

2009

The Interdependent Relationship Between Internal and External Separation of Powers

Gillian E. Metzger
Columbia Law School, gmetzg1@law.columbia.edu

Follow this and additional works at: https://scholarship.law.columbia.edu/faculty_scholarship



Part of the [Constitutional Law Commons](#), and the [President/Executive Department Commons](#)

Recommended Citation

Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, EMORY LAW JOURNAL, VOL. 59, P. 423, 2009; COLUMBIA PUBLIC LAW RESEARCH PAPER NO. 09-213 (2009).
Available at: https://scholarship.law.columbia.edu/faculty_scholarship/1599

This Working Paper is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact scholarshiparchive@law.columbia.edu.

Columbia Law School

Public Law & Legal Theory Working Paper Group

Paper Number 09-213

THE INTERDEPENDENT RELATIONSHIP BETWEEN INTERNAL AND EXTERNAL SEPARATION OF POWERS

(version of Oct. 7, 2009)

BY:

PROFESSOR GILLIAN E. METZGER
COLUMBIA LAW SCHOOL

ESSAY:
THE INTERDEPENDENT RELATIONSHIP BETWEEN INTERNAL AND EXTERNAL
SEPARATION OF POWERS

Gillian E. Metzger*

It has been the best of times and the worst of times for internal separation of powers. Over the past few years, internal checks on executive power have been central topic of legal academic debate — rarely have details of public administrative structure received so much attention. To some extent, this sudden popularity reflects growing interest in questions of institutional design.¹ Unfortunately, however, another reason for this attention is the prominent erosion and impotence of such internal constraints under the Bush administration.

Though differing in subject area and form, the instances in which the Bush administration appeared to evade and perhaps violate internal constraints on administrative decisionmaking can largely be grouped under the heading of politicization of administration.² Some involved allegations that White House ideology and politics were determining agency decisions instead of statutory criteria and professional assessment, like EPA's denial of California's application for a waiver to set automobile emission limits for greenhouse gases or FDA's refusal to allow the Plan B emergency contraceptive to be sold over-the-counter.³ Others involved charges of misuse of

* Professor of Law, Columbia Law School.

¹ See, e.g., Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. Rev. 678, 875, 886-88 (2003); Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 Duke L. J. 1277, 1279-86 (2001); Jerry L. Mashaw, *Accountability and Institutional Design: Some Thoughts on the Grammar of Governance*, in Michael Dowdle ed., *Public Accountability: Designs, Dilemmas and Experiences* 115-156 (2006).

² David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 Geo. Wash. L. Rev. 1095, 1096 (2008); Donald P. Moynihan & Alasdair S. Roberts, *The End of an Idea? The Bush Administration and the Exhaustion of the Politicized Presidency 4* (La Follette School, Working Paper No. 2008-024, 2008), *available at* <http://www.lafollette.wisc.edu/publications/workingpapers>.

³ See Memorandum Re: EPA's Denial of the California Waiver, House Committee on Oversight and Government Reform 1-2 (May 19, 2008), *available at* <http://oversight.house.gov/story.asp?ID=1956> (follow link to "Memo: EPA's Denial of the California Waiver") (noting that "[t]he record before the Committee suggests that the White House played a pivotal role in the decision to reject the California petition," and also that "[i]nternal EPA documents and transcribed interviews with EPA staff show that the agency career staff all supported granting the California petition"); Nina A. Mendelson, *The California Greenhouse Gas Waiver Decision and Agency Interpretation: A Response to Professors Galle and Seidenfeld*, 57 Duke L.J. 2157, 2169 (2008) (noting "apparent (though informal) White

personnel decisions for political purposes, such as claims that political affiliation and ideology were a basis for civil service hiring at the Department of Justice (DOJ).⁴ Still others involved efforts to restrict information dissemination and insert White House appointees into agency rulemaking decisions allegedly to serve the administration's political agenda.⁵ Yet another category involved efforts to evade or silence dissenting internal voices, a phenomenon particularly documented with respect to development of national security policy.⁶

House involvement" in reviewing California's waiver application); Gillian E. Metzger, *Abortion, Equality, and Administrative Regulation*, 56 *Emory L.J.* 865, 901–02 (2007) [hereinafter Metzger, *Administrative Regulation*] (arguing that, "after-the-fact justifications reinforce the suspicion that the FDA's decision [to deny over-the-counter status to Plan B emergency contraceptives] was driven more by moral opposition to teenage sex and politics than the public health concerns that constitute the agency's statutory mandate").

⁴ See, e.g., Office of the Inspector Gen. & Office of Prof'l Responsibility, U.S. Dep't of Justice, *An Investigation of Allegations of Politicized Hiring and Other Improper Personnel Actions in the Civil Rights Division 1* (2008), *available at* <http://www.usdoj.gov/oig/special/index.htm> (follow "An Investigation of Allegations of Politicized Hiring and Other Improper Personnel Actions in the Civil Rights Division, July 2, 2008 (Released Publicly January 13, 2009)); Office of the Inspector Gen. & Office of Prof'l Responsibility, U.S. Dep't of Justice, *An Investigation into the Removal of Nine U.S. Attorneys in 2006* (2008), *available at* <http://www.usdoj.gov/oig/special/s0809a/index.htm>.

⁵ See, e.g., Mark Bowen, *Censoring Science* 15–16, 34, 36, 49–50, 56, 124, 227 (2008) (describing how NASA scientists were required to pre-clear media appearances); Holly Doremus, *Scientific and Political Integrity in Environmental Policy*, 86 *Tex. L. Rev.* 1601, 1603–17 (2008) (describing complaints lodged against Bush Administration for editing scientific evaluations and censoring agency scientists); Michele Estrin Gilman, *The President as Scientist-in-Chief*, 45 *Willamette L. Rev.* 565, 566 (2009) (noting allegations by government scientists of political litmus tests, censorship, and political interference by the Bush administration); Michael Specter, *The Bush Administration's War on the Laboratory*, *New Yorker*, March 13, 2006 (reporting administration officials "repeatedly altered government climate reports in order to minimize the relationship between [greenhouse gas emissions] and global warming"); see also Exec. Order No. 13,422 §§ 4(b), 5(b), 72 *Fed. Reg.* 2763, 2764 (Jan.18, 2007) (adding requirement that approval of agency regulatory policy officers ordinarily be required for rulemaking to commence and that such officers be presidential appointee chosen in consultation with the Office of Management and Budget).

⁶ Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* 166–68 (2007) (explaining White House "made it a practice to limit readership of controversial legal opinions," and that "under directions from the White House, O.L.C. did not show [the 2002 torture memo] to the State Department, which would have strenuously objected," a practice Goldsmith "came to believe ... was done to control outcomes in opinions and minimize

A possible lesson to draw from these incidents is that internal constraints are ultimately of limited effect in checking aggrandized presidential authority. To my mind, that conclusion is unduly pessimistic. Examples also exist of internal resistance playing an important role in constraining the Bush administration's efforts to push its policy beyond legal limits.⁷ In addition, constraints that are ineffective in high profile policy disputes may have significant greater potency in less public and politically charged contexts—and in high profile contexts, even internal checks with limited effect may be preferable to no checks at all. Moreover, presidential insistence on a policy position over internal resistance may not actually be an example of internal constraint failure. Instead, sometimes such insistence may be constitutionally desirable instances of direct presidential oversight of the executive branch decisionmaking that foster political accountability. At a minimum, no clear line separates forceful presidential assertion of regulatory priorities and presidential aggrandizement, as recent discussion of the Obama administration's expansion of White House policy staff demonstrates.⁸

I therefore see benefits from paying greater attention to internal administrative design, and in particular to analyzing what types of administrative structures are likely to prove effective and appropriate in different contexts.⁹ But I believe that attending to internal constraints alone

resistance to them”) (referencing Memorandum from Jay S. Bybee, Assistant Attorney General, Department of Justice Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002)).

⁷ Dan Eggen & Paul Kane, *Gonzales Hospital Episode Detailed*, Wash. Post, May 16, 2007, at A1 (describing incident in which Attorney General John Ashcroft rebuffed White House aides attempting to obtain his approval for re-authorization of National Security Agency surveillance program); David Johnston & Scott Shane, *Notes Detail Pressure on Ashcroft Over Spying*, N.Y. Times, Aug. 17, 2007, at A14 (same); see also Julian E. Barnes, *Military Fought to Abide by War Rules*, L.A. Times, June 30, 2006, at A1 (describing conflict between administration and military lawyers over military commissions).

⁸ President Obama, has, for example, appointed numerous so-called “czars” to coordinate legislative and policy initiatives in the White House, see, e.g., Bruce Ackerman, *A Role for Congress to Reclaim*, Wash. Post, March 11, 2009, at A15 (arguing White House Czars likely to overshadow Cabinet officials); Christi Parsons & Tom Hamburger, *White House Czars’ Power Stirs Criticism*, Chicago Tribune, March 5, 2009, at XXX (describing criticism of expanded use of White House officials to coordinate policy matters).

⁹ A recent example of political attention to institutional design is the Obama administration's proposal to pull responsibility for consumer protection from current federal financial regulators and instead house this function, with expanded powers, in a new single-focus agency, in order to ensure that consumer protection in financial contexts receives adequate attention. Binyamin Appelbaum and David Cho, *Obama Blueprint Deepens Federal Role in Markets*, Wash. Post, June 17, 2009, at XXX (describing White House plan to create consumer protection agency).

is too narrow a focus because it excludes the crucial relationship between internal and external checks on the executive branch. Internal checks can and often are reinforced by a variety of external forces—including not just Congress and the courts, but also state and foreign governments, international bodies, the media, and civil society organizations. Moreover, the reinforcement can also work in reverse, with internal constraints serving to enhance the ability of external forces, in particular Congress and the courts, to exert meaningful checks on the executive branch. Greater acknowledgment of this reciprocal relationship holds import both for fully understanding the separation of powers role played by internal constraints and for identifying effective reform strategies.

One internal-external connection meriting additional attention is the link between internal executive branch constraints and external legal doctrine. Contemporary separation of powers doctrine makes little effort to reinforce internal executive branch constraints and instead largely focuses on whether internal constraints intrude too far on presidential power, to the extent it considers such constraints at all. This stands in some contrast to administrative law doctrine, which focuses primarily on internal executive branch behavior and often seeks to encourage executive branch adherence to constraints on agency action. This division of labor is not coincidental; the availability of administrative law restrictions on agencies is one reason why the courts have not sought to link internal and external constraints as a matter of separation of powers analysis. Judicial concerns about not unduly intruding into congressional and presidential choices in structuring administration, and about the courts' limited competency on questions of institutional design, are likely in play as well. Yet greater exploration of how separation of powers doctrine could be used to reinforce internal executive branch constraints appears justified, given the important separation of powers function that internal constraints can serve.

In what follows, I first describe internal separation of powers mechanisms and constitutional role they can play. I next take up the question of whether these constraints are effective checks on executive branch overreaching, and emphasize the mutually reinforcing relationship between these internal constraints and external checks on the executive branch. Finally, I discuss the general failure of current separation of powers doctrine to directly connect internal and external constraints and analyze whether including such a linkage would be appropriate.

I. INTERNAL SEPARATION OF POWERS MECHANISMS AND THEIR CONSTITUTIONAL IMPLICATIONS

The meaning of “internal separation of powers” is not immediately self-evident. The Constitution says rather little on separation of powers, but the provisions it does include focus overwhelmingly on external relations between the branches—whether it be the branches' division and assignment of distinct powers (as in the Vesting Clauses) or their subsequent intermixing (as in provisions for a presidential veto and senate advice and consent).¹⁰ Although constitutional

¹⁰ U.S. Const. art. I, § 1; id. art. I, § 7, cl. 2–3; id. art. II, § 1, cl. 1; id. art. II § 2, cl. 2; id. art. III, § 1.

requirements directed at operations within each branch do exist,¹¹ they are few and the constitutional pattern is either silence or express grants of discretion on internal branch arrangements.¹² Indeed, to a constitutional formalist intent on sharp divisions among the branches and on policing against efforts by each branch to exceed its proper sphere,¹³ the concept of internal separation of powers may seem a contradiction in terms. As a result, some explication and description of what are internal separation of powers measures and assessment of their constitutional status is warranted.

