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## Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within

**ABSTRACT.** The standard conception of separation of powers presumes three branches with equivalent ambitions of maximizing their powers. Today, however, legislative abdication is the reigning *modus operandi*. Instead of bemoaning this state of affairs, this Essay asks how separation of powers can be reflected within the executive branch when that branch, not the legislature, is making much of the law today. The first-best concept of “legislature v. executive” checks and balances must be updated to contemplate second-best “executive v. executive” divisions. A critical mechanism to promote internal separation of powers is bureaucracy. Much maligned by both the political left and right, bureaucracy serves crucial functions. It creates a civil service not beholden to any particular administration and a cadre of experts with a long-term institutional worldview. This Essay therefore proposes a set of mechanisms that can create checks and balances within the executive branch in the foreign affairs area. The apparatuses are familiar—separate and overlapping cabinet offices, mandatory review of government action by different agencies, civil-service protections for agency workers, reporting requirements to Congress, and an impartial decision-maker to resolve inter-agency conflicts. The idea is to create a more textured conception of the presidency than either the unitary executives or their critics espouse.

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**INTRODUCTION**

Our political system, and much academic writing about it, is premised on the idea that “the 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.”<sup>1</sup> But what if this idea is now bunk?

After all, Publius’s view of separation of powers presumes three branches with equivalent ambitions of maximizing their powers, yet legislative abdication is the reigning *modus operandi*. It is often remarked that “9/11 changed everything”;<sup>2</sup> particularly so in the war on terror, in which Congress has been absent or content to pass vague, open-ended statutes. The result is an executive that subsumes much of the tripartite structure of government.

Many commentators have bemoaned this state of affairs. This Essay will not pile on to those complaints. Rather, it begins where others have left off. If major decisions are going to be made by the President, then how might separation of powers be reflected within the executive branch? The first-best concept of “legislature v. executive” checks and balances must be updated to contemplate second-best “executive v. executive” divisions. And this Essay proposes doing so in perhaps the most controversial area: foreign policy. It is widely thought that the President’s power is at its apogee in this arena. By explaining the virtues of internal divisions in the realm of foreign policy, this Essay sparks conversation on whether checks are necessary in other, domestic realms.

That conversation desperately needs to center on how best to structure the ever-expanding modern executive branch. From 608,915 employees working in agencies in 1930,<sup>3</sup> to 2,649,319 individuals in 2004,<sup>4</sup> the growth of the executive has not generated a systematic focus on internal checks. We are all fond of analyzing checks on judicial activism in the post-*Brown*, post-*Roe* era. So too we think of checks on legislatures, from the filibuster to judicial review. But

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1. THE FEDERALIST NO. 51, at 321-22 (James Madison) (Clinton Rossiter ed., 1961).
  2. *E.g.*, *Meet the Press* (NBC television broadcast Sept. 14, 2003) (remarks of Vice President Richard Cheney), *transcript available at* <http://msnbc.msn.com/id/3080244/default.htm>.
  3. 53 U.S. BUREAU OF FOREIGN AND DOMESTIC COMMERCE, U.S. DEP’T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 168 (1931), *available at* <http://www2.census.gov/prod2/statcomp/documents/1931-01.pdf>.
  4. U.S. OFFICE OF PERS. MGMT., FEDERAL CIVILIAN WORKFORCE STATISTICS: EMPLOYMENT AND TRENDS AS OF SEPTEMBER 2004, at 6 (2004), *available at* <http://www.opm.gov/feddata/html/2004/september/sep04.pdf>.

there is a paucity of thought regarding checks on the President beyond banal wishful thinking about congressional and judicial activity. This Essay aims to fill that gap.

A critical mechanism to promote internal separation of powers is bureaucracy. Much maligned by both the political left and right, bureaucracy creates a civil service not beholden to any particular administration and a cadre of experts with a long-term institutional worldview. These benefits have been obscured by the now-dominant, caricatured view of agencies as simple anti-change agents. This Essay celebrates the potential of bureaucracy and explains how legal institutions can better tap its powers.

A well-functioning bureaucracy contains agencies with differing missions and objectives that intentionally overlap to create friction. Just as the standard separation-of-powers paradigms (legislature v. courts, executive v. courts, legislature v. executive) overlap to produce friction, so too do their internal variants. When the State and Defense Departments have to convince each other of why their view is right, for example, better decision-making results. And when there is no neutral decision-maker within the government in cases of disagreement, the system risks breaking down.

In short, the executive is the home of two different sorts of legitimacy: political (democratic will) and bureaucratic (expertise). A chief aim of this Essay's proposal is to allow each to function without undermining the other. This goal can be met without agency competition—overlapping jurisdiction is simply one catalyzing agent. Other ideas deserve consideration, alongside or independent of such competition, such as developing career protections for the civil service modeled more on the Foreign Service.

Executives of all stripes offer the same rationale for forgoing bureaucracy—executive energy and dispatch.<sup>5</sup> Yet the Founders assumed that massive changes to the status quo required legislative enactments, not executive decrees. As that concept has broken down, the risks of unchecked executive power have grown to the point where dispatch has become a worn-out excuse for capricious activity.

Such claims of executive power are not limited to the current administration, nor are they limited to politicians. Take, for example, Dean Elena Kagan's rich celebration of presidential administration.<sup>6</sup> Kagan, herself a former political appointee, lauded the President's ability to trump bureaucracy. Anticipating the claims of the current administration, Kagan argued that the

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5. *E.g.*, THE FEDERALIST NO. 70, at 424 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing that the presidency is characterized by “secrecy[] and dispatch”).

6. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

President's ability to overrule bureaucrats "energize[s] regulatory policy" because only "the President has the ability to effect comprehensive, coherent change in administrative policymaking."<sup>7</sup> Yet it becomes clear that the Kagan thesis depends crucially on oversight by the coordinate legislative branch (typically controlled by a party in opposition to the President). Without that checking function, presidential administration can become an engine of concentrated power.

This Essay therefore outlines a set of mechanisms that create checks and balances within the executive branch. The apparatuses are familiar—separate and overlapping cabinet offices, mandatory review of government action by different agencies, civil-service protections for agency workers, reporting requirements to Congress, and an impartial decision-maker to resolve inter-agency conflicts. But these restraints have been informally laid down and inconsistently applied, and in the wake of September 11 they have been decimated.<sup>8</sup> A general framework statute is needed to codify a set of practices. In many ways, the status quo is the worst of all worlds because it creates the façade of external and internal checks when both have withered.

This Essay's proposed reforms reflect a more textured conception of the presidency than either the unitary executives or their critics espouse. In contrast to the unitary executives, I believe that the simple fact that the President should be in control of the executive branch does not answer the question of how institutions should be structured to encourage the most robust flow of advice to the President. Nor does that fact weigh against modest internal checks that, while subject to presidential override, could constrain presidential adventurism on a day-to-day basis. And in contrast to the doubters of the unitary executive, I believe a unitary executive serves important values, particularly in times of crisis. Speed and dispatch are often virtues to be celebrated.

Instead of doing away with the unitary executive, this Essay proposes designs that force internal checks but permit temporary departures when the need is great. Of course, the risk of incorporating a presidential override is that its great formal power will eclipse everything else, leading agency officials to fear that the President will overrule or fire them. But just as a filibuster does not tremendously constrain presidential action, modest internal checks, buoyed by reporting requirements, can create sufficient deterrent costs.

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7. *Id.* at 2341.

8. See, e.g., Glenn Kessler, *Administration Critics Chafe at State Dept. Shuffle*, WASH. POST, Feb. 21, 2006, at A4 (describing career officials at the State Department who claim to be stifled by political appointees).

Let me offer a brief word about what this Essay does not attempt. It does not propose a far-reaching internal checking system on all presidential power, domestic and foreign. Instead, this Essay takes a case study, the war on terror, and uses the collapse of external checks and balances to demonstrate the need for internal ones. In this arena, public accountability is low – not only because decisions are made in secret, but also because they routinely impact only people who cannot vote (such as detainees). In addition to these process defects, decisions in this area often have subtle long-term consequences that short-term executives may not fully appreciate.<sup>9</sup>

## I. THE NEED FOR INTERNAL SEPARATION OF POWERS

The treacherous attacks of September 11 gave Congress and the President a unique opportunity to work together. Within a week, both houses of Congress passed an Authorization for Use of Military Force (AUMF);<sup>10</sup> two months later they enacted the USA PATRIOT Act to further expand intelligence and law enforcement powers.<sup>11</sup> But Congress did no more. It passed no laws authorizing or regulating detentions for U.S. citizens. It did not affirm or regulate President Bush's decision to use military commissions to try unlawful belligerents.<sup>12</sup> It stood silent when President Bush accepted thinly reasoned legal views of the Geneva Conventions.<sup>13</sup> The administration was content to rely on vague legislation, and Congress was content to enact little else.<sup>14</sup>

There is much to be said about the violation of separation of powers engendered by these executive decisions, but for purposes of this Essay, I want

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9. As such, this Essay is the counterpart to Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709 (1998). That article developed a view of judges as structurally situated to advise short-term politicians in the long run. Well-functioning bureaucracies are an alternative to reposing that function in judges, particularly in the foreign affairs context in which judicial competence is comparatively lower.
  10. Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (Supp. III 2003)).
  11. Pub. L. No. 107-56, 115 Stat. 272 (2001).
  12. Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001).
  13. Geneva Convention Relative to Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.
  14. Congress's one foray was the Detainee Treatment Act of 2005, which prohibits torture and cruel treatment. Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2739 (2005) (codified at 10 U.S.C.A § 801 note and 42 U.S.C.A. §§ 2000dd to 2000dd-1 (West Supp. 2006)). But that bill was coupled to court-stripping language that eviscerated its force. See Aziz Huq, *Bush and Congress Unjustly Add Barriers To Keep Detainees Away from Courts*, LEGAL TIMES, Jan. 16, 2006, at 43.

to concede the executive's claim—that the AUMF gave the President the raw authority to make these decisions. A democratic deficit still exists; the values of divided government and popular accountability are not being preserved. Even if the President did have the power to carry out the above acts, it would surely have been wiser if Congress had specifically authorized them. Congress's imprimatur would have ensured that the people's representatives concurred, would have aided the government's defense of these actions in courts, and would have signaled to the world a broader American commitment to these decisions than one man's pen stroke.

