Ct. 2551 (2019) (“[A]ll of the relevant evidence before Secretary Ross — all of it —”, including evidence presented by Census Bureau staff, indicated that existing records would provide better data for voting rights purposes).

428. *Dep’t of Commerce*, 139 S. Ct. at 2571.

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subordinate officers. Agency action should usually be set aside as arbitrary and capricious if it does not reasonably incorporate or otherwise respond to factual findings and policy analyses presented to the final decision-maker by subordinate officials with relevant subject-matter expertise or authority.

The majority and the dissenters both failed to engage with the district court's convincing finding that the Secretary had violated the practices of the Census Bureau and the rules of the executive branch. The Court thus missed another opportunity to underscore the importance of departmental structure in constraining executive decision-making. The Justices ought to have affirmed the district court's finding that the agency had violated the *Accardi* doctrine by departing from statistical standards issued through a rulemaking process and consistently adhered to by prior secretaries.<sup>429</sup> It instead upheld the conclusion that the Secretary's decision was pretextual, as the Secretary intended to add the citizenship question and subsequently asked the Attorney General to have the Justice Department request the addition of the question.<sup>430</sup> It is noteworthy that Ross' concocted justification relied again on departmental norms of coordination and comity, purporting to honor the requests of another subordinate department within the executive branch. The Court was right to reject this sham departmentalism.<sup>431</sup> Genuine deliberation and reasoned decision-making between officials would be undermined if the Court had accepted a plainly contrived and dishonest reason.

The circumstances of this case were "unusual,"<sup>432</sup> however. The government itself divulged the crucial memo that prompted the district court to order completion of the record and extra-record discovery.<sup>433</sup> Such orders are appropriately rare in administrative law, which relies on a "presumption of regularity" absent a showing of "bad faith."<sup>434</sup> The holding of the *Census Case* rightly condemns official lies disclosed in the course of judicial proceedings. But this holding does little to affirm and safeguard the departmental architecture that consistently conditions the exercise of discretion on procedural conformity, reasoned deliberation, and subject-matter jurisdiction.

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429. *New York*, 351 F. Supp. 3d at 659.

430. *Dep't of Commerce*, 139 S. Ct. at 2574.

431. It failed to subject the government's justification to similar scrutiny in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018). See Huq, *supra* note 50, at 75.

432. *Dep't of Commerce*, 139 S. Ct. at 2576.

433. *New York*, 351 F. Supp. 3d at 548.

434. *Dep't of Commerce*, 139 S. Ct. at 2574-76. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415, 420 (1971).

*B. Leadership of the Consumer Financial Protection Bureau*

In *Seila Law*,<sup>435</sup> the Supreme Court held that the leadership structure of the Consumer Financial Protection Bureau was unconstitutional, as the Agency held significant statutory powers and was headed by a single official removable only for good cause. The case raised departmental concerns about checking power within the internal organization of the executive branch. As this Article has demonstrated, these checks play an important constitutional function in channeling and delimiting political discretion. But the maintenance of such controls does not meaningfully turn on whether an agency is headed by a single principal officer removable only for cause. If the law is duly respectful of departmental norms of reasoned decision-making, conformity to agency regulations, and coordinate forms of action within departments, then the risk of arbitrary decision-making by a single, independent administrator will be kept to a minimum. Maintaining that set of internal controls is far more important for preserving separation-of-powers values than striking a removal restriction on a single agency head. In this regard, the Trump Administration's assertion of White House control over the CFPB posed a much more serious threat to constitutional values than the Bureau's single, independent Director.

The argument in this Section relies largely on functionalist methodology to show how statutory law and working governance arrangements play a more important role than the formal question of removal authority in protecting the system of checks and balances. To this extent, the argument might not have great appeal to formalists. However, *Seila Law* shows unitary theorists relying on both functional and formal arguments to enhance presidential power and to diminish institutional controls within the executive branch. The functional arguments are remarkably weak, whatever may be said of the formal arguments.<sup>436</sup>

The constitutionality of the CFPB's leadership structure had previously been considered by the District of Columbia Court of Appeals in *PHH Corp. v. CFPB*.<sup>437</sup> Sitting en banc to review a panel decision authored by then-Judge Kavanaugh, the court concluded that single-head-for-cause removal posed no constitutional difficulties under *Humphrey's Executor* and *Morrison v. Olson*.<sup>438</sup> In his dissent, then-Judge Kavanaugh renewed

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435. 140 S. Ct. 2183 (2020).

