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### Bureaucratic Resistance and the National Security State

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# Bureaucratic Resistance and the National Security State

*Rebecca Ingber\**

*ABSTRACT: Modern accounts of the national security state tend toward one of two opposing views of bureaucratic tensions within it: At one extreme, the executive branch bureaucracy is a shadowy “deep state,” unaccountable to the public or even to the elected President. On this account, bureaucratic obstacles to the President’s agenda are inherently suspect, even dangerous. At the other end, bureaucratic resistance to the President represents a necessary benevolent constraint on an otherwise imperial executive. This account hails the bureaucracy as the modern incarnation of the separation of powers, an alternative to the traditional checks on the President of the courts and Congress, which are faulted with falling down on the job. These “deep state” and “benevolent constraints” approaches to bureaucratic behavior track debates in the scholarship over the legitimacy of the administrative state more broadly, and are used as rhetorical devices to challenge or defend current allocations of power. These accounts lead, respectively, to fear of or over-reliance on bureaucratic resistance—which I define here broadly as action or inaction within the executive branch that hinders executive movement—as a means of checking Presidential power. Fear of bureaucratic resistance results in an erosion of valuable internal checks on the President. Alternatively, over-reliance on these internal checks may result in complacency, and an abdication of responsibility by the traditional external checks, namely members of Congress and the courts. Both approaches result in an insufficiently constrained President, which should concern most advocates and opponents of the administrative state.*

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\* Associate Professor, Boston University School of Law. I am grateful to Jack Beermann, Pam Bookman, Jessica Bulman-Pozen, Bennett Capers, Daniela Caruso, Kris Collins, Ashley Deeks, Stacey Dogan, David Fontana, Ahmed Ghappour, Paul R. Gugliuzza, Monica Hakimi, Gary Lawson, Tracey Maclin, Linda McClain, Anton Metlitsky, Gillian Metzger, Jon Michaels, Martha Minow, Henry Monaghan, Nancy Moore, Mark Nevitt, David Noll, Nicholas Parrillo, Deborah Pearlstein, David Pozen, Daphna Renan, David Rubenstein, Katherine Silbaugh, Theodore Sims, Mila Sohoni, Glen Staszewski, Rory Van Loo, Steve Vladeck, and Matthew Waxman, as well as participants at the Administrative Law New Scholarship Roundtable at Michigan, the New Voices in Administrative Law workshop at the Association of American Law Schools annual meeting, and the BU Law faculty workshop, for generous discussions and comments on drafts. For excellent research assistance, I thank Margaret Chrusciel, Lindsay Ladner, and Stew Sibert.

*This Article seeks to navigate the tension between these approaches in order to craft a more realistic account of bureaucratic resistance, divorced from substantive views about the policies or President at hand. This account suggests that critics of the bureaucracy underestimate the extent to which bureaucrats wield formal authority well-tethered to politically accountable sources. And both critics and champions of bureaucratic resistance overestimate the extent to which bureaucrats exercise functional power free from practical constraint. Ultimately, the bureaucracy is neither all-powerful nor unaccountable. While it plays an essential—and endangered—role in the modern separation of powers, it is neither the threat that some fear, nor the holistic cure to a President who is.*

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## I. INTRODUCTION

In January 2017, a momentous transition in the U.S. presidency loomed on the horizon, and the Israeli press carried a fantastical allegation. According to the country's main daily newspaper, career U.S. intelligence officials had warned their Israeli counterparts against providing information to the incoming U.S. President's administration, *their own government*, for fear that, through malfeasance or trickery, the information might land in the wrong

hands.<sup>1</sup> The allegation was explosive, and quite possibly inaccurate. But it fed into a narrative—nurtured by friend and foe of the incoming President alike—that lurking within the executive branch bureaucracy were career operators who harbored reservations about the new President and might seek to undermine him.

As such, the existence of misgivings among career bureaucrats inside the executive branch regarding the incoming President's motivations and intentions is hardly controversial.<sup>2</sup> Nor is it unique to this President, though there may be significant differences of degree. But the extent to which these misgivings have or could lead to active subversion by career bureaucrats, and the propriety of any such "resistance" from within the executive branch to an elected President, are matters of hot debate. That debate has fed and been fueled by longstanding disagreements in scholarship over the legitimacy of the administrative state writ large. But two underlying questions—the practical power and the formal authority of bureaucrats to resist—have not been adequately examined in the literature. They, and the ensuing extent to which the bureaucracy should be either feared or revered as a threat to the republic or as its last hope, are the focus of this Article.

Fear or reverence animates many accounts of bureaucratic tension within the "national security state." Modern accounts, to the extent they ascribe any significance to actors beyond the President himself and his appointed cabinet, tend toward one of two diametrically opposed conceptions of resistance to the President's agenda from the broader bureaucracy. Painted in the broadest brushstrokes, one school views bureaucratic resistance as a benevolent, apolitical constraining force on what might otherwise be an imperial autocrat.<sup>3</sup> On this account, the bureaucracy is the modern incarnation of the traditional separation of powers, reining in the President from abuses of power in areas where the courts and Congress have fallen down on the job. The other camp views the bureaucracy as a self-interested, power-hungry cabal of conspiratorial operators, a "deep state," acting in darkness to wield the vast military and surveillance powers of the state at the expense of the accountable,

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1. Ronen Bergman, *US Intel Sources Warn Israel Against Sharing Secrets with Trump Administration*, YNETNEWS (Dec. 1, 2017, 2:12 PM), <http://www.ynetnews.com/articles/0,7340,L-4906642,00.html>.

2. See, e.g., Jeffrey Gettleman, *State Dept. Dissent Cable on Trump's Ban Draws 1,000 Signatures*, N.Y. TIMES (Jan. 31, 2017), <https://www.nytimes.com/2017/01/31/world/americas/state-dept-dissent-cable-trump-immigration-order.html>; Michael D. Shear & Eric Lichtblau, *'A Sense of Dread' for Civil Servants Shaken by Trump Transition*, N.Y. TIMES (Feb. 11, 2017), <https://www.nytimes.com/2017/02/11/us/politics/a-sense-of-dread-for-civil-servants-shaken-by-trump-transition.html>.

3. For scholars who view bureaucratic constraints as critical and legitimizing checks on the President, see, e.g., Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2317 (2006); Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 551–60 (2015); Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1716 (2011) (reviewing BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* (2010)).

elected leadership, namely the President.<sup>4</sup> I call these different approaches the “benevolent constraints” and “deep state” models of bureaucratic behavior. These are, of course, stark characterizations, but much scholarship, including my own, engages elements from one or the other (or even, at times, from both).

These divergent accounts of the national security state invoke different conceptions of the ideal balance of political accountability and expertise within the government, and perhaps more significantly, they reveal contrasting instincts regarding the nature of the actors at stake. Yet they share an assumption—based in historical evidence, experience, and common sense—that bureaucratic actors will at times act in ways that frustrate the stated will of their politically-appointed leadership. This frustration of the expressed will of political leadership—and more broadly any action or inaction within the executive branch that hinders movement—is what I identify as bureaucratic resistance.<sup>5</sup> While the term “resistance” has a political life of its own, I intend it here in its broadest sense, to include any friction or force that acts as a counterweight to a particular decision or action. This includes, therefore, not only the affirmative actions by bureaucrats seeking actively to thwart the President’s agenda, but also what I have previously termed the “neutral friction” that constrains all bureaucratic action, irrespective of substance.<sup>6</sup>

Both approaches to bureaucratic behavior are preoccupied with the legitimacy of presidential power and the administrative state. Indeed, these approaches track debates in the scholarship about the legitimacy of the administrative state more broadly, and are used as rhetorical devices to challenge or defend current allocations of power. The “deep state”—a term historically associated with abuse of the national security powers of a government—has recently been appropriated by those engaged in the project

4. See, e.g., MARC AMBINDER & D.B. GRADY, *DEEP STATE: INSIDE THE GOVERNMENT SECRECY INDUSTRY* 4 (2013); MIKE LOFGREN, *THE DEEP STATE: THE FALL OF THE CONSTITUTION AND THE RISE OF A SHADOW GOVERNMENT* 34–36 (2016); Peggy Noonan, *The Deep State*, WALL ST. J.: PEGGY NOONAN (Oct. 28, 2013, 9:10 PM), <https://blogs.wsj.com/peggynoonan/2013/10/28/the-deep-state>. See generally Jack Goldsmith, *Paradoxes of the Deep State*, in CASS R. SUNSTEIN, *CAN IT HAPPEN HERE?: AUTHORITARIANISM IN AMERICA* (2018) (providing a cogent and nuanced argument in favor of the position that the U.S. national security state has “deep state” tendencies, which can both be anti-democratic and legitimizing). Other scholars have critiqued the national security bureaucracy as powerful, unaccountable, and overly secretive without necessarily employing the term “deep state.” See MICHAEL J. GLENNON, *NATIONAL SECURITY AND DOUBLE GOVERNMENT* 11–28 (2015). A broader group of scholars express similar concerns with power in the hands of an unelected bureaucracy across the administrative state. See, e.g., STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* 17 (2008).

5. I define the term more fully in Section II.B.

6. Rebecca Ingber, *The Obama War Powers Legacy and the Internal Forces that Entrench Executive Power*, 110 AM. J. INT’L L. 680, 687 (2016) (identifying the concept of “neutral friction” as forces hindering change within the executive branch bureaucracy).

of delegitimizing the administrative state more broadly as untethered to democratic accountability. The deep state rhetoric conjures images of shadowy, powerful bureaucrats, evoking and stoking fears of the power that has accrued in the executive branch's national security bureaucracy, for the purpose of challenging the administrative state and its regulatory power writ large, or any bureaucratic hurdles to the President's agenda specifically.

Advocates of benevolent internal constraints, for their part, (or ours, as I fall loosely within this camp) point to the existence of bureaucratic resistance as enhancing the legitimacy of the administrative state and the modern accrual of executive power, specifically *because* the bureaucracy sometimes checks the President and his political leadership, thus demonstrating that their power is not uncabined. Scholars within this school range from embracing these internal constraints as legitimizing of a given exercise of executive power, to proffering them as essential to the constitutionality of the administrative state. Both the deep state and benevolent constraints projects thus recognize the existence of bureaucratic tension within the executive branch. But when it comes to determining the locus of their disagreement, they are ships passing in the night. Of particular relevance here, the benevolent constraints scholarship, focused as it is on countering fears of presidential power and not of shadowy bureaucrats, simply does not speak to the threat of an unaccountable deep state. To the contrary, by often simplifying the tensions within the executive branch to a bipolar career-President dynamic in order to hail the importance of checks by the former on the latter, this literature may incidentally bolster, rather than answer, deep state fears.

While much of the political rhetoric surrounding the "deep state" is overwrought, it is a successful narrative not only because it evokes historical abuses—for example, the Iran Contra affair, or FBI surveillance of Martin Luther King, Jr. under J. Edgar Hoover—but also because it taps into a common anxiety in the public mind: a frustration with a lack of connection to one's government, a belief that the federal bureaucracy has expanded beyond its purview, and a sense that little changes from one administration to the next. Much of this has a real basis in evidence. Government actors *have* in some instances abused their power. Abuse aside, there *is* significant continuity between presidential administrations, and the entrenched bureaucracy has a lot to do with that.<sup>7</sup> Moreover, though constraint may be valued for its own sake, it does not necessarily produce benevolent results. In fact, it often stands in the way of benevolent action.<sup>8</sup> As I have written elsewhere, while a primary effect of bureaucratic constraints is to restrain political actors from quickly

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7. *See id.* at 687.

8. Of course, what constitutes "benevolent" action necessarily turns on substantive views about the policy at hand. For example, views will differ on whether the internal constraints that hindered President Obama's ability to close the detention facilities at Guantanamo Bay aided or harmed U.S. national security or were otherwise normatively "benevolent." *Id.* at 688.

effecting significant changes, these institutional features also operate to defend and entrench executive claims to power, over time leading to incremental aggrandizement that internal forces alone cannot—or at least will not—dial back.<sup>9</sup>

This Article seeks in part to navigate the tension between these accounts in order to assess the experience of bureaucratic resistance divorced, to the extent feasible, from substantive views about the particular policy or President at hand.<sup>10</sup> To the extent these approaches toward bureaucratic resistance are proxies for debates about the legitimacy of the administrative state, I view my intervention here as follows: The deep state decriers' invocation of bureaucratic resistance as a threat to the legitimacy of the administrative state rests on an argument that bureaucrats both exercise significant power to steer government action against the President, and are unaccountable in their exercise of that power. I demonstrate that this is inaccurate or at least incomplete on both fronts, and thus deep state rhetoric obscures rather than illuminates debates about the administrative state.

The benevolent constraints literature, by contrast, presents the existence of bureaucratic constraints as legitimizing of the administrative state and as the last safeguard of the republic should the traditional checks of the courts and Congress fall down on the job. I agree that the existence of internal process and constraint has salience for questions about the legitimacy of any given exercise of executive power, as well as to how the other branches should engage. Because I demonstrate that these internal actors and mechanisms are inextricably, symbiotically interwoven with the external—deriving from them both power and constraint—I view them as necessary to the continued ability of all three branches to govern and to constrain executive action. But as such, I do not view bureaucratic constraints as ultimately surviving the failure of the traditional separation of powers, and therefore they are not a substitute for it.

This Article proceeds as follows: Part I explores academic accounts of bureaucratic resistance and the interplay between historical perspectives on bureaucratic behavior and the rise of the modern deep state narrative.

Part II challenges several common mischaracterizations of the bureaucracy and resistance within it, which can fuel both fear and complacency. The first is the misrepresentation of the bureaucracy as comprising a clear dichotomy between two polar opposites: a crisply defined career bureaucracy, on the one hand, and the President and his inner circle, on the other. The second is the depiction of resistance within that bureaucracy as unidirectional, originating within that defined career bureaucracy, and directed against the President. These oversimplifications

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9. *Id.* at 687.

10. Of course, we cannot divorce substantive views entirely from this assessment, as questions of legality, abuse, or corrupt intent behind executive action will all be relevant to the question of bureaucratic authority to resist. *See infra* Part III.



are sometimes useful heuristics, but they lend themselves to distortion, particularly when paired with fear of the bureaucracy as a “deep state” bent on undermining the President. By the same token, they may undergird unrealistic expectations of the “bureaucracy’s” capacity to rein in executive overreach. This Part thus provides a more textured description both of the diverse array of actors throughout the executive branch bureaucracy and of the multi-directional nature of resistance within it.

The Article next addresses the formal and functional authority that bureaucratic actors actually wield and, specifically, the power that they have to resist the President or other bureaucratic actors. Does their discretion to act align with their authority to do so? This Article challenges both the deep state and benevolent constraints accounts of bureaucratic power. I argue that the deep state account underestimates the extent to which bureaucrats wield actual formal authority tethered to political accountability. And while both critics and champions of bureaucratic resistance alike rely on conventional accounts portraying bureaucrats as wielding significant functional power to act, this article demonstrates the practical constraints on that power facing all actors within the executive branch. The reality is that all bureaucratic actors at every locus throughout the executive branch reasonably sense themselves to be hemmed in, most of the time, from all directions.

Leaks merit their own brief treatment in this Part, both because they are frequently held out as the evidence of an aggressive and powerful deep state, and because leaking is the rare mechanism that does not require organized action in order to have real consequences. Access to explosive information alone can be a force-multiplier for a lone wolf executive branch actor. As such, leaking is immune from several of the practical constraints on bureaucratic power that I discuss in this section. Leaks are often likened to that paradigmatic example of “deep state” corruption, the Hoover-era hoarding of secrets to blackmail political officials. Both involve the use of information to affect decision-making, but that is where the similarity ends. Leaks effect change only if they are made public; their power rests in the public’s hands. As such, they are antithetical to blackmail, whose power rests in the hands of the blackmailer, and only so long as the public does not discover the secret. The leaker’s power is thus heavily circumscribed by the intended recipients of the leaks themselves, the public, over whom the individual leaker has little-to-no control. Leaking can raise many legitimate concerns, to be sure, but power untethered to public accountability is not usually one of them.<sup>11</sup>

Part IV establishes a framework for assessing bureaucratic resistance. It first establishes zones of discretion in undertaking acts of bureaucratic

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11. A notable exception is the use of leaks or other selective release of information timed specifically to affect public opinion decisively, such as immediately preceding an election. I might distinguish this from other leaks because the finality of an event like an election gives information released immediately prior more weight than it otherwise might have and any defects cannot be remedied by subsequent releases of information.

resistance, using legality as the normative trait (though not the only potential trait) against which to weigh appropriateness of action. These zones range from legally-compelled resistance to unlawful action. In between are acts that might be authorized by not compelled, as well as acts that are unauthorized but not strictly unlawful. Where a specific action falls within these zones is dependent not only on the act itself, but on the purpose for which it is taken. Therefore, this Part next maps out the relationship between purpose and mechanism. Refusing to change language in a report, for example, falls within one zone (legally-compelled action) if done for the purpose of challenging an order to doctor facts, and another zone (unauthorized but not necessarily unlawful) if done due to a mere policy disagreement with one's boss.

I then deploy this framework in Part V to revisit the story I discuss above of U.S. intelligence agents-gone-rogue, as well as three familiar examples of bureaucratic resistance to political leadership. These are: President Nixon's last Defense Secretary's efforts to rein in the President's potential use of military force during the waning days of his administration; the bureaucratic hurdles President Obama faced in attempting to close the Guantanamo Bay detention center; and the ongoing executive branch investigation into Russia's interference in the 2016 presidential campaign, despite President Trump's frequent entreaties that it end. While the national security sphere is the focus of this Article and the case studies I dissect, the broader reconceptualization of bureaucratic constraint, resistance, and power resonates across the administrative state.

This Article is ultimately a cautious defense of the robust exercise of formal bureaucratic power, tempered by—and in fact reliant upon—the manifold existing practical constraints on that power. Both the deep state and benevolent constraints bodies of scholarship recognize the considerable power that has accumulated in the modern executive branch. It is concern over the risks of executive overreach and the potential for containing that power that animates much of this work. The most significant point of departure between these bodies of scholarship is that the benevolent constraints account views the unelected bureaucracy as a solution to the modern accretion of power in the Executive, whereas the deep state decriers see it as the threat. This Article argues that the bureaucracy itself is not the threat that some fear, nor is it the whole cure to a President who is. Nevertheless, it is an essential component of our modern system of checks and balances, and it is in jeopardy.

## II. THE DEEP STATE AND THE INTERNAL SEPARATION OF POWERS

Public law scholarship on both the international and domestic planes has been engaged for years in projects aimed at peeling away the outer layers of the black box of the state to reveal more and more of its inner workings to the next group of interested scholars. While conventional international law scholarship often treated states as though they were individual, rational

actors, imbued with anthropomorphized thoughts and self-interests, many modern scholars have moved beyond this treatment. They have opened up those states to examine how the many institutions within affect the state's actions and legal positioning, and thus the development of international law. Scholarship on these intra-state institutions similarly initially treated these institutions—such as the branches of U.S. government—as distinct unitary entities, only to have those initial accounts overcome by subsequent scholarship opening up our conceptions of Congress, the courts, and the Executive Branch to account for the many actors within.<sup>12</sup> Scholars of presidential powers have explored dynamics between the President and actors within his administration, most notably between the President and his appointees,<sup>13</sup> or between the President and his lawyers,<sup>14</sup> and even among those lawyers themselves.<sup>15</sup> Likewise, scholars of administrative law have moved beyond treating agency action as deriving from or empowering one sole source, and have looked behind the outer veneer of the agency and top administrator to examine the role played by professionals, career bureaucrats, within the agency.<sup>16</sup> This Article follows in this trend of opening up the complexity of the executive branch further, to assess the experience of bureaucratic resistance within it.

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12. See, e.g., Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 240 (1992).

13. See, e.g., CALABRESI & YOO, *supra* note 4, at 10–22 (detailing the history of presidential claims to control over political appointees); John Yoo, *Unitary, Executive, or Both?*, 76 U. CHI. L. REV. 1935, 1936 (2009) (reviewing CALABRESI & YOO, *supra* note 4, and arguing in favor of a broader conception of the unitary executive to include significant substantive powers).

14. See, e.g., BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 87–116 (2010); ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 137–42 (2010); Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1101–03 (2013); Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1460–70 (2010); Richard H. Pildes, *Law and the President*, 125 HARV. L. REV. 1381, 1389–90 (2012) (reviewing POSNER & VERMEULE, *supra*).

15. See generally, e.g., Rebecca Ingber, *Interpretation Catalysts and Executive Branch Legal Decisionmaking*, 38 YALE J. INT'L L. 359 (2013) (examining the process of legal decision-making inside the U.S. executive branch, and arguing that the trigger or "interpretation catalyst" forcing the executive branch to respond to a legal question shapes the specific decision-making process, including the hierarchy of legal decision-makers involved, and ultimately has a significant effect on the executive's legal position); Neomi Rao, *Public Choice and International Law Compliance: The Executive Branch Is a "They," Not an It*, 96 MINN. L. REV. 194 (2011) (arguing that the array of different legal voices on matters of international law inside the executive branch provides the President with legal options, thus aiding his ability to shape his administration's views).

16. JON D. MICHAELS, *CONSTITUTIONAL COUP: PRIVATIZATION'S THREAT TO THE AMERICAN REPUBLIC* 205–08 (2017) (hailing the importance of the career civil service as against the threat of privatization); David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 203 (2001); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2260 (2001); Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1057 (2011).

## A. BENEVOLENT CONSTRAINTS: THE INTERNAL SEPARATION OF POWERS

In recent years, a rich body of scholarship has emerged exploring the role of institutional features and actors within the executive branch in constraining presidential prerogative, a dynamic often referred to as the “internal separation of powers.”<sup>17</sup> This scholarship has developed largely in response to concerns that over time too much power has accumulated in the Executive, at the expense of the other branches, and possibly also at the expense of individual rights. These “Imperial Executivists,” borrowing loosely from Arthur Schlesinger,<sup>18</sup> raised concerns that the courts and Congress—the entities formally charged with checking presidential overreach—have lapsed in these responsibilities and instead over time have acquiesced in a dangerous accretion of power to the President.<sup>19</sup> In response to these genuine concerns regarding congressional and judicial abdication of power to the President, a number of scholars rose to defend the merits of the current system and, to varying degrees, to decry the argument that the presidency had become an imperial one, divorced from constraint. (I say “to varying degrees,” because these scholars have differed over the extent to which the status quo is working just fine, thank you very much,<sup>20</sup> or whether additional internal constraints are necessary to best preserve the checks and balances of our system of government).<sup>21</sup> Some of these scholars had themselves served within the executive branch, which gave them a perch from which to observe in practice the relationship between the President and legal constraint. As part of their defense of modern executive power, these scholars identified the existence of *internal* constraints within the executive branch that they deemed reasonable “second-best” alternatives to the traditional Madisonian separation of powers, giving rise to the term “internal separation of powers.”<sup>22</sup>

This scholarship has predominantly considered the question of legal constraint on the *President*, responding as it does in particular to the matter of whether the President is constrained by law. Thus, much of this scholarship is

17. Katyal, *supra* note 3, at 2316–17; Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 423 (2009); Michaels, *supra* note 3, at 536; Morrison, *supra* note 14, at 1524.

18. See ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 377 (1973).

19. ACKERMAN, *supra* note 14, at 87–89, 95; Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1732 (1996).

20. Michaels, *supra* note 3, at 530; Morrison, *supra* note 3, at 1692.

21. Katyal, *supra* note 3, at 2318 (calling for the creation of an internal independent court with the power to check the President).

22. See *id.* at 2316–17. I include within this body of scholarship scholars who have explored internal constraints on the President as part of the checks and balances without necessarily using this term. Jon Michaels has delved extensively into the layers of bureaucratic dynamics, which he defends as an essential component of the checks and balances of the modern government. See, e.g., MICHAELS, *supra* note 16, at 205–08; Michaels, *supra* note 3, at 551–60; Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. 227, 229 (2016).

focused on a small but critical office within the executive branch long devoted to grappling with the most significant legal questions facing the President: the Office of Legal Counsel (“OLC”), within the Department of Justice (“DOJ”).<sup>23</sup> But more broadly, the unifying contribution of this body of literature is a grappling with the internal dynamics of the executive branch and some of the varied ways in which these dynamics may constrain a President inclined to excesses.