Of course, Congress has not passed legislation to denounce these presidential actions either. And here we come to a subtle change in the legal landscape with broad ramifications: the demise of the congressional checking function. The story begins with the collapse of the nondelegation doctrine in the 1930s, which enabled broad areas of policymaking authority to be given to the President and to agencies under his control. That collapse, however, was tempered by the legislative veto; in practical terms, when Congress did not approve of a particular agency action, it could correct the problem. But after *INS v. Chadha*,<sup>15</sup> which declared the legislative veto unconstitutional, that checking function, too, disappeared.

In most instances today, the only way for Congress to disapprove of a presidential decree, even one chock full of rampant lawmaking, is to pass a bill with a solid enough majority to override a presidential veto. The veto power thus becomes a tool to entrench presidential decrees, rather than one that blocks congressional misadventures. And because Congress *ex ante* appreciates the supermajority-override rule, its members do not even bother to try to check the President, knowing that a small cadre of loyalists in either House can block a bill.<sup>16</sup> For example, when some of the Senate's most powerful Republicans (John McCain, Lindsay Graham, and John Warner) tried to regulate detentions and trials at Guantánamo Bay, they were told that the President would veto any attempt to modify the AUMF.<sup>17</sup> The result is that once a court

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15. 462 U.S. 919 (1983).

16. See Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132, 146 (1999).

17. OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY: S. 1042—NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2006, at 2-3 (2005), available at <http://www.whitehouse.gov/OMB/legislative/sap/109-1/s1042sap-s.pdf> (stating that the AUMF should not be altered and recommending a veto of a bill to govern the detention and trial of enemy combatants). That bill eventually failed and was resurrected in a different form when Congress agreed to prohibit certain forms of torture in exchange for stripping federal jurisdiction over certain claims from Guantánamo detainees. See Detainee Treatment Act, 119 Stat. 2739.

interprets a congressional act, such as the AUMF, to give the President broad powers, Congress often cannot reverse the interpretation, even if Congress never intended to give the President those powers in the first place. Senator McCain might persuade every one of the other ninety-nine Senators to vote for his bill, but that is of no moment without a supermajority in the House of Representatives as well.<sup>18</sup>

At the same time, the executive branch has gained power from deference doctrines that induce courts to leave much conduct untouched—particularly in foreign affairs.<sup>19</sup> The combination of deference and the veto is especially insidious—it means that a President can interpret a vague statute to give himself additional powers, receive deference in that interpretation from courts, and then lock that decision into place by brandishing the veto. This ratchet-and-lock scheme makes it almost impossible to rein in executive power.

All legislative action is therefore dangerous. Any bill, like Senator McCain’s torture bill, can be derailed through compromise. A rational legislator, fearing this cascading cycle, is likely to do nothing at all.

This expansion of presidential power is reinforced by the party system. When the political branches are controlled by the same party, loyalty, discipline, and self-interest generally preclude interbranch checking. That reluctance is exacerbated by a paucity of weapons that check the President. Post-*Chadha*, Congress only has weapons that cause extensive collateral damage. The fear of that damage becomes yet another reason why Congress is plagued with inertia. And the filibuster, the last big check in periods of single-party government, is useless against the host of problems caused by Presidents who take expansive views of their powers under existing laws (such as the AUMF). Instead of preserving bicameralism, *Chadha* has led to its subversion and “no-cameralism.”

A Congress that conducts little oversight provides a veneer of legitimacy to an adventurist President. The President can appeal to the historic sense of checks and balances, even if those checks are entirely compromised by modern political dynamics. With this system in place, it is no surprise that recent calls

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18. This point explains why the strong theory of *stare decisis*, that courts should not disturb statutory precedents, *see, e.g.*, *Flood v. Kuhn*, 407 U.S. 258, 282 (1972), should not apply to court decisions that interpret legislation to confer greater power on the executive. The strong theory rests on the notion that Congress can override any judicial mistake about a statute, so that congressional silence gives the precedent heightened force. But court decisions that give the President additional powers are different, for they require a bicameral supermajority to override a court interpretation. Congress can therefore find itself stuck with an interpretation of a law that it cannot change—because the President and his loyalists in Congress will block attempts to return to the law’s original intent.

19. *E.g.*, *Dames & Moore v. Regan*, 453 U.S. 654 (1981).



for legislative revitalization have failed. No successful action-forcing mechanisms have been developed; instead we are still in John Hart Ely's world of giving a "halftime pep-talk imploring that body to pull up its socks and reclaim its rightful authority."<sup>20</sup> It is time to consider second-best solutions to bring separation of powers into the executive. Bureaucracy can be reformed and celebrated (instead of purged and maligned), and neutral conflict-decision mechanisms can be introduced. Design choices such as these can help bring our government back in line with the principles envisioned by our Founders.<sup>21</sup>

## II. TOWARD BETTER BUREAUCRACY

Assaulted by political forces, the modern agency is a stew of presidential loyalists and relatively powerless career officials. To this political assault comes an academic one as well, with luminaries such as Elena Kagan celebrating presidential administration and unitary executives explaining why such theories are part of our constitutional design. This vision may work in eras of divided government, but it fails to control power the rest of the time.

Some academics claim that the unitary executive requires, as a historical and constitutional matter, presidential freedom to structure a branch as he sees fit. But the cult of unitariness should be separated from the reality. No one

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20. JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 52 (1993).

21. This Essay therefore attempts to carry the ideas in HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* (1990), to contemporary circumstances, in which Koh's attempts to get Congress and the courts back into the national-security arena have not been adopted. Unlike most treatments, Koh's book suggested a handful of procedures that would produce internal checks, largely over covert operations: (1) inter-agency review of legal opinions authorizing covert action; (2) designation of the Attorney General as a statutory member of the National Security Council; (3) release of certain legal opinions to congressional intelligence committees; (4) the requirement that Presidents make "findings" for all covert action; and (5) the requirement that the National Security Adviser be a civilian, perhaps even the Vice President. *Id.* at 162-66. Separately, Professor Magill has argued that the notion of separation of powers is incoherent and that the divided functions of each branch adequately serve as checks. M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 612-26, 651-54 (2001). Magill concluded, for example, that "the amount and character of that diffusion of state power should be more than sufficient to put to rest concerns about dangerous concentrations of power." *Id.* at 654. Time has not been kind to this claim. Perhaps in 2001, at the time of her writing, divided government produced the coalitions necessary to prevent a massive increase in executive power. The different era ushered in by single-party government, however, suggests a great need for changes beyond the current half-hearted attempt at bureaucracy. That is a key project for those who wish to adapt principles of divided government to the modern age.

seriously suggests that Congress's division of the military into four separate services (Army, Navy, Air Force, Marines) is unconstitutional—despite the fact that the National Security Act of 1947 was passed to stop a President from eliminating one of the four.<sup>22</sup> Just as free-speech proponents often dodge civic responsibility for the consequences of particular speech by hiding behind the Constitution, unitary executives dodge responsibility for a presidential system that does not preserve core values of divided government or provide the President with the best information. By squelching bureaucracy, the President guarantees that information given to him is not the product of independent and sober thought but rather data selectively filtered by loyalists.

But hope exists for better bureaucracy, one consistent with the unitary executive. This Part places the fundamental design question first: What should an agency system look like to foment internal checks and balances? It then takes up the question of who should staff the agencies and how individuals should be induced to exercise their checking function. From there, the Part considers how agency disagreements should be resolved by both the President and courts. And finally, it considers how those disagreements should be publicized outside of the executive to produce external and internal checks.

Before getting into the substance of the proposals, it is worth taking up a criticism that might be present off the bat. Aren't all proposals for bureaucratic reform bedeviled by the very forces that promote legislative inertia? If Congress can't be motivated to regulate any particular aspect of the legal war on terror, then how can it be expected to regulate anything more far-reaching? The answer lies in the fact that sometimes broad design choices are easier to impose by fiat than are specific policies.<sup>23</sup>

Any given policy proposal can get mired in a competition of special interests; indeed, that danger leads many to prefer executive action. Institutional design changes differ from these specific policy proposals because they cut across a plethora of interest groups and because the effects on constituencies are harder to assess due to the multiplicity of changes. The benefits of faction that Madison discussed in *The Federalist No. 51* therefore arise; multitudes of interest groups find things to embrace in the system change. It is therefore not surprising that at the same time that Congress dropped the ball overseeing the legal war on terror it enacted the most sweeping set of changes to the executive branch in a half-century in the form of

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22. Pub. L. No. 80-253, §§ 205-207, 61 Stat. 495, 501-03; see J. ROBERT MOSKIN, *THE U.S. MARINE CORPS STORY* 434 (3d ed. 1992) (discussing the fear that without such an act, "the Corps would be exposed to any future president's wish to reduce or eliminate it").

23. E.g., James M. Lindsay, *Congress, Foreign Policy, and the New Institutionalism*, 38 INT'L STUD. Q. 281, 282 (1994).

the Homeland Security Act of 2002.<sup>24</sup> Indeed, as we shall see, that Act provides an object lesson: Design matters. And by altering bureaucratic arrangements, stronger internal checks can emerge.