436. The formal arguments against for-cause removal are weak too. See generally Peter Shane, *supra* note 145. The President's duty to faithfully execute the laws would not encompass the power to remove an officer for a reason other than good cause. Jerry L. Mashaw, *Of Angels, Pins, and For-Cause Removal: A Requiem for the Passive Virtues*, U. CHI. L. REV. ONLINE (Aug. 27, 2020), <https://lawreviewblog.uchicago.edu/2020/08/27/seila-mashaw/> [<https://perma.cc/6GAV-56F5>].

437. *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018).

438. *Id.* at 77.

his case for striking down the removal restriction, arguing that the constitutional legitimacy of independent commissions rests on checks and balances between the commissioners: “Multi-member independent agencies do not concentrate all power in one unaccountable individual, but instead divide and disperse power across multiple commissioners or board members.”<sup>439</sup> By contrast, “executive agencies” were constitutionally legitimate because they were subject to the direction and supervision of the President.<sup>440</sup> Then-Judge Kavanaugh thus outlines two independent and perhaps mutually exclusive models of administrative legitimacy: political accountability to the President or diffusion of power among several principal officers. It deserves emphasis that then-Judge Kavanaugh’s distinction between commissions and executive agencies has no foundation in the Constitution’s text. Rather, he draws a functional distinction between the way in which independent commissions check officials’ powers and the way single-headed agencies do.

In *Seila Law*, Chief Justice Roberts adopted this functional aspect of then-Judge Kavanaugh’s reasoning in holding that the CFPB’s structure was unconstitutional.<sup>441</sup> He distinguished *Humphrey’s Executor* in part on the ground that the independent-commission structure permitted in that case was “a multimember body of experts”<sup>442</sup> whereas the CFPB was headed by a “unilateral actor insulated from presidential control.”<sup>443</sup> Following then-Judge Kavanaugh’s alternatives between presidential control or the distribution of power among a board, Chief Justice Roberts reasoned that “the CFPB’s single-Director configuration is incompatible with our constitutional structure. Aside from the sole exception of the Presidency, that structure scrupulously avoids concentrating power in the hands of any single individual.”<sup>444</sup> A single-Director removable for cause would, unlike the chair of commissions like the FTC or the SEC, have “no colleagues to persuade.”<sup>445</sup> Her authority would be checked neither by other principal officers nor by the President.

The kernel of truth in this position is that checks between officials within the executive department are constitutionally valuable. As Madison stated on multiple occasions, checks on the “subordinate distributions of power” protect the public interest and reduce the risk of arbitrary decision-making.<sup>446</sup> That idea is at the very core of the departmental structure the

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439. *Id.* at 165.

440. *Id.* at 177.

441. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2219-20 (2020).

442. *Id.* at 2199.

443. *Id.* at 2192.

444. *Id.* at 2202.

445. *Id.* at 2204.

446. THE FEDERALIST NO. 51 (James Madison) (Jacob E. Cooke ed., 1961).

Constitution outlined and that statute, case law, and executive branch practice carried into effect. Then-Judge Kavanaugh's and Chief Justice Roberts's mistake, however, was to draw a sharp line between commissions and executive departments on this score. "From the first," as Justice Kagan recognized in her dissent, "Congress debated and enacted measures to create spheres of administration . . . detached from direct presidential control."<sup>447</sup> Modern administrative law has fortified and generalized that early structure with its principles of review on the record, reasoned decision-making, and agency self-binding, all of which distribute authority among multiple actors within departments who check one another and their principals. Fortifying these general constraints in the case of the CFPB is the statutory provision that the Financial Stability Oversight Council, composed of the Treasury Secretary and other financial regulatory heads, can set aside CFPB rules by a super-majority vote.<sup>448</sup> The CFPB Director thus acts under the shadow of review by other officials within the executive branch.<sup>449</sup>