A. Internal Separation of Powers Defined

The very idea of internal separation of powers is premised on a functionalist approach that emphasizes general separation of powers principles rather than their specific manifestations in the constitutional text.¹⁴ These principles, well familiar from the Supreme Court's separation of powers case law, include the division of the federal government's powers "into three defined categories, Legislative, Executive, and Judicial"¹⁵ as well as the intermixing of the branches through "a carefully crafted system of checked and balanced power."¹⁶ Though often invoking these principles in a somewhat conclusory and inconsistent manner,¹⁷ the Court has identified the

¹¹ See, e.g., the opinions clause, *id.* art. II, § 2, cl. 1, the revenue bills originating clause, *id.* art. I, § 7, cl. 1, the provision for three classes of senators, *id.* art. I, § 3, cl. 2.

¹² For example, Article I gives discretion to the house and senate in determining their rules of procedure, *id.* art. I, § 5, cl. 2, and provides discretionary authority to congress in shaping the government through the "necessary and proper" clause, *id.* art. I, § 7, cl. 18.

¹³ See *I.N.S. v. Chadha*, 462 U.S. 919, 951 (1983).

¹⁴ For an account of the contrasting functionalist and formalist approaches to separation of powers, see generally Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 *Cornell L. Rev.* 488 (1987) [hereinafter Strauss, *Formal and Functional*].

¹⁵ *INS v. Chadha*, 462 U.S. 919, 951 (1983); see also *Bowsher v. Synar*, 478 U.S. 714, 721–22 (1986).

¹⁶ *Mistretta v. United States*, 488 U.S. 361, 381 (1989); see also *Buckley v. Valeo*, 424 U.S. 1, 121 (1976); *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

¹⁷ See Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 *U. Pa. L. Rev.* 1513, 1517 (1991) ("[T]he Supreme Court's treatment of the constitutional separation of powers is an incoherent muddle."); Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 *Va. L. Rev.* 1127, 1132, 1174–83 (2000) [hereinafter Magill, *Real Separation*] (explaining the "set of principles constituting 'separation of powers' is far more easily invoked than specified")

ultimate goal of the separation of powers system as being to protect liberty and prohibit tyranny by preventing “the accumulation of excessive authority in a single Branch.”¹⁸ At the same time, in addition to deterring “arbitrary or tyrannical rule, . . . [b]y dispersing the federal power among three branches [and] allocating powers and responsibilities to a branch fitted to the task, the Framers created a National Government that is both effective and accountable.”¹⁹ The Court’s efforts to secure these at times contradictory goals of diffused and checked power and accountability has focused on preventing “the encroachment or aggrandizement of one branch at the expense of another.”²⁰

The defining characteristic of internal separation of powers measures is that they seek to achieve these goals by operating within the confines of a single branch, as opposed to through interactions among the different branches of government or with other forces external to a particular branch’s operations—mechanisms that I will here describe, to highlight the contrast, as external separation of powers measures. Although such internal measures are present in all the branches,²¹ the focus of internal separation of powers scholarship is overwhelmingly on the

and noting inherent contradiction in current doctrine); see also Peter L. Strauss, *The Place of and the Fourth Branch*, 84 *Colum. L. Rev.* 573, 617 (1984) [hereinafter *Strauss, Place of Agencies*] (describing contrast between separation of powers and checks and balances approaches).

¹⁸ *Mistretta v. US*, 488 U.S. 361, 382 (1989); *Youngstown*, 343 U.S. at 635 (“the Constitution diffuses power the better to secure liberty”); cf. *The Federalist No. 47*, at 301 (James Madison) (Clinton Rossiter ed., 1961) (James Madison) (“[A]ccumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny.”).

¹⁹ *Loving v. United States*, 517 U.S. 748, 757 (1996). For descriptions of accountability as a core separation of powers value, see Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 *Ark. L. Rev.* 23, 42–45 (1995) (describing accountability as one basis for unitary executive theory); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 *Colum. L. Rev.* 1, 93-94 (1994).

²⁰ *Buckley*, 424 U.S. at 122; accord *Mistretta*, 488 U.S. at 382 (“It is this concern of encroachment and aggrandizement that has animated out separation-of-powers jurisprudence”).

²¹ Congressional analogues are easiest to identify; they include not just the bicameral character of Congress, but also the division of each branch into separate and sometimes competing committees, rules limiting the power of leadership to force votes and end debate, independent research arms, the presence of majority and minority committee staff, and so on. Judicial checks also exist, however, such as division of the federal courts into geographic-based circuits, the use of three-judge appellate panels, the possibility of en banc review, and also jurisdictional limitations. My focus here, following the literature, is on internal checks within the executive branch.

executive branch, reflecting the view that the greatest threat of aggrandized power today lies in the broad delegations of power to the executive branch that characterize the modern administrative and national security state.²² Moreover, as that suggests, internal separation of powers is most often equated with measures that check or constrain the executive branch and particularly presidential power.

A wide range of administrative structures and other mechanisms could be viewed as serving such an internal executive branch checking function. Some appear primarily animated by individual fairness concerns and have a due process edge, in particular the division of functions within agencies and the separation of adjudication from legislative, investigatory, and enforcement activities.²³ Many others have a more systemic focus and seek to ensure regularity and the rule of law by depoliticizing governmental administration. One example of the latter that is prominent in separation of powers literature and case law is the independent agency, the heads of which achieve some independence from the president as a result of term appointments and for-cause removal protection.²⁴ Other internal personnel measures offer independence even within executive agencies, the prime instance here being the civil service and its prohibitions on politically-motivated employment decisions.²⁵ Another important structural feature is the

²² See, e.g., Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 *Yale L.J.* 2314, 2316 (2006) [hereinafter Katyal, *Internal Separation*] (“The result [of the War on Terror] is an executive that subsumes much of the tripartite structure of government.”); see also Martin S. Flaherty, *The Most Dangerous Branch*, 105 *Yale L.J.* 1725, 1816–20 (1996) (describing accumulation of authority and responsibility in the executive branch); Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 *U. Chi. L. Rev.* 123, 125 (1994) (“In the post-New Deal world, however, the framers’ factual assumptions have been displaced. Now, it is the President whose power has expanded and who therefore needs to be checked.”).

²³ See 5 U.S.C. §§ 554, 556; see also Strauss, *Place of Agencies*, *supra* note 17, at 622–25 (discussing individual fairness in considering separation of functions); Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 *Stan. L. Rev.* 869, 890, 896 (2009) (noting due process benefits to separating enforcement and adjudicative powers in law enforcement context).

²⁴ The extent of such independence is a matter of dispute. See Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 *B. U. L. Rev.* 459, 477–79, 485–95 (2008) (finding party polarization increases presidential control over supposedly independent agencies, but also delays the period before a new president can appoint a majority of the agency’s commissioners).

²⁵ 5 U.S.C. §§ 2301–2305 (2000) (merit system for personnel decisions); Katyal, *Internal Separation*, *supra* note 22, at 2331–335 (2006) (highlighting importance of independent civil service and arguing for stronger protection from politicization). Another example is the tenure protections for administrative law judges (ALJs). 5 U.S.C. § 7513 (2004) (requiring “good cause

presence of separate agency watchdogs, such as inspector generals, protected by structural insulation within agencies and independent reporting relationships with Congress.²⁶ Division of employees into distinct organizational units or agencies can also serve to limit the role of raw political calculations in policymaking, in part by breeding agency cultures that foster more professionalized and expertise-based decisionmaking.²⁷ Indeed, simply the structural mechanism of dividing staff with similar responsibilities into separate agencies can serve a checking function, as their separate administrative homes may foster different perspectives and lead to different sources of information.²⁸ Internal constraints can also take a “soft” form, being rooted more in agency traditions and culture than “hard” structural features. A case in point here is the Office of Legal Counsel (OLC) in the Department of Justice, which has at times operated as a check on the President as well as other agencies, despite being headed by political appointees and lacking structural insulation.²⁹

established and determined by the Merit Systems Protection Board on the record after opportunity for hearing” prior to removal, suspension, or reduction in pay of ALJs).

²⁶ Paul C. Light, *Monitoring Government: Inspectors General and the Search for Accountability* 23-25, 56 (1993) [hereinafter Light, *Monitoring Government*].

²⁷ This dynamic was evident in the FDA’s review of the application to make Plan B over-the-counter and is also frequently discussed in regard to the creation of separate national science and health research institutes. See Metzger, *Administrative Regulation*, supra note 3, at 880 (noting “FDA’s decision to reject the recommendations of both its advisory committees and the directors and staff of the offices reviewing the application was a deviation from its usual practice regarding OTC applications,” a signal of internal opposition); Thomas O. McGarrity & Sidney Shapiro, *Workers at Risk : The Failed Promise of the Occupational Safety and Health Administration* 194 (1993) (explaining “the Senate may have desired to protect NIOSH’s ‘scientific integrity’ by sheltering it from the day-to-day political and interest group pressures to which OSHA is constantly subjected, thereby allowing NIOSH to serve as a check on any propensity in OSHA to reach conclusions inconsistent with scientific knowledge,” but also noting attendant coordination problems).

²⁸ Some scholars have recently defended redundancy in national intelligence responsibilities on this ground. See Anne Joseph O’Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post 9-11 World*, 94 Cal. L. Rev. 1655, 1689 (2006) (“[T]he most effective [national intelligence] structure probably would have redundant components as well as components that coordinate and centralize certain efforts.”); see also Katyal, *Internal Separation*, supra note 22, at 2324–28 (advocating bureaucratic overlap in national security).

²⁹ Goldsmith, supra note 6, at XXX (“OLC is, and views itself as, the front line institution responsible for ensuring that the executive branch charged with executing the law is itself bound by law.”); Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on*

Separate from agency structure, personnel measures, and culture are those internal constraints that target how agencies operate and their procedures. Most prominent among these might be thought the Administrative Procedure Act (APA), which imposes procedural requirements that agencies must follow in formal adjudication and in adopting or changing binding regulations—the latter feature receiving attention recently as the Obama administration sought to undo last-minute Bush administration rulemaking.³⁰ More important on a day-to-day basis are the agency guidance, policy manuals and agency regulations that govern much of the operation of federal programs.³¹ But although it regulates how agencies act, the APA is as much an external check as an internal one; not only does its procedural demands focus primarily on ensuring an opportunity for the public to participate in agency decisionmaking, the APA exempts many internal matters from its orbit.³² Publication and procedural requirements that attach to agency guidance lend it external dimensions as well,³³ and other procedural checks, such as the

Executive Power, 54 UCLA L. Rev. 1559, 1577–78 (2007) [hereinafter Johnsen, Internal Constraints] (explaining that “OLC’s legal interpretations typically are considered binding within the executive branch, unless overruled by the attorney general or the President (an exceedingly rare occurrence),” and noting OLC’s “tradition of accurate and principled legal advice”); Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 Mich. L. Rev. 676, 703, 710–17 (2005) [hereinafter Pillard, Constitution] (discussing relative OLC independence and noting OLC “characterized by relative disengagement from [its] client entities, staffed largely with career lawyers whose principal credentials are their legal skills, and ha[s] tended to foster within [its] own legal culture[] a distinction between politics and law”).

³⁰ Jack M. Beerman, *Combating Midnight Regulation*, 103 Nw. U. L. Rev. Colloquy 352, 360 (2009) (noting actions to reverse last minute regulation by the Bush administration). Such efforts also occurred eight years earlier, when the Bush administration confronted a number of rules adopted by the Clinton administration just before leaving office. See *Natural Res. Def. Council v. Abraham*, 355 F.3d 179 (2d Cir. 2004) (describing Bush administration attempt to reverse Clinton era rule published Jan. 22, 2001).

³¹ See Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 Yale. L. J. 1256, 1261-62 (2006) (discussing “internal law of administration” consisting of internal instructions issued by higher level officials to control subordinate officials’s exercises of discretion).

³² See 5 U.S.C. § 553(b–c) (describing notice and comment requirements). But see 5 U.S.C. § 553 (a) (exempting rules relating to agency management, including personnel matters, from notice and comment requirements); 5 U.S.C. § 553(b) (similarly exempting “rules of agency organization, procedure, or practice”).