*A. Agency Structure: The Need for Bureaucratic Overlap*

Agency design can replicate some functional overlap of responsibilities among the branches. One of the classic divisions of power in the Constitution concerns war. Though Congress declares war, the President is the Commander-in-Chief.<sup>25</sup> That division is structurally inefficient in the sense that it creates the possibility of dissension and rivalry. Yet its inefficiency is the point.<sup>26</sup>

Today, academic concern focuses on the extent to which the President and Congress should control agency decision-making. These discussions center on the President v. Agency axis. Instead, legal reform could focus on a lower rung: President v. (Agency<sub>1</sub> + Agency<sub>2</sub>). Partially overlapping agency jurisdiction could create friction on issues before they are teed up to the President for decision. Otherwise, the President could easily surround himself with people of a similar worldview who lack expertise.

Redundancy conjures up images of inefficiency and waste. In private markets, attacks on redundancy became a dominant component of Taylorism (the early-twentieth-century theory of scientific management) and have motivated many recent agency consolidations.<sup>27</sup> But there are a number of positive redundancies—starting with those in the Constitution itself, which creates two Houses of Congress and divides functions between two political branches. Redundancy has practical benefits as well because reliance on just one agency is risky. It is “a form of administrative brinkmanship. They are extraordinary gambles. When one bulb blows, everything goes.”<sup>28</sup>

As the common saying goes, “Where you stand is a function of where you sit.” By placing individuals in different organizational structures, different viewpoints emerge. For example, Colin Powell acts differently as Secretary of

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24. Pub. L. No. 107-296, 116 Stat. 2135.

25. U.S. CONST. art. I, § 8; *id.* art. II, § 2.

26. “The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power.” *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

27. See, e.g., *Duplication, Overlap, and Fragmentation in Government Programs: Hearing Before the S. Comm. on Governmental Affairs*, 104th Cong. (1995).

28. Martin Landau, *Redundancy, Rationality, and the Problem of Duplication and Overlap*, 29 PUB. ADMIN. REV. 346, 354 (1969) (emphasis omitted).

State than as head of the Joint Chiefs of Staff.<sup>29</sup> Differing perspectives allow agencies to function more like laboratories, by devising new solutions to new problems. That is one rationale for the division of antitrust authority between the Federal Trade Commission and the Department of Justice.<sup>30</sup> Moreover, to the extent that particular agencies are captured by interest groups, overlapping jurisdiction can mitigate the harm.<sup>31</sup>

This notion is similar to a free market. We do not want one supplier of information to the President; a competitive market better supplies clients than a monopolist. Without bureaucratic overlaps, agencies are not pushed to develop innovative ways of dealing with problems and may ossify.<sup>32</sup> It is therefore surprising that market-oriented scholars resist conceptualizing the executive branch in this way. The story of the unitary executive has morphed into a myth of a President who must have seamless control over the executive branch. But there is a counter-story to be told, one that emphasizes checks and balances within the executive branch.

Just as bicameralism and two political branches produce better decisions, so too there is powerful evidence that Presidents succeed because redundancy generates the information a President needs.<sup>33</sup> Perhaps no analysis so condemns the status quo as Richard Neustadt's comparison of Franklin D.

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29. A person "does not live for months or years in a particular position in an organization, exposed to some streams of communication, shielded from others, without the most profound effects upon what he knows, believes, attends to, hopes, wishes, emphasizes, fears, and proposes." HERBERT A. SIMON, *ADMINISTRATIVE BEHAVIOR*, at xvi (3d ed. 1976). A related thought undergirds the aphorisms "two heads are better than one"—that one "head" situated differently from another will generate different ideas. Systems analysis shows that individually unreliable units can be combined to produce high reliability. John von Neumann, *Probabilistic Logics and the Synthesis of Reliable Organisms from Unreliable Components*, 34 *ANNALS MATHEMATICS STUD.* 43 (1956).
30. William E. Kovacic, *Downsizing Antitrust: Is It Time To End Dual Federal Enforcement?*, 41 *ANTITRUST BULL.* 505, 510 (1996).
31. Cf. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 *HARV. L. REV.* 1667, 1684-87 (1975) (describing the process of agency capture). Organized-crime investigations are split among state and federal authorities to avoid the effects of bribes and political influence. Neal Kumar Katyal, *Conspiracy Theory*, 112 *YALE L.J.* 1307, 1380 n.266 (2003).
32. The success of the 1975 Grain Agreement between the United States and the Soviet Union, for example, can be attributed to overlap between the Departments of State, Agriculture, and Labor, and the ability of each to influence the President. See Roger B. Porter, *The US-USSR Grain Agreement (1998)* (Kennedy School of Government Case Program: CR 15-98-1449.0) (on file with author).
33. RICHARD E. NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENTS: THE POLITICS OF LEADERSHIP FROM ROOSEVELT TO REAGAN* 128-33 (rev. ed. 1991).

Roosevelt and Dwight D. Eisenhower. Roosevelt succeeded because he guaranteed a flow of information, using his own contacts in agencies:

He would call you in . . . and he'd ask you to get the story on some complicated business, and you'd come back after a couple of days of hard labor and present the juicy morsel you'd uncovered under a stone somewhere, and then you'd find out he knew all about it, along with something else you didn't know.<sup>34</sup>

Roosevelt used bureaucratic overlaps to produce better policy and information: "His favorite technique was to keep grants of authority incomplete, jurisdictions uncertain, charters overlapping."<sup>35</sup> Eisenhower, by contrast, imparted "more superficial symmetry and order to his flow of information . . . . Thereby, he became typically the last man in his office to know tangible details and the last to come to grips with acts of choice."<sup>36</sup>

Speed will be necessary, as when responding to disaster or sudden invasion. But even in these instances, the need for speed should not preclude ex post examination of executive conduct by agencies sharing jurisdiction. Nor should it preclude some reporting of that analysis. The constant flow of information resulting from redundancy may in turn produce better decision-making.

Of course, a strong President can stymie two agencies almost as easily as he can stymie one.<sup>37</sup> For this reason, overlapping jurisdiction (such as that between the Departments of State and Defense) has failed to mitigate the excesses of the war on terror. In theory, because each department serves a different core constituency, the overlap should produce internal checks. But practice has deviated from theory for three reasons. First, because agencies can be cut out of relevant decisions by political actors, formal overlap has been made irrelevant.<sup>38</sup> Second, even when agencies have been consulted, political

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34. *Id.* at 132 (emphasis omitted).

35. *Id.* (quoting 2 ARTHUR M. SCHLESINGER, JR., *THE AGE OF ROOSEVELT: THE COMING OF THE NEW DEAL* 528 (1959)).

36. *Id.* at 133.

37. This was a classic reason for independent agencies. *See, e.g.*, JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 113-14 (1938).

38. For example, the military commission trial "plan was considered so sensitive that senior White House officials kept its final details hidden from the president's national security adviser, Condoleezza Rice, and the secretary of state, Colin L. Powell, officials said. It was so urgent, some of those involved said, that they hardly thought of consulting Congress" and the longstanding "interagency debate" process was discarded. Tim Golden, *After Terror, a Secret Rewriting of Military Law*, N.Y. TIMES, Oct. 24, 2004, at A1.

influence has compromised the redundant system.<sup>39</sup> Third, redundancy's benefits have collapsed as the legal decision-maker, the Office of Legal Counsel, has been structurally compromised. These problems illustrate that overlapping jurisdiction creates only an architecture to enable internal checks. Without more, that structure collapses under the weight of presidential influence.

At a minimum, legislation can ensure that relevant agencies have a voice in significant policy debates within an administration. A State Department International Law Division or an Army Law-of-War unit means little if politicians can exclude such units from the treaty interpretation process.<sup>40</sup> Congress funds those units to dispense advice to the President and to agencies. While no legislation can require a President to obey them, a statute could, time permitting, mandate consultation before action. Therefore, this Essay's first suggestion is to bolster existing bureaucratic redundancy with legislation setting out inter-agency consultation requirements. Questions about the implementation and meaning of our most sacred treaties deserve vetting by the State and Defense Departments; they are too important to be left to a circle of loyalists at the White House who do not, and structurally will not, have the long-term interests of the nation at heart.

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39. In some areas, the Administrative Procedure Act can reduce harm from political control by requiring agencies to provide some explanation for action, *see, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48-49 (1983), and to apply standards symmetrically from one case to the next, *see Pearson v. Shalala*, 164 F.3d 650, 660 (D.C. Cir. 1999). But the Act exempts agency action involving "a military or foreign affairs function of the United States." 5 U.S.C. § 553(a)(1) (2000); *see also id.* § 554(a)(4) (2000) (exempting agency adjudication in the same categories). *But see* Admin. Conference of the U.S., Elimination of the "Military or Foreign Affairs Function" Exemption from APA Rulemaking Requirements, 1 C.F.R. § 305.73-5 (1975) (recommending the abolition of these "neither necessary nor desirable" exemptions). The lack of this constraint makes internal checks even more important.

40. *See, e.g.*, John Barry et al., *The Roots of Torture*, NEWSWEEK, May 24, 2004, at 26, 30 ("Cut out of the [Geneva Convention] process, as usual, was Colin Powell's State Department. So were military lawyers for the uniformed services. When State Department lawyers first saw the Yoo memo, 'we were horrified,' said one.").

*B. Agency Composition: Protection and Promotion of Civil Servants*

*1. The Foreign Service Model*

In France, the top graduates of the nation's premier institutions go into the civil service.<sup>41</sup> America has no comparable pattern. Our top graduates vie for appointments to supervise agencies, not jobs in the agencies themselves. In those roles, a distrust of career officials can take root. In turn, many agency employees come to resent political appointees, become demoralized, and are unable to exercise any significant control over the path of government.<sup>42</sup>

At least one American institution, however, works in a different way: the Foreign Service. The Service in many respects is "foreign" to American government; it is our closest analogue to a European model in that it attracts excellent college graduates and retains them. The Foreign Service is not perfect; the claim is simply that it functions better than the civil service. Its vitality is particularly striking given our nation's longstanding distrust of a diplomatic corps<sup>43</sup> and because foreign affairs is, for unitary executives, the most sacred of executive bailiwicks.