The contrast then-Judge Kavanaugh and Chief-Justice Roberts relied on between the independent commission and the traditional executive agency is thus greatly overdrawn.<sup>450</sup> There is no formal or functional basis for such a "binary" distinction between "independent" agencies that sit in a separate "fourth branch" and "executive agencies" that are subject to the President's control.<sup>451</sup> The degree of presidential control over agencies depends on a number of statutory and managerial factors other than for-cause removal,<sup>452</sup> as well as informal "conventions" as to whether or not these agencies are directly responsible to the President.<sup>453</sup> Statutory frameworks, agency rules, and historical practice constitute each agency as partially subject to political discretion and partially constituted by durable norms. The number of officers who lead the agency and the terms under which they may be removed are only some factors relevant to this balance, and hardly should form a sufficient basis for a categorical, constitutional distinction.

Chief Justice Roberts and the Court's majority thus ignored the rich heritage of American public law that constitutes departments as well as commissions to channel discretion through a network of official obligations

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447. *Seila Law*, 140 S. Ct. at 2225 (2020) (Kagan, J., dissenting in part, and concurring in the judgment with respect to severability).

448. 12 U.S.C. §§ 5321, 5513 (2018).

449. *Seila Law*, 140 S. Ct. at 2242 n.13 (Kagan, J., dissenting in part, and concurring in the judgment with respect to severability).

450. Strauss, *supra* note 42, at 590-91.

451. Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 773 (2013).

452. Aziz Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1, 25-36 (2013).

453. See generally Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163 (2013).

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and relationships. It was rather Justice Kagan, in dissent, who gave voice to the departmental executive:

[T]he Constitution . . . giv[es] Congress broad authority to establish and organize the Executive Branch. Article II presumes the existence of “Officer[s] in “executive Departments.” But it does not, as you might think from reading the majority opinion, give the President authority to decide what kinds of officers—in what departments, with what responsibilities—the Executive Branch requires. . . . Instead, Article I’s Necessary and Proper Clause puts those decisions in the legislature’s hands. Congress has the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution” not just its own enumerated powers but also “all other Powers vested by this Constitutions in the Government of the United States, or in any Department or Officer thereof.”<sup>454</sup>

The Appointments and Opinion Clauses likewise create considerable, if somewhat indeterminate, distance between presidential will and the structures of authority and official responsibility that make up the executive branch and its departments.<sup>455</sup> The majority opinion in *Seila Law* failed to consider how these constitutional structures, and the public law issuing through them, have created internal checks that regularize and restrain the head’s conduct. The departmental structure of the Executive, if adequately maintained and safeguarded, ensures that principal officers cannot act on their own, but must be limited to the reasoning, processes, and jurisdiction of the department they head.

In this respect, the more worrying aspect of the CFPB’s recent history was the appointment of Mick Mulvaney, then Director of the White House’s Office of Management and Budget, as Acting Director of the CFPB.<sup>456</sup> As he has in many other cases,<sup>457</sup> President Trump relied on the Federal Vacancies Reform Act,<sup>458</sup> which permits the President to direct Senate-confirmed officials to temporarily occupy certain vacant offices to which they had not been appointed and for which Senate confirmation would ordinarily be required.<sup>459</sup> This move effectively subjected the CFPB to the direct supervision of the White House, outside of the constitutionally prescribed appointment process. Mulvaney’s appointment secured presidential control of the Bureau, despite the fact that Congress exempted

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454. *Seila Law*, 140 S. Ct. at 2277 (Kagan, J., dissenting in part, and concurring in the judgment with respect to severability).

455. *Id.* at 2277 n.3.

456. Patricia A. McCoy, *Inside Job: The Assault on the Structure of the Consumer Financial Protection Bureau*, 103 MINN. L. REV. 2543, 2574-79 (2019).

457. Anne Joseph O’Connell, *Actings*, 120 COLUM. L. REV. 613, 643 (2020).

458. 5 U.S.C. §§ 3345-3349 (2018).