The internal separation of powers literature is responsive to, and to my view answers many of the concerns of, scholars warning of an “Imperial Presidency.”<sup>24</sup> Certainly, Congress and the courts have relinquished some responsibility for direct oversight of the national security state, and in doing so may be seen as weakening the checks and balances of the traditional Madisonian separation of powers. This may be due in part to abdication, but it is also a function of the sheer impossibility of reaching into all of the dark corners of the behemoth that is the modern executive branch. Whatever the reason, as scholars of internal constraints rightly note, this has not resulted in a presidency wholly unchecked by or without concern for legal limits. To the contrary, we have seen in recent years a presidency almost obsessed with law, along with an explosion of NGOs, reporters, and scholars steeped in national security law expertise—scrutinizing its every move.<sup>25</sup>

Much of this presidential engagement with law owes a debt to the growing legions of executive branch lawyers toiling away in their windowless offices and “SCIFs”<sup>26</sup> from DC to the northern Virginian suburbs. Many of these executive branch actors tend to hold over in their positions from presidential administration to administration. That continuity of personnel—as well as the trail of paper it creates and the respect for norms it entrenches—is partly responsible for the fact that executive branch legal positions and other policies do not immediately or easily reverse course from administration to administration.<sup>27</sup> On that account alone, internal separation of powers scholars are correct about the existence of a constraining effect of internal institutions on whoever happens to be sitting in the Oval Office.

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23. See, e.g., Kalyal, *supra* note 3, at 2336; Morrison, *supra* note 14, at 1458; see also Daphna Renan, *The Law Presidents Make*, 103 VA. L. REV. 805, 813 (2017) (exploring the possible decline of the importance of OLC in recent years).

24. SCHLESINGER, *supra* note 18, at 377.

25. See, e.g., JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11*, at 36–39 (2012).

26. A “Sensitive Compartmented Information Facility” (“SCIF”) is a secure room used for viewing and discussing highly classified information. See Dennis C. Blair, Intelligence Community Directive Number 705, U.S. OFF. DIRECTOR NAT’L INTELLIGENCE (May 26, 2010), [https://www.dni.gov/files/documents/ICD/ICD\\_705\\_SCIFs.pdf](https://www.dni.gov/files/documents/ICD/ICD_705_SCIFs.pdf).

27. Rebecca Ingber, *Co-Belligerency*, 42 YALE J. INT’L L. 67, 105 (2017) (examining the evolution of executive branch legal positioning and the constraints on radical change in the context of the U.S. government’s position on its authority under the AUMF).

But many scholars concerned with an Imperial Presidency rightly fear not just the person of the President himself, *but the executive branch as a whole*. For critics of the national security state who may view existing policies in the areas of surveillance, targeted killing, detention, or other areas as examples of Executive overreach, the existence of internal constraints that keep the President from changing course are not merely insufficiently comforting; these internal forces for continuity are something to fear in and of themselves.<sup>28</sup> For at least when the President himself is the danger, there exists a potential solution—seek to elect someone with better policies. Much more elusive is how to course correct in the face of an entrenched bureaucracy, bound by its nature to keeping a President from easily changing that course.

### B. THE RISE OF THE AMERICAN “DEEP STATE” NARRATIVE

Concerns with the substantive policies of the national security state coincide with a recent narrative in accounts of the presidency: that of the “deep state.” Historically, the term “deep state” has been employed with respect to regimes in Turkey, Pakistan, and Egypt, to describe control of the state, irrespective of democratic institutions, by powerful and clandestine alliances among the intelligence, military, and business elite, often with ties to organized crime.<sup>29</sup> As it is used in the U.S. context, the “deep state” generally connotes an organized bureaucratic power base within the executive branch, typically within the national security arm, that may operate independently of, or in tension with, the politically elected leadership.<sup>30</sup> The “deep state” narrative takes various forms—from conspiracy theories about a cabal of bureaucrats seeking to undermine the President,<sup>31</sup> to very real concerns about the outsized power of the national security state and its past

28. GLENNON, *supra* note 4, at 91–99. For a contrasting view of the relationship between internal constraints and individual rights see Shirin Sinnar, *Protecting Rights from Within? Inspectors General and National Security Oversight*, 65 STAN. L. REV. 1027, 1074 (2013).

29. See David A. Graham, *There Is No American ‘Deep State’*, ATLANTIC (Feb. 20, 2017), <https://www.theatlantic.com/international/archive/2017/02/why-its-dangerous-to-talk-about-a-deep-state/517221>; David Remnick, *There Is No Deep State*, NEW YORKER (Mar. 20, 2017), <https://www.newyorker.com/magazine/2017/03/20/there-is-no-deep-state>.

30. See, e.g., Goldsmith, *supra* note 4, at 107–10. Recently some scholars who favor bureaucratic checks on the President have sought to reappropriate “deep state” rhetoric. See Jon D. Michaels, *The American Deep State*, 93 NOTRE DAME L. REV. 1653, 1666 (2018); Cass R. Sunstein, *In Praise of the Deep State*, DEEP STATE (June 13, 2017, 8:00 AM), <http://thedeepstate.com/in-praise-of-the-deep-state>.

31. See Mark Hensch, *Gingrich: ‘The Deep State Exists’*, HILL (Mar. 14, 2017, 4:07 PM), <http://thehill.com/homenews/news/323950-gingrich-the-deep-state-exists>; David J. Lynch, *Trump Loyalists Lash Out at ‘Deep State Gone Rogue’*, FIN. TIMES (Aug. 10, 2017), <https://www.ft.com/content/64b8f8d2-7d47-11e7-9108-eda0bcb0928>; Patricia Mazzei, *Rubio: ‘Bureaucrats’ to Blame for Softening Trump Cuba Policy*, MIAMI HERALD (Nov. 8, 2017, 6:27 PM), <http://www.miamiherald.com/news/nation-world/world/americas/cuba/article183486726.html>; Tom Porter, *Deep State: How a Conspiracy Theory Went from Political Fringe to Mainstream*, NEWSWEEK (Aug. 2, 2017, 12:23 PM), <http://www.newsweek.com/deep-state-conspiracy-theory-trump-645376>.

abuses.<sup>32</sup> The “deep state” terminology itself evokes a shadowy, conspiratorial tone, particularly considering its origins in states where the use of the term coincides with a breakdown of faith in elected institutions.<sup>33</sup>

What the various “deep state” narratives share is a concern that the large and powerful national security bureaucracy might operate untethered from the democratic controls of elected political oversight. In this regard, they provide a more conspiratorial spin on an old problem, the longstanding frustrations of presidents seeking to push their agendas through the vast and seemingly calcified bureaucracy.<sup>34</sup>

While skepticism of the bureaucracy as a whole has been a particular feature of some Republican administrations in recent decades, as well as a longstanding critique in legal scholarship,<sup>35</sup> that concern did not historically extend to the national security bureaucracy such as the military and intelligence community.<sup>36</sup> Criticism of the national security state has instead

32. See, e.g., Goldsmith, *supra* note 4, at 107–12. “Deep state” terminology has also been employed more broadly to describe power elites at high levels of government and the phenomenon of government secrecy more generally. See, e.g., LOFGREN, *supra* note 4, at 4.

33. Ryan Gingeras, *Last Rites for a ‘Pure Bandit’: Clandestine Service, Historiography and the Origins of the Turkish ‘Deep State’*, 206 PAST & PRESENT 151, 152 (2010) (the “phrase” deep state “generally refers to a kind of shadow or parallel system of government in which unofficial or publicly unacknowledged individuals play important roles in defining and implementing state policy”); Sarah Childress, *The Deep State: How Egypt’s Shadow State Won Out*, PBS FRONTLINE (Sept. 17, 2013), <https://www.pbs.org/wgbh/frontline/article/the-deep-state-how-egypts-shadow-state-won-out>; Philip Reiner, *Pakistan’s ISI: The True Deep State*, CIPHER BRIEF (July 20, 2017), <https://www.thecipherbrief.com/pakistans-isi-the-true-deep-state>.

34. Presidents have long expressed frustration with bureaucratic impediments, but some Republican presidents have expressed a more specific view that the bureaucracy is left-leaning and predisposed against their agenda. Joel D. Aberbach & Bert A. Rockman, *Clashing Beliefs Within the Executive Branch: The Nixon Administration Bureaucracy*, 70 AM. POL. SCI. REV. 456, 456 (1976) (stating that all presidents face concerns about loyalty from the bureaucracy, but that this dynamic is heightened “when the changeover is from Democratic to Republican control because of Republican suspicions that the career bureaucracy is heavily infiltrated by Democrats”); Francis E. Rourke, *Responsiveness and Neutral Competence in American Bureaucracy*, 52 PUB. ADMIN. REV. 539, 541–42 (1992) (“Republican presidents in recent decades have tended to see bureaucracy as being in the camp of their political enemies, as being perhaps Democrats in disguise—or worse, closet liberals. Democratic presidents, on the other hand, have been inclined to view bureaucrats as having an agenda of their own, which they pursue no matter who occupies the White House.”). But see Richard L. Cole & David A. Caputo, *Presidential Control of the Senior Civil Service: Assessing the Strategies of the Nixon Years*, 73 AM. POL. SCI. REV. 399, 409 tbl.6 (1979) (noting the longstanding frustration of presidents vis-à-vis the career bureaucracy, but showing that the majority of career civil servants during Nixon’s presidency did not, in fact, oppose the President’s policy agenda).

35. Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994) (deeming the modern administrative state unconstitutional); Gillian E. Metzger, *Foreward: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 2 (2017) (chronicling modern and historical antipathy toward the administrative state).

36. See Aberbach & Rockman, *supra* note 34, at 457–58. An intriguing exception is the Nixon administration’s attempt to blame the Watergate break-in on the CIA. See, e.g., David Greenberg, *Watergate Fueled Conspiracy Theories, Too*, POLITICO MAG. (June 17, 2017), <https://www.politico.com/magazine/story/2017/06/17/trump-watergate-and-how-conspiracy-theories-get-made-215274>;

largely been a focus of the political left, from scholars to NGOs and activists. For these groups, concerns with the national security state aligned with concerns about an unchecked imperial executive.<sup>37</sup> That fear of the national security state has a sturdy foundation based on a long history of abuses, which boil over from time to time, and which often require course corrections such as the reining in of the intelligence community in the wake of the Church Committee report.<sup>38</sup> Over the past decade, however, with a left-leaning presidential administration wielding the instruments of the national security state, some among the political right began to adopt the critiques, and fears, of that bureaucracy.<sup>39</sup>

The most recent presidential campaign capitalized upon fears of the national security state, with a twist. With Trump's transition into the Oval Office, his surrogates and supporters could no longer decry the President himself, but they continued their assault on the entrenched bureaucracy.<sup>40</sup> They adopted and then adapted the concept of the "deep state" to their new purpose. While the traditional critique of the national security state focused on the power of the state—including the President at its helm—as against individual rights, the new "deep state" decriers railed against the power of the federal bureaucracy as against the President, incorporating the old Republican critiques of the domestic policy-focused bureaucracy and now turning them against the national security state as well. Any perceived bureaucratic resistance to the President's agenda—from the career analysts in the intelligence agencies, to line officials at the EPA, to his own political appointees at the helms of agencies and inside the White House—became evidence to the President's supporters of a "deep state" seeking to undermine him.<sup>41</sup>

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*Richard Nixon: Statements About the Watergate Investigations (May 22, 1973)*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/index.php?pid=3855> (last visited Oct. 10, 2018).

37. Flaherty, *supra* note 19, at 1742.

38. See, e.g., S. REP. NO. 94-755, bk. I at 7 & bk. II at 93 (1976) (presenting the final report of the Senate Church Committee, which investigated abuses by the CIA, NSA, FBI and IRS that included illegal attempted assassinations of foreign leaders and illegal domestic surveillance); RONALD KESSLER, *THE SECRETS OF THE FBI* 38 (2011); TIM WEINER, *ENEMIES: A HISTORY OF THE FBI* 83–84 (2013) (detailing excesses of the FBI under the leadership of J. Edgar Hoover, focusing on the existence of the bureau's secret 'enemies' list).

39. See, e.g., DAVID E. BERNSTEIN, *LAWLESS: THE OBAMA ADMINISTRATION'S UNPRECEDENTED ASSAULT ON THE CONSTITUTION AND THE RULE OF LAW* 68–69, 112–13 (2015).

40. Patrick J. Buchanan, *After the Coup, What Then?*, BUCHANAN (Aug. 8, 2017, 12:46 AM), <http://buchanan.org/blog/after-the-coup-what-then-127443>; Joe Concha, *Gingrich Says Mueller Represents 'Deep State' at Worst*, HILL (Aug. 4, 2017, 9:01 AM), <http://thehill.com/homenews/media/345290-gingrich-says-mueller-represents-deep-state-at-worst>; Ian Schwartz, *Hannity Rips "Deep State": "Unelected Fourth Branch of Government Looking for Retribution"*, REAL CLEAR POL. (June 17, 2017), [https://www.realclearpolitics.com/video/2017/06/17/hannity\\_rips\\_deep\\_state\\_unelected\\_fourth\\_branch\\_of\\_government\\_looking\\_for\\_retribution.html](https://www.realclearpolitics.com/video/2017/06/17/hannity_rips_deep_state_unelected_fourth_branch_of_government_looking_for_retribution.html).

41. See, e.g., Kalev Leetaru, *What the 'Rogue' EPA, NPS and NASA Twitter Accounts Teach Us About The Future of Social*, FORBES (Jan. 25, 2017, 10:35 PM), <https://www.forbes.com/sites/kalevleetaru/2017/01/25/what-the-rogue-epa-nps-and-nasa-twitter-accounts-teach-us-about-the->



## C. POINTS OF CONVERGENCE AND POINTS OF DEPARTURE

While all these approaches to bureaucracy generally share a conception of bureaucrats as sometimes resistant to the President's agenda, they part ways on when such resistance is legitimate.

Under the "deep state" model, unelected bureaucrats are unaccountable to the public and therefore, at least under an extreme version of this view, any resistance to those officials who *are* duly elected must be intrinsically illegitimate. On the other end of the spectrum, scholars hailing benevolent constraints accept bureaucratic resistance as not only legitimate in itself but legitimizing of the President's power.<sup>42</sup> And yet this scholarship does not provide an answer as to when such resistance is appropriate, or not, and where the line should fall. Moreover, because this scholarship has responded generally to fears of presidential power, it has focused on how bureaucratic checks limit and thus legitimize the President himself; as such, it has not provided a full response to critiques of the national security state as a whole, nor does it respond to fear of those bureaucratic checks themselves.<sup>43</sup>

In between are scholars who have long raised concerns with the breadth of power currently amassed by the national security state as a whole, or who are focused on the specific substantive policies the government establishes, rather than the particulars of the behind-the-scenes process that results in such policies.<sup>44</sup> These scholars are not wholly uninterested in the balance of

future-of-social (exploring the existence of social media accounts purporting to be the vehicles for "rogue" bureaucrats within those government agencies); Jonathan Lemire, *Trump White House Sees Deep State Behind Leaks, Opposition*, AP NEWS (Mar. 14, 2017), <https://www.apnews.com/363ccdb946548bfa4b855ae38d1797a/Trump-White-House-sees-%22deep-state%22-behind-opposition,-leaks> (discussing the preoccupation within the Trump White House with a perceived "deep state" seeking to undermine the President); Michael S. Schmidt et al., *Mueller Removed Top Agent in Russia Inquiry Over Possible Anti-Trump Texts*, N.Y. TIMES (Dec. 2, 2017), <https://www.nytimes.com/2017/12/02/us/politics/mueller-removed-top-fbi-agent-over-possible-anti-trump-texts.html>.

42. See *supra* note 3 and accompanying text.

43. Some internal constraints advocates propose additional institutional mechanisms that would be even more independent of the President. See Katyal, *supra* note 3, at 2318.

44. Scholars have hailed instances of resistance when it has been in the service of individual rights, for example, as against presidential illegality, and bemoaned it when it has entrenched or furthered policies the author disfavors. See Ingber, *supra* note 6, at 686; Michael P. Scharf, *International Law and the Torture Memos*, 42 CASE W. RES. J. INT'L L. 321, 346 (2009) (describing the State Department Office of the Legal Adviser's opposition to the "torture memos" and techniques); Sinnar, *supra* note 28, at 1036-40; cf. Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 197 (2015) (defending the merits of constraining the civil service in the service of effectuating particular policy goals); Aziz Z. Huq, *The President and the Detainees*, 165 U. PA. L. REV. 499, 500 (2017) (explaining the "bureaucratic-legislative alliance" that hindered President Obama's plan to close the military detention facility at Guantanamo Bay). See generally JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* (2009) (describing administration officials'—including the author's—confrontation with the administration over the "torture memos"). There are some notable exceptions. Michael Glennon, for example, is concerned both with the substantive powers

power between the entrenched bureaucracy and the political leadership, but their interest in internal process is usually a means to a substantive ends. Bureaucratic resistance is thus likely to be favored or disfavored depending on the policy it is resisting.

This Article seeks to intervene at precisely this point. It follows to some extent in the vein of the “benevolent constraints” project and is deeply informed by this scholarship. Yet I see risks in both the deep state *and* the benevolent constraints models of bureaucratic behavior: the twin dangers of fear and complacency. Fear of the bureaucracy may provoke attempts to erode that check on the President. But over-reliance on bureaucratic checks is also dangerous, as it may lead to an abdication of responsibility by the other branches, resulting in insufficient cabining of executive power as a whole. I seek to contribute here a complexity necessary to assessing what the bureaucracy can feasibly accomplish, within both its functional and formal power, and what it cannot. To do so, I draw on bodies of scholarship on executive power and national security, political science literature on bureaucratic behavior, and administrative law scholarship on the allocation of power within the executive branch—as well as other sources, historical and contemporaneous—that provide data on government behavior.<sup>45</sup>

### III. BUREAUCRACY AND RESISTANCE

Bureaucratic resistance within the U.S. executive branch, as elsewhere, takes countless shapes. The phrase “bureaucratic resistance” is typically employed to describe a unidirectional activity—“resistance”—from one clearly defined group—the “bureaucracy,” or perhaps the “career bureaucracy”—as against another—the President or political leadership.<sup>46</sup> Yet that crisp conceptual dichotomy between these two entities masks the complexity of both the bureaucracy and resistance within it. To be sure, all of these categories are useful heuristics, and I employ them myself. But in order to consider the extent to which this “bureaucracy” might employ “resistance” in such a manner that it truly constrains—or alternatively, truly threatens—the President in a way that should be either relied upon or feared, it is necessary to unpack what each of these components actually entails.

Before diving in, it is worth considering the means and mechanisms of recognizing and identifying evidence of resistance inside the bureaucracy. Evidence of internal decision-making, let alone dissent, is particularly elusive

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and policies of the executive branch as a whole and with what he perceives as an “illusion” of political leadership, in fact steered by the unelected bureaucracy. GLENNON, *supra* note 4, at 29–37.

45. Sources of evidence on government behavior include formal government documents, information from government leaks, press reports, congressional statutes and legislative histories, government briefs and oral arguments, statements by executive officials, judicial opinions, and accounts of former government officials.

46. See, e.g., Jennifer Nou, *Bureaucratic Resistance from Below*, YALE J. ON REG.: NOTICE & COMMENT (Nov. 16, 2016), <http://yalejreg.com/nc/bureaucratic-resistance-from-below-by-jennifer-nou>.

in the context of the national security state, where so much executive branch deliberation takes place in secret. Nevertheless, evidence of resistance and internal dissent comes from numerous sources. The most noticeable comes from leaks to the press or criticism from political actors about bureaucratic intransigence. But there exist more subtle means of discerning internal conflict. Shards of evidence exist in inconsistent statements from different agencies, an evolving position, or even an intentionally ambiguous one.<sup>47</sup>

Evidence of resistance and dissent can also be found in the dogs that do not bark. Consider for example the norm of agency signatures on legal briefs in litigation to which the United States is a party or is intervening: a lack of a relevant official's signature may signal nonconcurrence with the government's position.<sup>48</sup> Similarly, discontent with a position may be inferred when officials fail to provide documentation of internal support that would ordinarily be expected. Courts have sometimes drawn such inferences. For example, in litigation over President Trump's travel ban, one court noted as significant that the government had not included in its briefing evidentiary support for its position from relevant agency professionals, along with evidence that a leaked draft report from civil servants had not been filed with the court.<sup>49</sup> At times, courts conflate concerns over lack of involvement by a particular agency with concerns over lack of involvement of particular actors *within* the agency, and thus when courts raise concerns about internal "process," this may imply a deeper interest in the involvement of particular actors who may be assumed to have greater expertise, or who may be assumed to act free from partisan political motivations that the court may deem inappropriate to the matter at hand.

#### A. BUREAUCRATIC AXES

Bureaucratic resistance and perceptions thereof are anything but monolithic. The vast executive branch "bureaucracy" has not only thwarted and befuddled Democrat and Republican presidents alike,<sup>50</sup> it has also

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47. For a discussion on divining an understanding of the U.S. government's legal position—or conflicting positions—on the scope of the 2001 statute governing the conflict with al Qaeda through evidence from public sources, see Ingber, *supra* note 27, at 80–86.

48. See, e.g., Margaret H. Lemos, *The Solicitor General as Mediator Between Court and Agency*, 2009 MICH. ST. L. REV. 185, 197 (noting that under typical practice, officials from relevant agencies with a stake in litigation sign the briefs DOJ files in court; lack of signature thus signals dissent). At times of internal debate, the DOJ may act as arbiter. See *Rex E. Lee Conference on the Office of the Solicitor General of the United States*, 2003 BYU L. REV. 1, 73 (including a statement of former Deputy Solicitor General, now Chief Justice John Roberts, likening such mediation to "Thanksgiving dinner at a dysfunctional family" in which the SG's office plays the parents).

49. *Hawaii v. Trump*, 878 F.3d 662, 756, 766 (9th Cir. 2017).

50. A famous quote attributed to Truman, contemplating his successor, Dwight Eisenhower, as President, evokes this frustration: "He'll sit here, and he'll say, 'Do this! Do that!' *And nothing will happen*. Poor Ike—it won't be a bit like the Army. He'll find it very frustrating." RICHARD E. NEUSTADT, *PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP* 9 (1960). While all presidents have shared frustration with the bureaucracy, some political scientists have suggested that a

thwarted the plans of every human being within the executive branch, low and high-level alike. And despite the narratives that divide the bureaucracy into neat, opposing categories, in reality there are few true crisp dichotomies, whether between the President and the bureaucracy; the politically appointed and civil service; the partisan and the impartial; or the high-level officials and the low.<sup>51</sup> Each of these categories itself represents a spectrum rather than a binary dichotomy, as I will discuss in this section. And bureaucratic actors at each point along each of these many spectra intersect and tussle with others above, below, and horizontal to them across the bureaucracy.<sup>52</sup>

### 1. Career-Political Continuum

One such spectrum exists between the President and the paradigmatic career civil servant line officer, between which sit a tangle of actors. Within the White House staff alone, where one might expect to find the highest consolidation of political actors, such as senior advisors who came with the President from the campaign, also sit high-level officials appointed to their positions from within the ranks of career officers,<sup>53</sup> high-level civil servants who run offices within the national security council and sit alongside political counterparts, and lower-level civil servants detailed to the White House from agencies.<sup>54</sup> Within agencies, the staff will include a politically appointed head

partisan imbalance among career bureaucrats results in a more “disruptive” relationship with a Republican President. See Aberbach & Rockman, *supra* note 34, at 468. Others have suggested that this imbalance is overstated. See Cole & Caputo, *supra* note 34, at 406.

51. Career officials are often in positions of decision-making authority throughout the executive branch. See Aberbach & Rockman, *supra* note 34, at 458 (discussing their sample set as limited to both “political appointees and high-level career civil servants” who “occupy positions with administrative responsibility for some program or set of programs,” with an objective of interviewing only those officials “whose jobs clearly entailed a responsibility for policy making and implementation”).

52. For a thorough study of the modern personnel architecture, see DAVID E. LEWIS & JENNIFER L. SELIN, SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES (2012), [https://www.acus.gov/sites/default/files/documents/Sourcebook-2012-Final\\_12-Dec\\_Online.pdf](https://www.acus.gov/sites/default/files/documents/Sourcebook-2012-Final_12-Dec_Online.pdf).