Two factors account for this success. First, the Foreign Service rewards and protects its employees. Employees are encouraged to rotate through new positions in new countries so that jobs do not grow stagnant over time. Second, the Foreign Service rewards merit and discourages spoils. It creates, for example, extensive opportunities for promotion through its up-or-out system, whereby management must either be promoted or exit the Service after a term of years.

Consider one of the most innovative tools in government today, the State Department's "Dissent Channel." This Channel gives any officer in any embassy the ability and power to disagree with the position taken by the ambassador or high-ranking officials. Under State Department regulations, all dissents are sent to the elite Policy Planning Staff. That office then transmits them to the Secretary of State, the Deputy, and others who are specifically

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41. See William M. Haraway, III & Dana L. Haraway, *American Civil Service Reform: Using France as a Model To Develop Administrative Statesmen in the Senior Executive Service*, INT'L SOC. SCI. REV., Fall-Winter 2004, at 108, 111-12.

42. Paul C. Light, *To Restore and Renew*, GOV'T EXECUTIVE, Nov. 1, 2001, at 32, available at <http://www.govexec.com/features/1101/1101plight.htm>.

43. The Continental Congress even required diplomats to return from overseas every three years, and the "profound suspicion of diplomacy" continued until the 1924 Rogers Act, which created the Foreign Service. DONALD WARWICK, *A THEORY OF PUBLIC BUREAUCRACY* 13 (1975).

involved in the matter. In most cases, the State Department must acknowledge receipt of a dissent within two days and prepare a substantive reply within two months. Dissent messages can be sent anonymously but many times are not because extensive procedures prevent reprisals.<sup>44</sup>

Instead of earning their ire, the Channel has repeatedly earned the praise of Secretaries of State. It was a Secretary of State, Nixon appointee William Rogers, who set up the Channel in 1971 because he believed he was not receiving contrary views. Secretary of State Warren Christopher stated that the Channel “stimulate[s] new thinking” and is “an established, proven, and effective instrument for ensuring that those alternative views are heard by senior policymakers.”<sup>45</sup> Indeed, the Channel is so celebrated that an award is given out every year to the Foreign Service officer who makes the best use of it. When the last recipient accepted the award, he signaled how the Foreign Service attitude reflects the internal checking function celebrated in this Essay: “[W]e signed on for a career that has a larger cause, whoever is the occupant of the White House. Frankness is a form of dissent.”<sup>46</sup> Unlike in other agencies, dissenters are rewarded in the Foreign Service.<sup>47</sup>

Some fear using the Dissent Channel, but the Channel nevertheless yields considerable benefits. It is troubling that other agencies lack anything similar and that this innovative tool has been stuck in the hallways of the State Department.<sup>48</sup> If we want a civil service more like our effective Foreign Service, replication of the Dissent Channel is necessary—perhaps we should even permit employees to dissent outside their agency.<sup>49</sup>

Dissent is only one part of the formula for a successful bureaucracy. The Foreign Service, like every private-sector employer, understands that retention policies and opportunities for advancement are crucial. If workers fear being fired unfairly, the most talented individuals either will not join the enterprise *ex ante* or will act with excess caution *ex post*. And if promotions depend on

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44. 2 FOREIGN AFFAIRS MANUAL § 071.1(c) (1998), available at <http://www.state.gov/s/p/of/abt/18676.htm>.

45. Warren Christopher, Secretary of State, Message on the Dissent Channel (Aug. 8, 1995), available at <http://www.state.gov/s/p/of/abt/18990.htm>.

46. Peter Slevin, *Diplomats Honored for Dissent*, WASH. POST, June 28, 2004, at A19.

47. “Every one of the 22 mid-level officers who won the Rivkin Award from 1968 to 1992 . . . was subsequently promoted into the Senior Foreign Service. Moreover, fully half of them have already served as ambassadors, and others can be expected to do so in time.” Edward Peck, *Where Wave-Makers Can Prosper*, FOREIGN SERVICE J., June 2002, at 32, 34.

48. *Id.* at 32. (“Nothing similar takes place elsewhere, not in the military, quasi-military, or purely civilian agencies; just ours, all alone.”).

49. See *infra* Section II.C (suggesting the replacement of the Office of Legal Counsel with a Director of Adjudication who might receive such dissents).



catering to the political leadership du jour then it will be similarly difficult to attract talented employees. Bureaucracies need structures that avoid a sycophantic race to the bottom whereby workers devote their energies to pleasing political appointees.

The Foreign Service Act of 1980 requires that promotion decisions be made strictly according to rankings by impartial selection boards.<sup>50</sup> These boards must include at least two outsider evaluators, thereby reducing the possibility of favoritism. The boards may base their decisions only on written performance evaluations, and the process is viewed as “one of the Service’s most cherished features.”<sup>51</sup> Moreover, the Service uses a “rank-in-person” system like the military, whereby an officer’s rank does not change with the position she happens to occupy at a given time. The system rewards merit far more often than the civil service’s “rank-in-job” approach, which requires a qualified employee to find an open position graded at a higher level to advance.<sup>52</sup> The result is a Foreign Service with skilled employees who are motivated to do their jobs.<sup>53</sup>

Along with these procedures, the Service uses bonuses and perks to bond employees to the organization and to compensate for hardships.<sup>54</sup> It permits officers to be detailed outside of the State Department to work for international organizations, Congress, educational institutions, and even corporations.<sup>55</sup> The upshot is that few Foreign Service officers resign; as a result, they fill senior policy positions in far greater numbers than those in other executive departments.<sup>56</sup>

The panoply of protections given to the Foreign Service no doubt accounts for the hostility expressed toward it by many political appointees. As former Judge Laurence Silberman put it,

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50. Pub. L. No. 96-465, §§ 601-605, 94 Stat. 2071, 2094-96; see ANDREW L. STEIGMAN, *THE FOREIGN SERVICE OF THE UNITED STATES: FIRST LINE OF DEFENSE* 40-42 (1985); see also David Garnham, *Foreign Service Elitism and U.S. Foreign Affairs*, 35 PUB. ADMIN. REV. 44 (1975); Martin B. Hickman & Neil Hollander, *Undergraduate Origin as a Factor in Elite Recruitment and Mobility: The Foreign Service—A Case Study*, 19 W. POL. Q. 337 (1966).

51. STEIGMAN, *supra* note 50, at 41.

52. *Id.* at 33.

53. ELMER PLISCHKE, *U.S. DEPARTMENT OF STATE: A REFERENCE HISTORY* 660 (1999).

54. STEIGMAN, *supra* note 50, at 50.

55. *Id.* at 45.

56. *Id.* at 6. Today, one of the six undersecretaries and six of the fifteen assistant secretaries hail from the Foreign Service, as do a majority of chiefs of missions. U.S. State Department Biographies Listed by Title or Country, <http://www.state.gov/r/pa/ei/biog/c7647.htm> (last visited Aug. 31, 2006).

I ended my ambassadorial stint with less than friendly feelings toward the Foreign Service as a whole. . . . The practice of having Foreign Service officers in senior State Department positions goes back a long way; in the minds of many it has attained the status of an accepted convention. I believe it is time to reject that convention . . . .<sup>57</sup>

While admitting that the “Foreign Service does attract, on the whole, the ablest men and women who enter government,”<sup>58</sup> Silberman claimed that its entrenched bureaucracy frustrates the ability of the President to conduct foreign affairs. However, the flip side is that the entrenched bureaucracy takes a long-term view. The success of the Foreign Service poses fundamental challenges to unitary executives who think that the President should be able to streamline government to issue commands without challenge. If internal checks work well in an area as sensitive as diplomacy, they deserve consideration in other areas as well.

## 2. *The Civil Service*

At first glance, civil-service personnel policies appear to resemble those in the Foreign Service. The Civil Service Reform Act of 1978,<sup>59</sup> following the long tradition begun with the 1883 Pendleton Act,<sup>60</sup> was “designed to protect career employees against improper political influences or personal favoritism . . . and to protect individuals who speak out about government wrongdoing from reprisals.”<sup>61</sup> The Act prohibits agencies from taking personnel actions that undermine an emphasis on merit<sup>62</sup> and creates an independent agency, the Merit Systems Protection Board, to hear appeals of personnel actions.<sup>63</sup>

But the 1978 Act does not do nearly enough. For one thing, it ensures only retention; it does not attempt to enliven positions or make promotions possible. The best employees are more attuned to securing new and exciting

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57. Laurence H. Silberman, *Toward Presidential Control of the State Department*, 57 FOREIGN AFF. 872, 872 (1979).

58. *Id.* at 883.

59. Pub. L. No. 95-454, 92 Stat. 1111.

60. An Act To Regulate and Improve the Civil Service of the United States, ch. 27, 22 Stat. 403 (1883).

61. S. REP. NO. 95-969, at 18 (1978), as reprinted in 1978 U.S.C.C.A.N. 2723, 2740; see also Jia Lynn Yang, *An Evolving Civil Service*, 35 NAT'L J. 2238, 2238-39 (2003).

62. 5 U.S.C. §§ 2301-2305 (2000).