459. *Id.* § 3345(a)(2).

the CFPB from the OMB's regulatory review process and labeled the Agency an "independent bureau."<sup>460</sup>

The designation of Mulvaney as Acting Director, while permissible under the Vacancies Act,<sup>461</sup> undermined the distinction between the departmental structures and the President's personal directive authority. Quite arguably, the President should not be permitted to direct a Senate-confirmed officer to perform the duties of an office in a department different from the one to which he was initially confirmed.<sup>462</sup> The Supreme Court has long held that an already appointed officer may be assigned "additional duties, germane to the office already held by them"<sup>463</sup> without need for a fresh appointment. However, an officer from one department should not generally be understood to have duties germane to a post in another.<sup>464</sup> The appointment of a White House official to lead a subordinate department is in some respects more worrying, as it short-circuits the regular channels of exchange between the President's discretionary power and the specialized jurisdiction and organization of executive branch components. As this Article has shown, the Constitution contemplates jurisdictionally distinct departments that bind and systematize the duties of the officers so as to prevent arbitrariness or abuse of power. While some departments may have overlapping responsibilities, the value of departmental integrity places limits on the interchangeability of official roles.

It would be far preferable, from the perspective of departmental norms, to limit the pool of acting officials to those who already have authority and experience within the department they would be appointed to lead.<sup>465</sup> The leading expert on the Vacancies Act, Anne Joseph O'Connell, has cautioned against restricting the supply of acting officials in this way out of concern to preserve adequate staffing and "management expertise."<sup>466</sup> But cross-agency acting appointments are currently rare,<sup>467</sup> which suggests that limiting such appointments would not pose a major problem for governance. If the practice of appointing inter-departmental acting

460. *Id.* §§ 2576-2577; 12 U.S.C. §§ 5491(a), 5497(a)(4)(E) (2018).

461. 5 U.S.C. § 3345(a)(2) (2018). The Acting Director named by the Obama-appointed Director unsuccessfully sought to enjoin Mulvaney's appointment, arguing that CFPB's organic act's provisions were exclusive of the FVRA procedure. *English v. Trump*, 279 F. Supp. 3d 307 (D.D.C. 2018). *See* O'Connell, *supra* note 457, at 669.

462. *See* O'Connell, *supra* note 457, at 663.

463. *Shoemaker v. United States*, 147 U.S. 282, 301 (1893). *See also* *Weiss v. United States*, 510 U.S. 163, 174 (1994).

464. *See* *Guedes v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 356 F. Supp. 3d 109, 149 (D.D.C. 2019), *cert. denied*, 140 S. Ct. 789 (2020) ("[D]epartment heads tapped to lead other, unrelated departments" would not have duties in their Senate-confirmed office germane to their temporary office).

465. The Vacancy Act permits but does not require this. 5 U.S.C. § 3345(a)(3) (2018).

466. O'Connell, *supra* note 457, at 714.

467. *Id.* at 714 nn.548.

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officers goes unchecked, by contrast, emboldened future presidents might again use the Vacancies Act more routinely in the way Trump did. They might use the Act to fill department leadership with officers who were confirmed to posts much more closely linked to the President's discretionary powers, and less bound by distinct statutory and internal departmental norms.

The best solution, given Congress' primary role in establishing and delineating the boundaries of the departments, would be to amend the Vacancies Act to preclude or at least severely cabin such cross-agency appointments.<sup>468</sup> With much heavier artillery, the Court could read the Appointments Clause itself to preclude such appointments.<sup>469</sup> The latter approach would need to rely on the departmental structure the Constitution contemplates to distinguish permissible appointments of inferior officers within a given department to temporarily occupy the post of head of department, on the one hand, from impermissible appointments of principal or inferior officers from one department to head a different one, on the other. Alternatively, the judiciary might treat the regulatory decisions of agencies under such exogenous leadership with heightened scrutiny. An acting official who has been confirmed to lead a different department than the one she currently works in might be held presumptively to lack the expertise that often justifies deference to the agency's legal interpretations.<sup>470</sup>

### *C. The Special Counsel Investigation*

The Special Counsel's investigation into Russian interference in the 2016 election shows that departmental norms do not provide a significant limitation on discretionary power where those norms merely protect the

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468. One such proposal has been offered by Steve Vladeck, *Trump Is Abusing His Authority to Name "Acting Secretaries." Here's How Congress Can Stop Him*, SLATE (Apr. 9, 2019), <https://slate.com/news-and-politics/2019/04/trump-acting-secretaries-dhs-fvra-senate-reform.html> [<https://perma.cc/XC3J-JEKH>].