³³ See Peter L. Strauss, *Publication Rules In the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 Ad. L. Rev. 803, 804-07 (2001) (describing publication and procedural constraints that can apply to agency guidance).

requirement of advisory committee participation or review, similarly share a joint internal and external character.³⁴

By contrast, one central constraint on rulemaking, the requirement of OMB regulatory review,³⁵ is acknowledgedly internal but is less often thought of as a separation of powers mechanism because it fosters rather than checks presidential control over agencies.³⁶ Without doubt, presidential interventions and assertions of decisionmaking power can undermine expertise and independence in administration, particularly if pushed too far into agency structures and personnel. Thus, for example, one of the more worrying trends during the Bush administration was the expansion of political appointees and their insertion deeper into agency structures than had been prior practice.³⁷ Nor is it clear that broad presidential political control is

³⁴ These panels often form a core part of an agency's regulatory approach, but are composed primarily of outside experts. A good example is the use of scientific advisory panels in drug regulation. See Lars Noah, Scientific "Republicanism": Expert Peer Review and the Quest for Regulatory Deliberation, 49 Emory L.J. 1033, 1054–57 (2000) (describing FDA use of technical advisory panels); see also 21 U.S.C. § 355(n) (setting out composition requirements for FDA advisory committees used in drug regulation and describing their functions); see generally 1 Food and Drug Admin. § 13:94 (2009) (describing role of advisory committees in new drug applications). In 2007, Congress added new controls to help prevent conflicts of interest on FDA advisory panels. See Pub. L. No. 110-85 (codified at 21 U.S.C. § 379d-1).

³⁵ Exec. Order No. 12,866, 58, Fed. Reg. 51,735 (Oct. 4, 1993), amended by Exec. Order No. 13,422, 72, Fed. Reg. 2763 (Jan. 18, 2007).

³⁶ See Peter L. Strauss, *Overseer, or "The Decider"?* The President in Administrative Law, 75 Geo. Wash. L. rev. 696, 702 (2006) [hereinafter Strauss, *Overseer*] ("[Executive Orders 12,866 and 13,422] threaten the control of agency heads over their agencies' agendas and effect a dramatic increase in presidential control over regulatory outcomes"). Although OMB enhances presidential control, it might also undermine an administration's pro-regulatory agenda due to cost cutting biases. See Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 Colum. L. Rev. 1260, 1267 (2006) (suggesting that regardless of administration political agenda, Executive Order 12,866, "contains within it several structural and institutional biases against regulation"). Moreover, as David Barron has argued, identifiable White House involvement in and centralization of policy setting may be less threatening to agency independence than some alternatives, such as increased politicization of agency appointments. See Barron, *supra* note 2, at 1120–21; see generally Terry M. Moe, *The Politicized Presidency*, in *The New Direction in American Politics* 235, 244–45 (John E. Chubb & Paul E. Peterson eds., 1985) (noting presidential incentives to centralize and politicize administration).

³⁷ Barron, *supra* note 2, at 1128, 1142 (noting "surge in the number of politically appointed positions created during the first term of President George W. Bush" and describing effect of politicization on the EPA during Bush administration); Strauss, *Overseer*, *supra* note 36, 42, at 701–02 (describing expanded role of Regulatory Policy Officers and requirement of

the best method for ensuring politically responsive decisionmaking. Not only can such a presidential role undermine popular input on government policy through Congress, it can also restrict the political accountability of the executive branch, by limiting transparency and minimizing the effect of participatory and open administrative processes.³⁸

Yet at the same time, unilateral agency decisionmaking is also problematic from a separation of powers perspective, raising dangers of an unaccountable fourth branch and ineffective government.³⁹ Such unilateral decisionmaking is additionally at odds with constitutional provisions mandating some form of presidential oversight of executive branch officials and the constitutional decision to adopt a single rather than plural executive.⁴⁰ Put differently, the line between excessive politicization and appropriate presidential political input is

political appointment); David E. Lewis, *The Politics of Presidential Appointments: Political Control and Bureaucratic Performance 19–21*, 137 (2008) (showing number of political appointees increased during George W. Bush administration, and noting that today, half of all civilian workforce positions exempt from merit system compared to only 10 percent in 1951); see also Paul C. Light, *Thickening Government: Federal Hierarchy and the Diffusion of Accountability 7* (1995) (finding 430 percent increase in senior executives and presidential appointees from 1960 to 1992).

³⁸ See Heidi Kitrosser, *The Accountable Executive*, 93 *Minn. L. Rev.* 1741, 1743, 1774 (2009) [hereinafter Kitrosser, *Accountable*] (arguing that a unitary executive approach undermines accountability by increasing the president’s ability to control information and “make or implement policy behind closed doors”); see also Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 *Chi.-Kent L. Rev.* 987, 992-1007 (1997) (arguing that accountability justifications for strong presidentialism are premised on false understandings of popular will); Flaherty, *supra* note 22, at ___ (similarly arguing that political accountability justifications for broad presidential authority rest on an unduly simple understanding of accountability); Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 *Mich L Rev* 53, 55 (2008) (arguing that “a moderate degree of bureaucratic insulation alleviates rather than exacerbates the countermajoritarian problems inherent in bureaucratic policymaking”).

³⁹ See Elena Kagan, *Presidential Administration*, 114 *Harv. L. Rev.* 2245, 2263-64, 2331-46 (2001) (emphasizing need for “direction and energy” as well as administrative constraints and arguing that presidential involvement leads to more accountable, responsive, and effective government); Lessig & Sunstein, *supra* note 19, at 98 (arguing that in the context of the modern administrative state, immunizing administrators from presidential control harms separation of powers values by limiting accountability and increasing the risk of faction).

⁴⁰ See Strauss, *Formal and Functional*, *supra* note 14, at 495 (“Any workable theory must not only avoid placing excessive power in the President’s hands, but also maintain his claim to a central and unifying governmental role—that is, to a relationship with all agencies that permits the exercise of his characteristic functions.”).

often unclear. Presidential violation of governing statutes is plainly prohibited except in the rare instances when Congress intrudes on the president's constitutional powers,⁴¹ but statutes often leave broad room for presidential discretion. In those contexts at least, presidential oversight as assertions of authority may best reflect constitutional structure and separation of powers values.⁴² As a result, categorically excluding mechanisms that enhance rather than check presidential oversight reflects an unjustifiably narrow conception of internal separation of powers.

It is also important not to lose sight of a centrally important fact: Presidents frequently support imposition of internal mechanisms that substantially constrain the executive branch, even sometimes adopting such measures voluntarily on their own or at agency initiative.⁴³ Part of the explanation for this is politics, but part is also that presidents are judged on their ability to govern effectively.⁴⁴ Terry Moe has argued that such presidential performance accountability leads to core dynamics of executive branch centralization and politicization, as a president wants “an institutional system responsive to his needs as a political leader. He values organizational competence, to be sure, but what he seeks is “responsive competence,” not neutral competence.”⁴⁵ Yet presidents' political accountability may also lead them to support

⁴¹ *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (“When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.”).

⁴² See Kagan, *supra* note 39, at 2251, 2372–80; Strauss, *Overseer*, *supra* note 36, 42, at 715–18 (finding a presidential role uncontroversial where “presidential authority readily fit the “oversight” mold and/or may have been explicitly conferred by Congress”).

⁴³ For a recent analysis of the phenomenon of executive branch voluntary impositions, see Elizabeth Magill, *Foreword: Agency Self-Regulation*, 77 *Geo. Wash. L. Rev.* 859 (2009) [hereinafter Magill, *Agency Self-Regulation*].

⁴⁴ See David E. Lewis, *The Politics of Presidential Appointments: Political Control and Bureaucratic Performance* 1, 55 (2008) (noting abysmal federal response to Hurricane Katrina and role of political appointees and arguing that “[s]ince voters and history judge presidents for the performance of the entire federal government during their tenure, this creates incentives for presidents to ensure that policy outcomes, both legislative and administrative, are under their control”); see also Moe, *supra* note 36, at 238 (explaining president motivated by “political support and opposition, political strategy, and political tradeoffs,” and therefore values “responsive competence,” not neutral competence”); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 *J.L. Econ. & Org.* 81, 95 (1985) (asserting that Presidents, unlike legislators, are judged based on the effect of general government policies).

⁴⁵ Moe, *supra* note 36, at 239, 244–45; see also Barron, *supra* note 2, at 1102 (identifying concepts of centralization and politicization); Kagan, *supra* note 39, at 2339 (describing presidential incentives).

administrative structures that are more independent. As David Barron has recently noted, sometimes “[a] system for making regulatory policy that is administrative in orientation may itself serve a given President’s agenda,” a situation Barron contends existed under President Franklin Roosevelt, who sought to “bulk[] up the regulatory state.”⁴⁶ Presidents may also find that responsiveness and competence conflict; in a recent study David Lewis concluded that programs run by expert professional administrators perform better on the whole than those run by political appointees.⁴⁷ Presidents may well be willing to forego politicization or centralization at times and opt for a form of administration they can less easily control, if they believe that doing so will yield more effective performance. Finally, presidents may also conclude that internal constraints are in fact essential to ensure their ability to control administration, by providing a mechanism that can limit on the ground discretion of agency officials.⁴⁸

B. The Constitutional Legitimacy of Internal Separation of Powers

The profusion of possible internal separation of powers mechanisms complicates assessments of their constitutional legitimacy. To be sure, many internal checks on presidential power are likely to be decried by unitary executive theorists who argue that under our constitutional scheme the President is granted control over all exercises of executive power. On the unitary executive view, the President must be able to remove any officer or employee and to set all administrative policy, even at the extreme of substituting his judgment for that of the agency head in whom a statute vested decisionmaking authority.⁴⁹ For unitary executives, then,

⁴⁶ Barron, *supra* note 2, at 1111–12.

⁴⁷ Lewis, *supra* note 37, at 195–97 (using Bush administration’s Program Assessment Rating Tool (PART) scores to find lower performance ratings of political appointees, and suggesting that “reducing the number of political appointees is one means of improving performance”).

⁴⁸ See Magill, *Agency Self-Regulation*, *supra* note ?, at 884–86; see also Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801–1829*, 116 *Yale L.J.* 1636, 1685–86 (2007) (“Administrators ... fear the centrifugal effects of discretion vested in subordinates. If for no reason other than self-protection, they inevitably construct supervisory routines and modes of instruction to bend peripheral discretion toward centralized control.”); Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 *Admin. L. Rev.* 803, 814 (2001) (“From an agency perspective, uniformity of administration nationwide is desirable and the agency may doubt whether its pool of not-so-well-paid inspectors will be able to handle so much discretion.”).

⁴⁹ Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 *Yale L.J.* 541, 594–96 (1994) (arguing power of “removal, a power to act in [inferior officer’s] stead, and a power to nullify [inferior officer’s] acts when the President disapproves” are constitutionally required). For commentary critical of unitary executive claims, see Farina,

internal constraints such as independent agencies, the civil service, and assertions of independent agency policymaking authority actually violate constitutional separation of powers principles.⁵⁰ That view is of course subject to much debate, and has failed to find much support at the Supreme Court.⁵¹

The more interesting point to note here is that even unitary executives might not question the constitutionality of some of the measures described above. Voluntarily adopted measures are an obvious example; although the policy benefits and costs of such constraints could be disputed, it is hard to view self-imposed executive branch constraints as a significant threat to presidential constitutional authority. In addition, few deny that Congress has the power to require that standards be based on scientific criteria and evidence, to divide functions within agencies or assign similar responsibilities to multiple agencies, even if the effect of such measures is to bolster internal checks on presidential decisionmaking and control.⁵² In like vein, those scholars who have raised concerns about expanding presidential authority generally accept the constitutionality of presidential efforts to oversee agency decisionmaking, provided such efforts do not extend so far as to involve presidential assumption of decisionmaking power that Congress has vested in agency heads.⁵³

supra note 11, 13, at 987–89 (rejecting democratic legitimation argument of unitarians); Lessig & Sunstein, supra note 19, at 2–3 (“[T]he view that the framers constitutionalized anything like [the unitary] vision of the executive is just plain myth.”); Strauss, *Overseer*, supra note 36, 42, 702–03 (finding Constitution “at best ambivalent on the question” of whether President may direct agency determination of policy matters).

⁵⁰ Calabresi & Yoo, supra note ?, at 420–22 (direction of subordinates); *id.* at 422–23 (civil service); *id.* at 423–25 (independent agencies).

⁵¹ See, e.g., *Morrison v. Olson*, 487 U.S. 654, 685–96 (1988). The Court will hear a case in the coming term raising the question of the extent to which executive branch officials must be subject to presidential removal. See *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 537 F.3d 667 (D.C. Cir. 2008), cert. granted, 77 U.S.L.W. 3431 (U.S. May 18, 2009) (No. 08-861).