63. *Id.* §§ 1201-1209; see H. Manley Case, *Federal Employee Job Rights: The Pendleton Act of 1883 to the Civil Service Reform Act of 1978*, 29 HOW. L.J. 283, 297 (1986).

jobs than to keeping their current positions. Moreover, the Act does not protect the jobs of senior employees, such as those in the Senior Executive Service. It also fails to create job rotations or to permit the same sort of “detailing” arrangements that characterize the Foreign Service, and it does little to encourage a system of experienced professionals who feel that they can challenge political decision-making. The key problem is that advancement is often dependent on political actors, who dominate the top layers in most agencies. Thus, even if employees are protected from being fired, they are not protected from career stagnation.

At the same time, the number of political actors in agencies has grown. When the National Security Act of 1947 was written, there were twelve presidential appointees with Senate confirmation in the Department of Defense; in May 1999, that number stood at forty-four.<sup>64</sup> And those numbers mask the increase in lower-level appointees, the so-called Schedule C employees. The Volcker Commission found approximately 3000 presidential appointees in 1989, compared with “barely 200” during Franklin D. Roosevelt’s tenure.<sup>65</sup>

The growth in presidential appointees “year after year inevitably discourage[s] talented men and women from remaining in the career service, or entering in the first place. The ultimate risk is reduced competence among careerists and political appointees alike.”<sup>66</sup> The Volcker Commission concluded that “excessive numbers of political appointees serving relatively brief periods may undermine the President’s ability to govern, insulating the Administration from needed dispassionate advice and institutional memory.”<sup>67</sup> And with political control of agencies comes a lessened ability to reward dissent.

To create a civil service that resembles our Foreign Service, far more attention must be paid to making exciting employment opportunities available without forcing employees to leave the service. Attention could also be given to developing protections for career advancement with a focus on “rank-in-

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64. CHERYL Y. MARCUM ET AL., RAND CORP., DEPARTMENT OF DEFENSE POLITICAL APPOINTMENTS: POSITIONS AND PROCESS 1, 5 (2001), available at [http://www.rand.org/pubs/monograph\\_reports/MR1253](http://www.rand.org/pubs/monograph_reports/MR1253).

65. NAT’L COMM’N ON THE PUB. SERV., LEADERSHIP FOR AMERICA: REBUILDING THE PUBLIC SERVICE 17 (1989) [hereinafter VOLCKER COMMISSION REPORT]; see also ROBERT MARANTO, HERITAGE FOUND., WHY THE PRESIDENT SHOULD IGNORE CALLS TO REDUCE THE NUMBER OF POLITICAL APPOINTEES 4 (2001), available at <http://www.heritage.org/Research/GovernmentReform/BG1413.cfm> (providing a chart of the growth of appointees).

66. VOLCKER COMMISSION REPORT, *supra* note 65, at 18.

67. *Id.* at 7; see also *id.* at 18 (“Career bureaucracies need to be leavened with fresh ideas from outside and need to be responsive to presidential leadership. But they can also be a vast resource of knowledge and impartial judgment.”).

person” systems, “up-or-out” promotion, and other mechanisms borrowed from the Foreign Service.

Granted, it may be unrealistic to envision civil-service reform given contemporary hostility to labor protections, but at least existing protections should not be weakened. Yet that is what happened in the Homeland Security Act of 2002 (HSA), which weakened civil-service protections for approximately 170,000 federal workers.<sup>68</sup> As the HSA began to take shape, then-Homeland Security chief Tom Ridge stated that greater powers to suspend civil-service protections were “profoundly important to achieving [the] goal of securing the homeland.”<sup>69</sup>

The congressional and public debate was framed along one axis—national security versus the labor rights of workers, with Republicans generally taking the view that national security required exemptions from civil-service protections and Democrats cloaking themselves in the rights of workers. But both sides missed a fundamental point: National security can be enhanced, not diminished, by civil-service protections.

Opponents of the President repeatedly made the defensive case that national security was not weakened by labor protections.<sup>70</sup> The President’s defenders responded that at the time of its creation, the civil service was necessary to create a “professional workforce free from cronyism” but contended that in the twenty-first century the model was outdated due to terrorism.<sup>71</sup>

In the tens of thousands of words spilled on these questions, one Senator, Joseph Lieberman, offered the affirmative case for civil-service protection:

Today, the top echelons of Departments are subject to political appointment, as they should be, to allow a President to select the loyal agency leadership he needs and deserves. But the bulk of public employees are protected against the whims of changing political climates. We now understand that effective Departments are made up of both types of employees, working closely together and depending on

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68. 6 U.S.C.A. § 412(c) (West Supp. 2006); *see also* 148 CONG. REC. S7728, 7729 (daily ed. July 31, 2002) (statement of Sen. Byrd) (expressing concern regarding the weakening of civil-service protections).

69. *The Homeland Security Act of 2002: Hearing on H.R. 5005 Before the H. Select Comm. on Homeland Security*, 107th Cong. 24 (2002) (statement of Tom Ridge, Director, Office of Homeland Security); *see also* President George W. Bush, Remarks at Mount Rushmore National Monument in Keystone, South Dakota, 2 PUB. PAPERS 1417 (Aug. 15, 2002).

70. *E.g.*, 148 CONG. REC. H5793, 5803 (daily ed. July 26, 2002) (statement of Rep. Reyes).

71. 148 CONG. REC. S9186, 9195 (daily ed. Sept. 25, 2002) (statement of Sen. Miller).

one another. Career civil servants who develop expertise, know the ins and outs of Government.<sup>72</sup>

Senator Lieberman then noted that “[t]hose who would dismantle the civil service system make it more likely that the Colleen Rowleys”—the FBI agent who wrote a pre-September 11 memo regarding flight students—“of tomorrow and the Department of Homeland Security would be silenced, not heard.”<sup>73</sup> But no one listened.<sup>74</sup>

Though the HSA decision is portrayed in terms of protecting national security, an understanding of internal checks suggests that the opposite may be the case. Though proponents of the HSA claimed that the Act would protect national security, they were wrong; in fact, the Act weakened national security. Because the organization it created, the Department of Homeland Security, can launch reprisals against employees, it cannot effectively guarantee the flow of information that challenges entrenched understandings. Were Congress adequately providing the checking function, the need for agencies to do so would be lessened. But in the absence of a congressional check, a bureaucratic one must be developed.

This was the genius of the 1883 Pendleton Act, which established civil-service protections.<sup>75</sup> The Act was designed so that

[p]ersons in the employ of the government will feel that they are servants of the country and not of a party. . . . They will come to feel that success does not lie wholly in their ability to retain the favor of political leaders who may, for services rendered, desire to put or keep them in office.<sup>76</sup>

We have come far from the Pendleton Act, which was written at a time when agencies were far weaker than they are today. The growth of the executive militates for stronger, not weaker, civil-service protections. Yet can

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72. 148 CONG. REC. S8726, 8739 (daily ed. Sept. 18, 2002) (statement of Sen. Lieberman).

73. *Id.* at 8740.

74. See generally Joseph Slater, *Homeland Security vs. Workers' Rights? What the Federal Government Should Learn from History and Experience, and Why*, 6 U. PA. J. LAB. & EMP. L. 295, 311-12 (2004).

75. As Pendleton's Senate Report warned, under the preexisting spoils system “official positions are bought and sold, and the price is political servitude. Because of it honest but mistaken poverty is induced to forego the comforts and independence which reward honorable toil, and becomes a suppliant for the official crumbs which fall from the table of some political master.” S. REP. NO. 47-576, at iv (1882).

76. *Id.* at xi.

we really say that civil servants today view themselves as “servants of the country and not of a party”? Or that their “success does not lie wholly in their ability to retain the favor of political leaders”? While the Foreign Service might answer both of these questions in the affirmative, few agencies could say the same thing today.

### C. *Internal Adjudication*

Overlapping bureaucratic mandates and protections for civil servants can only take matters so far. With friction comes the need for a decision-maker. Hopefully, the tumble between two agencies will lead to compromise without external resolution, but this aspiration is not always met. Again, unitary executive proponents haunt the debate with the claim that the President must be the final decision-maker. But even a unitary executive needs subordinates to resolve conflicts that need not occupy his attention. A central goal of executive-branch management is, after all, conservation of the President’s time and energy. The subordinate decision-maker could have a different skill set and outlook from the President; for example, her neutrality might inspire confidence, both in the public eye and in the courts, in a way that political decisions could not.

To take one example, Article 5 of the Third Geneva Convention states:

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.<sup>77</sup>

And Article 3 provides that “[i]n the case of armed conflict not of an international character . . . each party” must prohibit “outrages upon personal dignity, in particular, humiliating and degrading treatment” and “affor[d] all the judicial guarantees which are recognized as indispensable by civilized peoples.”<sup>78</sup>

Administration policies departed from these longstanding rules. The lawyerly arguments behind these positions were weak,<sup>79</sup> but what really concerns us here is process, not substance. For fifty years, the executive branch

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77. Geneva Convention Relative to Treatment of Prisoners of War, *supra* note 13, art. 5.

78. *Id.* art. 3.

79. See DEREK JINKS, *THE RULES OF WAR: THE GENEVA CONVENTIONS IN THE AGE OF TERROR* (forthcoming 2008).

has taken the position that POW hearings should be given to all who assert POW status.<sup>80</sup> Indeed, the Army gave these hearings to members of the Viet Cong and guerillas.<sup>81</sup>

How was this weighty issue resolved in the Bush Administration? A deputy in the Office of Legal Counsel (OLC), John Yoo, wrote a memorandum claiming that the Geneva Conventions did not apply to particular detainees.<sup>82</sup> When the State Department found out, its legal adviser, William Taft, disagreed in strong terms. Eventually, the Secretary of State, Colin Powell, complained to the White House, and the Attorney General defended Yoo's position. Yoo's position eventually became the position of the President.<sup>83</sup>

A number of failures characterized this process. For one, the meaning and reach of the Geneva Conventions are, at bottom, legal questions. These questions involve a close reading of text and history, as well as a consideration of precedent. Agencies may differ about the rules, and they need somewhere to go to voice their opinions and seek adjudication. The President is of course one outlet, but he is exceptionally busy. Moreover, a presidential decision is best made, time permitting, after a neutral agency decision-maker has examined the matter first.