469. See *NLRB v. Sw. Gen., Inc.*, 137 S. Ct. 929, 946 (2017) (Thomas, J., concurring) ("Appointing principal officers under the FVRA, however, raises grave constitutional concerns because the Appointments Clause forbids the President to appoint principal officers without the advice and consent of the Senate.").

470. See *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) ("The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances," including the agency's "relative expertness"); *Barnhart v. Walton*, 535 U.S. 212, 222 (2002) (noting the "expertise of the [a]gency" as a reason to deploy *Chevron* deference); *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (noting the agency's lack of "expertise" on the subject-matter as a reason not to); *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 153 (1991) ("[H]istorical familiarity and policymaking expertise account in the first instance for the presumption that Congress delegates interpretive power to the agency rather than to the reviewing court . . ."); *Gonzales v. Oregon*, 546 U.S. 243, 267 (no deference to Attorney General's interpretation in part because "the authority claimed . . . is . . . beyond his expertise"); *Kisor v. Wilkie*, 139 S. Ct. 2400, 2419 (2019) (presumption of deference to an agency's interpretation of its own regulations may be rebutted when the interpretation is not "expertise-based").

prerogatives of political leadership. Equipped with a better understanding of the departmental executive, officials should in the future do a better job of drafting and interpreting regulations so as to safeguard the integrity of their institutions as checks on unlawfulness and abuse of power.

Inter-departmental delegation and deliberation characterized the Special Counsel investigation from start to finish. In 2017, Attorney General Jeff Sessions recused himself from the investigation after having “met with the relevant senior career Department officials.”<sup>471</sup> Deputy Attorney General Rod Rosenstein then appointed Robert S. Mueller, III as Special Counsel because “a Special Counsel is necessary in order for the American people to have full confidence in the outcome. Our nation is grounded on the rule of law, and the public must be assured that government officials administer the laws fairly.”<sup>472</sup> The office of Special Counsel was created and governed not by statute but by Justice Department procedural regulations,<sup>473</sup> issued under the Attorney General’s authority as “head of an Executive department” to “prescribe regulations for the government of his department.”<sup>474</sup> These regulations obliged the Special Counsel to “comply with the rules, regulations, procedures, practices and policies of the Department of Justice” and to “consult with appropriate offices within the Department for guidance” but did not make him “subject to the day-to-day supervision of any official of the Department.”<sup>475</sup> The Special Counsel could only be removed by the “personal action of the attorney general” for “good cause,” including but not limited to “violation of Departmental policies.”<sup>476</sup>

The legal architecture of the Special Counsel’s investigation was thus exemplary of departmental form. While the entire authority for that investigation was rooted in the Attorney General’s statutorily vested powers, that authority had been delegated to a deputy, who in turn delegated authority to an office constituted by, bound to, and protected from interference by departmental regulations. The reason for this delegation was to preserve public confidence in the rule of law within the executive branch. The structure of the office internalized within the Department of Justice the statutory removal restrictions the Court had condoned in *Humphrey’s*

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471. U.S. Dep’t of Justice, Office of Public Affairs, Attorney General Sessions Statement on Recusal (Mar. 2, 2017), <https://www.justice.gov/opa/pr/attorney-general-sessions-statement-recusal> [<https://perma.cc/U2NR-8Z9C>].

472. Email from Rod Rosenstein to James Crowell and Zachary Terwilliger Re: Draft Press Release, Appointment of Special Counsel (May 17, 2019), [https://www.justice.gov/oip/foia-library/foia-processed/general\\_topics/actions\\_dag\\_appointment\\_mueller/download](https://www.justice.gov/oip/foia-library/foia-processed/general_topics/actions_dag_appointment_mueller/download) [<https://perma.cc/9PNP-A2DD>].

473. 28 C.F.R. § 600 (2020).

474. 5 U.S.C. § 301 (2018).

475. 28 C.F.R. § 600.7(a), (b).

476. *Id.* § 600.7(d).