53. See, e.g., Ryan Browne, *Who Is H.R. McMaster, Trump’s National Security Adviser?*, CNN POL. (last updated May 16, 2017, 1:05 PM), <https://www.cnn.com/2017/05/16/politics/hr-mcmaster-national-security-adviser-donald-trump/index.html> (noting McMaster’s trajectory from career military officer to national security adviser under President Trump); *John Brennan Fast Facts*, CNN (last updated Aug. 17, 2018, 2:25 PM), <https://www.cnn.com/2013/01/08/us/john-brennan-fast-facts/index.html> (providing a list of facts on former CIA director John Brennan); Press Release, White House Office of the Press Secretary, President Obama Announces More Key Administration Posts (Apr. 17, 2013), <https://obamawhitehouse.archives.gov/the-press-office/2013/04/17/president-obama-announces-more-key-administration-posts> (noting Avril Haines’ prior positions as a career lawyer in the State Department); Statement by the President on the Selection of Avril Haines as Deputy National Security Advisor (Dec. 18, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/12/18/statement-president-selection-avril-haines-deputy-national-security-advi>.

54. Freedom of Information Act Request, JMD FOIA Tracking No. 110520 (Jan. 23, 2018) (revealing that there were six DOJ employees detailed to the White House and two to NSC on November 1, 2016, and one DOJ employee detailed to the White House and zero to NSC on Feb. 1, 2017); Karen DeYoung, *How the Obama White House Runs Foreign Policy*, WASH. POST (Aug. 4, 2015), <https://www.washingtonpost.com/world/national-security/how-the-obama-white-house-runs-foreign>

at the very top and her immediate advisers, many of whom may be politically appointed but not necessarily all; a mélange of politically appointed and high-level career officials running the many offices inside the agency, as well as a mix of career and appointed officials, like special assistants, occupying both more and less important mid and lower-level jobs throughout.<sup>55</sup> A civil servant acting as head of an office may oversee political appointees assigned to that office, and will attend meetings, work together, and spar with colleagues from other agencies who will also be a mix of politically appointed and career officials.

As a matter of interests and policy positioning, a high-level politically appointed official running an agency or office full of career civil servants may find she has more in common professionally with those working under her than with her politically appointed peers working within another agency or at the White House. That may be due either to the personal interests that led her to the job in the first place, or it may result from the day-to-day interaction with the institutional environment itself.<sup>56</sup> The converse is true for the array of employees serving within the White House, who often find themselves understanding those needs and interests, irrespective of their particular employment status. Policy positions therefore often align according to agency lines as much (or more than) along an individual's placement in the hierarchy.

## 2. Burrowers and Ladder Climbers

In addition to the cross-section of a career-political spectrum I describe above, the placement of any given individual actor at a point along that spectrum is itself a moving target. Any particular executive branch official may invariably occupy different roles throughout his or her career. It has been discussed in both academic literature and public discourse that individuals who have been appointed to political positions in one administration may later “burrow” into a career position in order to stay on in the executive

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[policy/2015/08/04/2befb960-2fd7-11e5-8353-1215475949f4\\_story.html](https://www.nsc.gov/policy/2015/08/04/2befb960-2fd7-11e5-8353-1215475949f4_story.html) (providing organizational charts of the National Security Council).

55. For a discussion of the “modern personnel system” see DAVID E. LEWIS, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE* 20–25 (2008). Lewis describes the plethora of statuses within the executive branch, from the “positions requiring presidential nomination and Senate confirmation (PAS)” as well as the Senior Executive Service (“SES”) and Schedules A–C. *Id.* at 22. SES positions include both career and political appointments, and Lewis refers to Schedule C as a “subtype of political appointment.” *Id.* at 24; see also Kathleen M. Doherty et al., *Controlling Agency Choke Points: Presidents and Turnover in the Senior Executive Service* 3 (Vanderbilt Univ. Law Sch. Legal Studies Research Paper Series, Working Paper No. 17-64, 2017) (describing the SES as “typically occupy[ing] top level positions, and by design, serv[ing] as the link between the administration and the career officials more generally”).

56. See, e.g., FRANCIS E. ROURKE, *BUREAUCRACY, POLITICS, AND PUBLIC POLICY* 194 (3d ed. 1984) (describing how agency officials may find they “care more about the needs and problems of the agency whose work they are directing than they do about representing the President’s views in developing the organization’s policies”).

branch within the next administration.<sup>57</sup> But the opposite, less-familiar phenomenon also occurs: Career officials may rise sufficiently high in the executive branch that they hold significant positions of power, at times taking on a new appointed, non-career slot.<sup>58</sup> In contrast to burrowers, these “ladder climbers” will at times find it difficult or impossible to remain long into a new administration, whether or not technically holding the right to a protected, tenured position.<sup>59</sup>

Burrowers and ladder climbers may have different cultural and institutional instincts and biases than others who occupy similar positions due to their different backgrounds. They also share a keener understanding of how to work the levers of the bureaucracy than do their more static counterparts. These features give them certain powers, and potentially a different willingness to use those powers, than others in similar roles. An official who rose to senior status from a career as a civil servant may be more comfortable pushing back on political operatives than would a purely political appointee who owes his career to his boss. By contrast, a political appointee who burrows into a career position may have political instincts unusual for purely career officials. Similarly, officials who switch agencies may also have residual proclivities and loyalties left over from their former role, or a unique ability to engage with other offices. These kinds of temporal blurring are not unique to higher-level officials. Lower-level officials may also be temporarily detailed to the White House, or to special assistant positions typically held by politically-appointed officials, and will similarly accumulate a hybrid of career and political loyalties and instincts.

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57. See, e.g., Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. Rev. 557, 606–09 (2003) (discussing presidents’ reliance, promotion, hiring, and transferring of political personnel into career positions in order to entrench like-minded personnel in anticipation of a presidential transition).

58. See Rourke, *supra* note 34, at 542 (discussing the potential “for civil servants to become key players in the policy process by demonstrating a strong sympathy with the political goals of the administration in power,” thus executing a “metamorphosis of executive officials from career to political status”). Falling into this “ladder climber” category are officials like Sally Yates, who was temporarily the Acting Attorney General of the DOJ until she was fired by President Trump. Statement, The White House, Statement on the Appointment of Dana Boente as Acting Attorney Gen. (Jan. 30, 2017), <https://www.whitehouse.gov/briefings-statements/statement-appointment-dana-boente-acting-attorney-general>.

59. Foreign service officers often rise to the level of Ambassador or other appointed placements within the State Department and later return to their career positions. But reports suggest that after the Trump transition, some foreign service officers holding high-level appointments found their continued service untenable and left the government. See, e.g., Josh Delk, *State Department Wracked by Departures Under Trump: Report*, HILL (Nov. 25, 2017, 10:55 AM), <http://thehill.com/blogs/blog-briefing-room/361783-state-department-wracked-by-departures-under-trump-report>; Gardiner Harris, *Diplomats Sound the Alarm as They Are Pushed Out in Drones*, N.Y. TIMES (Nov. 24, 2017), <https://www.nytimes.com/2017/11/24/us/politics/state-department-tillerson.html>.

### 3. Ideological Alliance with the President

The representation of partisan or ideological leanings among the bureaucracy form another important spectrum. While the bureaucracy is sometimes painted in broad brushstrokes as leaning “left,” political science research has shown that partisan leanings among the bureaucracy, and attitudes toward presidential administrations directly, tend to shift from administration to administration.<sup>60</sup> Moreover, ideological leanings are hardly constant across the entire bureaucracy; rather, they tend to vary agency to agency, according to the alignment of the agency’s mandate with particular ideological views or party affiliation.<sup>61</sup> Individuals who value environmental protection will be more inclined to seek jobs at the EPA than those who do not; whereas ICE will be populated generally by those who prioritize border security. This kind of self-selection is natural but may lend some support to the notion that some agencies may have more personnel inclined toward the politics of a given President than others.<sup>62</sup>

This also means that the ideological spectrum does not map neatly onto the career-political spectrum. In fact, this is even true at the level of political appointees. The cabinet itself may include members of the opposition political party, as Presidents have historically reached across partisan aisles to fill even highly important appointments in their inner circle.<sup>63</sup> At the other end, in some cases, entire offices, like OLC, have high turnover and thus while the line attorneys are officially “career” positions, the high rate of turnover between administrations, and type of work such offices tend to do, ensures that a fairly high percentage of the office will ultimately align with the political preferences of the President.<sup>64</sup>

### 4. Political Taint and Independence

Another critical axis that does not align as one might expect with the career-political divide is the expectation by any given official or office of

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60. See, e.g., Joel D. Aberbach & Bert A. Rockman, *The Political Views of U.S. Senior Federal Executives, 1970-1992*, 57 J. POL. 838, 842-52 (1995) (“[T]he top career service in the United States turns out to be surprisingly flexible in adapting to the political forces around it.”); Cole & Caputo, *supra* note 34, at 406.

61. Mark D. Richardson et al., *Elite Perceptions of Agency Ideology and Workforce Skill*, 80 J. POL. 303, 304-07 (2017) (demonstrating significant variances in political affiliation among civil servants according to agency).

62. MARISSA MARTINO GOLDEN, WHAT MOTIVATES BUREAUCRATS?: POLITICS AND ADMINISTRATION DURING THE REAGAN YEARS 27 (2000); Aberbach & Rockman, *supra* note 34, at 461-66.

63. President Obama, for example, held over as his defense secretary Robert Gates, who had previously served Republican presidents. *Dr. Robert M. Gates*, DEP’T OF DEF., <https://www.defense.gov/About/Biographies/Biography-View/Article/602797> (last visited Sept. 2, 2018) (“Dr. Robert M. Gates served as U.S. Secretary of Defense from December 2006 [under President Bush] to July 2011 [under President Obama].”).

64. GOLDEN, *supra* note 62, at 96-98; Aberbach & Rockman, *supra* note 34, at 467.

independence from the President, and from politics or partisanship more broadly.<sup>65</sup> In other words, to what extent should an individual expect to fall in line with the President's political considerations, in lieu of exercising independent judgment? Some offices—including within the politically-appointed leadership—view themselves as necessarily insulated from policy preferences, others from partisan politics.<sup>66</sup> In the realm of legal decision-making, the expectation of independence from politics between DOJ and the White House is to some extent more significant than that between the career bureaucracy and political leadership, and there are further shades of gray as between different offices and actors within DOJ.<sup>67</sup> There is “a spectrum of accepted political or policy motivation among executive branch legal decision-makers, from the President at one end, to White House counsel to OLC to civil servants working in agency general-counsel offices to career prosecutors at the other extreme.”<sup>68</sup> In light of recent events, I would note the FBI director's place on that spectrum is historically closer to that of career prosecutors in terms of expected independence from the President, despite the fact that he is politically appointed (albeit for a fixed term) and removable by the President like other cabinet officials.<sup>69</sup>

##### 5. The Entrenched and Transient Bureaucracies

There is one additional dichotomy that may better describe what many scholars of the national security state—or of the internal separation of powers—have in mind when they consider bureaucratic constraints on political change. This is the dynamic between what I will call the entrenched and the transient bureaucracy, that is, those actors within the bureaucracy who tend to remain in the government through ideologically-opposed presidential administrations, and those who swap out when their President or party is out of power. Again, the reality is less a dichotomy than a spectrum. Actors leave at different points after a transition, based on the nature of their particular appointment, or whether they may return to a career post, or the extent to which they are comfortable working for a new administration.<sup>70</sup>

65. I identify this spectrum in Ingber, *supra* note 6, at 688.

66. *Id.*

67. *Id.*

68. *Id.* (footnote omitted); see also Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1202–03, 1209–11 (2013) (discussing the “convention” of independence between the President and U.S. attorneys and OLC).

69. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 1101, 82 Stat. 197, 236 (1968), amended by Crime Control Act of 1976, Pub. L. No. 94-503, § 203, 90 Stat. 2407, 2427 (1976) (codified as amended at 28 U.S.C. § 532).

70. See, e.g., Doherty et al., *supra* note 55, at 9–12 (discussing when and why certain career officials—and specifically those who have attained high-level positions—choose to leave at times of political transition); Maggie Haberman & Charlie Savage, *U.S. Attorney Preet Bharara Says He Was Fired After Refusing to Quit*, N.Y. TIMES (Mar. 11, 2017), <https://www.nytimes.com/2017/03/11/us/politics/preet-bharara-us-attorney.html> (discussing U.S. Attorneys appointed by President



Some burrow or ladder climb. But this is another useful—and distinct—heuristic, and one that I think targets most directly both the dangers and benefits of bureaucratic tension.

Despite the complexity I describe in this section, and the risks that oversimplification creates in assuming or assessing bureaucratic proclivities, heuristics are nevertheless useful and can be employed with care. I use them in this Article and elsewhere. The category distinctions I discuss in this section, and the tensions among them, are real. Civil servants do, of course, exist, as do political appointees. Different officers are more or less connected to partisan politics. My goal in this section is not to have us do away with classifications. Rather my intent is to establish three points: First, these classifications do not present perfectly binary dichotomies. Second, when scholars and others paint the bureaucracy in binary terms they often group together features that do not necessarily align. For example, as I show here, the career-political axis does not—as many might expect—map perfectly onto the political taint-to-independence spectrum, or onto the spectrum of ideological affinity with the President. Finally, the oversimplification of bureaucratic categories, particularly as a crisp dichotomy between the President and the career bureaucracy, risks engendering erroneous assumptions about how bureaucratic “resistance” might operate. Disaggregating the many different spectra of the bureaucracy is thus a necessary precursor to considering the many forms and many directions resistance takes within it.

### B. DISAGGREGATING RESISTANCE

Having pulled apart the bureaucracy, we can now consider the reality of bureaucratic resistance. The bureaucratic defiance of clear categories I describe above muddies the conventional conception of unidirectional “resistance” from the bureaucracy as against the President. Each of the innumerable offices and actors throughout the bureaucracy is more likely to tussle with another office or actor within the bureaucracy (not to mention actors outside the bureaucracy, such as Congressional members or staffers), as they are with the President specifically. Career line officials may at times

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Obama whom Trump asked to resign); Harris, *supra* note 59 (explaining how staff reductions, dismissals, and early retirements have fueled “the exodus of more than 100 senior Foreign Service officers” during President Trump’s first year in office); Sam Schwarz, *Who Is John Feeley? Trump’s Panama Ambassador Resigns, Says He Can’t Faithfully Serve the President*, NEWSWEEK (Jan. 12, 2018, 12:06 PM), <http://www.newsweek.com/john-feeley-donald-trump-resigns-ambassador-shithole-779852> (highlighting a case of a career member of the civil service who rose to ambassadorial rank and then chose to resign because of disagreement with President Trump’s policies nearly a year after President Trump took office); Michael D. Shear et al., *Trump Fires Acting Attorney General Who Defied Him*, N.Y. TIMES (Jan. 30, 2017), <https://www.nytimes.com/2017/01/30/us/politics/trump-immigration-ban-memo.html> (detailing the dismissal of Sally Yates, a long-term civil servant turned political appointee, upon her refusal to defend President Trump’s executive order initiating the travel ban shortly after his inauguration).

frustrate the will of their political superiors, and supervisors may overturn or otherwise wreak havoc with the work of their subordinates; but as often as not, officials at different levels within the same office (career and political) may sit on the same side of a conflict as against another agency or office. Each agency has its own mission and culture, as does each component within each agency. They often work together effectively, and can create powerful synergies when they do so.<sup>71</sup> But these multifarious components of the executive branch also spar over turf they are invested in and play hot potato with matters they do not want on their plates.<sup>72</sup> In the process, they frustrate each other's plans, battle over each other's positions, and generally "resist" in both neutral and active measures the movement of executive action.

### 1. Mechanisms of Resistance

Scholars of bureaucracy, from political science to administrative law, have long sought to understand bureaucratic behavior, and how to control it. As part of these studies they have documented the variety of actions (or inactions) that bureaucrats take to slow down or push back against policy changes, and have generally classified bureaucratic action, including resistance, according to the mechanism employed. Albert Hirschman crafted the well-known tripartite scheme of "exit, voice, and loyalty" to describe the potential range of organizational behavior in the face of unsatisfactory conditions.<sup>73</sup> One might "exit"—in other words, quit; or one might stay and speak up in order to remedy the matter from the inside.<sup>74</sup> Loyalty helps explain why some might choose the latter over the former.<sup>75</sup> John Brehm and Scott Gates created a model more specifically attuned to government bureaucrats.<sup>76</sup> Under their schema, bureaucratic action falls within one of three categories: working, shirking, or sabotage.<sup>77</sup> Working, they define as "devoting energy in order to accomplish the policy goals of the principal."<sup>78</sup> Shirking "may be either leisure-shirking or politically motivated shirking; and

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71. See Daphna Renan, *Pooling Powers*, 115 COLUM. L. REV. 211, 256 (2015).

72. See, e.g., ROURKE, *supra* note 56, at 190 ("[M]any bureaucrats look upon power as a burden rather than an opportunity, and shift it from their hands whenever possible."); MICHAEL P. SCHARF & PAUL R. WILLIAMS, SHAPING FOREIGN POLICY IN TIMES OF CRISIS: THE ROLE OF INTERNATIONAL LAW AND THE STATE DEPARTMENT LEGAL ADVISER 52-54, 57 (2010) (discussing turf battles between the Departments of State and Justice over international litigation and interpretation of international law).

73. ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 4, 77 (1970).

74. *Id.* at 21-43.

75. *Id.* at 82.

76. See JOHN BREHM & SCOTT GATES, WORKING, SHIRKING, AND SABOTAGE: BUREAUCRATIC RESPONSE TO A DEMOCRATIC PUBLIC 21 (1997).

77. *Id.* at 22.

78. *Id.*

sabotage [is] devoting time at work in order to undermine the policy goals of the principal.”<sup>79</sup>

I draw on these categories, but as I characterize resistance it includes elements of each. Exit and voice, from Hirschman’s model, are certainly forms of resistance under any definition, and understanding bureaucratic loyalty—to the country, to the executive branch, to an agency, to one’s colleagues—is essential to comprehending bureaucratic behavior, particularly when it seems at odds with conventional ideas of self-interest.<sup>80</sup> Of Brehm and Gates’ schema, I include “working” as well as “shirking” and “sabotage” in my conception of resistance. I would expand the definition of “working” that Brehm and Gates employ to include not only forwarding the goals of the principal, but also “seeking to accomplish the goals of that worker’s position,” which might include the goals of the institution, and the legislation creating that position, office, and agency, and thus might at times conflict with the President’s prerogatives. Thus, each of Brehm and Gates’ three categories—shirking, sabotage, and *working*, includes actions that could fall within my definition of “resistance.”

Jennifer Nou has taken these categories to a more granular level and identified several specific “mechanisms” she associates with bureaucratic resistance, as follows: “slow down,” “build a record,” “leak,” “enlist inspectors general, ‘offices of goodness,’ and other allies,” “sue the agency,” and “resign.”<sup>81</sup> These generally fall within the shirking and sabotage categories, and I might add some additional examples, such as: refusal to act, either publicly or privately;<sup>82</sup> and the seeking of support from potential allies outside the executive branch, such as members or staff of congressional committees.

On top of these “shirking and sabotage” mechanisms of resistance, however, I would also classify within resistance many acts that Brehm and Gates might consider “working,” such as the daily activities of executive branch officials asking questions, seeking information, sticking to facts and law regardless of the policy implications, and seeking to persuade others, either their colleagues in other offices or agencies, or the political leadership,

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79. *Id.*

80. See HIRSCHMAN, *supra* note 73, at 76–105.

81. Nou, *supra* note 46. In the early months of the Trump administration, several commentators put forward lists of potential actions bureaucratic actors might take to “resist” the President. See Oona Hathaway & Sarah Weiner, *Dissenting from Within the Trump Administration*, JUST SEC. (Jan. 17, 2017), <https://www.justsecurity.org/36420/dissenting-trump-administration>; Ian Samuel, *The Nervous Civil Servant’s Guide to Defying an Illegal Order*, SLATE (Feb. 2, 2017, 3:53 PM), [http://www.slate.com/articles/news\\_and\\_politics/politics/2017/02/legal\\_protections\\_for\\_civil\\_servants\\_who\\_refuse\\_to\\_carry\\_out\\_illegal\\_orders.html](http://www.slate.com/articles/news_and_politics/politics/2017/02/legal_protections_for_civil_servants_who_refuse_to_carry_out_illegal_orders.html).

82. Sally Yates’s decision to refuse to defend the Trump administration travel ban executive order is a recent, very public example. Lydia Wheeler, *Acting Attorney General Orders DOJ Not to Defend Trump’s Travel Ban*, HILL (Jan. 30, 2017, 6:43 PM), <http://thehill.com/homenews/administration/316990-justice-department-wont-defend-trump-immigration-order>.

of the advantages of particular decisions, or of the risks of others.<sup>83</sup> This kind of resistance may take the form of a range of actions, including disagreeing in a meeting, framing the agenda in a particular way, or drafting a memo seeking to persuade the other relevant actors.<sup>84</sup> An official who, after taking one of these actions, then loses a policy dispute may at that point choose to stand down, or she may take additional action, such as “elevate” the dispute to a higher-level official, or register dissent with formal channels to the extent they exist.<sup>85</sup> Of course, she may at times move on to activities better categorized as shirking or sabotaging, such as switching portfolios, or seeking support from congressional staff, or even resigning or leaking damaging information about the proposed course of action, but these actions are the outliers. The piece of resistance that is simply “work,” but that nevertheless keeps the machinery of the bureaucracy from changing direction on a dime or from taking action as quickly as it otherwise might, is the bread and butter of bureaucratic life.

On top of this classification by mechanism, I add classification of resistance by underlying purpose, as follows. Many of the mechanisms discussed above may be employed for many of the purposes discussed below.

## 2. Purposes of Resistance

### i. *Neutral Friction*

In past work on continuity in executive power, I identified a feature of bureaucratic behavior I termed “neutral friction,” which I defined as: the existence of forces within the executive branch “that operate to constrain . . . change generally, in any direction, without regard to substance.”<sup>86</sup> These forces for continuity exist in part because of the simple practical hurdles of making the gears of an enormous organization move, and in part because of the continuity of bureaucratic actors themselves, working on the same issues from one administration to the next. There will inevitably be transaction costs to making a change, whatever the substance of the baseline.

Thus, for example, despite a presidential transition, DOJ attorneys will continue to file briefs in ongoing cases that take the same legal positions as—indeed are often based on the same templates of—briefs written under the

83. See, e.g., GOLDEN, *supra* note 62, at 91 (discussing that attorneys in the DOJ civil rights division “argued vociferously, both orally and in written memoranda” with the political appointees in their office).

84. Charlie Savage, *Obama Team Is Divided on Anti-Terror Tactics*, N.Y. TIMES (Mar. 28, 2010), <http://www.nytimes.com/2010/03/29/us/politics/29gforce.html> (discussing dueling internal memos between the State Department and Pentagon over the legal theory for detention in the conflict with al Qaeda).

85. HANNAH GURMAN, *THE DISSENT PAPERS: THE VOICES OF DIPLOMATS IN THE COLD WAR AND BEYOND* 171, 191 (2012).

86. See Ingber, *supra* note 6, at 687. In that piece, I was referring specifically to continuity in legal positions between administrations and neutrality vis-à-vis claims of executive power. Here, I am referring to neutrality vis-à-vis a particular substantive policy.

prior administration.<sup>87</sup> The Department of Defense (“DOD”) will continue preparing for natural disasters despite an Executive Order directing the rescission of key climate change regulations.<sup>88</sup> Bureaucratic behavior will tend to continue on its path unless countervailing actors directly force a change, and counteraction requires time and energy to effectuate, not to mention knowledge of the matter.<sup>89</sup> Until officials within an agency receive direct orders to change course, they will generally continue their work as usual.<sup>90</sup> They may do so despite awareness of the President’s publicly stated view, and whether or not they agree with that stated view.

Such continuity may read as “resistance” to a President’s agenda, yet an official working within an agency is expected to continue doing her job as she has always done until specifically directed otherwise, even if that means continuing to work under a mandate that the President has denigrated.<sup>91</sup> Officials may struggle to make sense of how the President’s stated agenda may affect their priorities, and may work to incorporate that agenda into their actions or not; but until they receive clear, direct guidance from a superior, they may not know how they will be expected to effectuate the President’s intent. There is good reason to wait for clear orders to trickle down through the hierarchy—policy changes are often not simple binary choices and must be implemented while taking into consideration the interests and work of numerous actors throughout the executive. Moreover, as presidential prerogative weaves its way through the normal process of becoming workable

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87. See *id.*

88. Exec. Order No. 13,783, 82 Fed. Reg. 16093 § 3 (Mar. 28, 2017); Tara Copp, *Pentagon Is Still Preparing for Global Warming Even Though Trump Said to Stop*, MIL. TIMES (Sept. 12, 2017), <https://www.militarytimes.com/news/your-military/2017/09/12/pentagon-is-still-preparing-for-global-warming-even-though-trump-said-to-stop>.