⁵² See, e.g., Saikrishna B. Prakash, *Fragmented Features of the Constitution’s Unitary Executive*, 45 *Willamette L. Rev.* 701, 705 (2009) (“The power to create offices is not merely the limited power to create generic offices, leaving the President to determine each office’s functions and duties. Rather, when Congress creates a Secretary of Treasury or a Secretary of the Interior, it may establish the powers and duties of these offices.”); see also *United States v. Kendall*, 37 U.S. 12, (Pep) 524 (1838).

⁵³ Strauss, *Overseer*, supra note 36, 42, at 715–18; see also Harold H. Bruff, *Balance of Forces: Separation of Powers Law in the Administrative State* 455–74 (2006).

In any event, whatever the scholars' views, under current doctrine the vast majority of internal separation of powers mechanisms within the executive branch are constitutional.⁵⁴ Most prominently, the Court has repeatedly upheld the constitutionality of restrictions on the president's power to remove high-level executive branch officers.⁵⁵ Even if the Court were to revisit that determination,⁵⁶ it is quite unlikely to call into question many other structural protections for intra-executive branch independence. In particular, the Court long ago upheld the constitutionality of the civil service, and reiterated that view in its decision most favorable to presidential control.⁵⁷ The Court has also repeatedly enforced substantive statutory requirements over contrary presidential priorities, with *Massachusetts v. EPA*⁵⁸ and *Gonzales v. Oregon*⁵⁹ being just two recent examples.⁶⁰ Hence, as a practical matter the constitutionality of statutory provisions mandating science or expert-based decisionmaking or for segregating professional and expert employees organizationally seems at this point beyond debate.

⁵⁴ Even in the context of the military, the Court has insisted on executive branch adherence to congressional strictures, see, e.g., *Hamdan v Rumsfeld*, 548 US 557, 590–95 (2006) (finding Presidential national security powers not sufficient to expand on statutorily specified procedures for military trials).

⁵⁵ See *Morrison v. Olson*, 487 U.S. 654, 685–96 (1988); *Wiener v. United States*, 357 U.S. 349, 356 (1958); *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629-31 (1935).

⁵⁶ The *Free Enterprise* decision on the Court's docket for next term may not reach this question, as the statute at issue there made no provision for presidential removal and instead vested for cause removal authority in the SEC, an independent commission whose members also enjoy removal protections. *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 537 F.3d 667 (D.C. Cir. 2008), cert. granted, 77 U.S.L.W. 3431 (U.S. May 18, 2009) (No. 08-861).

⁵⁷ *United States v. Perkins*, 116 U.S. 483 (1886); see also *Myers v. United States*, 272 U.S. 52, 173 (1926) (rebuffing critique that removal power would contravene civil service protections).

⁵⁸ *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007).

⁵⁹ *Gonzales v. Oregon*, 126 S. Ct. 904 (2006).

⁶⁰ See e.g. Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 Sup. Ct. Rev. 51, 52 (identifying these decisions as instances in which a majority was "worry[d] about the politicization of administrative expertise"); Kathryn A. Watts, *Proposing A Place for Politics in Arbitrary-and-Capricious Review*, 119 Yale Law Journal (forthcoming XXX) (manuscript at 18, 21–22) (discussing administrative law's resistance to political justifications for agency action).

II. THE INTERDEPENDENCE OF INTERNAL AND EXTERNAL SEPARATION OF POWERS

A separate question to raise about internal separation of powers mechanisms concerns their effectiveness, particularly as measures aimed at constraining executive branch aggrandizement. Are they actually able to constrain excessive presidential assertions of authority and other abuses? Or are they, in the end, little more than “parchment barriers”⁶¹ that are largely ineffective or worse may obscure the extent of accumulated presidential power?

The case in favor of internal mechanisms is in part comparative. Real limitations exist on the ability of traditional external constraints, specifically Congress and the courts, to check the executive branch. The fundamental impediments for Congress are internal ones, in particular its need to proceed via the arduous process of bicameralism and presentment and the additional obstacles created by congressional committees and rules.⁶² The ordinary burdens of the legislative process are intensified in contexts involving efforts to check presidential authority, given the frequent need to overcome a presidential veto.⁶³ Congress does wield important investigatory and oversight powers, and has other tools that may give it leverage over the president, such as control over spending or the ability to add contentious measures to must-pass legislation.⁶⁴ But the political reality of party allegiance dominating over institutional interests, along with greater ideological cohesion in congressional parties, undermines these techniques and makes rigorous congressional constraints on presidential actions unlikely except in contexts of divided government.⁶⁵ Moreover, even if Congress is willing to undertake oversight, its ability to do so may be significantly hampered by executive branch non-cooperation or intransigence,

⁶¹ The Federalist No. 48, at 305 (James Madison) (Clinton Rossiter ed., 1999).

⁶² See William N. Eskridge, Jr., *Vetogates, Chevron, Preemption*, 83 *Notre Dame. L. Rev.* 1441, 1444–46 (2008) (describing barriers to legislative action).

⁶³ Cf. Johnsen, *Internal Constraints*, *supra* note 29, at 1562 (arguing Congress is an inadequate check on presidential power in part because of need to overcome veto).

⁶⁴ See, e.g., William G. Howell & Jon C. Pevehouse, *While Dangers Gather: Congressional Checks on Presidential War Powers* 10–27 (2007) (describing congressional powers in face of executive intransigence); Douglas Kriner, *Can Enhanced Oversight Repair “the Broken Branch”?*, 89 *B.U. L. Rev.* 765, 773–75 (2009) (describing importance of congressional oversight).

⁶⁵ Kagan, *supra* note 39, at 2311–12 (noting “congressional parties have grown more ideologically coherent and partisan,” but also arguing that divided power is the reality of modern government); Katyay, *Internal Separation*, *supra* note 22, at 2321 (“When the political branches are controlled by the same party, loyalty, discipline, and self-interest generally preclude interbranch checking.”); see generally Thomas Mann & Norman Ornstein, *The Broken Branch: How Congress is Failing America and How to Get Back on Track* (2006).

often in the form of assertions of executive privilege and failure to inform Congress of contentious activities.⁶⁶

Courts, in turn, face jurisdictional barriers that limit their ability to review executive branch actions.⁶⁷ Such barriers have recently surfaced in litigation challenging the government's expansion of domestic wiretapping without complying with FISA requirements, with the Sixth Circuit holding that plaintiffs' claims of injury from the program were too speculative to provide a basis for standing to challenge the program.⁶⁸ Even when actions are justiciable, the courts' effectiveness as a check can be significantly curtailed by their deference to reasonable executive branch policy determinations, particularly in the area of national security.⁶⁹ Courts are also

⁶⁶ The Bush administration repeatedly demonstrated such resistance to congressional oversight, ranging from its early 2001 refusal to turn over documents relating Vice-President Cheney's energy task force, see to its 2007 invocation of executive privilege to shield high-level presidential aides from testifying about the removal of seven U.S. attorneys to its 2008 attempt to block access to an EPA draft document finding that greenhouse gases endanger the environment. See Heidi Kitrosser, *Accountability and Administrative Structure*, 45 *Willamette L. Rev.* 607, 609 (2009) [hereinafter Kitrosser, *Administrative Structure*]; Mark J. Rozell & Mitchel A. Sollenberger, *Executive Privilege and the Bush Administration*, 24 *J. L. & Politics* 1, 12–18, 37–38 (2008). The Bush administration has also been accused of tampering with data that was publicly released. See, e.g., Freeman & Vermeule, *supra* note 60, at 55 (“[T]here were suggestions of widespread tampering by the Bush administration with the global warming data reported by numerous federal agencies, including EPA.”). Whether Congress was adequately informed of the Bush Administration's program for expanded domestic national security wiretapping is a question currently in dispute. See, e.g., Perry Bacon Jr. and Joby Warrick, *CIA Chief Rebutts Pelosi's Charges*, *The Washington Post*, May 16, 2009, at XXX.

⁶⁷ Johnsen, *supra* note 29, at 1587 (“Courts employ a variety of jurisdictional and prudential limitations that either preclude review--such as standing and the political question doctrine--or that result in only partial review.”); Pillard, *Constitution*, *supra* note 29, at 688–91 (describing “acute practical and legal limitations on the courts' ability and willingness to decide many constitutional issues that confront the executive branch”).

⁶⁸ See *A.C.L.U. v. N.S.A.*, 493 F.3d 644, 656 (6th Cir. 2007), cert. denied, 128 S. Ct. 1334 (2008) (“Because there is no evidence that any plaintiff's communications have ever been intercepted, and the state secrets privilege prevents discovery of such evidence ... the anticipated harm is neither imminent nor concrete—it is hypothetical, conjectural, or speculative. Therefore, this harm cannot satisfy the “injury in fact” requirement of standing.”).

⁶⁹ Adrian Vermeule, *Our Schmittian Administrative Law*, 122 *Harv. L. Rev.* 1095, 1140 (2009) (“[W]here judges perceive an emergency ... standards of rationality, statutory clarity, evidence, and reasonableness all become more capacious and forgiving.”); see also Pillard, *Constitution*, *supra* note 29, at 692 (“In cases involving foreign policy, national security, military, or immigration judgments, the courts systematically apply doctrines of overt deference that cause

reluctant to intervene to correct general failures in administration or prompt executive branch action.⁷⁰ An additional major impediment is delay; courts must wait for cases to come to them, and challenges to presidential action or policy are likely to be appealed.⁷¹ This is not to say that deference and inaction necessarily undermine judicial checks; the Supreme Court's rejection of the Bush Administration's refusal to regulate greenhouse gases in *Massachusetts v. EPA*⁷² and recent decisions rebuffing broad presidential assertions of power regarding the Guantanamo Bay detainees⁷³ are important testaments to the contrary. Yet even in these contexts the limits of judicial constraints are evident. Although the EPA proposed regulating greenhouse gases under the Clean Air Act in response to the decision in *Massachusetts*, the White House refused to act on the proposal and no formal action towards regulating greenhouse gases had yet been taken when President Obama assumed office over a year and a half later.⁷⁴ The seven-year-and-ongoing saga of habeas challenges involving the Guantanamo Bay detention center demonstrates even more vividly that it can be years before judicial review forces a change in executive branch behavior on the ground.⁷⁵

Several bases exist for thinking that internal separation of powers mechanisms may have a comparative advantage. Internal mechanisms operate *ex ante*, at the time when the executive branch is formulating and implementing policy, rather than *ex post*; they are therefore able to

them to refrain from full enforcement of constitutional norms, leaving that task to the political branches.”).

⁷⁰ See *Summers v. Earth Island Institute*, 129 S.Ct. 1142, 1151 (2009) (“[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right in *vacuo*—is insufficient to create Article III standing.”); *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (“[Supreme Court] has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion.”).

⁷¹ See Pillard, *Constitution*, *supra* note 29, at 689 (finding that “even where private parties can get courts to respond to their constitutional harms, they may face interstitial deprivations” including delay and irreparable injury).

⁷² *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007).

⁷³ See, e.g., *Boumediene v. Bush*, 128 S. Ct. 2229 (2008); *Hamdan v. Rumsfeld*, 548 US 557 (2006).

⁷⁴ Kitrosser, *Administrative Structure*, *supra* note 17, at 609 (describing Bush administration attempts to stall EPA rulemaking on climate change following Supreme Court ruling).

⁷⁵ See *Boumediene v. Bush*, 128 S. Ct. 2229, 2275 (2008) (noting, in 2008, that “[i]n some of these cases six years have elapsed without the judicial oversight that habeas corpus or an adequate substitute demands.”).

avoid the delay in application that can hamper both judicial and congressional oversight.⁷⁶ Internal mechanisms often operate continuously, rather than being limited to issues that generate congressional attention or arise in the form of a justiciable challenge.⁷⁷ Internal mechanisms operate not just at the points at which policy proposals originate and are implemented but also at higher managerial levels, and thus can address policy and administration in both a granular and a systemic fashion. In addition, policy recommendations generated through internal checks may face less resistance than those offered externally, because the latter frequently arise after executive officials have already decided upon a policy course and are more likely to take an adversarial form.⁷⁸ Internal mechanisms may also gain credibility with executive branch officials to the extent they are perceived as contributing to more fully informed and expertise-based decisionmaking.⁷⁹

⁷⁶ Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 Va L. Rev. 431, 433 (1989) (“[E]ffective political control of an agency requires ex ante constraints on the agency (that is, a means of restricting the agency’s decisionmaking before it actually makes policy choices), one source of which is manipulation of its structure and process.”); see also Kenneth A. Bamberger & Deirdre K. Mulligan, *Privacy Decisionmaking in Administrative Agencies*, 75 U. Chi. L. Rev. 75, 106 (2008) (noting ex ante controls may overcome shortcomings of ex post monitoring); see also Laura A. Dickinson, *Outsourcing War and Peace* (forthcoming 2010) (emphasizing internalization of rules and norms as a more effective check than external controls, and describing efforts by military to encourage such internalization, such as integrating JAG officers into command structures).