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*Executors*<sup>477</sup> and *Morrison v. Olson*.<sup>478</sup> The regulations implicitly relied on the *Accardi* principle, enforced against the President in *United States v. Nixon*,<sup>479</sup> that departmental regulations were binding upon executive officers' conduct.

As written, though, these protections appeared to be less than absolute. One of the principal authors of the special counsel regulations believed the President could have lawfully ordered Rosenstein to fire Mueller, even without repealing the regulations, given that “our Constitution gives the President the full prosecution power.”<sup>480</sup> And the regulations themselves conclude with the caveat that they “do not . . . create any rights.”<sup>481</sup> Perhaps, then, they were not even truly binding. Nonetheless Trump faced stiff internal resistance from White House Counsel Donald F. McGahn II when he sought to fire Mueller.<sup>482</sup> The investigation then ran its course and Mueller delivered his report. It speaks to the deep, implicit strength of departmental values in our constitutional culture that these arguably unenforceable regulations nonetheless created the shield around which Special Counsel Mueller could conduct an investigation implicating the conduct of a sitting President.

The departmental norms that protected Mueller also operated to constrain him, however. The regulations required the Special Counsel to “comply” with Justice Department “policies.”<sup>483</sup> Mueller cited this provision in declining to “reach a traditional prosecutorial judgment” as to whether the President had committed obstruction of justice:

The [Justice Department’s] Office of Legal Counsel (OLC) has issued an opinion finding that the “indictment or criminal prosecution of a sitting [P]resident would impermissibly undermine the capacity of the executive branch to perform its constitutionally assigned functions” in violation of the “constitutional separation of powers.” Given the role of the Special Counsel as an attorney in the Department of Justice and the framework of Special

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477. 295 U.S. 602 (1935).

478. 487 U.S. 654 (1988).

479. 418 U.S. 683, 684 (1974).

480. Neal Katyal, *Trump or Congress Can Still Block Mueller. I know. I wrote the rules*, WASH. POST (May 19, 2017, 6:00 AM), <https://www.washingtonpost.com/posteverything/wp/2017/05/19/politics-could-still-block-muellers-investigation-i-know-i-wrote-the-rules/> [<https://perma.cc/7A76-P78M>]. That view seems to be inconsistent with *United States v. Nixon*, and relies on a version of the unitary theory that goes far beyond contemporaneous case law on removal. For a critique of Katyal, see Peter M. Shane, *President Trump Can’t Just Fire Robert Mueller*, N.Y. TIMES (June 13, 2017), <https://www.nytimes.com/2017/06/13/opinion/donald-trump-fire-robert-mueller.html> [<https://nyti.ms/2skYaiT>].

481. 28 C.F.R. § 600.10 (2020).

482. Michael S. Schmidt & Maggie Halberman, *Trump Ordered Mueller Fired, but Backed Off When White House Counsel Threatened to Quit*, N.Y. TIMES (Jan. 5, 2018), <https://www.nytimes.com/2018/01/25/us/politics/trump-mueller-special-counsel-russia.html> [<https://perma.cc/67NV-XM3A>].

483. 28 C.F.R. § 600.7(a) (2020).

Counsel regulations, this Office accepted OLC's legal conclusion for the purpose of exercising prosecutorial discretion. . . . We considered whether to evaluate the conduct we investigated under the Justice Manual standards governing prosecution and declination decisions, but we determined not to apply an approach that could potentially result in a judgment that the [P]resident committed crimes. . . . Fairness concerns counseled against potentially reaching that judgment when no charges can be brought.<sup>484</sup>

The Special Counsel's office thus wrestled with the implications of two competing sources of internal departmental law: OLC's conclusion that a sitting President could not be indicted and the Justice Manual's standards as to when a prosecuting attorney should commence or recommend criminal prosecution.