The problem with the Yoo memo lay with the supposedly neutral decision-maker, the OLC. It is perfectly appropriate for agencies within the government, such as the CIA or Department of Defense, to disagree with a particular interpretation of the Conventions. One function of agencies is to push the law, particularly in national-security matters. But when that push is made, there has to be dispassionate analysis from a neutral decision-maker, instead of a pep squad masquerading as a quasi-judge.

A crucial function of OLC is to resolve inter-agency legal disputes.<sup>84</sup> In performing this and other functions, OLC prides itself on its independent

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80. Army Reg. 190-8, § 1-6 (1997), available at [http://www.usapa.army.mil/pdffiles/r190\\_8.pdf](http://www.usapa.army.mil/pdffiles/r190_8.pdf).

81. 60 NAVAL WAR COLLEGE, INTERNATIONAL LAW STUDIES: DOCUMENTS ON PRISONERS OF WAR 722-31 (Howard S. Levie ed., 1979).

82. Draft Memorandum from John Yoo, Deputy Assistant Attorney Gen., & Robert J. Delahunty, Special Counsel, to William J. Haynes II, Gen. Counsel of the Dep't of Def. (Jan. 9, 2002), available at <http://www.msnbc.msn.com/id/5025040/site/newsweek>.

83. See Golden, *supra* note 38. Nothing here should be taken as personal criticism of Professor Yoo. While some of his positions are not easily defensible, they are understandable (even predictable) given the structural design of the modern executive branch.

84. See Exec. Order No. 12,146, 3 C.F.R. 409, 411 (1979).

judgment and expertise.<sup>85</sup> When its high-ranking officials become advocates, however, the system breaks down. The decisions of that Office begin to look suspect, resembling a courtroom flush with political influence rather than law. Yet the political pressure on OLC officials is unavoidably immense. They are, after all, political appointees themselves—the head of the Office and all the deputies are politically appointed.<sup>86</sup> They are expected not only to adjudicate disputes but also to advise the President, and they are regularly present at White House meetings. And in this climate, there is simply no way that OLC’s aspiration to be a neutral decision-maker can play out in practice. Simply put, they are lawyers with a client to serve.

OLC’s practice of issuing written opinions is not an office conceit; it reflects the underappreciated fact that in resolving inter-agency disputes, OLC is supposed to function as a court. The client-driven advisory function, however, infects its adjudicatory role.<sup>87</sup> Just as the trend in the government has been to split the litigation function from the advisory function (so that there is no longer a Solicitor General who both litigates and advises), a new split between the advisory and adjudicatory functions of OLC is necessary.<sup>88</sup>

Instead of a compromised OLC, OLC should be stripped of its adjudicatory role and permitted to function only as an adviser to the administration. As counselors, OLC attorneys would help troubleshoot legislation, research discrete areas of law, and provide their best judgment as to legal views. The adjudication function would be transferred to a separate official, a Director of Adjudication, who would resolve inter-agency disputes. Unlike an Article III judge, the Director would not hold tenure for life, but rather for periods of four years that straddle presidential terms, subject only to removal for cause.

At this point, unitary executives blush. How can such an entity not be under the direct control of the President? Even if direct presidential control of the Director is constitutionally compelled (and there are good reasons to think it is), that would not mean the Director is unconstitutional. It would merely make the Director’s decisions subject to presidential overrule. An overruling

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85. Former OLC head Ted Olson stated, “[I]t is not our function to prepare an advocate’s brief or simply to find support for what we or our clients might like the law to be” because OLC aims to make “the clearest statement of what we believe the law provides and how the courts would resolve the matter.” Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 727 (2005) (quoting Olson).

86. *Id.* at 716.

87. *Id.* at 720 n.135 (quoting analyses that find that OLC functions in a client-driven capacity).

88. Indeed, ABA rules have in the past issued different standards for advisers than for litigators. See MODEL CODE OF PROF’L RESPONSIBILITY EC 7-3 (1986); see also Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1161 (1958) (describing a similar distinction).



might be appropriate because the Director might make a mistake or might not be attuned to particular foreign-policy consequences, or because her lack of political accountability might dispose her toward adventurism.

The downside of incorporating a presidential-overrule mechanism is that it may politicize the Director. The Director might fear being overruled and tailor opinions accordingly. But that dark scenario is unlikely to unfold—a rational Director would appreciate the myriad reasons why a President's formal power would not be exercised, such as fear of publicity and lack of expertise.<sup>89</sup> Yet the formality trap looms far larger in executive power debates than it should. We do not clamor for legislation to restrict federal courts from issuing advisory opinions simply because they are the only ones to have announced this restriction on their jurisdiction. So too we do not clamor for legislation to prevent Congress from easily declaring war simply because it could. Instead, in both cases we rely on obvious internal checks. Here, too, publicity, expertise, and good judgment will make it structurally difficult for the President to overrule the Director in many instances.

Government has confronted a similar problem before. The Ethics in Government Act of 1978 created something akin to a Director of Adjudication, albeit in the form of a prosecutor instead of a judge.<sup>90</sup> The Independent Counsel lacked accountability and was often insensitive to a decision's long-term cost.<sup>91</sup> Congress eventually let these powers return to the Justice Department. But the Department then issued regulations creating Special Prosecutors removed from the day-to-day control and influence of political actors.<sup>92</sup> Special Prosecutors are free to conduct their investigations and, after deciding on particular courses of action, must present their proposals to the Attorney General, who retains a veto power.

Critics relied on the formality trap, arguing that internal regulations would falter under the Attorney General's veto power. In response, the regulations required the Attorney General to notify Congress if he interfered with a Special Prosecutor. As a result, lines of accountability were preserved, so much that the

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89. See generally Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 PSYCHOL. BULL. 255, 270 (1999) (discussing empirical research on accountable decision-making).

90. Pub. L. No. 95-521, §§ 601-602, 92 Stat. 1824, 1867-74.

91. See *The Future of the Independent Counsel Act: Hearing Before the S. Comm. on Governmental Affairs*, 106th Cong. (1999) (statement of Janet Reno, Att'y Gen. of the United States).

92. My job at the Department of Justice involved drafting these regulations and the testimony in the preceding footnote. Nothing in this Essay reflects any private knowledge; the regulations and their intended goals have long been matters of public record.

Attorney General could be held responsible for trying to bury an investigation. Thus, the matter would receive political, though perhaps not public, oversight.

Similarly, a presidential overruling of the Director of Adjudication could trigger reporting to Congress. Congress, though unlikely to begin legislating after a single override (for reasons offered in Part I), could use formal pressures of oversight hearings and informal pressures through the media to demand some accountability. While the executive would therefore be accountable to the other branches, instead of directly to the public, these mechanisms would nevertheless function as a valuable constraint. Over time, a culture of compliance might emerge, in which Presidents would not second-guess the opinions of the Director except in extreme instances.

The traditional case against OLC independence is that it leads to less advice rather than more.<sup>93</sup> But there are ways to structure the system to avoid much of this problem. The trick lies, once again, in taking seriously OLC's function as a court. Like a court, the OLC has rules that enable aggrieved parties to bring their disputes to it. Those quasi-“standing” rules could be liberalized to permit more entities to seek the Director's judgment. Bureaucratic overlap does this by creating more parties who can “sue.” A legal dissent channel for employees, not only agencies, to refer legal questions could do even more.

Today, OLC often hears only one side of an issue because a single agency presents an issue to it. As a result, OLC gets a distorted picture, quite unlike a court.<sup>94</sup> Agency overlap would thus create more traditional legal adversaries. By splitting adjudication from advice, agencies, as well as the judicial branch, will develop trust in the new entity. That is the lesson of the ill-fated War Resources Board, created by President Roosevelt in 1939 to manage war mobilization. That Board collapsed after a few months and was replaced by a series of other short-lived boards. The only one to succeed was the Office of War Mobilization (OWM). “To avoid the weakness of cabinet committees and commissions, OWM was a decision maker. To avoid the jealousy and rivalry inspired by the War Production Board, OWM ran no programs, created no czars, and had a minuscule budget. . . . OWM was a courtroom, not an agency.

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93. Pillard, *supra* note 85, at 714 (“[B]ecause resorting to OLC is purely optional, any agency wary of advance constitutional scrutiny of its conduct, or simply unaware of or inattentive to constitutional implications, may fail to seek advice from OLC.”).

94. *Id.* at 737 (“Opposing views are usually unavailable to OLC because the programmatic interests of the requesting entities support only one side. Virtually all requests for OLC advice are privileged and confidential, so there is no opportunity for members of the public, academics, advocacy groups, or others to supply the otherwise-missing information or analyses.”).

It worked.”<sup>95</sup> For similar reasons, the fact that the Director of Adjudication would not have the President’s ear on a daily basis would encourage more disputes to be brought to it and would avoid the jealousy that plagued the War Production Board. OLC at present must dance delicately around its two functions, not only when it works with the President but also when it works with impacted agencies.<sup>96</sup>

The executive has some self-interest in developing an insulated adjudicator of legal issues. The Bush Administration’s chief argument in federal court against, for example, the applicability of the Geneva Conventions to detainees at Guantánamo has been that OLC and the President have determined that the Conventions do not apply. Had a neutral adjudicator prepared a full “lower court” opinion for final presidential decision, the case for judicial deference to the President would have been stronger. But the ad hoc process produced self-serving rationales, particularly as it was conducted in secret.