⁷⁷ Pillard, *supra* note 29, at 690–91 (describing deficiencies of ex post judicial review in ensuring constitutionality of executive actions); Matthew D. McCubbins, *Abdication or Delegation? Congress, the Bureaucracy, and the Delegation Dilemma*, Regulation, Summer 1999, at 33, explaining “[Congressional] leaders do not have to spend a lot of time looking for trouble. Waiting for trouble to be brought to their attention assures leaders that the trouble is important to constituents.”).

⁷⁸ See Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 Colum. L. Rev. (forthcoming 2010, manuscript on file) at 32 n.66 (discussing “greater effectiveness of internally generated reforms”); Stephanie Stern, *Cognitive Consistency: Theory Maintenance and Administrative Rulemaking*, 63 U. Pitt. L. Rev. 589, 591 (2002) (suggesting a “bias towards the maintenance of existing beliefs,” and thus that agencies more receptive to new ideas before “lock-in” of policy preferences); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 Colum. L. Rev. 458, 522 (2001) (“Judicially developed and imposed systems frequently trigger strong resentment and resistance, and they invite strategic behavior aimed at minimizing the impact of the law.”).

⁷⁹ See *supra* text accompanying notes 22–23 (explaining how internal checks foster expertise and information generation); see also Mark Seidenfeld, *Cognitive Loafing, Social*

At the same time, it is important not to exaggerate the ability of internal separation of powers mechanisms to check presidential authority. Although as noted presidents have reasons to adhere to these mechanisms, they also have strong incentives to trump and evade internal checks in order to advance their political agendas and desired policy goals. Particularly in the face of a determined president, the constraining power of internal checks can be quite limited. Perhaps more than any other, this is the lesson brought home by the Bush administration.⁸⁰ Policy decisions were repeatedly made against the recommendations of career professional staff, often with evidence of direct White House intervention.⁸¹ In other instances, most prominently the promulgation of OLC memos on torture and interrogation techniques, top presidential officials avoided consulting with career staff or involving other agencies with expertise on the questions.⁸² Both entrenched practices and legal constraints guaranteeing political independence

Conformity, and Judicial Review of Agency Rulemaking, 87 Cornell L. Rev. 486, 515–16 (2002) [hereinafter Seidenfeld, Cognitive Loafing] (noting agencies more likely to respond to review where perceived legitimacy of reviewing audience).

⁸⁰ See M. Elizabeth Magill, Can Process Cure Substance? A Response to Neal Katyal's "Internal Separation of Powers", 116 Yale L.J. Pocket Part 126, 130 (2006) [hereinafter, Magill, Response] (emphasizing that President Bush pursued post-September 11 policies despite internal dissent); see also William G. Howell, Political Checks on a Politicized Presidency: a Response to Neal Katyal's "Internal Separation of Powers", 116 Yale L.J. Pocket Part 111 (2006) (noting "essentially political nature of bureaucratic structure" and methods the executive might employ to circumvent internal opposition).

⁸¹ See Doremus, *supra* note 5, at 1603–9 (describing allegations that Bush administration political appointees interfered in work of agency scientists); Gilman, *supra* note 5, at 566 (noting complaints of scientists "who claimed they were censored, forced to alter their conclusions, and prohibited from issuing reports and attending conferences"); Mendelson, *supra* note 3, at 2164 ("[T]hrough Office of Management and Budget clearance was not required for this decision, EPA officials reportedly consulted with the White House on the decision [to deny California's waiver for stricter greenhouse gas regulations] anyway."); Metzger, Administrative Regulation, *supra* note 3, at 881 (describing rejection of "recommendations of both [FDA] advisory committees and the directors and staff of the offices reviewing the application [for over-the-counter status for Plan B]").

⁸² See Goldsmith, *supra* note 6, at 166–68 (2007) (describing Bush administration practice of "limit[ing] readership of controversial legal opinions [from OLC] to a very small group of lawyers," and specifically exclusion of state department from consideration of torture memos); Cornelia Pillard, Unitariness and Myopia: the Executive Branch, Legal Process, and Torture, 81 Ind. L.J. 1297, 1303–05 (2006) [hereinafter Pillard, Unitariness] (highlighting importance of consultation within executive branch and suggesting that key entities were not consulted during drafting of torture memos); see also Jane Mayer, Annals of the Pentagon: the Memo, *The New Yorker*, February 27, 2006.

were violated.⁸³ As Elizabeth Magill has argued, even the strongest internal constraints are unlikely to be that effective in contexts in which the president is committed to a policy fundamentally at odds with the suggestions generated by agency independents.⁸⁴

Yet it does not follow that efforts to strengthen internal checking mechanisms are necessarily misdirected. The potential separation of powers benefits of such mechanisms, particularly given the limitations of external checks, makes these efforts worthwhile.⁸⁵ Moreover, high profile political disputes are too narrow a frame against which to assess the effectiveness of internal constraints. Even if unable to check a determined president in contexts of deep political disagreement, internal constraints may still prove potent in more run of the mill policy disputes or in contexts in which political allegiances are more divided. Nor does this mean that internal constraints are ineffective just when it counts. To the contrary, high-profile political disputes are arguably situations in which presidents *should* be able to implement their policies of choice in order to ensure democratic accountability of the executive branch, assuming these policies accord with governing law. In such contexts, success and effectiveness for internal constraints may be better understood not as forestalling presidential control of policy but rather as ensuring that contentious policy choices are made by the president and that the president's role

⁸³ See Office of the Inspector Gen. & Office of Prof'l Responsibility, *Politicized Hiring*, supra note?, at 64 (finding Justice Department official "considered political and ideological affiliations in hiring career attorneys and in other personnel actions affecting career attorneys in the Civil Rights Division. In doing so, he violated federal law" and that "[i]n doing so, he violated federal law ... and [Justice] Department policy"); Office of the Inspector Gen. & Office of Prof'l Responsibility, *U.S. Attorneys*, supra note 4, at 356 ("Process used to remove the nine U.S. Attorneys in 2006 was fundamentally flawed."); Johnsen, supra note 29, at 1578 ("Many [former OLC attorneys] were deeply outraged and saddened by what they saw as a dramatic and dangerous deviation from the office's tradition of accurate and principled legal advice on violation of OLC practices."); see also U.S. Gov't Accountability Office, *No. GAO-06-109, Food and Drug Administration: Decision Process to Deny Initial Application for Over-the-Counter Marketing of the Emergency Contraceptive Drug Plan B Was Unusual 5* (2005), <http://www.gao.gov/new.items/d06109.pdf> (noting Plan B denial letter's deviation from consistent FDA practice).

⁸⁴ See Magill, *Response*, supra note 80, at 126, 130 (arguing that belief that further internal process would impede President was "misplaced" and that Bush administration faced internal dissent but "adopted the course that they did despite those objections").

⁸⁵ Johnsen, supra note 29, at 1562 (emphasizing role of internal legal constraints in face of "inherent inadequacies of the courts and Congress as external checks on the President").

is publicly known.⁸⁶ The primary onus for checking excessive presidential assertions of authority then falls to external forces, including Congress, the courts, and public opinion.

More basically, focusing on the effectiveness of internal constraints alone ignores the critical interdependent relationship between internal and external separation of powers. Internal mechanisms can have more traction when reinforced externally, and external checks may be able to have such a reinforcing effect even if their ability to constrain the president directly is more limited. Recent history demonstrates the way that external mechanisms can reinforce internal constraints.⁸⁷ Congressional hearings on the politicization of DOJ hiring and the politically-motivated firings of US Attorneys forced the resignation of Attorney General Alberto Gonzales and several of his staff.⁸⁸ Even if politicized government hiring continued but was driven more underground, the hearings still likely served to reinforce civil service protections by making clear the potential reputational costs of such behavior and emboldening career staff to come forward with examples of abuse.⁸⁹ Two senators were able to force the FDA to reconsider its denial of

⁸⁶ Cf. Katyal, *supra* note 7, at 2337–38 (recommending transferring OLC’s adjudicatory function to independent official, removable only for cause, but making that official’s decisions “subject to presidential override”). Katyal explains that “a presidential overruling of [an independent internal executive adjudication] could trigger reporting to Congress,” *id.* at 2339, and also foster accountability by checking unelected director. *Id.* at 2338 (arguing presidential override appropriate because “lack of political accountability might dispose [director] toward adventurism”).

⁸⁷ Daniel Carpenter’s study of the emergence of bureaucratic autonomy during the progressive era, in which he underscores the important role that external networks played, demonstrates that the dependence of internal constraints on external forces is not just a recent phenomenon. See Daniel P. Carpenter, *The Forging of Bureaucratic Autonomy* 26-33 (2001).

⁸⁸ Steven Lee Myers & Philip Shenon, *Embattled Attorney General Resigns*, *New York Times*, August 27, 2007, at XXX; see also David Johnston & Eric Lipton, *Ex-aide Disputes Gonzales Stand over Dismissals*, *New York Times*, March 30, 2007, at A20 (noting resignation of Chief of Staff to Attorney General Gonzales over dismissal of U.S. attorneys); David Stout & David Johnston, *A Top Aide to Gonzales Resigns, Becoming Latest Fallout Casualty*, *New York Times*, April 7, 2007, at XXXX (reporting resignation of Monica Goodling who helped “coordinate” dismissals of U.S. attorneys).

⁸⁹ Indeed, former U.S. Attorney David Iglesias has argued that the scandal had a kind of paradoxical effect. “There was a sense at first that maybe it was going to make it less likely for U.S. attorneys to take more controversial cases, public corruption cases,” but, he explains, “It’s had the opposite effect. You’ve got U.S. attorneys that are really independent in a way they haven’t been in years.” Interview by Emma Schwartz with David Iglesias, *Looking Back on the Justice Department Scandal: A Conversation With Former U.S. Attorney David Iglesias*, *U.S. News & World Rep.*, June 4, 2008, at XXX; cf. Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 *UCLA L. Rev.* 117, 162 (2006) (“[A]dministrators may care a good deal

over-the-counter status for Plan B by blocking action on President Bush's nominee to take over as Commissioner.⁹⁰ The Supreme Court's habeas decisions undermined the more extreme ideologically-driven positions taken by high-level Bush Administration lawyers and—along with public outcry over OLC's the Torture Memo—appear to have led to some more moderate positions.⁹¹ Media exposure combined with pressure by professional organizations and other groups also forced some retraction in efforts to politicize science.⁹² The Court's decision in *Massachusetts* led initially to EPA's political leadership changing its stance and acceding to the agency staff's view that greenhouse gases should be regulated under the CAA, although the White House continued to stonewall such a move.⁹³

more about the reputational harms that flow from public censure than the legal consequences of an adverse judgment (for which they are not usually personally liable). An administrator's perceived failure to act with reasonable prudence can have devastating reputational costs, as illustrated in the wake of Hurricane Katrina by the news media's excoriation of Federal Emergency Management Agency (FEMA) director, Michael Brown.”).

⁹⁰ See Gardiner Harris, F.D.A. Approves Broader Access to Next-Day Pill, *New York Times*, August 25, 2006, at A1; see also Gardiner Harris, Bush Picks F.D.A. Chief, but Vote Is Unlikely Soon, *N.Y. Times*, Mar. 16, 2006, at A18. Peter Strauss has noted the role played by the need to obtain Senatorial consent for a successor in curbing presidential power to fire agency heads, thereby reinforcing agency independence and expertise. Strauss, *Overseer*, supra note 36, 42, at 735–36.

⁹¹ Bart Gellman, Angler: The Cheney Vice Presidency 354–57 (2008) (describing pullback from more extreme positions on treatment of detainees following Supreme Court's decision in *Hamdan*); Goldsmith, supra note 6, at 125 (“Whenever the Supreme Court threatened to review one of the administration's terrorism policies, [Solicitor General] Paul Clement was able to eke out small concessions from the White House [such as] more formal procedural protections for detainees.”). Cornelia Pillard has argued more generally that the authority of OLC and the Solicitor General within the executive branch depends largely on their being able to “backstop [their] judgments in judicial doctrine.” Pillard, *Constitution*, supra note 29, at 685.