89. See GOLDEN, *supra* note 62, at 91 (discussing the significant steps the political appointee in charge of the DOJ civil rights division under Reagan took in order to effectuate major changes in the office’s positions, including placing political appointees in the frontline task of brief-drafting).

90. See, e.g., Nik Steinberg, *Rex Tillerson Is Running the State Department Into the Ground: Skilled and Patriotic Diplomats Are Leaving Like Never Before in an Exodus that is Damaging the United States*, POLITICO (Oct. 4, 2017), <http://www.politico.com/magazine/story/2017/10/04/rex-tillerson-is-running-the-state-department-into-the-ground-215677>. The author reflected on his interaction with career foreign policy officials in the aftermath of Trump’s election who focused on continuity and stated their mandate, in the words of one foreign service officer, as follows: “We will keep serving this country. That’s what we do.” *Id.*

91. This “neutral friction”—and not a more aggressive affront to the President’s authority—was likely responsible for military officers’ dismissive response to President Trump’s “tweet” in July 2017, declaring “that the United States Government will not accept or allow transgender individuals to serve in any capacity in the U.S. Military.” Richard Sisk, *Dunford Taps Brakes on Trump’s Call for Transgender Ban in Military*, MIL. TIMES (July 27, 2017), <http://www.military.com/daily-news/2017/07/27/dunford-taps-brakes-on-trumps-call-for-transgender-ban-in-milit.html> (quoting the Chairman of the Joint Chiefs as stating that there would be “no modifications to the current policy until the President’s direction has been received by the Secretary of Defense and the Secretary has issued implementation guidance,” in other words, until the order had been processed through the normal chain of command).

policy, the position itself may change shape. The President himself may change course, incrementally or even dramatically, upon hearing from all of the relevant parties.<sup>92</sup>

Changing the status quo simply requires more effort than allowing it to continue. This is why effective bureaucracy wranglers seek to frame decision-making tasks such that their preferred outcome is positioned as the status quo, rather than as a novel change.

ii. *Legal Constraint*

Most legal scholarship on constraints within the executive branch is concerned primarily with whether, and the extent to which, executive branch actors are constrained by law, and why. Much of this literature focuses on the President-checking function played by lawyers inside the executive branch, in particular the office of OLC, and the extent to which it adequately circumscribes the President's actions within legal boundaries.<sup>93</sup> Very recent scholarship has suggested a decline in the prominence of OLC in favor of other institutional processes for assessing and delivering legal advice to the President, such as the National Security Council ("NSC")-led "Lawyer's Group."<sup>94</sup> But whichever set of government lawyers is the focus, the implicit understanding of this body of scholarship is that there is some tension between the "President," on one side, and his "lawyers," on the other, as if these were each discrete and unitary categories with one line of bilateral tension between them.

But the bureaucratic mechanisms of legal constraint within the executive branch are far more complex than a simple dichotomy between the President and "the lawyers." A realistic assessment of legal constraint must account for not only the potential friction between policy actors and lawyers, but also

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92. See President Donald Trump, Remarks on the Strategy in Afghanistan and South Asia (Aug. 21, 2017), <https://www.whitehouse.gov/the-press-office/2017/08/21/remarks-president-trump-strategy-afghanistan-and-south-asia> (acknowledging his own change of heart on the preferred course of action in Afghanistan, after having met with his cabinet and military leadership).

93. See *supra* notes 13–15. For example, there is a longstanding debate over the extent to which the President is practically constrained by law—international or domestic—in determining whether to use force unilaterally, without congressional authorization, or in violation of the UN Charter. See POSNER & VERMEULE, *supra* note 14, at 155–57; Marty Lederman, *Why the Strikes Against Syria Probably Violate the U.N. Charter and (Therefore) the U.S. Constitution*, JUST SECURITY (Apr. 6, 2017), <https://www.justsecurity.org/39674/syrian-strikes-violate-u-n-charter-constitution>. See generally ABRAM CHAYES, *THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISES AND THE ROLE OF LAW* (1974) (exploring the role and effect of law in high-level crisis decision-making within the U.S. government, through the lens of the Cuban missile crisis); JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005) (pointing to the Kosovo intervention, in violation of the UN Charter, as an example of the "common" occurrence of state violations of international law, which, the authors argue, must be judged on normative rather than formal grounds, in part because international law changes through state violations, and may in fact change for the better).

94. See Renan, *supra* note 23, at 830–35.

between and among lawyers themselves. Legal disagreement inside the executive—and the corresponding resistance that it may entail—is anything but unidirectional. Lawyers throughout the executive branch clash regularly over their different interpretations of legal obligations and authorities—between agencies, between offices within agencies, between individuals.<sup>95</sup> Often these disputes are longstanding and survive one or more presidential transitions. Such interagency tussling may involve a longstanding dispute about a legal position between colleagues at a horizontal “peer” level between the agencies, in other words at about the same pay grade. At other times there may be a dispute about a legal question between career attorneys in an office and their politically appointed heads.<sup>96</sup> But as often as not, the political head may be more institutionally inclined to agree with her career subordinates than with her own horizontal “peers” at other agencies. And thus, should career-level officials feel the need to “elevate” the matter—in other words, to raise it with higher-level officials in the bureaucratic food chain—the political head will in such circumstances be inclined to plead the case of her own subordinates in an interagency dispute—or in a dispute with a policy office within the agency—rather than to side automatically with her counterparts in other offices or agencies. At the very least, career attorneys—along with the particular preferences and interests of the particular agency—will often have a significant influence on the leanings of the politically appointed lawyers within those agencies. Likewise, a political appointee seeking to change the government’s legal position may encounter more resistance from peer colleagues at other agencies than from her subordinates.<sup>97</sup>

Of course, some internal legal friction involves disputes between lawyers in the entrenched versus the transient bureaucracies. Such friction occurs both within and among offices. In fact, OLC itself is an office more likely to be on board with the President’s general agenda than opposed; considering its prominence within the executive, the office is typically led by a carefully chosen political appointee and staffed with career lawyers who tend to change over at a much higher frequency than those in agency general counsel offices, and are thus more likely to have chosen to work in the office under the contemporaneous President. By contrast, longstanding career officials in

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95. For an excellent discussion of the diversity of lawyers and lawyering throughout the executive branch, along with the varying incentives and preferences these lawyers bring to the decision-making table, see generally David Fontana, *Executive Branch Legalisms*, 124 HARV. L. REV. F. 21 (2012).

96. See GOLDEN, *supra* note 62, at 91 (discussing an empirical study of the Reagan-era civil rights office).

97. See, e.g., Marko Milanovic, *Harold Koh’s Legal Opinions on the US Position on the Extraterritorial Application of Human Rights Treaties*, EJIL: TALK! (Mar. 7, 2014), <http://www.ejiltalk.org/harold-kohs-legal-opinions-on-the-us-position-on-the-extraterritorial-application-of-human-rights-treaties> (discussing reports of leaked opinions by then-State Department Legal Adviser, Harold Koh, advocating—unsuccessfully—for the U.S. Government to change its position on the extraterritorial application of its ICCPR and CAT obligations); Savage, *supra* note 84.

other offices often have more discretion over their portfolios—based on deference, respect, or simple necessity and workload.<sup>98</sup>

This multi-directional legal disagreement between and among agencies may create friction to a path forward. It certainly creates impediments to coming to a uniform *legal position*. But that does not necessarily result in a holdup of action. By contrast, this legal conflict may suggest to policymakers that the law is less of a clear constraint, and thus less of a check on moving forward.<sup>99</sup>

In any event, while scholars disagree over the effectiveness of internal constraints in checking executive branch illegality, there is general consensus that concerns about illegality are reasonable bases on which bureaucratic actors might push back on political leadership. Illegal activity, and the related category of abuse, which I discuss next, are perhaps the most clearly accepted categories of bureaucratic resistance.

### *iii. Ethics, Abuse, and Norm-Breaking*

Internal actors may also seek to resist what they perceive to be otherwise unethical or abusive behaviors within the executive branch. This might include waste and mismanagement, as well as violations of norms that do not rise to the level of illegality. Even activities that are not illegal per se may—when brought to light—entail significant repercussions. The reported firing of career prosecutors for political purposes under the George W. Bush administration, for example, generated public outrage and was ultimately the subject of a highly critical Inspector General report in the Department of Justice.<sup>100</sup>

Public accounts of resistance to internal abusive behavior often categorize such resistance under the general heading of whistleblowing, which may entail raising the matter with superiors or with particular offices within the executive designed for this purpose—like the Inspector General or the Office of Special Counsel—or more drastic measures like leaks and resignation. But more mundane resistance against abuse and norm-breaking occurs regularly, with officials simply raising potential problems with colleagues and bosses, pointing out potential risks of proposals in meetings

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98. See CHARLIE SAVAGE, *POWER WARS: THE RELENTLESS RISE OF PRESIDENTIAL AUTHORITY AND SECRECY* 324 (2015) (providing a discussion of Ed Kneedler, a longstanding career attorney in the Office of the Solicitor General, who had significant influence on the government's litigation decisions and, at times, ultimate decision-making authority).

99. See Ingber, *supra* note 6, at 693 (discussing why the NSC Lawyers Group may at times inhibit rather than promote legal constraint); Bruce Ackerman, *Legal Acrobatics, Illegal War*, N.Y. TIMES (June 20, 2011), <https://www.nytimes.com/2011/06/21/opinion/21Ackerman.html> (suggesting that the availability of multiple legal positions on the President's authority to continue military strikes in Libya provided an opportunity for the President to "cherry pick" his legal advice to conform to his policy interests).

100. U.S. DEP'T. OF JUSTICE, *AN INVESTIGATION INTO THE REMOVAL OF NINE U.S. ATTORNEYS IN 2006*, at 325 (2008), <https://oig.justice.gov/special/so809a/final.pdf>.



or individually, and thus creating a culture in which such overstepping is not tolerated.

Of course, institutional culture can cut the other way. To the extent ostensibly abusive activities become the norm in an office, it can be difficult, for the same cultural and institutional reasons that enforce positive norms, for longstanding members of that office to raise concerns. Under such circumstances, external actors who do not “belong” to that cultural in-group—such as agency lawyers, officials from another office or agency, or political actors who newly arrive in an office—may be the ones raising problems with abusive behavior, rather than the other way around.

Violations of ethics and executive branch norms, along with allegations of illegality, have the most clear-cut formal authorities for a range of mechanisms of resistance.<sup>101</sup>

*iv. Evidentiary Disagreement and Professional Standards*

Like lawyers within the Executive, scientists and other professional bureaucrats have their own exogenous source of expertise upon which to draw in forming positions on bureaucratic action. Analysts throughout the intelligence community analyze ongoing events and monitor national security risks. Military officers provide threat assessments on ongoing conflicts around the globe, craft and present risk analyses on proposed action, and assess the resource needs of troops abroad and at home. Foreign service officers in diplomatic missions draft reports about conditions abroad. Analysts in the State Department Bureau of Counterterrorism monitor terrorist activity and make findings necessary to designate foreign terrorist organizations.<sup>102</sup> Outside the national security context, scientists at the EPA research and analyze matters such as the effect of greenhouse gasses on climate change. All of these actors will inevitably be influenced by the mandate and culture of their particular agency, as well as their own policy preferences, preferences that led them to embark on a career within that agency. They also have professional obligations, both to provide dispassionate guidance as well as to the standards of their profession.<sup>103</sup> All of these factors may at times be at odds with the preferences of political leadership.

The President, agency heads, and other policy actors rely upon this professional analysis in drawing conclusions and making policy determinations, and in justifying those policy positions once made. Resistance to policy positions may affect this process at different decision points: professional bureaucrats may at the outset insist on an evidentiary

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101. I discuss formal authorities in Section III.B.

102. 8 U.S.C. § 1189 (2012); *Bureau of Counterterrorism and Countering Violent Extremism*, U.S. DEP'T. OF STATE, <https://www.state.gov/j/ct> (last visited Sept. 2, 2018).

103. See, e.g., Stephanie J. Bird, *The Role of Professional Societies: Codes of Conduct and Their Enforcement*, 4 *SCI. & ENG'G ETHICS* 315, 316 (1998); *Departmental Ethics Office*, U.S. DEP'T. OF JUSTICE, <https://www.justice.gov/jmd/departamental-ethics-office> (last visited Sept. 2, 2018).

analysis that challenges the preferred policy-leanings of policy-makers, and on the other end, they may refuse to change conclusions or provide evidence to bolster particular policy decisions once announced.<sup>104</sup> This tension, even when wholly internal, may surface publicly through the Freedom of Information Act (“FOIA”), litigation, congressional testimony, leaks, or resignation. Internal divisions also may at times be inferred when policy makers are not able to provide evidence of bureaucratic support when they might typically be expected to do so, through reports, affidavits in litigation, signing of briefs or public statements.<sup>105</sup>

*v. Policy Disagreement*

Most attacks on bureaucratic resistance as illegitimate are not focused on concerns that bureaucrats may raise alarms about abusive or unlawful activities; rather, such criticism centers on concerns that bureaucrats may impede legitimate change—change which the electorate demanded—based on disagreement over policy. Disagreements over policy—and even resistance to policy change—are frequent features of executive branch life. But the extent to which there exists a clear political-career divide within the bureaucracy over policy decisions is less clear or frequent than it may appear in the simplified media and pundit accounts. This is true for two reasons: (1) what may appear as policy disagreement to outside observers is often in fact a combination of other forms of resistance described above, including neutral friction; and (2) longstanding multidirectional policy disagreement between offices within the executive branch transcends a pure career-political divide.

First, critiques of bureaucratic resistance often assume policy disagreements underlie any friction, even when other factors—neutral friction, legal hurdles, and evidentiary disagreement—may play a significant or concurrent role. In many areas, of course, the line between these different purposes underlying bureaucratic resistance may not be strictly defined.<sup>106</sup> If

104. At other times they may succumb to political pressure to change such assessments. See, e.g., Walter Pincus & Dana Priest, *Some Iraq Analysts Felt Pressure from Cheney Visits*, WASH. POST (June 5, 2003), <https://www.washingtonpost.com/archive/politics/2003/06/05/some-iraq-analysts-felt-pressure-from-cheney-visits/4afb2009-20e7-4619-b40f-669cd94dcf3> (suggesting that analysts felt pressure from senior Bush administration officials to change their assessments to fit policy objectives).

105. See Lemos, *supra* note 48, at 200 (identifying the presence or absence of agency officials’ signatures on briefs as evidence of agency views on the position the U.S. was taking in court); Benjamin Wittes, *The Friendliest Lawsuit Ever Filed Against the Justice Department*, LAWFARE (Aug. 12, 2017, 7:29 AM), <https://www.lawfareblog.com/friendliest-lawsuit-ever-filed-against-justice-department> (requesting from the Justice Department evidence that the President “lied before Congress about data kept by his Justice Department,” due to Wittes’s own research suggesting that “the National Security Division of the Justice Department [had not] provided any data or analysis to the White House that could reasonably be read to support the president’s claim”).

106. Golden has shown, for example, that career attorneys in the DOJ civil rights division who clashed with political appointees over positions taken in civil rights litigation did so because

military officials differ with the President over reducing troop levels in Afghanistan, the dispute may revolve around disagreement over evidence regarding the risks, but all parties involved may view that evidence through the lens of their policy preference.

In any event, disagreement over policy abounds within the executive branch, as in any organization, and does not map simplistically onto a career-political axis. Horizontal policy disagreements between agencies and offices are frequent, exacerbated by differing priorities and biases. And vertical disagreements also occur, which need not be tied to a presidential transition, such as when new political leadership arrive to run an office who may not share the same priorities and biases as the career bureaucrats who had been working on the issue under prior management.

In fact, policy disputes typically transcend presidential administrations. Career officials in the Departments of State and Defense may have ongoing disagreements over how to interpret particular legal obligations regarding detainees.<sup>107</sup> Officials within DOJ and the CIA may disagree over priorities about declassifying evidence litigators believe is necessary to present in court. Offices may disagree over not only substantive questions but process as well, such as which office or agency should have control over decision-making in a particular area. For example, the Office of the Legal Adviser within State and the Office of Legal Counsel in Justice have for years tussled over which office should be the final authority on matters of international law.<sup>108</sup>

The most significant feature of a change in political leadership is less that the new political actors will butt heads with the entrenched bureaucracy, but rather that they will change the balance of power among the bureaucratic actors already engaged in a policy disagreement. Career officials may rightly sense new opportunities to advance their position in these longstanding debates, while others may fear losing their mandate. The President or agency head's position on a matter may be clear coming into office, or it may develop while in office, and career officials may find political actors siding with their career opponents after a somewhat transparent adversarial process, or find that they are simply cut out of the decision-making loop altogether.<sup>109</sup> Even under such circumstances, this is often more a horizontal dispute than a vertical one; political officials will often have policy preferences that are more

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they believed those "policies were seriously misguided, detrimental to the effective enforcement of civil rights, and in conflict with existing statute and case law." GOLDEN, *supra* note 62, at 91.

107. SAVAGE, *supra* note 98, at 534-38.

108. See SCHARF & WILLIAMS, *supra* note 72, at 52-54, 57; Ingber, *supra* note 15, at 70-73; see also *supra* text accompanying note 15.

109. See *supra* note 44 and accompanying text (discussing internal debates over the torture memos, in which a small group of executive branch officials attempted to restrict decision-making and cut out key agencies and officials likely to dissent).

closely connected to those of the career officials within their office than to the politically appointed colleagues in other agencies or the White House.<sup>110</sup>

#### IV. FORMAL AUTHORITY AND FUNCTIONAL POWER TO RESIST

In order to evaluate both the threat and the efficacy of bureaucratic resistance as a check on the President, it is necessary to consider and distinguish both the formal authority and functional power of bureaucrats to resist. Common characterizations of bureaucrats paint them as wielding a great deal of practical, discretionary power to act, but with little real, traditionally-sourced authority to do so. I refer to these here respectively as “functional power” and “formal authority.” On this account, the bureaucrat—an unelected official, untethered to popular accountability—nevertheless wields significant behind-the-scenes discretion to effectuate his or her preferred course of action, even to challenge the duly-elected President. Those who fear bureaucrats find the prospect of them wielding practical power divorced from traditional sources of authority understandably concerning. On the other end, some who hail the benefits of bureaucratic checks may view traditionally-sourced accountability as having fallen down on the job, and thus may be willing to accept a “second-best alternative” in order to check the President from within. These camps may differ on the extent to which bureaucrats hold formal authority, but both camps tend to overestimate the practical ability of bureaucrats to wield it. To put it plainly, critics and champions of bureaucratic resistance alike may overestimate the extent to which bureaucrats exercise functional power free from constraint, and underestimate the extent to which bureaucrats wield actual formal authority connected to political accountability.

This Part will therefore consider the elements of this conversation that are underestimated, and that are yet necessary to weighing the merits, legitimacy, and efficacy of bureaucratic resistance: I will first consider the robust formal authority to resist that is granted to even lower-level bureaucrats within the executive branch, from Congress, from the courts, and from the executive branch itself. And I will then consider the significant practical constraints on bureaucrats’ functional abilities to exercise that authority.

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110. For example, then-Secretary of State, Colin Powell, and his Legal Adviser, William Howard Taft, IV, both wrote memos to counterparts at DOJ, DOD, and in the White House, disagreeing with the suggested dismissal of international law protections for military detainees in the conflict with al Qaeda and the Taliban. Memorandum from Sec’y of State Colin Powell to Counsel to the President (Jan. 25, 2002), <https://nsarchive2.gwu.edu/torturingdemocracy/documents/20020126.pdf>; Memorandum from William H. Taft, IV to the Counsel to the President (Feb. 2, 2002), [http://www.nytimes.com/packages/html/politics/20040608\\_DOC.pdf](http://www.nytimes.com/packages/html/politics/20040608_DOC.pdf). Likewise, reporting suggests that then-Secretary of State, John Kerry, agreed with many of the career foreign service officers in his building, and not with the White House, about the proper course of action on Syria. See Mark Landler, *John Kerry Is Said to Side with Diplomats’ Critical Memo on Syria*, N.Y. TIMES (June 17, 2016), <https://www.nytimes.com/2016/06/18/world/middleeast/john-kerry-syria-diplomats-criticism-memo-assad.html>.

A. *DEFINING FORMAL AUTHORITY AND FUNCTIONAL POWER*

I should define at the outset what I intend by these two types of bureaucratic power: functional power and formal authority. The concept of “power” itself is fairly amorphous, and scholars have long grappled with its multiple meanings.<sup>111</sup> Many have drawn distinctions between the capacity to act or compel action—what I call here “functional” power—on the one hand, and legal or “formal” authority, on the other. And they have argued that one form or the other constitutes “real” power, usually when wielded by the President himself.<sup>112</sup> I find both of these features to be complementary and essential components of the exercise of political power, and not only that of the President, who is the focus of much of this scholarship on power, but also of bureaucrats within the executive branch. Each of these components speaks to different features and concerns regarding bureaucratic resistance, and can be summarized in two questions: What are the actual capacities of bureaucrats to act; and how are these capacities tied to formal, democratically sourced authorities?

Functional power, as I define it here, is akin to what Daryl Levinson calls “capacity,” or the “ability to accomplish things.” Formal authority, by contrast, is marked not by capacity to accomplish but by *permission* to do so by the relevant authority—be it the Constitution, a controlling statute, or even a longstanding norm or an oral request.<sup>113</sup> Within the state, at the first level of

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111. ROBERT A. DAHL, *WHO GOVERNS?: DEMOCRACY AND POWER IN AN AMERICAN CITY* 1–8 (2d ed. 1961); STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO BILL CLINTON* 17–18 (rev. ed. 1997) (differentiating between “power,” which he defines as “the resources, formal and informal, that presidents in a given period have at their disposal to get things done,” and “authority”—“the expectations that surround the exercise of power at a particular moment . . . [and] perceptions of what is appropriate for a given President to do”); Robert A. Dahl, *The Concept of Power*, 2 *BEHAV. SCI.* 201, 201–03 (1957) (arguing that there is no one theory of power, but suggesting that the theory that aligns with most intuitions of power is the ability to compel another actor to act in a way he or she might otherwise not have done).

112. NEUSTADT, *supra* note 50, at 10 (distinguishing the President’s “extraordinary range of formal powers” from actual power to act or effect action, and coining the phrase “presidential power is the power to persuade”); see also WILLIAM G. HOWELL, *POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION* 8–14 (2003) (diverging from Neustadt to argue that presidential power lies in their ability to act unilaterally, without necessarily ever having to rely on persuasion); Daryl J. Levinson, *Looking for Power in Public Law*, 130 *HARV. L. REV.* 31, 39 (2016) (“For most (though not all) purposes, ‘power’ in public law should be understood to refer to the ability of political actors to control the outcomes of contested decision-making processes and secure their preferred policies. When we talk about power in political life and in constitutional law, this is the kind of power we are typically talking about: the ability to effect substantive policy outcomes by influencing what the government will or will not do.”). Levinson also differentiates between “capacity,” which he describes as the “ability to accomplish . . . things” and “control,” which is “the political power to determine what state capacity will and will not be used to accomplish,”—in other words, the “power *over* the power of the state.” *Id.* at 46–47.

113. In Levinson’s model, these two types of power inhere in different entities—the state as a whole has capacity, and a particular actor within the state exercises “control” over that capacity. *Id.* As I use the terms formal authority and functional power—or capacity and control—both may

disaggregation, formal authority is allocated via the Madisonian separation of powers, the constitutional divvying up of specific features of governance. Functional power is then the “capacity,” to use Levinson’s word, of any given branch to carry out a particular act. In this piece I disaggregate further—to the allocation of both types of power *within* the executive branch, as between the different actors along the bureaucratic spectra I discuss in Part II.