Courts here can jump-start matters by requiring a system of internal checks before permitting a President to take advantage of the judicial deference historically afforded to presidential decisions. Yet contemporary law suggests the reverse. For example, in *Hampton v. Mow Sun Wong*, the Court held that the Civil Service Commission’s rule barring aliens from service in the federal government was forbidden.<sup>97</sup> But the Justices suggested that if the President (as opposed to a mere agency) issued the rule, it might be permissible.<sup>98</sup> From the perspective of this Essay, the Court might have it somewhat backwards—agency decision-making might be considerably more evenhanded than

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95. JAMES Q. WILSON, BUREAUCRACY 270-71 (2d ed. 2000).

96. Professor Pillard’s excellent article implies that OLC can be reformed without drastic measures, such as by “Encourag[ing] Express Presidential Articulation of Commitment to Constitutional Rights.” Pillard, *supra* note 85, at 745. If one could wave a wand to cause that kind of presidential action, then Pillard’s conclusion would follow. But individual cheering-on in a law review to elect or motivate a certain type of President will have about the same sway as the pep talks to Congress that John Hart Ely described. See *supra* text accompanying note 20.

Pillard’s other solutions, such as increasing the number of published OLC opinions and encouraging employees to act as constitutional whistleblowers, Pillard, *supra* note 85, at 749-53, have much to commend them. These ideas will work far better with the reforms proposed here. For example, Pillard fears that forcing publication of OLC opinions would lead agencies not to seek their advice. Bureaucratic overlap, and its de facto liberalization of “standing,” can mitigate that problem by forcing conflicts to the adjudication “court.” Constitutional whistleblowers, too, are unlikely to have an impact when OLC is not independent (and is therefore unlikely to rule for a whistleblower) and when the whistleblower’s agency superiors are themselves politicized.

97. 426 U.S. 88, 114-17 (1976).

98. *Id.* at 103.

presidential decision-making. At the same time, Presidents have accountability advantages. A penalty default rule like that sketched out here would capture the benefits from each decision-maker.

So too Congress might be able to jump-start internal checks through reporting requirements. Reporting requirements are powerful devices that have gone without much scholarly analysis, though they appear in many places today. For example, the President must report to Congress “as soon as possible” after approval of, and before initiation of, covert action.<sup>99</sup> Such requirements are anathema to unitary executives. These critics face an uphill battle, for their position requires dismantling vast numbers of requirements throughout the Code.<sup>100</sup> Some laws even require reporting to the public—most prominently, the Freedom of Information Act (FOIA).<sup>101</sup> And still other Acts require the President to consult with entities before acting.<sup>102</sup>

In much the same way as the Solicitor General must notify Congress when he declines to defend the constitutionality of a statute, the President could be required to notify Congress when he decides that a particular treaty designed to regulate warfare does not apply to a specific conflict and to provide Congress with the basis for that determination.<sup>103</sup> Other requirements could be created—

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99. 50 U.S.C. § 413b(a)(1) (2000).

100. *See, e.g.*, 8 U.S.C. § 1184(e)(4) (2000) (requiring the President to notify Congress and provide a report before asking the Attorney General to increase or waive the number of nonimmigrant workers permitted to enter the United States); 8 U.S.C. § 1721(c)(2) (Supp. II. 2002) (requiring, as part of the USA PATRIOT Act, the President to consult with Congress in creating a coordination plan among law enforcement and intelligence agencies); 22 U.S.C. § 2022 (2000) (requiring an annual reporting to Congress on “activities of the International Atomic Energy Agency and on the participation of the United States therein”); *id.* § 2364(a)(3) (requiring the President to provide Senate Committees with “written policy justification” before providing arms, credits, or guarantees to foreign governments); *id.* § 2429a-2 (requiring the President to notify Congress within fifteen days after providing assistance to a non-nuclear power that violated an International Atomic Energy Agency safeguard); *id.* § 2799aa-1(a)(2) (requiring notification to Congress if the President furnishes aid to a country that would otherwise be ineligible under nuclear non-proliferation controls); *id.* § 6442(b)(3) (requiring notification if the President determines a country is violating religious freedom severely).

101. 5 U.S.C. § 552(f) (2000) (identifying the Executive Office of the President as subject to FOIA).

102. *E.g.*, 19 U.S.C. § 2155(a) (2000) (requiring the President to “seek information and advice from representative elements of the private sector” and take that advice under consideration when negotiating trade agreements).

103. You might ask whether this requirement is necessary, since the Geneva Convention determinations made by President Bush are now common knowledge. But the President made his determinations on February 7, 2002, and their basis was not publicly revealed for two years (and only then via leak). Richard A. Serrano & Richard B. Schmitt, *Files Show*

for example, notifying Congress of the number of individuals held in military detention, the conditions of their confinement, the allegations (if any) against them, and their nationalities.

Such reporting requirements would not only create an information flow to Congress that would promote external checks but would also eliminate a perverse effect engendered by strengthening the bureaucracy. The more power a bureaucrat has, the greater the President's temptation to staff the position with a loyalist. Reporting requirements can help mitigate this problem by guaranteeing that Congress will learn of the decisions that bureaucrats make and the reasons they gave for making those decisions. Of course, in a one-party government, Congress might not act even with an abundance of material. But reporting requirements, given the two-year election cycle, would have some effect.

That effect might be strengthened by coupling this reform to others, such as minority hearings. Currently, only the majority party in Congress can hold oversight hearings. There is no obvious reason for this winner-take-all system. Imagine, instead, that during periods of single-party government, in which both Houses of Congress and the presidency are controlled by the same political party, the dominant minority party could hold oversight hearings in the Senate.<sup>104</sup> Because the hearings would only create a voice, not a dominant vote, they would not give the minority a weapon to block government actions.

Permitting the minority party to hold hearings might produce modest constraints on domineering executives and could work in synergy with reporting requirements and bureaucratic job protections to ensure better information flow. Oddly, there appears to be no academic discussion of the possibility or advantages of minority hearings in our law reviews. Such hearings might lead to policy stagnation under the eye of greater accountability, or perhaps the hearings will ultimately prove ineffectual. These results are not self-evident, however, and future examination is appropriate.

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*Bush Team Torn over POW Rules*, L.A. TIMES, June 23, 2004, at A1. Such leaked decisions can be presented as *fait accompli*, so that reversing policy would be interpreted as weakness.

104. To further entice support for the idea, legislation could be passed now, to take effect in 2009.

### III. OBJECTIONS AND REFINEMENTS

#### A. Kagan's Presidential Administration

Elena Kagan's recent defense of presidential administration concentrated on domestic policy, but her ideas suggest a criticism of the above proposals. She claims that presidential administration energizes a moribund bureaucracy:

The need for an injection of energy and leadership [by the President] becomes apparent, lest an inert bureaucracy encased in an inert political system grind inflexibly, in the face of new opportunities and challenges, toward (at best) irrelevance or (at worst) real harm. . . . This conclusion, of course, would be less sound to the extent that the political and administrative systems fail to impose adequate limits on the President's exercise of administrative power. Then, the balance between friction and energy would tip toward the opposite extreme—away from the too broad curtailment of regulatory initiative to the too facile assertion of unilateral power. One reason not to fear this outcome relates to the President's accountability to the public . . . .<sup>105</sup>

But this view of the presidency, at least in the realm of foreign affairs, is as far from a description of contemporary reality as are Madison's views, reprinted in the first paragraph of this Essay. Consider such claims in light of the facts that: (1) there is little public accountability when decisions are secret; (2) agency officials have been excluded from providing input on answers to key legal questions; (3) no neutral subordinate decision-maker exists; and (4) the administration has itself asserted that the brunt of these questions are beyond the purview of the courts altogether.

A number of other assumptions are built into Kagan's claim. Kagan was self-consciously writing in an era of divided government,<sup>106</sup> and she was extolling presidential transparency as well. After all, a chief advantage of presidential administration is its accountability. But that claim has little applicability to foreign affairs, in which presidential interventions are often classified or hidden and in which agency conflicts are often swept under the

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105. Kagan, *supra* note 6, at 2344-45. Kagan states that her discussion of the Clinton presidency (which she later calls the "centerpiece" of her article) is about its attempt to use the President's authority to achieve domestic policy goals. *Id.* at 2248; *see also id.* at 2282, 2307, 2345. Also, at a few points, she excludes or distinguishes foreign policy. *See id.* at 2291, 2313 n.267, 2364 n.444, 2371. As such, the above analysis is not a direct criticism of her article but rather of attempts to extend her concept to foreign affairs.

106. *See id.* at 2312.

rug. Accountability can never be a powerful solution in foreign affairs, just as accountability cannot adequately constrain the criminal prosecution power under the Article II Take Care Clause. Instead, a second-best substitute is needed. In the prosecution context, that accountability substitute is a Special Prosecutor and a reporting requirement.<sup>107</sup> In this context, it might take the form of overlapping agency jurisdiction and reporting or consultation requirements.

Given where Kagan once sat, in the White House's Domestic Policy Council, it is not surprising that she lingered over claims that "bureaucracy also has inherent vices (even pathologies), foremost among which are inertia and torpor."<sup>108</sup> With vivid portraits of necrosis—"agencies inevitably develop 'arteriosclerosis'"<sup>109</sup> and "ossification syndrome"<sup>110</sup>—Kagan paints a picture of agencies resting on their laurels and remaining adverse to change. This is, of course, a common feeling for any high-level political appointee in any administration, as Kagan herself recognizes.<sup>111</sup> And while this view is understandable, it invites the question of whether the vantage-point of an administration that wants to get things done is the proper one for setting parameters in constitutional and administrative law. There are sometimes good reasons for employing tradition-bound actors, reasons no doubt underappreciated by political appointees but perhaps wise nonetheless.