⁹² See Gilman, supra note 5, at 605 (“Media reports [on politicization of science] spurred some government agencies to conduct internal investigations that generated new policies to protect agency scientists and promote transparency. Thus, the media clearly enhanced accountability....”); Andrew C. Revkin, NASA Office Is Criticized on Climate Reports, *N.Y. Times*, June 3, 2008 (reporting Michael Griffin, NASA agency head, quickly ordered review and policy changes when pattern of distorting science was made public).

⁹³ See Kitrosser, *Administrative Structure*, supra note 66, at 608–09 (explaining White House refused to see the EPA's plans and did their best to ensure that others could not see them,” even refusing to open email from EPA containing draft document recommending pollution controls); Felicity Barringer, White House Refused to Open Pollutants E-Mail, *N.Y. Times*, June

Equally important, the relationship between internal and external separation of powers is not unidimensional: Internal mechanisms can, in turn, play a pivotal role in enabling external checks on the executive branch to function. Congress needs information in order to conduct meaningful oversight of the executive branch.⁹⁴ Internal agency experts and watchdogs are important sources of that information, whether in the guise of formal reports, studies, and testimony or more informal conversations and leaks.⁹⁵ Procedural constraints within agencies can serve a similar function of ensuring that Congress is aware of agency activities.⁹⁶ Internal mechanisms also reinforce Congress's role by creating bodies of personnel within the executive branch who are committed to enforcing the governing statutory regime, which sets out the parameters of their authority and regulatory responsibilities, and on whose expertise functioning

25, 2008; Juliet Eilperin, *White House Tried to Silence EPA Proposal on Car Emissions*, Wash. Post, June 26, 2008. Instead, the EPA sent out notice seeking further comment, delaying the rulemaking until the end of the Bush administration. Juliet Eilperin & R. Jeffrey Smith, *EPA Won't Act on Emissions This Year*, Wash. Post, July 11, 2008, at A1.

⁹⁴ See Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, *in* *Congress, Structure and Policy* 426, 427–30 (1987) (arguing Congress likely to depend on outside sources, such as citizens and interest group for information directing oversight activities); Matthew D. McCubbins et al., *supra* note 76, at 434 (noting cost of oversight provides incentive “to set up a system in which someone else (that is, a third party outside of the principal-agent diad) monitors the agent and reports acts of noncompliance”); Patricia M. Wald & Jonathan R. Siegel, *The D.C. Circuit and the Struggle for Control of Presidential Information*, 90 *Geo. L.J.* 737, 739 (2002) (explaining Congress requires information from executive for legislative and investigatory tasks because “Executive is the repository of the country's most important information for public policy formulation”).

⁹⁵ Katyal, *Internal Separation*, *supra* note 22, at 2347 (“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.”); see generally Light, *Monitoring Government*, *supra* note 26. As Seth Kreimer has argued, internal separation of powers constraints may also play a crucial role in enhancing transparency, and in turn accountability to external actors, through the Freedom of Information Act (FOIA). To be successful, requests under the Freedom of Information Act usually require prerequisite knowledge, and requesters are therefore largely dependent on leaks from civil servants or other insiders in identifying which claims for information to pursue. Seth F. Kreimer, *the Freedom of Information Act and the Ecology of Transparency*, 10 *U. Pa. J. Const. L.* 1011, 1025–32, 1037–45 (2008).

⁹⁶ See McCubbins & Schwartz, *supra* note 94, at 427–30 (describing Congressional dependence on “fire alarms,” outside interest groups that highlight areas requiring oversight, allowing Congress to focus resources on needs of constituents).

of those regimes often depends.⁹⁷ Courts are equally dependent on information and evidence compiled by agency personnel to adequately review agency actions, and have invoked this dependence in justifying the requirement that agencies disclose underlying information and offer detailed explanations of their decisions.⁹⁸ Moreover, despite regularly intoning that “it [is] not the function of the court to probe the mental processes of Secretar[ies] in reaching [their] conclusions,”⁹⁹ judicial review of agency actions often appear to turn on judges’ perceptions of the role politics played in agency officials’ decisionmaking.¹⁰⁰ Evidence that decisions were made over the objections of career staff and agency professionals—sometimes indicated by inconsistency in an agency’s position from its previous stance—often triggers more rigorous review.¹⁰¹ A particularly striking suggestion of how internal checks can effect judicial review came in the recent *Boumediene* litigation: Just a few months after refusing to grant certiorari in order to allow the CSRT process to proceed, the Court reversed course and granted review,

⁹⁷ Bruff, *supra* note 53, at 408 (“By training and inclination, [civil service] bureaucrats seek legal authority for their actions. Accordingly, they constitute an often unappreciated bulwark to the rule of law in its everyday application to the citizen.”).

⁹⁸ See, e.g., *United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240, 249 (2nd Cir. 1977) (“Adequate review of a determination requires an adequate record, if the review is to be meaningful.”).

⁹⁹ See, e.g., *Cobell v. Norton*, 334 F.3d 1128, 1142 (D.C. Cir. 2003) (citing *Morgan v. United States*, 304 U.S. 1, 18 (1938)).

¹⁰⁰ Freeman & Vermeule, *supra* note 60, at 52 (arguing case law driven by fear that executive expertise had been subordinated to politics).

¹⁰¹ *Tummino v. Von Eschenbach*, 427 F. Supp. 2d 212, 230-34 (E.D.N.Y. 2006) (noting concern that agency action not approved by scientific advisory committee in finding requisite bad faith necessary for discovery beyond administrative record). Inconsistency in an agency’s opinion, particularly over a recent period, is often a good indicator that politics affected the agency’s decision rather than expertise, and often leads to greater scrutiny. See, e.g., *Wyeth v. Levine*, 129 S. Ct. 1187, 1201 (2009) (refusing to show deference to agency’s determination of preemption in part because reversal indicates determination not based on expertise); *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41–42 (1983) (“Accordingly, an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.”). But see *F.C.C. v. Fox Television Stations, Inc.*, 129 S.Ct. 1800, 1810 (2009) (“We find no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review.”).

apparently influenced in part by concerns expressed by military lawyers about how the tribunals were functioning.¹⁰²

The claim that internal and external separation of powers mechanisms are interdependent is not novel. Recognition of this interdependence figures most prominently in commentary on how to enhance the effectiveness of internal mechanisms, which often involve suggestions for strengthening congressional and public oversight of the executive branch through greater disclosure.¹⁰³ It also surfaces, though more infrequently, in general separation of powers scholarship.¹⁰⁴ Yet the connection between internal and external mechanisms is often implicit and not the focus of sustained analysis. Indeed, this connection is sometimes obscured by discussions of how internal mechanisms can replace external checks on the executive branch and analyses of external branch deficiencies that assess those branches' ability to function in isolation.¹⁰⁵

Bringing the interdependence of internal and external separation of powers mechanisms to the forefront allows for a more realistic assessment of what internal executive branch constraints can accomplish. Although such mechanisms can act as important brakes on

¹⁰² Joseph Landau, *Muscular Procedure: An Institutional Surrogate in Times of Crisis*, 84 *Wash. L. Rev.* (forthcoming XXX) (manuscript at 41).

¹⁰³ See Katyal, *Internal Separation*, *supra* note 22, at 2341–42 (explaining how congressional reporting requirements might strengthen internal checks); Pillard, *Constitution*, *supra* note 9, at 749–50 (arguing transparency encourages internal executive constitutionalism, since the public can bring pressure on President to comply with constitutional provisions); see also Johnsen, *supra* note 29, at 1596–97 (“Perhaps most essential to avoiding a culture in which OLC becomes merely an advocate of the administration's policy preferences is transparency in the specific legal advice that informs executive action, as well as in the general governing processes and standards.”). In some cases, however, disclosure may actually weaken internal checks. See Pillard, *Unitariness*, *supra* note 82, at 1302–03 (arguing that routine publication of OLC legal opinions might discourage executive branch officials from seeking OLC's legal advice in the first place).

¹⁰⁴ See, e.g., Bruce Ackerman, *The New Separation of Powers*, 113 *Harv. L. Rev.* 633 (2000) (analyzing the impact of tripartite system of government on federal bureaucracy); M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 *U. Pa. L. Rev.* 603, 605–06 (2001) [hereinafter Magill, *Beyond Powers*] (arguing government separated not into “three undifferentiated branches,” but rather into “large and diverse set of government decisionmakers,” and considering implications of this for separation of powers analysis); Strauss, *Place of Agencies*, *supra* note 17, at 622–25 (emphasizing import of separation of function concerns for separation of powers analysis).

¹⁰⁵ See Katyal, *Internal Separation*, *supra* note 22, at 2316 (2006) (“The first-best concept of “legislature v. executive” checks and balances must be updated to contemplate second-best “executive v. executive” divisions.”).

executive branch excesses, they are not a panacea for failures in other branches to adequately police the president. On the other hand, it is also mistaken to conclude that the dependence of internal mechanisms on external checks makes the former irrelevant, because this argument ignores the reciprocal and dynamic relationship between these two. Focusing on this internal-external interdependence also holds important lessons for proposals to strengthen internal mechanisms. It suggests that the reforms that are most likely to bear fruit are those that explicitly link external and internal constraints, to the benefit of each.¹⁰⁶

III. REINFORCING INTERNAL CONSTRAINTS THROUGH SEPARATION OF POWERS DOCTRINE

In this final section, I want to focus on one such potential reform: reinforcing internal separation of powers mechanisms through the medium of constitutional separation of powers doctrine. This reform technique has to date received relatively little attention in internal separation of powers scholarship.¹⁰⁷ More importantly, as I will argue below, it has received scant attention in the context of separation of powers decisions, with reinforcement of internal constraints being relegated instead to the realm of administrative law. This doctrinal divide is analytically perplexing and unfortunate, as it serves to hide the important function that internal executive branch checks can—and do—play in our constitutional system.

A. *The Absence of Internal Checks in Separation of Powers Analysis*

Internal executive branch constraints feature regularly in separation of powers jurisprudence. The Court has repeatedly addressed the constitutionality of efforts to insulate executive branch officers from at-will presidential removal, and internal executive branch structure also surfaces in determining an officer's status for Appointments Clause purposes.¹⁰⁸ Notably, however, these decisions generally treat internal constraints as a given and focus their

¹⁰⁶ This linkage need not be specifically to Congress and the courts; other external forces—state and foreign governments, the media, and civil society organizations such as professional associations or advocacy groups—can also play a reinforcing role. As noted above, professional associations sought to publicize the administration's interference with the work of government scientists, see *supra* text accompanying note 92, and advocacy organizations have brought repeated litigation to force disclosure of government policy.

¹⁰⁷ Although varied in their specific subject matter focus, many reform proposals have emphasized the importance of greater disclosure as a mechanism for reinforcing internal constraints. See sources cited *supra* note 103.

¹⁰⁸ *Edmond v. United States*, 520 U.S. 651, 658–66 (1997) (finding judges of the Coast Guard Court of Criminal Appeals “inferior officers,” and reviewing supervisory checks on their authority); *Morrison v. Olson*, 487 U.S. 654, 691? (1988); *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935).

attention on determining if the specific constraints at issue represent constitutional violations because they intrude too far on presidential power. Less common, particularly in recent decisions, is judicial recognition of the potential constitutional benefits from internal controls, either in terms of guarding against aggrandized power from within or in reinforcing the ability of the other branches to do so.

Morrison v. Olson, upholding the constitutionality of the independent counsel statute, is a good case in point. The Court there analyzed whether limitations on the President's ability to control and oversee an independent counsel, including the requirement that the counsel could only be removed for good cause, violated constitutional separation of powers principles by "impermissibly interfer[ing] with the President's exercise of his constitutionally appointed functions."¹⁰⁹ In concluding no such interference was present, the Court acknowledged the constitutional relevance of internal constraints governing the activities of independent counsels, both for determining the counsels' Appointments Clause status¹¹⁰ and for ensuring that such provisions do not impermissibly undermine the constitutional values of accountability and adherence to law.¹¹¹ Left unmentioned, however, was the possibility that the good cause provision and other internal constraints on presidential oversight in fact advanced these constitutional values by ensuring that legal violations by high-level executive branch officials do not go unpunished.