It is well understood that even lower-level bureaucrats have a certain degree of functional power, whether or not it is described as such, simply by virtue of their frequent position on the front lines. Functional power is a matter of practical reality. The line attorney drafting a brief that she is due to file at three o’clock p.m. in the district court is *able*, by virtue of her position as the first and last eyes on the brief, to add her own language affecting, perhaps even altering or undermining, the position her superiors had signed off on the government taking in the case. This is functional power. Formal authority is the permission that same attorney received to argue the case within a particular discretionary zone agreed to by the head of her office and colleagues in other relevant agencies. Functional power, as I use the term, is a question of whether an individual or group *can* accomplish something. Formal authority, by contrast, is whether she or they *may*.

### B. FORMAL AUTHORITY TO RESIST

This section explores the formal authority to resist delegated to bureaucrats from the three sources with the soundest power to do so: Congress, the judiciary, and the executive branch itself. It is widely understood that Congress and the courts allocate power to different actors within the executive branch, for example, to one agency over another. Less considered is the extent to which these grants of power or constraints on their exercise allocate power further to lower-level officials within these agencies or within the executive branch more broadly. Elizabeth Magill and Adrian Vermeule have explored the phenomenon of intra-agency power allocation through judicial doctrine.<sup>114</sup> I draw on their scholarship and others’, and extend this examination to other sources of power, including congressional delegations of authority, and executive branch sub-delegations to lower-level officials.

#### 1. Congressionally-Sourced Bureaucratic Power to Resist

Congress empowers different actors throughout the bureaucracy, including the career bureaucracy *vis-à-vis* political leadership, via the following three mechanisms: through the creation of affirmative protections

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inhere in the same individual or entity whether it be a state or a state actor. They are separate forms of power—at times they coincide; at times they do not.

114. See generally Magill & Vermeule, *supra* note 16 (identifying the effects of administrative law doctrine on the allocation of power within agencies).

for career bureaucrats and others, in many cases specifically for the purpose of protecting resistance, through direct delegations of power to particular actors or actions, and, more implicitly, through broader delegations of power to the President or executive branch as a whole made against a backdrop of expectation that the power will be employed and curtailed by internal actors.

*i. Congress Protects, and Limits, Bureaucratic Resistance*

First, and most directly, Congress empowers bureaucratic actors, and bureaucratic resistance specifically, by creating protections against removal or ill-treatment for specific types of officials within the bureaucracy, such as civil servants, who may find themselves in tension with the political decision-makers for reasons of politics, illegality, corruption, or otherwise, and through the limitations it places on political appointments.<sup>115</sup>

The web of statutory protections, which evolved from the initial reform of the spoils system of the 1800s, with the Pendleton Act of 1883,<sup>116</sup> the Hatch Act of 1939,<sup>117</sup> and the Civil Service Reform Act of 1978,<sup>118</sup> as well as subsequent amendments and statutes, includes significant protections against partisan hiring or removal practices.<sup>119</sup> The clear intent and result of these reforms is a body of federal employees who are buffered from political coercion and thus able to act as a counterweight to politicized decision-making.

Congress did not stop at protecting the career bureaucracy from political coercion, however. They went several steps further, and crafted protections for whistleblowers specifically—through the Civil Service Reform Act, and later in the Whistleblower Protection Act of 1989, and subsequent amendments.<sup>120</sup> These acts protect bureaucrats' authority to resist, by prohibiting retaliation on the basis of their disclosure of abuse, mismanagement, or violations of law.<sup>121</sup>

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115. See LEWIS, *supra* note 55, at 60–61 (stating that members of Congress limit presidential control by limiting presidential appointees through appropriations, legislation, and oversight).

116. Pendleton Act, ch. 27, 22 Stat. 403 (1883) (codified as amended in scattered sections of 5 U.S.C. §§ 3104–7212) (creating a merit-based, rather than patronage-based, system for hiring federal employees).

117. Hatch Act of 1939, Pub. L. No. 76-252, 53 Stat. 1147 (codified as amended at 5 U.S.C. § 118 & 18 U.S.C. § 61) (limiting political activity for civil service employees and protecting civil servants from coercive political activity).

118. Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (codified as amended at 5 U.S.C. §§ 7321–26).

119. See *id.*; Pendleton Act, ch. 27, 22 Stat. 403 (1883) (codified as amended at 5 U.S.C. §§ 3104–7212); Hatch Act of 1939, Pub. L. No. 76-252, 53 Stat. 1147 (codified as amended at 5 U.S.C. § 118 & 18 U.S.C. § 61).

120. Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (codified as amended in scattered sections of 5 U.S.C.).

121. 5 U.S.C. § 2302(b)(8).

Furthermore, rather than simply leave these statutes as toothless statements of intent, Congress established what Margo Schlanger has called “offices of goodness”<sup>122</sup>—entities throughout the executive branch such as Inspectors General and the Office of Special Counsel, established to enforce this web of statutory protections.<sup>123</sup> Together, these rules and institutions are intended to safeguard the independence of career bureaucrats and others, and the discretionary space in which they are lawfully authorized to operate.

In the national security context, some of these protections are more limited. The Whistleblower Protection Act, for example, does not apply to employees of the Central Intelligence Agency, the National Security Agency, the Federal Bureau of Investigation, or certain other intelligence entities.<sup>124</sup> Other statutory protections extend to such employees, but they do not provide the same level of protection against retaliation.<sup>125</sup> Additionally, statutory restrictions on disclosure of classified information constrain the means of disclosure national security whistleblowers may lawfully employ—classified leaks remain prohibited—but the Special Counsel and Inspectors General are available to receive classified information.<sup>126</sup>

This thick web of statutory protections for executive branch actors both explicitly recognizes that these actors have formal authority to act, and affirmatively protects those actors’ right to do so, within certain parameters, without retaliation. This protection is not unbounded—Congress has lowered protections for certain types of activities and could adjust these protections further—but the existing protections operate even when bureaucratic action might be contrary to the wishes of political superiors.<sup>127</sup> In fact, it is precisely that set of circumstances—the lawful exercise of bureaucratic discretion in the face of disapproval by political superiors—that these statutory provisions are explicitly designed to protect.

*ii. Congress Delegates Directly to Areas of Bureaucratic Competence*

Congress also allocates specific power among bureaucrats by granting authority to the President or to agencies with conditions that necessitate involvement by specific professionals or “technocrat” officials. Grants of

122. Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 CARDOZO L. REV. 53, 60 (2013); see also Sinnar, *supra* note 28, at 1032–34.

123. See Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101 (codified as amended at 5 U.S.C. §§ 5315–16); Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (codified as amended at 5 U.S.C. §§ 1201–7703).

124. 5 U.S.C. § 2302(a)(2)(C).

125. Intelligence Community Whistleblower Protection Act of 1998, Pub. L. No. 105-272, 112 Stat. 2413 (codified as amended in scattered sections of 5, 10, 18, 21, 28, & 50 U.S.C.).

126. 5 U.S.C. § 2302(b)(8).

127. 5 U.S.C. § 2302(b)(9)(A) (prohibiting retaliatory employment actions against employees for, *inter alia*, “the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation”).



authority conditioned on making a “finding” of certain facts,<sup>128</sup> or on the issuance of a report,<sup>129</sup> or on the creation of an administrative record,<sup>130</sup> all require the involvement of experts within the bureaucracy, and thus result in a known allocation of certain types of power to particular officials, often within the career bureaucracy. The conferred power is not necessarily decision-making power—final decision-making power may be specifically designated elsewhere (and that delegation, if to any actor other than the President, is itself a bureaucratic constraint on the President)<sup>131</sup>—but a delegation need not include decision-making authority for it to nevertheless result in authority to act and even, to some degree, to resist the will of the decision-maker within the bounds of the bureaucrat’s zone of autonomy. If the President cannot take an action under a statute without first finding that “x” has occurred, and career bureaucrats hold the information and tools necessary to confirm whether “x” has in fact occurred, then the requirement creates a defined zone of authority for those bureaucrats to resist presidential action. It is neither uncabined—as it is authority only to find a particular fact—nor is it untethered to political accountability—as it is sourced in a Congressional grant. And Congress furthermore retains the ability to effect compliance through oversight of agency action.<sup>132</sup>

As one example, Congress grants the Secretary of State power “to designate an organization as a foreign terrorist organization,” which has severe legal ramifications, including bars on immigration for members, and criminal and financial sanctions for those doing business with them.<sup>133</sup> The authority for the Secretary to effect this designation is cabined by several administrative requirements, such as the requirement that the Secretary

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128. 22 U.S.C. §§ 2291–94 (authorizing executive branch officials to aid foreign officials in the interdiction of aircraft if the President has made certain factual findings regarding a threat from drug trafficking, and requiring a highly detailed annual report to Congress).

129. 8 U.S.C. §§ 1189(a)(1) & (2) (requiring that in order to designate a foreign terrorist organization, the Secretary of State must provide a report to Congress detailing the factual basis for the determination that the organization “threatens the security of United States nationals or the national security of the United States”).

130. *Id.* § 1189(a)(3)(A).

131. *See, e.g.*, National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1567, § 1028 at 1567–69 (2001) (requiring that, before the government may transfer a detainee from the military base at Guantanamo, the Secretary of Defense must personally certify that certain risks have been mitigated, including that the foreign government “has taken or agreed to take such actions as the Secretary of Defense determines are necessary to ensure that the individual cannot engage or reengage in any terrorist activity”).

132. Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 142 (2006) (“[A] positive element of oversight is that it may make an entrenched bureaucracy more responsive to the popular will when even the President cannot secure control over agency policy. Oversight can be viewed as a way to combat the general insulation of agencies from political accountability.”).

133. 8 U.S.C. § 1189(a)(1); *see also Foreign Terrorist Organizations*, U.S. DEP’T. OF STATE, <https://www.state.gov/j/ct/rls/other/des/123085.htm> (last visited Sept. 2, 2018).

“create an administrative record,”<sup>134</sup> provide Congress with a report detailing the findings and factual basis for the designation,<sup>135</sup> and provide a review of the designation at specified intervals.<sup>136</sup> Congress further provided for judicial review of the designation, including the ability to set aside the designation if these procedures were not followed.<sup>137</sup> Within the State Department, the office responsible for analyzing and providing this information is the Bureau of Counterterrorism and Countering Violent Extremism.<sup>138</sup> As of this writing, the office is led by a political appointee who was sworn in under the current administration, and four deputies who belong to what I have termed the “entrenched bureaucracy,” each having long served in the State Department, including in senior positions under the prior administration.<sup>139</sup> The rest of the office is staffed with a mix of career foreign service officers and civil servants.<sup>140</sup> A congressional delegation to the Secretary of State to provide detailed findings before designating a foreign terrorist organization thus results in a delegation to factfinders within the State Department, and specifically within this office, to find and memorialize the factual record, with the added threat of judicial review if these procedures are not followed.

*iii. Congress Bargains in the Shadow of the Bureaucracy*

Finally, when Congress grants power to the “President” or to a particular agency, it does so with full understanding that it is the vast executive branch bureaucracy, much of which is comprised of career bureaucrats and other officials who are distanced from the President by ideology or other buffers of institutional independence, that will in fact wield much of that power. This fact—that bureaucratic actors will play a significant role in shaping and deploying much of the power Congress grants the President—is not merely a practical reality of which any member of Congress is naturally aware; in many cases it is reasonable to conclude that Congress would not allocate precisely the same power in precisely the same manner were this not the practical reality. Reaching consensus on allocations of discretionary authority is often fraught. Considering the clear awareness by members of Congress regarding how the authority they grant will be deployed, and the narrow margins on which much legislation moves forward, their fragile consensus on any piece of contested legislation surely often rests on the assumption that the expert, non-partisan hands of the vast executive branch bureaucracy will be exercising a good part of that discretion, and thus checking political actors. I

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134. 8 U.S.C. § 1189(a)(3)(A).

135. *Id.* § 1189(a)(2)(A)(i).

136. *Id.* § 1189(a)(4)(C)(i).

137. *Id.* § 1189(c)(3)(E).

138. See *Foreign Terrorist Organizations*, *supra* note 133.

139. See *Leadership of the Bureau of Counterterrorism and Countering Violent Extremism*, U.S. DEP’T. OF JUSTICE, <https://www.state.gov/j/ct/about/leadership> (last visited Sept. 2, 2018).

140. I have a FOIA request pending regarding the detailed makeup of the office.

therefore consider congressional delegations of power made in that understanding to be implicit delegations to the broader professional, career, and politically-buffered actors of the executive branch to engage in the normal checking functions expected of them. In essence, Congress bargains in the shadow of the bureaucracy.<sup>141</sup>

The existence of this implicit delegation is supported by empirical and theoretical research suggesting that members of congress often employ ambiguous language, knowing that doing so will create discretion for the executive branch, as a means of reaching consensus on an otherwise difficult issue.<sup>142</sup> Were that discretion to be employed only by political actors within the executive, actors within Congress not hailing from the President's own political party would quite likely be more hesitant, or even refuse, to approve ambiguous language and thus discretionary authority.<sup>143</sup> The awareness that this power will be exercised by non-partisan "experts" and "technocrats" enables Congress to delegate authority that members might otherwise be more reticent to grant.<sup>144</sup>

141. Cf. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968–69 (1979) (considering the "impact of the legal system on negotiations and bargaining that occur *outside* the courtroom," but nevertheless against the backdrop of that existing system).

142. Lisa Schultz Bressman, *Chevron's Mistake*, 58 DUKE L.J. 549, 571 (2009) ("Both PPT scholars and legal scholars have observed that a divided Congress may choose deliberately ambiguous words to obtain consensus, thereby delegating interpretive authority to agencies or courts."); Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 997 (2013) (finding widespread acknowledgment among congressional drafters that statutory ambiguity may be the result of a desire to delegate to agencies, a lack of time to craft tighter language, or the need to find consensus); Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 769–70 (2014) (finding that congressional drafters "often have a desire for agencies to fill textual gaps," which "are often necessary to keep statutes at a level of detail that is not overwhelming"). *But see* Rourke, *supra* note 34, at 543 ("[T]he institutional rivalry between the President and Congress that is so salient a feature of the American constitutional process has long made it difficult for legislators to defer to executive agency bureaucrats merely because they are supposed to have some special kind of knowledge or skill at their disposal").

143. Scholarship suggests Congress is more swayed by political connections than by inter-branch rivalries. *See* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2375–76 (2006).

144. *See, e.g.*, Lawson, *supra* note 35, at 1245 ("Judging from the political conflict that is often generated by disputes between Congress and the President, it is at least arguable that Congress would never have granted agencies their current, almost-limitless powers if Congress recognized that such power had to be directly under the control of the President."); *see also* Jack Goldsmith & Susan Hennessey, *The Merits of Supporting 702 Reauthorization (Despite Worries About Trump and the Rule of Law)*, LAWFARE (Jan. 18, 2018, 9:20 AM), <https://www.lawfareblog.com/merits-supporting-702-reauthorization-despite-worries-about-trump-and-rule-law> (noting that Democratic lawmakers who voted to reauthorize the surveillance powers to the executive branch despite their criticism of the administration do so knowing those powers will be exercised "mostly by career public servants and supervised by all three branches of government").

As between these three sources of Congressional authority—special protections, direct delegations to areas of core bureaucratic competence, and implicit delegations made in the shadow of the bureaucracy, each lends support to some degree of bureaucratic autonomy. This bureaucratic power may not necessarily or only entail decision-making authority; but it surely involves the authority to find and analyze facts, to insist upon them, to refuse to craft a report contrary to these findings in the face of contrary orders from political leadership, and even, finally, to blow the whistle on political superiors when they fail to heed the constraints on that grant of power, as interpreted by these bureaucratic actors. These bureaucratic checks can ultimately mean the success or failure of an executive branch endeavor.

## 2. Judicially-Sourced Bureaucratic Power to Resist

Like Congress, the courts also allocate power to different actors within the executive branch both implicitly and explicitly.<sup>145</sup> They do so through a variety of doctrinal mechanisms and canons of interpretation, including: by conditioning deference upon a showing that the executive branch has engaged in specific decision-making processes or included particular offices; by requiring detailed rationales that require the involvement of technocrats or other bureaucratic professionals, sometimes prioritizing executive branch expertise over politics; and by upholding congressional protections for career bureaucrats.

Elizabeth Magill and Adrian Vermeule have written about the extent to which different administrative law doctrines alter the allocation of power within agencies, both horizontally (as between different types of actors, like technocrats or lawyers), and vertically (as between different levels of the hierarchy).<sup>146</sup> As they describe the results of these doctrines, many allocate power to higher-level officials, but several allocate power to lower-level career officials and experts.<sup>147</sup> While I may differ somewhat from Magill and Vermeule on the precise effects of some of these doctrines, I agree with the overarching argument that different judicial doctrines allocate power in each of these ways, including to lower-level officials.<sup>148</sup>

Other scholars, such as Elena Kagan and David Barron, have more implicitly acknowledged that courts have the capacity to effect intra-executive

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145. See generally Henry Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1 (1983) (premising his defense of the administrative state on this dynamic: judicial deference to congressional delegations of power).

146. Magill & Vermeule, *supra* note 16.

147. *Id.* at 1061–78.

148. For example, they argue that the effect of the *Chenery* requirement that agency actions be upheld on the rationale they provided at the time of action, not post-hoc rationalization given in litigation, allocates power away from lawyers and toward policymakers. See *id.* at 1043–44. I would argue that a more likely result is the involvement of agency lawyers—if not litigators—at the earlier stage of decision-making, which in fact empowers rather than disempowers a particular type of agency lawyer (advisers versus litigators).

allocations of power as between high and low-level officials.<sup>149</sup> Kagan and Barron press a normative argument that courts should defer to only those decisions made at a sufficiently high level, such as by political appointees, and thus their argument is superficially at odds with my account of diversified internal power. But in their explicit defense of a strong allocation of power to high-level political actors, Kagan and Barron acknowledge the current reality of entrenched bureaucratic power as a force weighing against these political actors. Moreover, they defend political power within the executive as a means of countering, not of entirely engulfing, that acknowledged authority of the entrenched bureaucracy. At a minimum, their work lends support to descriptive accounts of the inherent existence of judicially allocated bureaucratic power among internal actors.

Examples of judicial allocation of power to lower-level bureaucrats include judicial deference to expertise;<sup>150</sup> or conditioning deference on requirements that particular processes be followed; as well as requirements that executive decision-making occur at particular times<sup>151</sup> or in a particularly rigorous manner,<sup>152</sup> each of which may empower professional actors within the agency vis-à-vis their political counterparts.<sup>153</sup>

Doctrines that allocate power downward away from high-level decision-makers tend to do so quietly, with implicit rather than explicit allocations of authority to these actors. Judges rarely demand the involvement of “low-level” or “career” officials directly, and are often loath to appear to be intervening in the internal workings of the executive branch, even as their decisions may result in internal reshuffling.<sup>154</sup> But the conditioning of a favorable decision on the processes the agency takes in formulating its position, or the timing in

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149. Barron & Kagan, *supra* note 16, at 204–05 (arguing that courts should defer to only those decisions made at a sufficiently high level, such as by political appointees, and thus acknowledging that courts have the capacity to reallocate executive power internally); Kagan, *supra* note 16, at 2372.

150. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 864 (1984).

151. *See SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) (“The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.”); *see also* Magill & Vermuele, *supra* note 16, at 1043 (“The primary effect of the *Chenery* principle is to affect the *timing* of reason-giving by the agency itself. Under *Chenery* . . . the agency must speak before, rather than during, litigation.”).

152. *See, e.g., Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (explaining that the “arbitrary and capricious” standard of the Administrative Procedure Act requires that an “agency must examine the relevant data and articulate a satisfactory explanation for its action”).

153. *See* Magill & Vermeule, *supra* note 16, at 1038–40.

154. *See, e.g., Nat. Res. Def. Council, Inc. v. U.S. Nuclear Regulatory Comm’n*, 547 F.2d 633, 653–54 (D.C. Cir. 1976), *vacated*, *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 964 (1978) (requiring that the agency generate a more fully developed factual record before promulgating rules, but stating that the court does “not presume to intrude on the agency’s province” to determine how to flesh out that record). *See generally* *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519 (1978) (critiquing the DC Circuit’s “improper[] intru[sion] into the agency’s decisionmaking process”).

which it makes it, or the level of expertise involved, all result in an allocation of power to officials whose involvement is necessary to the undertaking of these requirements, and these are predominantly the lawyers, scientists, professionals, and generally officials making up the middle tier of the bureaucracy.

In addition to administrative law doctrine, the courts' national security jurisprudence suggests an interest in internal process, even outside of the formal requirements that bind the rest of the administrative state. The courts' interest in cracking open the executive branch bureaucracy to scrutinize its decision-making processes appears to ebb and flow to some degree with the courts' trust in the administration's actions in a given realm. Evidence that the President has flouted traditional executive branch norms, or typical interagency review or process, for example, has at times resulted in less judicial deference to the executive's position.<sup>155</sup> The corollary to this is that the executive branch itself does, and should, capitalize on the courts' interests in its internal dynamics, by specifically signaling adherence to internal processes and the inclusion of specific decision-makers, where applicable, through a variety of means, including through the signing of briefs by agency officials and the explicit highlighting of internal process.<sup>156</sup>

### 3. Executive-Sourced Bureaucratic Power to Resist

Finally, bureaucratic power to resist other actors within the executive branch, including the President, comes not only from external sources but also from the executive branch itself. Theoretically, this source of authority should be least concerning to critics of bureaucratic resistance, particularly those who view such resistance as a threat to the "unitary executive," because it ultimately flows from—and thus falls more readily within the control of—the President himself.<sup>157</sup> But *why* Presidents might allocate power to others

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155. See, e.g., *Hawaii v. Trump*, 859 F.3d 741, 756, 766 (9th Cir. 2017) (noting, in ruling against the government's "travel ban," many unusual process details regarding the creation of the executive order, including that the first order had been issued "without interagency review," that "federal officials themselves were unsure as to [its] scope," and that a high-level letter signed by cabinet officials regarding security risks seemed to lack a clear basis in evidence from contemporaneous reports from DHS).

156. See, e.g., *Hamlily v. Obama*, No. 05-0763-JDB, 2009 WL 369456, at \*1 (D.D.C. Feb. 11, 2009) (noting the government's request for a delay in reaching a detention policy standard in light of the new President's executive order creating a new review process and permitting "some delay [] only to accommodate the ongoing 'new' Executive Branch review"); see also Supplemental Memorandum in Support of Application for Stay Pending Appeal and Pending Disposition of Petition for a Writ of Certiorari at 28, *Trump v. Hawaii*, 138 S. Ct. 542 (2017) (No. 16A1191), <https://docs.justia.com/cases/federal/district-courts/hawaii/hidce/1:2017cv00050/132721/304/2.html> (emphasizing the government's "interagency process that culminated in a revised Order reflecting material substantive changes and detailed factual findings").

157. Theories of the "unitary executive" take different degrees. Gary Lawson, for example, takes the view that agency heads are themselves appendages of the President, who should be able to nullify their actions if he so chooses. Lawson, *supra* note 35, at 1244. Others take a somewhat

within the executive branch not only to carry out his prerogative but also to resist it might be less apparent. The reasons are diverse: The creation or protection of internal constraints can be a means of bolstering the President's or political actors' legitimacy, sometimes for the purpose of maintaining discretion. As discussed above, courts or Congress concerned with the creeping aggrandizement of executive power may be somewhat mollified by the idea that internal constraints are checking the President's wielding of that power. Thus, executive branch officials may virtue signal by pointing to, for example, the involvement of career officials in a matter, as a way of staving off judicial or congressional interference.<sup>158</sup> Likewise, political actors concerned about the power that has inhered in their position may seek to create limits on the office itself as a means of constraining its future occupants.

In fact, the President and heads of agencies allocate power within the executive in ways that protect significant discretion by lower-level, often career bureaucrats to question and resist other actors, even their political leadership. We might call these "sub-delegations"<sup>159</sup> of executive power, or perhaps "sub-allocations" is more appropriate, as they arise from more than clear grants of power—including the creation of structures, processes, and established norms for acting that allocate power and generate potential and necessity for resistance—and they may proffer something less than decision-making authority.<sup>160</sup> These sub-allocations may be ephemeral or longstanding, formal or informal, intentionally created or organic, written or unwritten, and they may derive from presidents and other political actors both present and past. I will distinguish a few of these categories here.

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narrower view and argue that the President has unlimited power to any executive branch officials at will, and others narrow that argument further to the power to remove officers. CALABRESI & YOO, *supra* note 4, at 3–4; Richard A. Epstein, *Executive Power in Political and Corporate Contexts*, 12 U. PA. J. CONST. L. 277, 305 (2010).