Mueller's conclusion was not inescapable or compelled by those sources.<sup>485</sup> He might have concluded that, despite OLC's judgment that a sitting President could not be indicted, his office could nonetheless reach a conclusion as to whether the President had committed a crime. It is far from clear that "fairness concerns" outweighed the public's and Congress's interest in obtaining a candid prosecutorial assessment of whether the President obstructed an investigation into foreign interference into his own election. But the institutional commitment of the Justice Department to preserving the President's authority imposed a set of considerations the Special Counsel was obliged to consider in how to assess and report on the President's conduct. Where, as in this case, departmental norms develop to protect the discretionary power of the President and his principal officers, such norms will limit internal efforts to police that power. The Mueller investigation thus shows the harm that flows from departmental regulations, interpretations, and culture that treat the interests of the presidential office as largely coterminous with the constitutional obligations of subordinate departments. To function as safeguards rather than permission slips, departmental norms must manifest a commitment to constitutional values other than presidential power.

Mueller's reasoning also rested on a judgment about the allocation of power between the *principal* departments: "a federal criminal accusation against a sitting President would . . . potentially preempt constitutional processes for addressing presidential misconduct."<sup>486</sup> Citing to Congress' constitutional power of impeachment, Mueller suggested that it was ultimately the province of the legislative department to try the President's conduct.

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484. U.S. DEP'T OF JUSTICE, 2 SPECIAL COUNSEL ROBERT S. MUELLER III, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 1-2 (Mar. 2019).

485. ANDREW WEISSMAN, WHERE LAW ENDS: INSIDE THE MUELLER INVESTIGATION 312-23 (2020) (Weissman, an attorney in the Special Counsel's office, recounting his position that the Justice Department regulations did not compel, and in some respects pointed against, Mueller's decision not to make a finding as to whether Trump had obstructed Justice).

486. U.S. DEP'T OF JUSTICE, *supra* note 484, at 1.

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He, an inferior officer in the executive department, would render the facts by which Congress would assess that conduct. But the legal conclusion would rest with the department to which the Constitution had assigned jurisdiction. There is reason to doubt Mueller's judgment on this issue. Congress and the public would arguably have been better served by clear conclusions as to legality of the President's conduct rather than by a rather confusing and legalistic evasion of the issue. But there is little doubt that Mueller's judgments were deeply conditioned and constituted by the departmental norms in which he had spent much of his professional life.<sup>487</sup> His investigation shows the virtues as well as limitations of such institutional commitments in policing "apex criminality."<sup>488</sup>

### Conclusion

This article has identified the departmental structures that constrain the way in which executive power is exercised by the President and his appointed officers. The Constitution identified executive departments within the structure of Article II and assigned to Congress responsibility to structure the administration of law. That rudimentary framework has given rise to an intricate departmental architecture arising from statutory law, judicial decisions, and executive branch opinions, regulations, and practice. This built environment not only restricts but also regularizes and legitimizes the exercise of public power. If properly attended to and maintained, it can provide significant assurance that the implementation of law will be subject to ongoing deliberation, predictable processes, and relevant knowledge.

During a presidency in which arbitrary exercises of executive power seem to have become routine, this departmental structure has been invoked and tested as a fundamental safeguard. But departmental norms of regular and reasoned government conduct are not self-implementing. The constitutional text itself is sparse, leaving the meaning of departments open to legal and political construction. The content of the executive departments has been generated over two and a half centuries of inter-branch commitment to republican ideals of rule-bound discretion and coordinate authority. While the departments have been designed to retain the distributed authority placed in them, these institutions' force and effect is likely to dissipate without renewed care and attention.

With the departmental executive now more clearly in view, the courts, Congress, principal officers, and even future presidents should fortify the institutional position and authority of subordinate officials in order to discipline and inform political judgment. If courts come to better recognize

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487. See WEISSMAN, *supra* note 485, at 323.

488. See generally Aziz Huq, *Legal or Political Checks on Apex Criminality: An Essay on Constitutional Design*, 65 UCLA L. REV. 1506 (2018).

departmental norms, states and civil society groups might use litigation to enforce principal officers' obligation to hear staff concerns and abide by procedural rules. If Congress revises appointment procedures to better secure departmental integrity, agencies could operate with fewer threats of arbitrary political interference. If department heads write procedural rules to require the input of multiple subordinate officials, then department components will have greater difficulty shortcutting reasoned deliberation. Our constitutional culture cannot rely solely on departmental values of regularity, official comity, and jurisdictional limitation to preserve a republican form of government. But a government of laws must manifest such virtues if it is to endure.