To be sure, the independent counsel statute's intrusions on presidential power were more immediately salient and represented the basis on which the constitutional challenge was framed. Nor have time and experience been kind to the argument that the independent counsels served separation of powers goals, with concerns about lack of accountability, prosecutorial excesses, and politicization leading Congress to let the statute die in 1999.¹¹² It is nonetheless surprising that the Court did not discuss the potential constitutional benefits of such an internal constraint on the executive branch, even in the course of upholding the independent counsel's constitutionality. *Humphrey's Executor v. United States*, the Court's 1935 decision upholding for cause limitations on the president's ability to remove Federal Trade Commissioners, offers an instructive comparison. In the course of so holding, the *Humphrey's Executor* Court argued that at will presidential removal would exert a "coercive influence . . . [on] the independence of the

¹⁰⁹ *Morrison v. Olson*, 487 U.S. 654, 685 (1988); see also *id.* at 697.

¹¹⁰ *Id.* at 670-77.

¹¹¹ *Id.* 692-93, 695-96.

¹¹² Roberto Suro, *As Special Counsel Law Expires, Power Will Shift to Reno*, Wash. Post, June 30, 1999, at A6 (discussing lapse of Independent Counsel Act).

commission”¹¹³ and portrayed this as serving a separation of powers function by guarding against presidential assumption of legislative and adjudicative powers.¹¹⁴

Similarly absent in recent separation of powers jurisprudence are efforts to use separation of powers doctrine to encourage executive branch adherence to or adoption of internal constraints. A striking decision here is *Whitman v. American Trucking Associations*, a 2001 decision rejecting the claim that the Clean Air Act’s delegation of authority to set emission standards for pollutants that were “requisite to protect public health” was an unconstitutional delegation of legislative power.¹¹⁵ The *Whitman* Court adamantly rejected the relevance of agency-imposed constraints to assessing a delegation challenge, stating “that [t]he idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory.”¹¹⁶ *Whitman*’s failure to acknowledge the separation of powers benefits of internal constraints is particularly notable because at issue was transfer to the executive branch of broad standard-setting authority, a core legislative activity even if one the executive branch could constitutionally perform.¹¹⁷ Unlike *Morrison*, therefore, the constitutional danger most clearly presented on the face of the case was excessive accumulation of power in the executive branch, precisely the type of danger to which internal executive branch constraints would appear most constitutionally relevant. Indeed, a number of commentators had identified the importance of internal constraints that restrict agency regulatory discretion to addressing delegation fears and guarding against arbitrary or abusive agency action—as indeed had some earlier delegation doctrine precedent.¹¹⁸ The net effect of *Whitman*,

¹¹³ 295 U.S. 602, 629-30 (1935).

¹¹⁴ *Id.*

¹¹⁵ 531 U.S. 457, 472–76 (2001).

¹¹⁶ *Id.* at 473. As Peter Strauss has noted, the Court also gave no weight to the fact that the process the Environmental Protection Agency used in promulgated the air quality standards at issue involved independent checks on agency discretion, specifically participation by outside experts on the statutorily-mandated Clean Air Scientific Advisory Council. Peter L. Strauss, *On Capturing the Possible Significance of Institutional Design and Ethos*, 61 *Admin. L. Rev.* 269, 270-71 (2009) [Hereinafter Strauss, *On Capturing*].

¹¹⁷ Cf. *Whitman v. American Trucking Associations*, 531 U.S. 457, 487–90 (2001) (Stevens, J., concurring) (arguing power at issue was legislative).

¹¹⁸ See, e.g., *Yakus v. United States*, 321 U.S. 414, 425 (1944) (noting power of the courts to “ascertain whether the will of Congress has been obeyed”); Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* 55–57, 219–20 (1969) (suggesting agencies should provide standards to limit their discretion); Lisa Schultz Bressman, *Disciplining Delegation After Whitman v. American Trucking Ass’ns*, 87 *Cornell L. Rev.* 452, 477, 479–82 (2001) (arguing agencies cannot “lack any authority whatsoever to adopt narrowing constructions in the

however, was to disable delegation doctrine as a means of encouraging adoption of such constraints and reinforcing adherence to their requirements.

An interesting contrast to *Whitman*'s insistence on the irrelevance of internal constraints is the Court's 2008 decision in *Boumediene v. Bush*, which held that the Military Commissions Act (MCA)'s restrictions on the ability of Guantanamo Bay detainees to challenge their detention through habeas corpus constituted a violation of the Suspension Clause.¹¹⁹ Although involving a habeas challenge, the *Boumediene* Court underscored the importance of the writ of habeas corpus to the separation of powers, explaining that through the writ the Judiciary retains "a time-tested device . . . to maintain the 'delicate balance of governance' that is itself the surest safeguard of liberty."¹²⁰ Most significant for my purposes here, in holding the MCA unconstitutional Justice Kennedy's majority opinion made repeated reference to procedural deficiencies with the government's internal administrative proceedings, the combatant status review tribunals (CSRTs), at times suggesting that use of more robust internal procedural protections could have led to a different result. In particular, the Court emphasized that such alternative procedures can be an adequate substitute for habeas and that in determining adequacy, "[w]hat matters is the sum total of procedural protections afforded to the detainee at all stages, direct and collateral."¹²¹

The effect of *Boumediene* was thus counter to that of *Whitman*, in that here the Court used its constitutional scrutiny to encourage the executive branch to adopt more robust internal constraints. Although it seems fair to say this was an intentional move on the Court's part, at a minimum *Boumediene* demonstrates that the Court's lack of attention to the separation of powers benefits of internal constraints is not universal.¹²² Yet *Boumediene*'s express linkage of

delegation situation," and that such authority should instead be derived from administrative law); Metzger, Ordinary Administrative Law, *supra* note 78 at 7 & n.42 (contrasting *Whitman* with prior case law looking to other checks, such as judicial review, to determine constitutionality).

¹¹⁹ 128 S. Ct. 2229, 2240 (2008).

¹²⁰ *Id.* at 2247.

¹²¹ *Id.* at 2269; see also *id.* at 2268 ("[T]he necessary scope of habeas review in part depends upon the rigor of any earlier proceedings").

¹²² *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), is arguably another instance of judicial reinforcement of internal constraints, albeit more tacit. According to Neil Katyal, driving the result in *Hamdan* was the fact that internal executive branch experts on the Geneva Convention and the law of war opposed the president's position. See Neal Kumar Katyal, *Hamdan v. Rumsfeld: the Legal Academy Goes to Practice*, 120 Harv. L. Rev. 65, 105, 109–112 (2006) ("The Justices consciously refused to award deference to the presidential determinations at issue because they lacked support from the bureaucracy, and in particular the Judge Advocates General and the State Department."). Yet as Katyal acknowledges, *Hamdan*'s strong emphasis on the importance of congressional sanction at a minimum obscures the decision's concern about the lack of internal expertise underlying the administration's position. *Id.*, at 112–13; see also

separation of powers doctrine and internal constraints remains a rarity, and reflects in part specific features of habeas jurisprudence, which has long required absence of adequate alternatives before a habeas claim will lie.¹²³

Internal executive branch constraints and external judicial review are much more frequently connected in administrative law doctrine. Here the most salient recent example is *United States v. Mead Corporation*, the Court's 2000 decision indicating that *Chevron* deference is predominantly granted to agency statutory interpretations promulgated using procedures that carry the force of law.¹²⁴ By thus linking deference to particular procedures, *Mead* gave agencies an incentive to undertake notice-and-comment rulemaking or formal adjudication, both processes that impose significant constraints on agency's policymaking discretion.¹²⁵ Administrative law decisions have tied judicial review to internal constraints in other ways, such as justifying extensive agency duties of explanation in rulemaking as necessary to allow meaningful judicial review or expressing concern that judicial review may lead to excessive proceduralization of agency decisionmaking.¹²⁶ Sometimes the connection is tacit, but nonetheless an evident

Hamdan, 548 U.S. at 593-95 & n.23, 601-03, 613; *id.* at 636 (Breyer, J., concurring). Instead, the more obvious incentive created by *Hamdan* was to encourage the executive branch to obtain congressional sanction for its policy of detaining and trying enemy combatants in military commissions, which the administration promptly proceeded to do and which resulted in enactment of the MCA. *ee* *Boumediene*, 128 S. Ct. at 2242 ("Congress responded [to *Hamdan*] by passing the MCA."); Goldsmith, *supra* note 2, at 137-40 (explaining that following *Hamdan*, "only Congress could help the administration out of its predicament").

¹²³ *Boumediene*, 128 S. Ct. at 2262 ("In light of this holding [that non-citizens detained at Guantanamo Bay, Cuba entitled to constitutional habeas protections] the question becomes whether the statute stripping jurisdiction to issue the writ avoids the Suspension Clause mandate because Congress has provided adequate substitute procedures for habeas corpus."); *Swain v. Pressley*, 430 U.S. 372, 381 (1977) ("[S]ubstitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention does not constitute a suspension of the writ of habeas corpus.").

¹²⁴ *United States v. Mead. Corp.*, 533 U.S. 218, 226-27, 230 (2001).

¹²⁵ See *Mead*, 533 U.S. at 246 (Scalia, J., dissenting) ("Another practical effect of today's opinion will be an artificially induced increase in informal rulemaking. Buy stock in the GPO."); Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 *Yale L.J.* 2, 31-32 (2008) ("[I]n the nonconstitutional administrative law context, whether an agency used formal decision-making procedures in promulgating an interpretation of a statute is a central factor courts consider in deciding whether the agency's interpretation is entitled to deference.").

¹²⁶ *United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240, 249 (2nd Cir. 1977) ("Adequate review of a determination requires an adequate record, if the review is to be

dynamic. The prime example here is the greater scrutiny that the Court often applies to agency decisions that appear driven by political considerations rather than expertise.¹²⁷ Another central linkage between administrative law doctrine and internal agency constraints is the rule that courts will force agencies to follow their existing regulations, often referred to as the *Accardi* principle.¹²⁸

B. *Should Separation of Powers Analysis Be Used to Reinforce Internal Executive Branch Constraints?*

meaningful.”); see also *Vermont Yankee Nuclear Corp. v. NRDC*, 435 U.S. 519, 547 (1978) (noting concern that “Monday morning quarterbacking [of the type engaged in by the lower court] not only encourages but almost compels the agency to conduct all rulemaking proceedings with the full panoply of procedural devices normally associated only with adjudicatory hearings.”). Interestingly, some proposed linkages between judicial review and other constraints have yet to find judicial favor. The Court does not defer more to executive branch actions for which there is evidence of greater presidential oversight and sanction, see Kagan, *supra* note 39, at 2372 (advocating such deference), or of political involvement more generally, see Peter L. Strauss, *Revisiting Overton Park: Political and Judicial Controls Over Administrative Actions Affecting the Community*, 39 *UCLA L. Rev.* 1251, 1329 (1992) (“The risks created by accepted judicial participation in the political process should lead judges to pay serious attention to the realities of political controls over administrative action before acting on the assumption that such controls will not prove effective.”). Nor is the involvement of state governments or expert advisory committees generally deemed an acceptable basis for expanded deference. See *Am. Trucking Ass'ns., Inc. v. EPA*, 175 F.3d 1027, 1061 (D.C. Cir. 1999) (Tatel, J., dissenting) (arguing that because politically accountable state governments play primary role in determining how to distribute burden or regulation, “courts have less reason to second-guess the specificity of the congressional delegation”); see also Strauss, *On Capturing*, *supra* note 29, at 271.

¹²⁷ See, e.g., Freeman & Vermeule, *supra* note 60, at 53 (“[J]ust as *State Farm* held deregulatory decisions reviewable, in order to allow a judicial hard look at a decision that allegedly injected politics into an expert judgment, so too *Massachusetts v. EPA* held the denial of a petition requesting regulation to be reviewable, and for similar reasons.”). Katherine Watts has recently suggested that courts take a different approach, deferring to agency express acknowledgment of the role politics played in their decisionmaking when such political calculations are allowable by statute, as a way to limit the extent to which politics undermines expertise in agency decisionmaking. See Watts, *supra* note 60, at 5 (arguing that “what counts as a ‘valid’ reason under arbitrary-and-capricious review should be expanded to include influences from the President, other executive officials and members of Congress, so long as these political influences are openly and transparently disclosed in the agency’s rulemaking record”).

¹²⁸ See *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266-68 (1954). For discussions of *Accardi*, see Magill, *Agency Self-Regulation*, *supra* note ?, at 873-881; Thomas W. Merrill, *The Accardi Principle*, 74 *Geo. Wash. L. Rev.* 569 (2006).