158. See, e.g., Laura Jarrett, *Rosenstein Consulted with Ethics Adviser at DOJ on Russia Probe*, CNN (Apr. 13, 2018, 7:51 PM), <https://www.cnn.com/2018/04/13/politics/rod-rosenstein-ethics-recusal/index.html> (reporting, in the wake of criticism that Deputy Attorney General, Rod Rosenstein, should recuse himself from the Russia probe, that he had "consult[ed] with a career ethics adviser at the Justice Department about his ability to oversee the . . . probe").

159. For a broader discussion of the implications of formal agency sub-delegations see Jennifer Nou, *Subdelegating Powers*, 117 COL. L. REV. 473, 474–77 (2017). Under Nou's account, sub-delegation refers to the formal act of delegating decision-making authority to bureaucratic underlings. *Id.* I intend to use it here to refer to any allocation of power down the bureaucratic ladder, not only final decision-making authority, and through a range of direct and indirect mechanisms.

160. See, e.g., U. S. ATTORNEY'S MANUAL sec. 3-1.130 (1997), <https://www.justice.gov/usam/usam-3-1000-organization-prior-approvals> (admonishing that U.S. Attorneys implement DOJ policy, but stressing "the need for their impartiality in administering justice [which] directly affect[s] the public's perception of federal law enforcement"); Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1290–91 (2017).

*i. Ephemeral Versus Longstanding Sub-Allocations*

One important consideration in analyzing executive sub-allocations is the extent to which the allocation of authority is ephemeral, such as a one-off assignment, or instead intended to be more longstanding. A paradigmatic model of an ephemeral sub-allocation is the tasking by a higher-level official to a lower-level one, such as an assignment by the head of OLC to an attorney-adviser within her office to prepare a legal memo on a particular question. That head might delegate an assignment to one staff attorney one day, without precluding herself from tasking a different staff attorney with the next question, or from taking a first crack at the task herself the next time rather than assigning it away. Each of these decisions might be made without incurring notable transaction costs in making a change.<sup>161</sup>

An example of a more longstanding sub-allocation is the regulation under which the Attorney General's statutory authority to provide legal guidance is delegated to OLC.<sup>162</sup> Another longstanding sub-allocation, though an informal one, is the organic development of an interagency working group that meets to decide how to handle a given set of issues arising regularly in litigation—like state secrets, or Guantanamo detention cases. Ephemeral and longstanding sub-allocations may each take various forms; they can be written or unwritten, formal or informal.<sup>163</sup> But a longstanding sub-allocation may be more difficult to reverse, and entail greater costs in doing so, than an ephemeral one. The practical power to resist the specific will of political superiors on any given issue will thus vary according to the costs of altering these sub-allocations. If a line official with an ephemeral tasking insists on writing a memo that goes against his or her superior's views, the superior can simply switch the assignee with relatively little cost. That taskee's power to resist through this mechanism is minimal.

In the case of longstanding sub-allocations, the costs of change will be greater and so will the concomitant power to resist. If the Attorney General or the President is not happy with the legal guidance coming from, say, the office of OLC, there are tools available for suppressing that guidance, but they involve costs. The White House might redirect taskings, or refer questions to OLC with less frequency, or dilute OLC guidance by adding other high-level lawyers to the mix, such as the use of a lawyers' group,<sup>164</sup> or by explicitly

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161. There are some necessary transaction costs inherent in forcing one official to recreate what another has done.

162. 28 C.F.R. § 0.25 (2017); see also Memorandum from David J. Barron, Acting Deputy Attorney General, to the Office of Legal Counsel (July 16, 2010), <https://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf>.

163. The lawyer could be tasked, for example, orally or by email. He might be assigned a formal, clearly delineated portfolio, or else be assigned to projects on an ad hoc basis.

164. Jack Goldsmith, *The Decline of OLC*, LAWFARE (Oct. 28, 2015, 6:11 PM), <https://www.lawfareblog.com/decline-olc>.



requesting guidance from another office.<sup>165</sup> It might simply disregard OLC's legal guidance altogether.<sup>166</sup> Each of these options entails costs, some of them quite high, such as the institutional and resource costs of creating other avenues for legal advice, the political cost of appearing to have disregarded what is generally understood to be dispassionate legal advice, or even the litigation costs that might come with the appearance of flouting law.<sup>167</sup> These costs are tied up in the perception of OLC as something of an honest broker, if one with a predilection for protecting executive power. These costs are reduced, and OLC thus loses some power, if and when it is seen as tainted with politics or otherwise corrupt. The high costs associated with dismissing or evading OLC give that office significant power to resist the will of political leadership, as long as the office itself retains the image of dispassionate legal advice that undergirds its power.<sup>168</sup>

ii. *Formally-Created Versus Organic Sub-Allocations*

As I note above, an important distinction can be drawn between executive branch sub-allocations that are formally, and intentionally, generated from those that develop organically, and evolve over time through the practice and acceptance of actors both inside and outside the Executive. These two categories are neither mutually exclusive nor immutable: Organically created norms or allocations of power may later be codified through hard or soft law, and formal allocations may later evolve through organic practice, or may themselves subvert organically created norms.

This division is distinct from the fleeting or longstanding nature of the allocation in question. To continue the tasking example: The head of an office might circulate a written memo to the office designating tasks for a

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165. Ackerman, *supra* note 99; Jack Goldsmith, *President Obama Rejected DOJ and DOD Advice, and Sided with Harold Koh, on War Powers Resolution*, LAWFARE (June 17, 2011, 11:38 PM), <https://www.lawfareblog.com/president-obama-rejected-doj-and-dod-advice-and-sided-harold-koh-war-powers-resolution>; see also Aaron C. Davis, *Eric Holder Raises Issue of D.C. Voting Rights a Day After Announcing Resignation*, WASH. POST (Sept. 26, 2014), [https://www.washingtonpost.com/local/dc-politics/eric-holder-to-raise-issue-of-dc-voting-rights-a-day-after-announcing-resignation/2014/09/26/e406eb38-457a-11e4-9a15-137aa0153527\\_story.html](https://www.washingtonpost.com/local/dc-politics/eric-holder-to-raise-issue-of-dc-voting-rights-a-day-after-announcing-resignation/2014/09/26/e406eb38-457a-11e4-9a15-137aa0153527_story.html) ("In a rare move [following a negative opinion from the Office of Legal Counsel], Holder ordered the Obama administration's solicitor general to provide a second opinion on the bill's legality."); Carrie Johnson, *Some in Justice Department See D.C. Vote in House as Unconstitutional*, WASH. POST (Apr. 1, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/31/AR2009033104426.html>.

166. Jim Baker, *Donald Trump, Twitter and Presidential Power to Interpret the Law for the Executive Branch*, LAWFARE (Aug. 24, 2018, 10:35 AM), <https://www.lawfareblog.com/donald-trump-twitter-and-presidential-power-interpret-law-executive-branch>.

167. Morrison, *supra* note 3, at 1747 ("[A] President who goes against OLC would invite substantial criticism, which helps explain why it virtually never happens.").

168. By that same token, the legitimizing effect on the President's course of action that the President seeks by requesting OLC sanction is also lessened when that office is perceived as corrupt, thus providing some incentive for Presidents to facilitate its dispassionate distance.

short-term project. At the other end, an official within that office may take on an informal assignment, which leads to taking on additional work when the matter escalates, which then leads to the development of expertise, and ultimately to that individual becoming the established point person in that field, and potentially over time even the institutional memory of the entire executive branch in a particular area. Eventually, despite the fact that this role developed organically, and whether or not the individual is given a formal title or portfolio, any attempt to address a matter in that area without seeking the input of that individual could raise concerns within and without the office. The first example is formal, ephemeral, and simple to change; the second is organic, longstanding and might incur real costs to alter.

iii. *Contemporaneous Versus Past-Presidential Sub-Allocations*

Finally, and perhaps most controversially, I argue that sub-allocations of executive branch power are made not only by the current sitting President or agency head, *but also by their predecessors*.

Executive branch structures, processes, norms, office portfolios, and even minor taskings often transcend specific presidential administrations. When a new presidential administration arrives, the cabinet secretaries and highest tier of political appointees will generally (although not always) turn over immediately, with some exceptions both formal and informal.<sup>169</sup> But a significant degree of the rest of the executive branch remains in place, and this means not just the personnel, but their organizational structure, norms, and processes as well.

In order to change these sub-delegations, a new administration must expend the resources to overturn, in effect, the actions of a prior administration. The status quo bias and collective action hurdles to doing so are not dissimilar from the difficulties one Congress may have in repealing or amending legislation that no longer has majority support. This lack of contemporaneous support—without legislative action—does not invalidate the existing legislation; nor does lack of presidential support invalidate sub-delegations he has not moved to alter. Recent scholarship considering such internal regulation as a form of administrative *law* supports a notion of any bureaucratic power created by these structures as more permanent, less reliant on the substantive positions taken or proximity of views to those of political appointees.<sup>170</sup> Both practically and formally, authority delegated by

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169. The FBI director, for example, is appointed for a ten-year term and under normal circumstances does not turn over with a new administration. An acting official may often need to oversee an agency or office while a new appointee is confirmed.

170. See Metzger & Stack, *supra* note 160, at 1256–57, 1294. Their account approaches these internal norms and institutions as a form of administrative law. *Id.* Under that approach, any allocation of power to career officials would have more permanence, and thus must take into account the reality that at times the bureaucracy will resist presidential prerogative. *See id.*

a prior administration may empower career bureaucrats within a new administration.

These categories and others exist in multiple permutations. Consider the longstanding phenomenon of DOJ and FBI independence from White House interference and partisan politics, which has both organic and formalized features, is longstanding, and is created and entrenched across multiple past presidential administrations. DOJ is situated clearly within the executive branch, headed by a cabinet official who is nominated by and serves at the pleasure of the President. The FBI, which falls under DOJ supervision, is also headed by a presidential appointee, who also may be fired at will (though he is appointed for a ten-year term).<sup>171</sup> Yet the traditions and history of these entities have established powerful norms under which DOJ and the offices within it expect—and are expected—to be shielded to differing degrees from partisan politics.<sup>172</sup>

These norms are guarded today by the culture of the institution and the people working within it, and they have also been codified over time in a number of soft law documents, like manuals, best practices guidelines for individual offices,<sup>173</sup> and written memoranda from the Attorney General's office.<sup>174</sup> The culture of independence from partisan interference trickles down to the attorneys working both within the building and outside it (such as U.S. attorneys at offices throughout the country), and reinforces an environment in which all actors perceive their role—to varying degrees—as, if not entirely neutral arbiters of the law, then at least buffered from partisan politics. Thus when Preet Bharara, then-U.S. attorney for the SDNY, received an unexpected phone call from the President soon after his inauguration, in the midst of public outcry over the President's business relationships (which

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171. See Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 1101, 82 Stat. 197, 236 (1968) (codified as amended at 28 U.S.C. § 532 (2006)). The Executive Branch's position is that the FBI director is removable at will by the President. See Memorandum Op. from Caroline D. Krass, Principal Deputy Assistant Attorney Gen., for the Counsel to the President on Constitutionality of Legislation Extending the Term of the FBI Director (June 20, 2011), <https://www.justice.gov/file/18356/download>.

172. For an excellent discussion of the history of the DOJ independence see generally Jed Handelsman Shugerman, *The Creation of the Department of Justice: Professionalization Without Civil Rights or Civil Service*, 66 STAN. L. REV. 121 (2014) (documenting both the organic and formal elements of DOJ's creation that created and entrenched norms of independence from the White House and partisan politics).

173. See, e.g., *Best Practices for OLC Legal Advice and Written Opinions*, U.S. DEP'T OF STATE, <https://www.justice.gov/olc/best-practices-olc-legal-advice-and-written-opinions> (last visited Sept. 2, 2018).

174. Memorandum from Alberto Gonzales, U.S. Attorney Gen., to Heads of Dep't Components and U.S. Attorneys (May 4, 2006), <https://www.justice.gov/sites/default/files/ag/legacy/2009/02/10/ag-050406a.pdf> (updating standards for “[c]ommunications with the Executive Office of the President”); Memorandum from Eric Holder, U.S. Attorney Gen., to Heads of Dep't Components and U.S. Attorneys (May 11, 2009), <https://lawfare.s3-us-west-2.amazonaws.com/staging/2017/2009%20Eric%20Holder%20memo.pdf> (updating standards for “[c]ommunications with the White House and Congress”).

could one day end up on the U.S. attorney's desk), Bharara declined to call back, citing DOJ protocols on communications with the White House.<sup>175</sup> Instead, he memorialized the phone call in an email to his staff, citing these protocols, and contacted the Attorney General's staff to discuss his concerns about the President's call.<sup>176</sup>

These norms of independence thus provide some level of authority, but only to the extent the parties respect them. Bharara ostensibly countered the wishes of the President in acting upon what I consider an allocation of power to assert such independence, an allocation made by presidents past, from a *mélange* of formal memoranda, as well as practice between former presidents and their Attorney Generals who created, cultivated, acquiesced in, and entrenched that practice over time (with the addition of congressional grants of power to the executive made on the understanding that this independence would continue, as I discuss above).

Bharara's particular act of independence ultimately may have resulted in his dismissal, which the President had the authority to effect, though he may have incurred or risked costs in doing so.<sup>177</sup> Presidents cannot simply instantaneously or costlessly reverse all ongoing sub-allocations of executive power. Yet on the other side, the President's ultimate ability to counter Bharara's resistance, here through dismissal, reinforces the existence of practical constraints on bureaucratic autonomy, even when bureaucrats act entirely within the bounds of their formal authority. Of the three traditional sources of authority I discuss in this section, authorities that are sourced entirely to the executive branch are typically more easily overridden by executive branch actions than those derived from external sources.

### C. FUNCTIONAL POWER TO RESIST

The deep state and benevolent constraints models may differ significantly in their understanding of the formal authority allocated to different bureaucratic actors, but they take a similar view of their functional power. The alternating fear and reliance animating these approaches both rest upon a conception of bureaucrats as wielding significant practical discretion to resist other bureaucratic actors. This perception finds support in political science research on bureaucracy, which finds bureaucrats exercising significant

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175. Haberman & Savage, *supra* note 70; see also Jason Leopold & Claudia Koerner, *Memo Shows Preet Bharara Was Concerned After Phone Call from White House*, BUZZFEED (June 23, 2017, 12:23 PM), <https://www.buzzfeed.com/jasonleopold/memo-shows-preet-bharara-was-concerned-about-contact-from> (finding that in an email to his staff Bharara states, "we printed out and reviewed a copy of the May 11, 2009 (as well as the December 19, 2007) Memos relating to Communications with the White House").

176. *Id.* Note that Bharara was then asked to resign the following day and was fired the day after that. *Id.*

177. Whether this was connected to Bharara's small act of resistance is speculative. Bharara was only one of 46 U.S. attorneys who the President asked to resign at once. See Haberman & Savage, *supra* note 70.

discretion, if not at the decision-making stage, then at the implementation and enforcement stages.<sup>178</sup> This functional power that bureaucrats wield derives from a variety of sources. These include: institutional relationships, both within the executive branch and external to it, with civil society, with members of Congress and staff, and with foreign counterparts; executive branch norms privileging independence; deference by transient political officials to entrenched officials' expertise; the proximity of line officials to the actual "action" and to sources of information,<sup>179</sup> including at times the practical ability to release that information without authorization (leaking);<sup>180</sup> and the ability of line officers to frame questions and decisions for superiors in a way that influences the result.<sup>181</sup> These facets of bureaucratic reality often endow career bureaucrats with significant practical discretion to act within certain bounds.

But this functional power does not come without its own, significant, practical constraints, which I submit should temper both fear of and reliance on bureaucratic resistance. The boundary lines within which bureaucrats operate are often highly circumscribed, and along with the functional power to act come real practical checks on every exercise of that power. In fact, *the very resistance that bureaucratic power permits also hems in that power* from every direction and at every level of the bureaucratic hierarchy. I explore three categories of practical constraint on bureaucratic power in the section that follows: (1) vertical constraints, that is checks on action coming from above or below in the bureaucratic hierarchy; (2) horizontal constraints, or checks coming from other similarly situated individuals, offices, or agencies; and (3) external checks, or those coming from outside the executive branch entirely.

### 1. Vertical Constraints on Resistance

Vertical checks on bureaucratic power are those coming from above or below in the bureaucratic hierarchy. Agencies are hierarchical institutions.<sup>182</sup> Career line officers typically fill the lower and middle ranks of any given office and tend to answer to a politically appointed head of the office, who herself will answer to another politically appointed head above her, and so on up to

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178. See, e.g., BREHM & GATES, *supra* note 76, at 9–13; JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 72–89 (1989).

179. See DANIEL P. CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862–1928, at 5 (2001) (situating agency autonomy in the agency's ability to do things that others cannot, and in their "multiple and diverse political affiliations").

180. See David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condones Unlawful Disclosures of Information*, 127 HARV. L. REV. 512, 515 (2013).

181. See Ingber, *supra* note 15, at 368.

182. ROURKE, *supra* note 56, at 194; *Organization Chart: November 2016*, U.S. DEP'T OF STATE, <https://www.state.gov/r/pa/ei/rls/dos/99484.htm> (last visited Sept. 2, 2018).

the head of the agency herself.<sup>183</sup> Bureaucrats on the front lines will typically have some discretion in their minute-by-minute, or even day-to-day, decisions, but superiors will typically have power to review—or even reassign or take on for themselves—the line officer’s work product.<sup>184</sup> An efficient manager will permit discretion to officials beneath them depending on the extent to which they can trust them to carry out their orders, as well as to bring to the manager’s attention any significant policy decisions or problems that arise.<sup>185</sup>

Micromanagement is not without cost for managers themselves. Constant oversight creates more work for superior officers, who cannot possibly watch over the shoulder of every line official beneath them as they go about their daily tasks.<sup>186</sup> They are likely not even aware of every single micro-decision that arises, and rely upon line officials to bring matters to their attention. While lower-level officials are constrained by their bosses’ oversight, higher-level officials are constrained by the sheer impossibility of micromanaging every action their office takes (not to mention by the oversight of their own bosses). It is for these reasons that high-level managers seeking to make significant changes restructure their office to ensure that more decisions must come across the desks of political officials—either by increasing the number of political officials in the office or by increasing their oversight of line officials’ work.<sup>187</sup>

Lower-level officials may choose to get with the program, suffer in silence, or voice dissent, but the last carries risks, including simply being cut out of the loop.<sup>188</sup> Voicing dissent in and of itself is significant work—it requires studying the risks of a problem, preparing to raise a concern at a meeting, or writing a persuasive memo; taking any of these relatively minor acts of dissent depletes resources.<sup>189</sup> And insubordination can result in the loss of one’s

183. *Organization Chart: November 2016*, *supra* note 182.

184. GOLDEN, *supra* note 62, at 27; LEWIS, *supra* note 55, at 20–25.

185. See BREHM & GATES, *supra* note 76, at 32.

186. See *id.* at 25–46 (examining the difficulties for managers seeking compliance from subordinates).

187. See GOLDEN, *supra* note 62, at 88–90 (discussing changes to the DOJ civil rights division under Reagan, among them “institute[ing] a system under which almost all the work of the career attorneys was reviewed by political[] appointe[es]” to “reduc[e] the autonomy and discretion of the career attorneys,” as well as through increased hiring of non-Senate confirmed political appointees); see also Aberbach & Rockman, *supra* note 34, at 456 (“[T]he Eisenhower administration came into office determined to weed out large numbers of Democratic bureaucrats and to reclassify a number of administrative positions from civil service status to Schedule ‘C’ or policy-appointive status.”).

188. GOLDEN, *supra* note 62, at 31 (“[T]he micromanagement techniques used by Reagan’s strategic appointees . . . took careerists out of the loop and rendered most types of voice all but impossible,” and demonstrated to civil servants, “[f]aced with ‘hit lists,’ demotion, transfer, and a general atmosphere of fear and distrust . . . that their utility was enhanced by cooperation, not resistance.”).

189. See *id.* (citing career officials who noted that political appointees may have employed a strategy of “forcing careerists to go to a lot of trouble to prevail” in arguments).

influence, the loss of position, the loss of job,<sup>190</sup> or even, in specific cases, criminal liability.<sup>191</sup>

Considering the hierarchical and disaggregated nature of most bureaucratic tasks, organized resistance is exceedingly difficult. This is borne out by scholarship demonstrating high rates of responsiveness from senior civil service officials to the President's policy decisions.<sup>192</sup> Rare historic instances of organized resistance within the bureaucracy on questions of policy disagreement have taken the form not of a dramatic refusal to act, but rather the more mundane vocal registering of dissent, such as through a group complaint or a persuasive memo.<sup>193</sup> The State Department has created a formalized process for employees to register disagreement with the agency or administration's positions.<sup>194</sup> On at least one occasion, a group of Foreign Service Officers signed a joint memo opposing the Obama administration's policies in Syria, which then came to light through a leak.<sup>195</sup> Such organized vocal acts of resistance are surprisingly rare. But even more important for the "deep state" versus benevolent constraints debate, even these rare accounts of organized resistance resulted in, not significant acts of disobedience, but rather simple attempts to persuade political leadership of the error of their policies.<sup>196</sup> The capacity of such bureaucrats to force change through their organized dissent is not a null set; persuasive power is important, as is the power of refusing to provide cover for a decision. But ultimately the force of such dissent is limited by the will of those running the office.

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190. See Transcript of April 19, 1971 meeting published in *The New York Times* 14 (July 20, 1974) quoted in Aberbach & Rockman, *supra* note 34, at 457 (quoting Nixon as having told the director of OMB to handle a noncompliant bureaucrat as follows: "Demote him or send him to the Guam regional office. . . . Get him the hell out.>").

191. Specifically, unlawful disclosure of certain types of information can result in criminal liability. See Disclosure of Classified Information, 18 U.S.C. § 798 (2012); Confidentiality and Disclosure of Returns and Return Information, 26 U.S.C. § 6103; Unauthorized Disclosure of Information, 26 U.S.C. § 7213(a)(1). In the military, disobeying a superior officer may result in a court martial. Assaulting or Willfully Disobeying Superior Commissioned Officer, 10 U.S.C. § 890 (codifying Article 90 of the Uniform Code of Military Justice).

192. David E. Lewis, *"Deep State" Claims and Professional Government*, REG. REV. (Dec. 5, 2017), <https://www.theregreview.org/2017/12/05/lewis-deep-state-professional-government>.

193. See GOLDEN, *supra* note 62, at 91–94 (discussing attempts by the career lawyers of the DOJ civil rights division to persuade the political leadership via memos).

194. See *The Dissent Channel*, AM. FOREIGN SERV. ASS'N, <http://www.afsa.org/dissent-channel> (last visited Sept. 2, 2018).

195. Mark Landler, *51 U.S. Diplomats Urge Strikes Against Assad in Syria*, N.Y. TIMES (June 16, 2016), <https://www.nytimes.com/2016/06/17/world/middleeast/syria-assad-obama-airstrikes-diplomats-memo.html>.

196. *Id.*

## 2. Horizontal Constraints on Resistance

Horizontal constraints on bureaucratic action can be equally or more powerful than vertical constraints, and they exist in more diverse forms, from office groupthink to inter-agency conflict.

The most immediate horizontal constraints on bureaucrats come from their own office colleagues: peer pressure, the “group think” of a particular office, the sense of “professionalism”<sup>197</sup> in which strong cultural norms reinforce a sense of what it means to be a member of the civil service or, more specifically, a given office or profession.<sup>198</sup> For career bureaucrats, these professional norms tend to enforce an office culture that shuns not only leaks and partisanship, but also certain types of dissent, in particular, straying too far from the long-held views of the office itself.<sup>199</sup> This may make it difficult to raise too much of a ruckus by questioning a decision in a meeting, to create work for other colleagues by raising questions or refusing to take on a task, or to oppose a longstanding position of the institution.

Horizontal constraints also come from peers in other offices, both within one agency and from other agencies on matters of inter-agency interest or coordination. As I discuss above, much disagreement within the executive branch involves longstanding points of dispute between different agencies or offices, rather than between the entrenched and transient, or career and political, bureaucracies.<sup>200</sup> Career officials across several agencies may, for example, attend the same working group meetings for years, even through multiple presidential administrations, and continue to have the same policy or legal disputes, despite transitions in the presidency.<sup>201</sup> Turnover in political leadership may affect the balance of power among the actors in those disagreements, but not all decision-making within the executive branch is inflected by partisan politics; in fact, many conflicts have fault lines that are primarily horizontal, between agencies, and not vertical, between career and political actors.