Kagan's defense of presidential administration centers largely on the energy a President gives regulatory agencies. But there are values other than efficiency, values celebrated by our Founders. Indeed, a starting point for our government is the evil of government efficiency.<sup>112</sup> Pointing to statements from Hamilton about the dangers of a "feeble executive" and the like, Kagan claims that the "countertradition" of strong, executive vigor outweighs these concerns.<sup>113</sup> But that countertradition presumes an active Congress as an overseer of presidential decision-making. When Hamilton feared a feeble executive, he did

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107. See *supra* text accompanying notes 92, 99-102.

108. Kagan, *supra* note 6, at 2263.

109. *Id.* at 2264 (quoting Louis L. Jaffe, *The Effective Limits of the Administrative Process: A Reevaluation*, 67 HARV. L. REV. 1105, 1109 (1954)).

110. *Id.* (quoting ANTHONY DOWNS, *INSIDE BUREAUCRACY* 158 (1967)).

111. *Id.* at 2272 & n.96.

112. Kagan recognizes this, mentioning in a paragraph the Founders' concerns about checks and balances. *Id.* at 2342.

113. *Id.* at 2342-43 (citation omitted). There are many other ways to deal with ossification besides presidential administration, such as constant infusion of new people, rotational service arrangements modeled on the Foreign Service, opportunities for promotion, overlapping agency jurisdiction to stimulate competition, and so on.

not imagine an executive who had “only” 2.6 million employees and fifteen cabinet secretaries,<sup>114</sup> or a President who could commit hundreds of thousands of troops to the field without a declaration of war and who had the military might to decimate entire continents by pushing some buttons, or a President who claimed he had the ability to set aside treaties ratified by a supermajority of the Senate.

Kagan concedes that agencies do have some expertise that will prove relevant.<sup>115</sup> But the advantage of empowering bureaucrats is not limited to their expertise; it also has to do with their time horizons. Presidents suffer from a last-period problem—a problem seen, for example, in President Clinton’s last-minute pardons. A chief advantage of bureaucracy is to maintain the long-term view. By articulating the prospective costs, an effective bureaucrat is able to refocus government questions away from the crisis du jour.

So, for example, even if a creative reinterpretation of the Geneva Conventions might be in the interest of a President who will soon leave office, it might not be in the long-term interest of the military or the country. The impact on international humanitarian law, and the safety of our own troops, will not manifest itself immediately. Just as Presidents face incentives to deficit-spend, they also face incentives to maximize well-being in the short term at the expense of the longer term. In our system of government, only courts and bureaucrats have longer time horizons. Judges, as generalists with limited jurisdiction, are not situated to protect all of the nation’s long-term interests. Bureaucrats must fulfill that role.

In the end, Kagan is surely right to point out that a President has a “stake” in building an efficient government,<sup>116</sup> but efficiency is not the equivalent of wisdom. Wisdom requires tradition-bound professionalism and the realization that future generations will feel the effects of earlier politicians’ decisions.

### *B. Ackerman’s Political Entrenchment*

Others might come at the problem from the other side, claiming that effective bureaucracy is impossible in America. Bruce Ackerman recently argued, for example, that the checking function of bureaucracy is elusive in a tripartite system of government. His claim is that when American politicians intervene in bureaucratic affairs, they invariably muck them up. Lofty rules of

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114. See *supra* text accompanying note 4.

115. Kagan, *supra* note 6, at 2352-53.

116. *Id.* at 2355 (citing Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, LAW & CONTEMP. PROBS., Spring 1994, at 1, 11).



general applicability become contorted to fit a particular politician's views.<sup>117</sup> And the upshot is to encourage Presidents to staff agencies with loyalists who use the mantra of "central coordination" to control agencies as much as possible.<sup>118</sup>

Ackerman is surely right to say, given the competing political pulls of Congress and the executive, that American bureaucracy cannot function in the European fashion. But there is no reason to think that a modest checking function, akin to the modest check envisioned by the separation of the branches, cannot emerge. After all, such constraints arise in Europe despite the obvious knowledge that whatever position a bureaucrat takes can eventually invite ridicule or praise when a new government comes into power. To be sure, a Prime Minister need not pressure a bureaucracy as often, since he can accomplish his aims via legislation without administrative lawmaking. But limited political capital constrains such action and similarly constrains his ability to overrule bureaucratic decisions.

In both systems, bureaucracies can perform a checking function. Overlapping jurisdiction, civil-service protections and promotion, and the invigoration of the agency bureaucrat as an elite force will produce modest internal checks. This is the lesson from the Foreign Service, which has developed into a well-functioning entity despite being housed in a three-branch government. At the same time, one must be careful not to oversell these reforms. The President will play a more powerful role than his European counterparts by being able to trump bureaucratic decision-making. That approach suffuses the bureaucracy's expertise-laden legitimacy with political legitimacy, while simultaneously valuing quick presidential action and control in times of crisis. The modest internal checking function created by bureaucratic overlap and civil-service protections, coupled with reporting requirements, moves the balance away from the regime of nearly pure presidential control toward a middle ground that more closely approximates the separation of powers laced into the fabric of our constitutional order.

### C. *The Divided Government Problem*

Perhaps the most intractable problem is to engineer a system that controls the excesses of one-party government without creating so many obstacles that

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117. Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 689 (2000).

118. *Id.* at 700-03.

it falls apart during two-party rule. Gridlock, for example, is more common in divided government,<sup>119</sup> and internal checks can exacerbate it.

For these reasons, many of the solutions advocated here are modest checks and balances that permit presidential overruling of bureaucratic decisions. They do not envision an insurmountable minority veto. Instead, they recognize that the current expansion of presidential power requires internal processes that ensure better decision-making. During periods of one-party government, the minority party holds only a single potent weapon, the filibuster. The filibuster, however, only constrains congressional action, not presidential rulemaking. A President who broadly interprets legislation that has already passed (like the AUMF) is not subject to even the filibuster constraint. For that reason, long-term changes such as civil-service protections are necessary, even if they have the undesirable byproduct of frustrating presidential administration.

An alternative to long-term changes is to activate checking mechanisms only during periods of one-party government. This Essay suggested one such mechanism, minority-party oversight hearings, to be triggered only during such periods. This trigger idea could be expanded elsewhere. For example, the minority party in Congress could be permitted to appoint two ombudsmen to each agency during periods of one-party government. Those ombudsmen would serve as clearinghouses for agency whistleblowers and would report their findings to both houses of Congress and, in appropriate cases, to the public.

This model, which builds on and supplements the current system of inspectors general, would be another way to utilize existing structures to produce more vibrant internal checks. Over fifty inspectors general serve today, and they are structurally insulated from control by agency heads and required to report their findings biannually to Congress.<sup>120</sup> While these officers no doubt exercise a check on abuse<sup>121</sup> (and are insulated from political control in precisely the way that unitary executive proponents fear<sup>122</sup>), they currently focus on mismanagement and fraud, not on the development of sound policy.

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119. Kagan, *supra* note 6, at 2344.

120. Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101; Inspector General Directory, <http://www.ignet.gov/igs/homepage1.html> (last visited Aug. 29, 2006). See generally PAUL C. LIGHT, *MONITORING GOVERNMENT: INSPECTORS GENERAL AND THE SEARCH FOR ACCOUNTABILITY* (1993).

121. See Margaret J. Gates & Marjorie Fine Knowles, *The Inspector General Act in the Federal Government: A New Approach to Accountability*, 36 ALA. L. REV. 473, 473-78 (1985).

122. See Christopher S. Yoo, Steven G. Calabresi & Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945-2004*, 90 IOWA L. REV. 601, 680-81 (2005).

Such scandal jurisdiction eclipses the far more important matters involving the merits of particular issues.<sup>123</sup> An ombudsman model could address this problem, dedicating officers to the types of weighty issues that currently occupy the State Department Dissent Channel.

## CONCLUSION

America faces a choice. It can either take its chances with an extremely powerful executive branch and the attendant risks that the courts will underreact and overreact, or it can harken back to a tradition of divided government that has served our country well. September 11 did change everything, but it is up to us to figure out how to translate the ideas of divided government into a modern age in which Presidents must act quickly to avoid calamity.

Courts, of course, are not unaware that a trend toward greater executive power in this time of crisis exists. As a result, one can expect that as the executive becomes more monolithic, courts will function as a sort of check. But judicial checking is bound to fail. It will often occur too late, if at all. Courts lack expertise in many areas, and they may intervene when they should not and refrain from intervening when they should. For this reason, and others advanced in this Essay, a set of institutional design choices must be made that permits both sources of executive legitimacy—democratic will and expertise—to function simultaneously.

It might be tempting to take the ideas advanced here and implement them in the domestic sphere, reasoning that foreign affairs is the most difficult area in which to curb presidential powers. However, the foreign affairs arena is also replete with civil-liberties concerns that are not properly addressed in the political process. Moreover, because state governments often exercise a checking function in the domestic sphere,<sup>124</sup> there may be less need for internal checks. Finally, because many foreign-policy decisions are made in secret, political accountability will not be as much of a constraint as in the domestic context. Political accountability is a central tenet of the unitary executive, but it utterly fails to justify expansive presidential powers deployed in secret and under legal opinions designed to remain secret.

The pendulum today has begun to swing so far toward executive branch vigor that one must fear that the principles of divided government embraced by our Founders are no longer working. By giving force to traditions that are

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123. See Mary De Rosa, *Privacy in the Age of Terror*, WASH. Q., Summer 2003, at 27, 35.

124. See THE FEDERALIST NO. 51 (James Madison), *supra* note 1, at 323.

## INTERNAL SEPARATION OF POWERS

already part of our subtle constitutional landscape—bureaucratic overlap, civil-service protections, internal adjudication, and reporting requirements—some of this movement can be pulled back toward equilibrium.