Assessing whether the Court should use separation of powers analysis to reinforce internal executive branch constraints requires greater understanding of why the Court's recent decisions largely fail to do so. No doubt, a major reason is the availability of ordinary administrative law to serve this role.¹²⁹ Ordinary administrative law provides a mechanism by which the Court can often reinforce internal constraints without expressly linking them to constitutional law. But this descriptive explanation really just serves to clarify the phenomenon at issue. The Court is plainly willing to enforce internal executive branch constraints—both those imposed by Congress, and in some contexts those assumed voluntarily by executive branch actors.¹³⁰ Its reluctance lies instead in acknowledging the constitutional role these constraints can play.¹³¹

I find this reluctance puzzling. The strong judicial inclination to avoid unnecessary constitutional questions does not justify it, as the Court is hardly avoiding constitutional questions in cases like *Morrison* and *Whitman*. More relevant might be a judicial concern that emphasizing the separation of powers benefits of internal executive branch constraints suggests that such constraints are constitutionally required and risks intruding unduly on Congress's prerogatives to fashion the administrative structure of federal government.¹³² Yet it is surely possible to take internal constraints into account as one factor in a separation of powers analysis without conveying that a particular set of constraints is mandatory.¹³³ The Court has done this in

¹²⁹ See Metzger, *Ordinary Administrative Law*, supra note 78, at 6–7; see also Bressman, supra note 7, at 479–81 (“[*Whitman*] shifts the source of authority for that requirement from constitutional law to administrative law....”).

¹³⁰ See sources cited in note 128 and accompanying text discussing *Accardi*. Many voluntary constraints, most notably Executive Order 12,866, providing for centralized regulatory review by OMB, are expressly made not judicially reviewable. See Exec. Order No. 12,866, 58, Fed. Reg. 51,735 (Oct. 4, 1993), amended by Exec. Order No. 13,422, 72, Fed. Reg. 2763 (Jan. 18, 2007).

¹³¹ I have argued elsewhere that the Court is similarly reluctant to openly acknowledge the constitutional basis of many core administrative law doctrines. See Metzger, *Ordinary Administrative Law*, supra note 78, at 4–5.

¹³² U.S. Const. art. I, § 7, cl. 18.

¹³³ See *Boumediene v. Bush*, 128 S. Ct. 2229, 2269 (2008) (explaining, in reviewing whether military commissions adequate substitute for habeas, “[w]hat matters is the sum total of procedural protections afforded to the detainee at all stages, direct and collateral”); *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 326 (1985) (“The flexibility of our approach in due process cases is intended in part to allow room for other forms of dispute resolution; with respect to the individual interests at stake here, legislatures are to be allowed considerable leeway to formulate such processes without being forced to conform to a rigid constitutional code of procedural necessities.”).

the Appointments Clause context,¹³⁴ and the general balancing and functionalist character of separation of powers analysis would seem easily able to absorb an additional consideration into the mix.¹³⁵ Moreover, perhaps some form of internal executive branch constraints *are* constitutionally required to address the separation of powers concerns raised by the expansions of executive power in the modern administrative and national security state. Or, at least, the Court should more directly engage that possibility before rejecting it.¹³⁶

A more significant concern is institutional competency. Courts may have difficulty assessing internal separation of powers mechanisms in a principled yet meaningful manner. Internal constraints may simultaneously advance some separation of powers values while undermining others; in particular, at the same time as they serve the constitutional goal of checking excessive executive branch power, these constraints arguably undermine political accountability and executive branch singularity.¹³⁷ Indeed, to some scholars the role that internal constraints play in strengthening external checks, particularly Congress, makes them

¹³⁴ *Edmond v. U.S.*, 520 U.S. 651, 662–63 (1997) (stating that “[w]hether one is an ‘inferior officer’ depends on whether he has a superior” and that “‘inferior officers’ are officers whose work is directed and supervised at some level by [principal officers]”); *Morrison v. Olson*, 487 U.S. 654, 671–72 (1988) (considering a variety of factors in determining that independent counsels were inferior officers).

¹³⁵ See, e.g., *Boumediene v. Bush*, 128 S. Ct. 2229, 2246–47, 2263–74 (2008) (finding writ of habeas corpus essential to separation of powers, but considering possibility of adequate alternative); *Clinton v. Jones*, 520 U.S. 681, 697–706 (1997) (considering role of president and judiciary and the extent that participating in court proceedings would burden president’s official duties); *Morrison v. Olson*, 487 U.S. 654, 685–96 (1988) (weighing range of factors to determine independent counsel law not upset constitutional balance).

¹³⁶ In this regard, *Whitman*’s formalistic emphasis on congressional guidance as the sole constitutional consideration in nondelegation challenges and lack of attention to more functional considerations is particularly unsatisfying, given the decision’s functionalist justification for why limitations on delegations are not rigorously enforced. *Whitman v. American Trucking Associations*, 531 U.S. 457, 474 (2001) 474–75 (“[W]e have “almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.” (Citing *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting))).

¹³⁷ In her article on presidential administration, for example, now Solicitor General Elena Kagan famously argued that courts should more readily defer to agency determinations where the President is involved their formulation to enhance accountability and improve effectiveness. Kagan, *supra* note 39, at 2331–46., statues as providing for presidential role).

constitutionally suspect as an effort by Congress to aggrandize itself at the president's expense.¹³⁸ Separate from this indeterminacy concern is the problem that the practical effect of such mechanisms is often contested and rests on aspects of government operations with which many judges may be unfamiliar. Thus assessing the impact of specific mechanisms may prove difficult even when agreement exists on the relevant priority of the separation of powers values at stake.

These institutional competency concerns are quite real, but ultimately unpersuasive as a reason to forego reinforcing internal constraints through separation of powers analysis. Neither is unique to the context of assessing the potential constitutional benefits of internal executive branch constraints. The same concern with constitutional indeterminacy underlies criticism of the Court's willingness to move beyond specific constitutional provisions and base its constitutional determinations on general constitutional values and principles.¹³⁹ But that issue is water under the bridge, in particular with respect to separation of powers analysis in which general constitutional values and principles have long played a central role.¹⁴⁰ Difficulties in assessing practical impact are equally present when courts address other separation of powers issues, such as how great an intrusion removal restrictions are on president's authority and ability to perform constitutional functions. Indeed, courts regularly make such assessments in a variety of constitutional contexts.¹⁴¹ Moreover, the implications of this competency concern are not easily cabined to constitutional analysis, and also call into question efforts to reinforce internal

¹³⁸ See *Fox v. F.C.C.*, 129 S. Ct. 1800, 1815–16 (2009) (“The independent agencies are sheltered not from politics but from the President, and it has often been observed that their freedom from presidential oversight (and protection) has simply been replaced by increased subservience to congressional direction.”); Calabresi & Prakash, *supra* note 13, 583 (1994) (“[I]ndirect political control [by Congress] will necessarily exist with any so-called “independent” agency or officer because absent presidential control, congressional oversight and appropriations powers become the only concern for the officers of the allegedly “independent” agencies.”).

¹³⁹ See John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 Harv. L. Rev. 2003, 2040–47 (2009) (finding constitutional decisions derived from background norms at odds with understanding of Constitution as finely crafted compromise).

¹⁴⁰ See Gillian E. Metzger, *Response: The Constitutional Legitimacy of Freestanding Federalism*, 122 Harv. L. Rev. F. 98, 103–06 (2009).

¹⁴¹ See, e.g., *Wilkinson v. Austin*, 545 U.S. 209, 224–30 (2005) (finding detention procedures provide detainees adequate process); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 128–37 (1992) (finding parade ordinance invalid under First and Fourteenth Amendments).

checks and otherwise encourage agency self-regulating behavior through administrative law.¹⁴² As a result, this competency concern cannot justify the current disparate treatment of internal constraints in constitutional as opposed to administrative law.

In addition, this concern rests on a misperception of the role courts would need to play if separation of powers doctrine were used to reinforce internal constraints. Courts could, as in *Boumediene*, identify a fairly specific set of internal constraints as necessary to avoid a constitutional violation. But they could also serve a reinforcing role simply by taking such constraints into account in the manner suggested above, as a factor that may support a finding of constitutionality or greater deference.¹⁴³ They could even continue to rely primarily on administrative law doctrine, both as a means of reinforcing internal checks and more directly policing against undue agency politicization, and simply acknowledge more openly the constitutional separation of powers function that administrative law is then performing.¹⁴⁴

Neither concerns with judicial overstepping or judicial institutional competency thus justify ignoring the potential separation of powers role that internal executive branch constraints can serve. That still leaves the question of what is gained by including this recognition and seeking to reinforce such internal constraints through constitutional separation of powers analysis—rather than leaving this task, as at present, to the realm of ordinary administrative law. One practical issue is that a number of instances involving alleged presidential overreaching do not arise in a form that allows a direct administrative law challenge.¹⁴⁵ But viewed more systematically, administrative law often functions well as a reinforcement mechanism, particularly given the Court’s willingness to manipulate doctrine if necessary to ensure that

¹⁴² Indeed, the administrative law scholars have often criticized the Court on just this basis, with complaints that the Court’s decisions have served to ossify rulemaking being a prime example. See, e.g., Thomas O. McGarity, Some Thoughts on “Deossifying” the Rulemaking Process, 41 Duke L.J. 1385, 1387-96, 1400-03, 1419 (1992).

¹⁴³ This latter route is the approach taken in *Wyeth v. Levine* last term, in which the Court indicated that it would titrate the weight given to agency assessments of the burden state laws imposed on federal regulatory schemes based on the degree to which those assessments represent an “informed determination[.]” 129 S. Ct. 1187, 1201 (2009) (“The weight we accord the agency’s explanation of state law’s impact on the federal scheme depends on its thoroughness, consistency, and persuasiveness.”).

¹⁴⁴ For suggestions in this vein, see Metzger, Ordinary Administrative Law, *supra* note 78, at 7–12).

¹⁴⁵ See, e.g., 5 U.S.C. § 553(a) (exempting matters involving military and foreign affairs from the scope of the APA); *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992) (holding the president is not an agency under the APA).

perceived excesses of presidential politicization do not escape judicial administrative law review.¹⁴⁶

Although effective in practice, the Court's current approach suffers from analytic and normative deficiencies. Relying on ordinary administrative law obscures the legitimate constitutional role that internal executive branch constraints can play, potentially leading to an incomplete separation of powers analysis that perceives such constraints in unduly negative terms. It also fuels misconceptions about the status of ordinary administrative law doctrine and undermines transparency in administrative law contexts, with the constitutional concerns motivating decisions too rarely being acknowledged.¹⁴⁷ Particularly given the constant battle over the proper scope of judicial review in administrative law, fuller recognition of the constitutional role of internal executive branch constraints can play—and thus of the potential constitutional benefits of judicial reinforcement of such constraints—is merited.

CONCLUSION

The public administration scandals of the Bush administration and recent regulatory failures have rightly focused scholarly and public attention on questions of institutional design. Often disparaged mechanisms for ensuring executive branch accountability, such as the Freedom of Information Act or the civil service, are suddenly being viewed in a more positive light.¹⁴⁸ Although these design questions are largely approached in policy or functional terms, they also carry constitutional resonance. Highlighting this constitutional dimension offers the possibility not only of reinforcing internal executive branch constraints through separation of powers analysis, but also of greater appreciation of how to achieve separation of powers goals in the contemporary world of administrative governance.

¹⁴⁶ *Massachusetts v. EPA* is perhaps the clearest recent example of this phenomenon. See Freeman & Vermeule, *supra* note 15, at 108–09 (suggesting Court, in *Massachusetts v. EPA* may have attempted to “nudge” agencies away from politicization and strong presidential administration by employing more rigorous scrutiny).

¹⁴⁷ See Metzger, *Ordinary Administrative Law*, *supra* note 78, at 3 (“What is less often acknowledged is the degree to which constitutional concerns permeate ordinary administrative

¹⁴⁸ See Scott Shane, *A.C.L.U. Lawyers Mine Documents for Truth About Detainees and Interrogations*, *New York Times*, August 30, 2009, at A4 (describing surprise at the success of the ACLU's FOIA requests with respect to the government's detention policies and activities); see also Evan Perez & Deborah Solomon, *Treasury Retreats from Standoff with TARP Watchdog*, *Wall Street Journal*, Sept. 2, 2009, at XXX (describing push for independence of Special Inspector General for Troubled Asset Relief Program by Republican lawmakers).