Inter-agencies constraints may flow, for example, from restrictions on information sharing, or unequal power around the decision-making table. Even when multiple agencies may have a stake in a particular decision, one

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197. See, e.g., BREHM & GATES, *supra* note 76, at 75–92, 134 (discussing the roles of professionalism and peers in constraining bureaucrats).

198. See David Kaye, *The Legal Bureaucracy and the Law of War*, 38 GEO. WASH. INT’L L. REV. 589, 597 (2006) (describing the “soft law” of bureaucratic accountability—professionalism, “the opprobrium or sanction of colleagues,” ambition for advancement).

199. See, e.g., GOLDEN, *supra* note 62, at 49–50, 106 (noting that the career officials surveyed viewed leaks and sabotage as improper means of resistance); ROURKE, *supra* note 56, at 205–07 (discussing the “internalized constraints” that “operate within the personalities of bureaucrats themselves”).

200. See *supra* Section III.B.

201. See *infra* Part V (discussing the State Department, Justice, and Defense disagreements over detention authority).



may hold more or less of the decision-making “reins.”<sup>202</sup> DOJ may hold the pen if the task at stake is filing a brief. The DOD may hold greater decision authority if the question is whether to use military force in a particular scenario or whether to release a detainee. State may hold power as the head of delegation to a negotiation. CIA officials wield control through restrictions on access to information.<sup>203</sup> Sometimes entire offices or agencies are cut out of the decision-making loop entirely, as a means of curating the decision-making process.<sup>204</sup> Cutting out a dissenting voice means reducing one constraint—that posed by the dissenting agency on others; but it also creates a constraint on that agency’s ability to act or resist. Thus, the risk of being cut out may keep an agency or agency actor from dissenting too forcefully from the actions of another agency official; this threat itself is another constraint on resistance.

When concerns of actual fraud or abuse are involved, agency actors have additional tools at their disposal to constrain their counterparts, as discussed in the previous section: internal offices like the Inspector General, or other “offices of goodness.”<sup>205</sup> Agency actors likewise employ their relationships with external actors—such as in Congress or the press—as a tool in changing the balance of power in an interagency dynamic, or as a means of sharing information about what they may deem to be misguided policy or abusive behavior. As one example, recent reports suggest that the Office of Intelligence and Analysis (“OIA”) within the Treasury Department may have unlawfully viewed the financial records of U.S. citizens and companies.<sup>206</sup> Another office within the Treasury Department that frequently spars with OIA over turf, the Financial Crimes Enforcement Network (“FinCEN”), reportedly raised concerns over the activity both with internal executive branch officials, and with members of Congress.<sup>207</sup> One bureaucrat’s power is another bureaucrat’s constraint.

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202. See Ingber, *supra* note 15, at 388. Daniel Farber and Anne O’Connell distinguish these kinds of relationships as involving “advisory or monitoring authority” rather than formal hierarchy, on the one hand, or symmetry, on the other. Daniel A. Farber & Anne Joseph O’Connell, *Agencies as Adversaries*, 105 CALIF. L. REV. 1375, 1389 (2017).

203. In controlling access to certain types of clearances, intelligence officials can reduce oversight by other agencies, on the one hand, but on the other, may feel they need to do so for the purpose of containing leaks.

204. See *supra* note 44 and accompanying text (discussing the Bush administration officials channeling decision-making on detainee treatment in order to avoid including officials who might dissent).

205. Schlanger, *supra* note 122, at 60; Sinnar, *supra* note 28, at 1034.

206. Jason Leopold & Jessica Garrison, *US Intelligence Unit Accused of Illegally Spying on Americans’ Financial Records*, BUZZFEED (Oct. 6, 2017, 10:00 AM), <https://www.buzzfeed.com/jasonleopold/us-intelligence-unit-accused-of-illegally-spying-on>.

207. See *id.*; Jason Leopold & Jessica Garrison, *In Midst of Terror Attack, US Intel Unit Was Blocked from Tracking the Terrorists*, BUZZFEED (Sept. 27, 2017, 1:46 PM), <https://www.buzzfeed.com/jasonleopold/us-intelligence-unit-was-blocked-from-tracking-terrorists> (chronicling “an increasingly nasty power struggle” between the two offices).

### 3. External Constraints on Resistance

In addition to the horizontal and vertical constraints on bureaucratic behavior from inside the executive branch, bureaucrats also face limitations on their discretion from external sources, just as they receive power from them. External constraints can be either formal or organic and can arise from both domestic and foreign sources exogenous to the executive branch—such as the other branches, state governments, foreign governments, the press, and civil society.

Executive branch officials in foreign policy and national security fields will often have longstanding relationships with foreign counterparts that provide both sources of information and practical allegiances necessary to accomplishing certain tasks. Officials within the intelligence community, for example, derive functional power from their ability to operate in a space shielded from public view, the unique expertise that comes from working in a field where very few have access to information, and also from the longstanding institutional relationships actors within this realm develop—with domestic actors as well as with counterparts in foreign intelligence communities. Those longstanding institutional relationships, and bonds of trust between career level officials, transcend any given political transition and form a distinct parallel—though inextricably interwoven—relationship between national governments alongside the formal one as between the heads of state.<sup>208</sup> Those relationships may cause friction for a President seeking to change direction, but they also help keep relationships with allies on a steady even keel, even as new presidents struggle to get their bearings, or falter.<sup>209</sup>

These interconnected relationships also create constraints, both formal and informal. Ashley Deeks has explored the role that peer intelligence communities (“IC”) play in constraining the space in which each may act.<sup>210</sup> She describes both formal and informal mechanisms that constrain peer intelligence actors, including written agreements between states, legal obligations within one state that circumscribe the space in which partners may act, “anticipated legal or regulatory changes that instill preemptive caution in one peer and then shift that caution to another peer,” “aggressive external oversight of one IC that alters the operational calculations in that IC’s

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208. See *U.S. Intelligence Officials Reportedly Warn Israeli Counterparts Against Sharing Info with Trump Administration*, HAARETZ (May 16, 2017, 3:23 PM), <http://www.haaretz.com/israel-news/1.764711> (reporting that that intelligence officials warned their counterparts in the Israeli intelligence community not to provide intelligence with the incoming administration).

209. See, e.g., Susan B. Glasser, *Trump National Security Team Blindsided by NATO Speech*, POLITICO (June 5, 2017), <http://www.politico.com/magazine/story/2017/06/05/trump-nato-speech-national-security-team-215227>.

210. See Ashley Deeks, *Intelligence Communities, Peer Constraints, and the Law*, 7 HARV. NAT'L SECURITY J. 1, 23–43 (2015).

relationship with its peer ICs,” and “face-to-face influence among peer ICs as intelligence operations transpire on the ground.”<sup>211</sup>

For members of the entrenched bureaucracy, new constraints may arise at times of transition. On the one hand, certain areas of functional power may seem to increase during the early days of new administrations, when career bureaucrats have a significant information advantage over incoming political officials. Yet these career bureaucrats may also find that they have to re-earn the trust of the political leadership, and that they may be cut out of the decision-making loop until they do so.<sup>212</sup> Relatedly, the value of U.S. bureaucrats to their international counterparts is only as good as their ability to accomplish things within the U.S. government or speak for their leadership, and therefore their star may rise or fall with the trust placed in them by political superiors. Thus, while collegial working relationships between career or long-serving officials in different governments gives them each some degree of practical power, in the forms of expertise, information, and ability to get things done quickly, that practical power is not limitless; international counterparts want to be sure that the word of their interlocutor has meaning and will not be counteracted by political leadership. U.S. career officials may find that their longstanding foreign counterparts may second-guess the extent to which they speak with the authority of the new President and political leadership and may request confirmation of that authority before taking action or relying on the bureaucrats’ word.<sup>213</sup> As with internal hierarchical relationships during political transition, faith must be regained to a certain degree as counterparts seek to understand the power dynamics in a new administration.

Similar reservations can come from domestic actors, like judges, who may query, *inter alia*, whether the Justice Department’s continuous legal position in a case in fact reflects the considered views of new political leadership.<sup>214</sup>

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211. *Id.*

212. *See, e.g.*, Harris, *supra* note 59; Eliana Johnson & Michael Crowley, *The Bottleneck in Rex Tillerson’s State Department*, POLITICO (June 4, 2017, 1:30 PM), <https://www.politico.com/story/2017/06/04/rex-tillerson-state-department-bottleneck-239107>; Nahal Toosi, *Leaked Document Shows Tillerson Power Play*, POLITICO (Oct. 26, 2017, 5:02 AM), <https://www.politico.com/story/2017/10/26/tillerson-diplomats-policy-state-department-244190>.

213. *See infra* notes 240–42 and accompanying text (discussing the failure of U.S. intelligence officials to convince their Israeli counterparts to withhold information from the incoming administration).

214. *E.g.*, DANIEL KLAIDMAN, *KILL OR CAPTURE: THE WAR ON TERROR AND THE SOUL OF THE OBAMA PRESIDENCY* 58–60 (2012); SAVAGE, *supra* note 98, at 117–18 (discussing Judge Bates’ request of DOJ attorneys, shortly after the transition to the Obama administration, whether the political leadership wished to take the same position, which resulted in the “March 13 brief”); *see also* Oral Argument at 18:30, Mohamed v. Jeppesen Dataplan, Inc., 579 F.3d 943 (9th Cir. 2009) (No. 08-15693), [https://www.cag.uscourts.gov/media/view.php?pk\\_id=000002777](https://www.cag.uscourts.gov/media/view.php?pk_id=000002777) (during which Judge Mary M. Schroeder expressed confusion at the career Justice Department attorney’s continued reliance on the prior administration’s state secrets argument and questioned whether the “change in administration” had not effected a change in the government’s position).

When such exchanges occur, they also flag the matter for political leadership, prompting them to take a closer look at the Department's interpretation, and possibly to override the position taken by career attorneys in the case.<sup>215</sup> Thus, bureaucratic discretion based on proximity to the point of activity, or on being the point of access for external actors, is circumscribed by external actors' political awareness of the government's hierarchy.

#### 4. Leaking as Both Power and Constraint

Leaking merits its own treatment, as this is one area where neither organized power nor the backing of political leadership is necessary for one individual to have a significant effect. Leaking may be among the most powerful, unsanctioned tools a single bureaucrat has at her disposal to resist or affect the decision-making process. Unlike many of the mechanisms I have discussed, leaks (with some exceptions) are not typically backed by formal authority; rather, their power largely stems from functional capacity—access to information and ability to release it. Moreover, access to large amounts of information can be a force multiplier; a lone individual may create an enormous splash simply by having access to and leaking explosive information. Because of this power, some see today's leaking as harkening back to the historical abuses of information by the national security state—in particular, the “Hoover-era FBI's use of secretly collected information to sabotage elected officials with adverse political interests.”<sup>216</sup> Those raising concerns about bureaucratic resistance thus tend to point to the existence of leaks as the primary evidence of “deep state” danger.<sup>217</sup>

And yet, as with other areas of bureaucratic power, concerns about leakers and “deep state” power may be overblown for several reasons. First, the leaking of information by bureaucrats seeking to harness public opinion in order to affect internal decision-making is entirely unlike the kind of weaponized hoarding of secrets engaged in under Hoover. The latter is blackmail, and I have seen no recent evidence today that lower-level officials are holding the threat of a release of information over the heads of superiors to force them to change a policy. By contrast, the current President's selective public shaming of executive branch officials, both career and political, along

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215. See Oral Argument at 18:30, *Mohamed v. Jeppesen Dataplan, Inc.*, 579 F.3d 943 (No. 08-15693), [https://www.ca9.uscourts.gov/media/view.php?pk\\_id=000002777](https://www.ca9.uscourts.gov/media/view.php?pk_id=000002777); Respondents' Memorandum Regarding the Government's Detention Authority Relative to the Detainees Held at Guantanamo Bay at 10–11, *In re Guantanamo Bay Detainee Litigation*, 577 F. Supp. 2d 312 (D.D.C. 2008) (No. 08-mc-0442); KLADMAN, *supra* note 214, at 58–60; SAVAGE, *supra* note 98, at 117–18.

216. See, e.g., Jack Goldsmith, *The 'Deep State' Is Real. But Are Its Leaks Against Trump Justified?*, *GUARDIAN* (Apr. 22, 2018, 2:00 AM), <https://www.theguardian.com/commentisfree/2018/apr/22/leaks-trump-deep-state-fbi-cia-michael-flynn>.

217. See, e.g., *id.*; Goldsmith, *supra* note 4, at 115–17.

with their families, over their government work, comes closer to the Hoover-era type of abuse.<sup>218</sup>

This is not to say that leaking is without dangers, or that leakers should face no consequence. As I discuss below, they should and do. But the harms inherent in public disclosure of information are usually different—are in fact typically the *opposite*—of the harms inherent in the hoarding of secrets to use as blackmail. The goal of blackmail is that the policymaker changes position so as to avoid the public learning the secret; the goal of leaking is that the policymaker changes position because the public learns the secret. The former works only if the policymaker fears the secret's release. The latter works only if the public cares about the information and demands change. The former favors secrecy; the latter transparency. For those concerned with the accountability to the public of government decision-makers—the core of the “deep state” fear—these distinctions are critical.

Second, the power of leaks is itself constrained by the source of that power. Leaks work by harnessing public outrage, which means the leaker's power is dependent upon it; leaks are only effective if they agitate the broader public.<sup>219</sup> Of course, the leaker holds the additional functional power beyond the unauthorized release of information itself, and that is the choice of selectively releasing information, as well as the choice of timing, both of which can have a significant influence on its impact. The government can remediate any false or selectively misleading information with its own release. But, as I mention above, one significant exception to this is the selective release of information timed to significant events, such as an election, that makes the immediate effect of on the public decisive, with little ability to later remedy any false readings. While we are currently wading through the aftermath of precisely such momentarily timed releases of information,<sup>220</sup> this is fairly atypical. And while the leaker has certain functional power, it is attenuated

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218. See, e.g., Donald J. Trump (@realDonaldTrump), TWITTER (July 25, 2017, 5:21 AM), <https://twitter.com/realDonaldTrump/status/889792764363276288> (“Problem is that the acting head of the FBI & the person in charge of the Hillary investigation, Andrew McCabe, got \$700,000 from H for wife!”).

219. Goldsmith, *supra* note 4, at 118–19; Orin Kerr, *Edward Snowden's Impact*, WASH. POST (Apr. 9, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/04/09/edward-snowdens-impact>; Bob Woodward, *How Mark Felt Became 'Deep Throat'*, WASH. POST (June 20, 2005), [https://www.washingtonpost.com/politics/how-mark-felt-became-deep-throat/2012/06/04/gJQAlpARIV\\_story.html](https://www.washingtonpost.com/politics/how-mark-felt-became-deep-throat/2012/06/04/gJQAlpARIV_story.html).

220. This includes both the high-level decision by James Comey to release information to Congress about the Clinton email investigation in the days before the election, which may have had an unintended effect on the result, as well as the unauthorized leaking by field agents for the actual purpose of affecting the election. Letter from James Comey, Dir., Fed. Bureau Investigation, to Messrs Chairmen (Oct. 28, 2018), <https://assets.documentcloud.org/documents/3198222/Letter.pdf> (announcing, shortly before the 2016 presidential election, the discovery of new emails relevant to the Hilary Clinton investigation); Jim Dwyer, *As Trump Ally, Rudy Giuliani Boasts of Ties to F.B.I.*, N.Y. TIMES (Nov. 3, 2016), <https://www.nytimes.com/2016/11/04/nyregion/as-trump-ally-rudy-giuliani-hints-at-ties-to-the-fbi.html>.

and reliant upon the public response, which he does not control; there is no guarantee that public exposure will sway the debate in any particular direction.<sup>221</sup>

Third, there are considerable constraints on the power of bureaucrats to leak, and severe consequences for those who do. As David Pozen has explained, these consequences are unevenly distributed to lower-level leakers, who do not enjoy the discretion of their political superiors with respect to decisions to release classified information, and thus face harsher consequences for its release.<sup>222</sup> Unlike senior officials who may have preexisting relationships with the press and an easy rapport with reporters from their positions prior to government, as well as access related to their government positions, lower-level officials have few if any sanctioned reasons to speak with reporters.<sup>223</sup> Thus they do not have the kind of daily interactions that would easily permit an added indiscretion here or there; leaking instead requires an affirmative decision to seek out a recipient. They also may not have access to the most significant information, which may be closely held by a few senior officials.<sup>224</sup> In addition, the cultural norms and group think of the career bureaucracy “vilif[y] leaking as disloyalty,” further constraining career bureaucrats from doing so.<sup>225</sup> Finally, there is a genuine fear of leaking among career bureaucrats, because of the serious consequences attached, in particular, to the release of classified information. Thus, despite the significant attention drawn by the stories of leaks by career bureaucrats and lower-level officials like Chelsea Manning, most government leaks come not from the lower tiers of government but rather from the White House and other senior officials.<sup>226</sup>

Finally, leaking is itself dual-natured; it provides the resistor with power, and it is also an effective means of constraining resistance. This manifests in vertical, horizontal, and external constraints, all of which ultimately rely on

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221. See Landler, *supra* note 195.

222. Pozen, *supra* note 180, at 593–94. Because of their relationship with the press and differentiated ability to control classification, higher-level officials have both a lower bar for disclosing information and fewer consequences for violating it. *Id.* (“[T]he regime privileges White House officials over agency officials, political appointees over civil servants, senior staff over junior staff, and non-IC employees over IC employees, both in terms of the type of sanctions utilized and the amount of disclosure discretion given.”).

223. *Id.*

224. See Charlie Savage, *How 4 Federal Lawyers Paved the Way to Kill Osama bin Laden*, N.Y. TIMES (Oct. 28, 2015), <https://www.nytimes.com/2015/10/29/us/politics/obama-legal-authorization-osama-bin-laden-raid.html> (highlighting that the information about the raid was known only to a very small number of people inside the government).

225. Pozen, *supra* note 180, at 529–30 (“Journalists and government insiders have consistently attested that leaking is far more common among those in leadership positions.”); see also GOLDEN, *supra* note 62, at 49, 106 (noting that, culturally, most bureaucrats found leaking to be a tool of resistance beyond the pale of what they would consider).

226. For an excellent dissection of the world of executive branch leaking, see Pozen, *supra* note 180, at 529–30.

external interest or pressure. Leaking is an alternative mechanism of registering dissent with a policy, which may effectively change the decision-making power dynamic depending on public reaction. Leaks may involve personal battles at the highest levels; the first year of the Trump administration, for example, saw constant reports of disputes within the White House and among senior cabinet officials within the Trump administration.<sup>227</sup> But leaks also stem from more bureaucratic disputes involving turf battles over which office should hold decision-making authority on a matter, policy disputes over the appropriate course of action, or concerns regarding abuse by particular offices or actors. Leaking is of course a tool used instrumentally to increase power, but the resulting transparency—or the threat thereof—serves as another means of constraining bureaucratic action. The constraint imposed by the fear of transparency even has a title within the government: the “Washington Post Test,” under the terms of which executive branch actors are warned to mentally test their proposed course of action by assuming it were it to be released as front page news.<sup>228</sup> Again, this threat of transparency—though it may influence policy—is the opposite of “deep state” unaccountability.

The risk of leaks by partners outside the executive branch—like Congress or foreign states—serves as yet another constraint. Congressional oversight inherently involves the risk that the material provided to it will leak, sometimes immediately.<sup>229</sup> And information sharing with foreign partners is often a necessary component of intelligence work, but it also exacerbates the risks that information will ultimately end up in the public domain. Ashley Deeks has noted the role that leaks have played in pressuring states to impose greater constraints on their own intelligence communities, which in turn result in added constraints on their peer communities.<sup>230</sup> Leaks by one intelligence community also create tensions in the intelligence relationship—either because the released information creates national security risks itself, or because the leak creates public outcry about the methods that an intelligence community has employed.<sup>231</sup> In either case, the relationship may

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227. See, e.g., Sarah Ellison, *The Inside Story of the Kushner-Bannon Civil War*, VANITY FAIR (May 2017), <https://www.vanityfair.com/news/2017/04/jared-kushner-steve-bannon-white-house-civil-war>; Graham Lanktree, *Did Rex Tillerson Call Trump a Moron?*, NEWSWEEK (Oct. 4, 2017, 10:23 AM), <http://www.newsweek.com/why-did-rex-tillerson-call-trump-moron-677464>.

228. Brian Agreen, *How to Steer Clear of Scandal*, WASH. POST (Apr. 19, 2012), [https://www.washingtonpost.com/local/dc-politics/how-to-steer-clear-of-scandal/2012/04/19/gIQApaI3TT\\_story.html](https://www.washingtonpost.com/local/dc-politics/how-to-steer-clear-of-scandal/2012/04/19/gIQApaI3TT_story.html) (describing the test as follows: “Every meeting you have, every decision your office makes . . . stop and think, ‘What would happen if this got leaked to The Washington Post?’”).

229. The leak of the Comey memos proves illustrative.

230. Deeks, *supra* note 210, at 11–13.

231. Jack Moore, *Trump ISIS Leak to Russia Could End Israel-U.S. Intelligence Sharing*, NEWSWEEK (May 16, 2017, 6:46 PM), <http://www.newsweek.com/israeli-and-us-intelligence-services-crisis-over-trump-leak-russia-610420> (describing how Israel is angry about Trump revealing sensitive

become strained, resulting in less information sharing, and thus less power for the bureaucratic actors on the leaking side. That likely result in turn helps to create and reinforce the institutional and cultural norms that hinder leaking *ex ante*, as well as the *ex post* formal consequences for doing so.

## V. ASSESSING RESISTANCE

The two conventional models of bureaucratic behavior I discuss in this Article take radically different approaches to the merits of bureaucratic resistance to political leadership. And neither provides a framework for assessing the appropriateness of any given act of resistance.

Under the “deep state” approach, assessing resistance should be quite clear-cut. In its starkest terms, career public servants and others serving the President are unelected and therefore unaccountable to the public; their only legitimate power derives from their role as the mere limbs of the President, in whom is vested all formal executive power. Any opposition to the President by those under him, under this account, would be illegitimate. Taking this to its logical conclusion, the “deep state” approach would require bureaucratic lawbreaking if the President demanded it, or even seemed to desire it—and yet that is an untenable position.<sup>232</sup>

The benevolent constraints model by its own terms takes a more welcoming approach to bureaucratic resistance. These scholars, after all, view the broader bureaucracy as imposing critical constraints on the President, as heirs to the separation-of-powers mantle.<sup>233</sup> In order to play that constraining function, the bureaucracy *must* at times “resist” political leadership, at least under the broad definition I ascribe to resistance. In fact, scholars in this camp do not see resistance as a net negative even for the President himself; instead, the very existence of such resistance *legitimizes* executive power.<sup>234</sup> Under this model then, some resistance ultimately benefits the President and

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intelligence related to ISIS); *The Latest on the Manchester Bombing Investigation*, N.Y. TIMES (May 24, 2017), <https://www.nytimes.com/2017/05/24/world/europe/manchester-uk-bombing-live.html> (describing British Prime Minister Theresa May’s confronting of Trump over leaks regarding the British investigation into the Manchester bombing.); *see also* Aaron Mate, *Canada’s Role in the CIA Torture Program Shouldn’t Be Ignored*, VICE (Dec. 19, 2014, 5:02 PM), [https://www.vice.com/en\\_ca/article/4w5b8g/canadas-role-in-the-cia-torture-program-shouldnt-be-ignored-928](https://www.vice.com/en_ca/article/4w5b8g/canadas-role-in-the-cia-torture-program-shouldnt-be-ignored-928) (stating how previously classified information which was publicly released caused international and domestic political troubles for the Canadian government).

232. A recent example of rogue action by bureaucrats in *support* of the President’s prerogative includes the defiance of court orders to halt deportations by Customs and Border Protection agents in the immediate wake of the Trump travel bans of early 2017. Edward Helmore & Alan Yuhas, *Border Agents Defy Courts on Trump Travel Ban, Congressmen and Lawyers Say*, GUARDIAN (Jan. 30, 2017, 3:57 AM), <https://www.theguardian.com/us-news/2017/jan/29/customs-border-protection-agents-trump-muslim-country-travel-ban>.

233. Katyal, *supra* note 3, at 2314; Metzger, *supra* note 17, at 427–28. Jon Michaels argues that the “administrative separation of powers” is today a necessary component of the broader system of checks and balances. *See* Michaels, *supra* note 3, at 530.

234. GOLDSMITH, *supra* note 25, at 243.



bolsters his authority at a macro level, even if at a micro level any specific act of resistance may thwart a given exercise of that authority.

But while the benevolent constraint model clearly embraces some resistance to the President, it does not offer guidance for determining what kind of resistance is acceptable, how aggressively the bureaucracy may push back against political leadership, and who decides when enough is enough. Surely career bureaucrats must be permitted to disagree with political leadership and explain their dissenting views, but may they ever say, “no?” And if so, are there limits on when they may do so and for what purpose? Some scholars seem to draw a line at legal constraint.<sup>235</sup> Under that approach, government lawyers might appropriately refuse to carry out an unlawful order, but it would be inappropriate (if not necessarily unlawful) to refuse to carry out a lawful policy or order they merely dislike, or even believe to be immoral.<sup>236</sup>

Drawing the line at illegality alone imbues government lawyers with significant power, and non-lawyers with very little. The implicit result of such a scheme would be that lawyers, and those relying on lawyers, are virtually the only bureaucrats with authority to resist. Such an approach does not provide guidance for what a scientist or other professional might do—beyond simply quitting—when faced with a proposal from leadership that may not be technically unlawful, but that is unethical, or immoral, or norm-breaking, or not in line with the congressional mandate, or requires them to disregard facts or evidence, or is merely a terrible policy that will not work.

Moreover, the legal/illegal dichotomy does not fully account for the range of actions that bureaucrats are authorized—in some cases even required—to take that nevertheless fall within my definition of resistance. In fact, even using legality as the normative trait against which to weigh resistance, the result is a spectrum of appropriate action, rather than a clear binary choice. And the question of how to respond to manifest illegality is only one that bureaucrats must face when considering their legitimate zone of discretion to resist other bureaucratic actors.

In Section A that follows, I consider how a spectrum of bureaucratic resistance maps out, using legality as the normative trait against which to weigh appropriateness of action. This first section is highly theoretical. But where a specific action will fall within these zones is dependent not only on the act itself, but on the purpose for which it is taken. I therefore map out the relationship between purpose and mechanism in Section B.

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235. See Quinta Jurecic, *The Lawfare Podcast: Goldsmith v. Lederman on Yates*, LAWFARE (Feb. 1, 2017, 5:54 PM), <https://www.lawfareblog.com/lawfare-podcast-goldsmith-v-lederman-yates> (discussing the firing of Yates).

236. *Id.*

*A. ASSESSING ZONES OF RESISTANCE ACCORDING TO LEGALITY*

This section maps resistance into four distinct zones according to authorization and legal prohibition. As I discuss below, legality is only one normative criterion we might employ for such a mapping. The potential repercussions that attach to each of these zones varies depending on the individual's employment status, but the basic conceptual framework applies all. In the first zone, I place acts of "resistance" that are not merely lawful but are *required* by law, such as insisting upon following the legal requirements of one's position despite being asked to skirt them, such as refusing an order to commit a war crime, or to unlawfully doctor a report for one's boss.

In the second zone are actions that are not strictly required, but that are fully within the bureaucrat's legal authority to take. This zone covers a lot of ground, and would include actions ranging from asking questions at a meeting to writing a memo to one's boss raising concerns with a course of action to whistleblowing in accordance with statutory protections. For civil servants acting within this zone, it would typically be unlawful for a political superior to take an adverse employment action in response to the bureaucrat's act, even if it amounts to what I identify generously as "resistance."

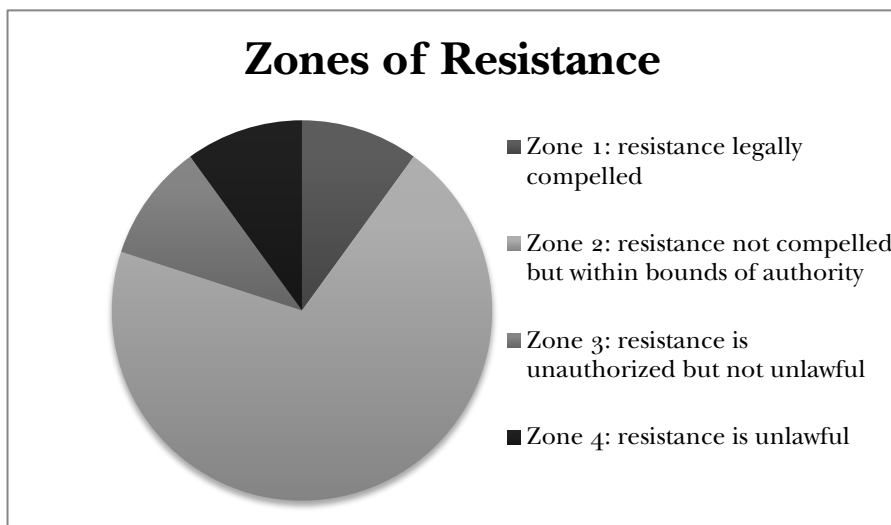
The third zone is the diciest—the bureaucrat's course of action is not authorized, but neither is it unlawful. He or she may act, but must face the consequences of doing so. An example within this zone would be refusing on policy grounds to take a particular position in court, such as Sally Yates' refusal to defend the President's travel ban, for which she was dismissed. Even civil servants may face adverse employment actions such as reassignment or removal for actions taken within zone three, though this is context-dependent.<sup>237</sup>

And finally, the fourth zone is resistance that is itself unlawful and could engender criminal punishment. Unprotected and unauthorized disclosures of classified info would typically fall within this zone, as would embezzlement of funds, mistreatment of detainees, and other unlawful activity.<sup>238</sup>

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237. Questions of removal or other adverse employment actions will differ dramatically depending on the actor at issue, and whether she is, for example, a politically-appointed and removable-at-will head of an agency or a protected civil servant.

238. Even disclosures of classified information are at times protected if made in accordance with Whistleblower statutes.



The framework I lay out above is tied strongly to legal authority and prohibition. But legality is not the only normative trait one might consider. Other values, like morality, might also be mapped into zones similar to what I describe above. And such a mapping would raise additional questions worth pondering, such as whether resistance even within legal zone four might at times be “legitimate” if not lawful. Reliance on different normative values could thus result in somewhat different interpretations of particular bureaucratic action, at least at the margins. That said, the vast majority of bureaucratic action—even resistance—does not occur anywhere near the margins. As discussed in Part IV, most mechanisms of resistance, even those that provoke fear, are fully grounded in traditional sources of authority. And even these fully sanctioned actions are severely constrained by layers of practical limitations on bureaucratic discretion to act. Moreover, truly *ultra vires* acts, like unauthorized disclosure of classified information not covered by whistleblower protections, carry the threat of severe consequences, including criminal punishment. The idea that there may be significant consequential bureaucratic action taking place within zone 4, or even zone 3, that meets with impunity, is fanciful.

#### *B. ASSESSING MECHANISMS OF RESISTANCE ACCORDING TO PURPOSE*

The zones above are highly theoretical. Assessing any specific act of resistance requires first breaking down the event into its component features: who are the actors involved; what precise acts have they taken; which mechanism of resistance did they employ; for what underlying purpose; and under which authorities (if any) do they act? Different actors will have different authorities based on both their placement within the bureaucracy as well as their specific skills, professional allegiances, and expertise. And

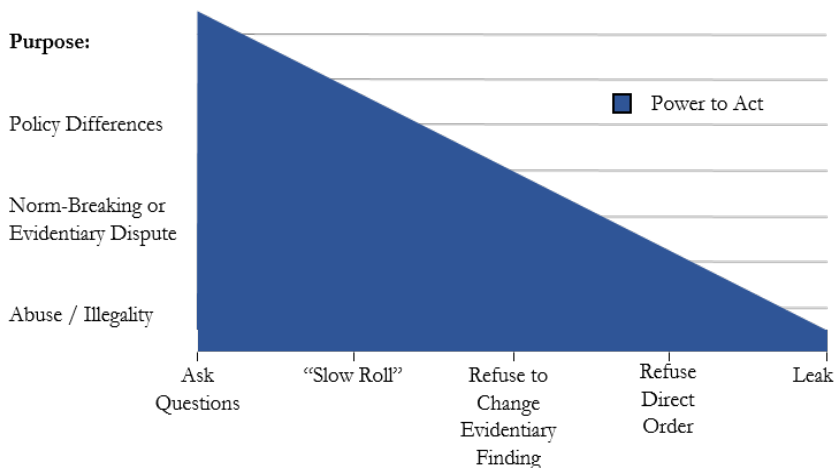
different mechanisms may be employed more or less aggressively depending on the underlying purpose behind the action. All of these could be mapped out and then superimposed on one another. For our purposes here, I will focus on the mechanism-to-purpose relationship.

In order to map any given act of resistance into one of the zones I discuss in Section A, one needs to consider not only the action itself but the purpose for which it is employed. The potential mechanisms of resistance, which I discuss in Section II.B., range from the anodyne (asking a question, raising a concern), to the more assertive (seek to slow-roll, “build a record,” bring to the attention of superiors or “offices of goodness” inside the government), to the most aggressive (refuse to act, bring to the attention of congressional overseers, leak). The purposes underlying resistance also can be weighted according to a related scale—resistance based on disagreement over policy direction having the least weight, or merit, to resistance for the purpose of challenging illegality and abuse at the other end of the spectrum, with concerns over norm-breaking, or evidentiary disagreement in the middle.

There is then an inverse relationship between the purpose for resistance and the aggressiveness of the mechanism that may be used in carrying out that resistance. Raising questions, noting dissent, and other forms of light resistance might appropriately be taken for any purpose, including simple disagreement over policy. These might all fall within zone two. Refusal to change a document might fall within zone one if taken in response to an order to doctor facts, but zone three if done for the purpose of a mere policy dispute. And on the other side of the scale, all of the potential mechanisms, including the most aggressive, like refusal to act or even the disclosure of information, if employed for the purpose of defying an unlawful order, could even fall within zone one. This leaves zone four, unlawful resistance. If one’s framework is legality, then actions within this realm may never be taken. But in some cases actions that might otherwise be unlawful or prohibited (such as refusal to follow military orders) might be lawful if taken for the purpose of refusing illegality. Moreover as I note above, other conceptions of legitimacy will create further ambiguities. Resistance within this zone is, in any event, exceedingly rare, due both to the consequences for so acting, and to the protections now available for whistleblowers that could move some actions out of Zone 4 that would otherwise be placed there.

I map out the relationship between mechanism and purpose as follows:

## Appropriateness of Resistance



Additional axes—if only I could draw this in multiple dimensions—are necessary to engage the full picture. These would include the specific placement of the particular actor within the bureaucracy, and the formal authority she wields. In the next section, I apply the framework I construct in this Article to familiar accounts of bureaucratic resistance.

### VI. RESISTANCE REVISITED

The anecdote I include in the introduction appears at first blush to be a classic example of the darkest “deep state” fears: U.S. intelligence officials gone rogue and undermining the President using their ties to a foreign power. It is also a Rorschach test. One’s immediate reaction to the story may turn dramatically on one’s substantive views of the President in question and the merits of the intelligence officials’ concerns about him. And yet, as with the other stories that I dissect in this Part, the closer one looks at the details, the less one can discern either a picture of unaccountable bureaucrats going rogue or even one of effective undermining of the President and political leadership.

We may never learn all of the details of this story, but the picture that continues to emerge suggests both more high-level involvement—this was not rogue action by career bureaucrats—and more practical constraints than the initial tale suggests.<sup>239</sup> In fact, according to reports, when U.S. intelligence

<sup>239</sup> E-mail from Susan E. Rice, National Security Advisor, to Susan E. Rice (Jan. 20, 2017, 12:15 PM), <https://www.judiciary.senate.gov/imo/media/doc/2018-02-08%20CEG%20LG>

officials passed along their warning about the incoming administration to their career Israeli counterparts, the Israelis' subsequent warnings to their own political leadership went ignored.<sup>240</sup> Quite possibly, this dismissal by the Israeli political leadership was due to the fact that they were already forging their own relationships with their new political counterparts, who were making their disdain for career bureaucrats known;<sup>241</sup> prior relationships would therefore be suspect. Israeli officials may also have been at a loss for how to put the American warning into action; the reported Israeli reaction to the statements was "shock," having "never heard Americans say something of that kind about their . . . president."<sup>242</sup> That reaction, and the lack of a pathway for putting the information to work, demonstrates both the rarity of such statements (countering the idea that this kind of action is par for the course for the "deep state"), and their ineffectiveness.<sup>243</sup> These elements of the story are damning to the "deep state" narrative.

Thus, while at first glance this tale suggests rogue intelligence officials freelancing in a dangerous affront to the President's power, the reality is likely more tedious: U.S. career officials soberly passing along information to Israeli counterparts with the blessing of their then-political leadership, to little practical effect due to the constraints of their counterparts' similarly constrained bureaucratic positions, and the budding relationship between the political leaders. Ultimately—whether because of the unusual nature of the warning, or the political reality of the Trump-Netanyahu relationship, both of which demonstrate the practical hurdles to bureaucrats in seeking to check political leadership—the U.S. officials appear to have failed to prevent the disclosure they feared. Rather than effective action, it seems the U.S. bureaucrats received raised eyebrows. This is hardly a powerful shadow state at work.

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%20to%20Rice%20(Russia%20Investigation%20Email).pdf (describing a conversation in which President Obama told his national security team to be "mindful to ascertain if there is any reason that we cannot share information fully as it relates to Russia").

240. See Howard Blum, *Exclusive: What Trump Really Told Kislyak After Comey Was Canned*, VANITY FAIR (Nov. 22, 2017, 2:27 PM), <https://www.vanityfair.com/news/2017/11/trump-intel-slip/amp>.

241. Joe Davidson, *Is Trump Making the Political Environment for Top Civil Servants Worse?*, WASH. POST (Aug. 22, 2017), <https://www.washingtonpost.com/news/powerpost/wp/2017/08/22/is-trump-making-the-political-environment-for-top-civil-servants-worse> (citing examples of senior executive career civil servants who have quit in response to President Trump's policies, and quoting one saying that "[e]ven though career SESs understand their role as nonpartisan professionals, nobody likes to be called a swamp denizen or have their mission denigrated in public. That's deadly for morale"); Mark Landler, *For Trump and Netanyahu, a Budding Symbiotic Relationship*, N.Y. TIMES (Mar. 7, 2017), <https://www.nytimes.com/2017/03/07/world/middle-east/israel-benjamin-netanyahu-trump.html> (highlighting President Trump's exceptionally close relationship with Israeli Prime Minister, Benjamin Netanyahu).

242. See Dave Davies, *Journalist Details Israel's 'Secret History' of Targeted Assassinations*, NPR (Jan. 31, 2018, 2:11 PM), <https://www.npr.org/2018/01/31/582099085/journalist-details-israels-secret-history-of-targeted-assassinations> (interviewing Ronen Bergman).

243. *Id.*

Other well-known accounts of bureaucratic resistance provide more developed evidentiary trails. In this Part, I draw from historical and more contemporary events to evaluate three such accounts in accordance with the Article's framework for assessing such behavior.

A. *PRESIDENT NIXON'S LAST DAYS, AND DEFENSE SECRETARY JAMES SCHLESINGER'S EFFORTS TO CONSTRAIN THE USE OF FORCE*

I will start with the more distant past: the oft-repeated story that in the waning days of the Nixon presidency, as the President's grip on power was slipping, his Secretary of Defense, James Schlesinger, took efforts to restrain his ability to take significant military action unilaterally. While the narrative has shifted somewhat over the years, the basic account is as follows: In the final days of Nixon's presidency, Schlesinger issued orders to the commanders of the military services not to act on any direct order from the President to launch a nuclear attack before first confirming such order with him or the Secretary of State, Henry Kissinger.<sup>244</sup>

Described at that level of abstraction, the suggestion that a Secretary of Defense might direct officials to disregard the President would seem clearly to undermine the President's authority to defend the country from attack, full stop. And to be sure, of the examples I dissect in this Part, this one is the most difficult to classify as "business as normal." It might at first blush seem to fall squarely within what Jack Goldsmith refers to as "sabotage"—possibly "virtuous" sabotage in extraordinary circumstances, which these certainly were, but damaging to the state nevertheless.<sup>245</sup> Yet, upon further inspection of both the facts and the authorities in question, the line in even this case between inappropriate undermining of the elected President and legitimate resistance becomes fuzzier. Contemporaneous accounts suggest that the precise order Schlesinger gave was not to disregard the President, but rather a direction to ensure that the normal lines of command from the President, through him, down to the military commanders would be followed.<sup>246</sup> He did so for two purposes: first to ensure that the President would not inappropriately reach out to individual military units directly (either to subvert the "constitutional process" by attacking Congress, or to create a diversion through a nuclear attack on a foreign country), as well as to ensure that "some official" would not try to direct a military unit to "oust the

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244. See, e.g., Garrett M. Graff, *The Madman and the Bomb*, POLITICO (Aug. 11, 2017), <http://www.politico.com/magazine/story/2017/08/11/donald-trump-nuclear-weapons-richard-nixon-215478>.

245. See Goldsmith, *supra* note 4, at 109.

246. See *Context of 'August 22, 1974: Pentagon, Joint Chiefs 'Kept Watch' on Nixon to Prevent Coup Attempt, Newspaper Reports'*, HIST. COMMONS, <http://www.historycommons.org/context.jsp?item=ao82274mediacoup#a082274> (last visited Sept. 3, 2018); Bernard Gwertzman, *Pentagon Kept Tight Rein in Last Days of Nixon Rule*, N.Y. TIMES (Aug. 25, 1974), <https://www.nytimes.com/1974/08/25/archives/pentagon-kept-tight-rein-in-last-days-of-nixon-rule-no-event.html>.

President.”<sup>247</sup> The actual mechanism used—a memo to the services stating that the normal lines of command were to be followed in the event of unusual circumstances—is hardly outside the bounds of the Defense Secretary’s authorities. To the contrary, this is exactly the chain of command created by the Secretary of Defense’s, and more generally the Department of Defense’s, statutory authorities, and is probably best placed in Zone 2 of the above framework.<sup>248</sup>

Ultimately, the circumstances Schlesinger feared—in particular a military order from the President in those last days—never came to pass; thus, we cannot know what Schlesinger would have done were a real conflict to arise. Moreover, had such a conflict arisen, the President could simply have dismissed Schlesinger (and based on what we know, probably would have), and then faced the political consequences of doing so.

Of course, it is rare for a President to find himself under real threat of having to step down, and for his subordinates to have cause to fear his rash actions as a result. But the fear of what a President might do with his enormous military powers—nuclear power in particular—is not unique to the Nixon era. More recently, Air Force General, John Hyten, commander of U.S. Strategic Command, made some waves when he responded to questions regarding how military commanders should handle a potential “illegal” order from the President to launch nuclear weapons.<sup>249</sup> Press reports painted his response as a promise to “resist” the President.<sup>250</sup> Yet Hyten’s actual comments were more nuanced, in fact, equivocal. He stated that in the event of an illegal order, he would tell the President, “that’s illegal,” and that as a result, they would “come up with options of a mix of capabilities to respond to whatever the situation is.”<sup>251</sup> The raising of legal problems and seeking to provide a better solution are both squarely within the authority, and in fact obligation, of a military commander in such a circumstance.

The much more difficult question, which each of these examples raises but does not ultimately address, is how an adviser to the President or a military officer would respond to an actual illegal order. Military officers in particular are duty-bound to obey lawful orders, and military orders are generally

247. Gwertzman, *supra* note 246.

248. See 10 U.S.C. § 113 (2012) (establishing the Secretary of Defense as head of the Department of Defense); *Id.* § 161 (establishing combatant commands under the direction of the Secretary of Defense).

249. See 2017 Plenary 2: Nukes: The Fire and the Fury, HALIFAX INT’L SECURITY F. (Nov. 18, 2017), [http://halifaxtheforum.org/media\\_library/2017-plenary-2-nukes-fire-fury](http://halifaxtheforum.org/media_library/2017-plenary-2-nukes-fire-fury).

250. See Daniella Diaz, *Top General Says He’d Push Back Against ‘Illegal’ Nuclear Strike Order*, CNN (Nov. 20, 2017, 5:07 PM), <https://www.cnn.com/2017/11/18/politics/air-force-general-john-hyten-nuclear-strike-donald-trump/index.html>; *U.S. Nuclear General Says Would Resist ‘Illegal’ Trump Strike Order*, REUTERS (Nov. 18, 2017, 1:20 PM), <https://www.reuters.com/article/us-usa-nuclear-commander/us-nuclear-general-says-would-resist-illegal-trump-strike-order-idUSKBN1D1oQV>.

251. HALIFAX INT’L SECURITY F., *supra* note 249.



presumed to be lawful.<sup>252</sup> And yet, there is a concomitant duty to disobey a patently unlawful order; in fact, an individual will be held responsible for carrying out an unlawful criminal act, despite having been ordered to do so.<sup>253</sup> Thus, at least theoretically, such officers might find themselves in a situation of true conflict, torn between competing legal obligations.<sup>254</sup> In such a rare circumstance, the legality of the order itself could place a soldier's refusal to carry it out within either Zone 1 or Zone 4—either legally compelled, or illegal. For the soldier deciding whether to obey a potential unlawful order, the consequences of erring in either direction could be severe, and include dismissal or criminal charge.<sup>255</sup> And while much is made of this theoretical obligation to disobey an illegal order, the standard for determining illegality is quite high—it must be “manifestly” or “patently” illegal. Though rarely this extreme, other officials throughout the bureaucracy may also face competing demands from different masters; this is the nature of drawing authority and obligation from multiple sources. For the rare instance of true conflict, there are no pat answers; the reality is the official must make a decision and face the consequences for erring either way. In the interim, the President's ability to remove and replace that official with another who *will* do his bidding is significant and is usually limited by practical considerations and politics rather than law.<sup>256</sup>

*B. PRESIDENT OBAMA'S FAILURE TO CLOSE THE MILITARY DETENTION  
FACILITIES AT GUANTANAMO BAY*

President Obama came into office in 2009 with the well-publicized intention of shuttering the military detention facilities at Guantanamo Bay, and either prosecuting or releasing all of the remaining detainees in order to do so. In one of his first acts in office, he signed an Executive Order creating

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252. See 10 U.S.C. § 892 (codifying the obligation for members of the military to obey orders); *United States v. New*, 55 M.J. 95, 109 (C.A.A.F. 2001) (“The duty to disobey an unlawful order applies only to a positive act that constitutes a crime that is so manifestly beyond the legal power or discretion of the commander as to admit of no rational doubt of their unlawfulness.”); JOINT SERV. COMM. ON MILITARY JUSTICE, MANUAL FOR COURTS-MARTIAL IV, at 20 (2016) (clarifying that under Article 92 “[a]n order requiring the performance of a military duty or act may be inferred to be lawful and it is disobeyed at the peril of the subordinate,” but “does not apply to a patently illegal order”).

253. *U.S. v. Calley*, 48 C.M.A. 19, 27 (1973) (stating that a subordinate can be held criminally liable for acts he should have known were unlawful); see *Smith v. Obama*, 217 F. Supp. 3d 283, 292 (D.D.C. 2016) (“[T]here is no right, let alone a duty, to disobey military orders simply because one questions the Congressional authorization of the broader military effort.”). To be sure, the use of nuclear weapons may elide the distinction between these two bodies of law.

254. For a discussion of these opposing pulls see generally Keith Petty, *Duty and Disobedience: The Conflict of Conscience and Compliance in the Trump Era*, 45 PEPP. L. REV. 55 (2017).

255. See *supra* notes 252–53 and accompanying text.

256. The ongoing debate over whether Trump's firing of FBI director Comey, and the political ramifications, are one example; we have yet to see whether there will be any legal implications, but even these will likely result in only political remedies.

an interagency process to effectuate the closure of the detention facility by the end of his first year in office.<sup>257</sup> His failure to do so, not only within that first year but within his entire eight years in office, was a source of frustration both for him and for his supporters.<sup>258</sup> In explaining that failure, many have pointed to bureaucratic factors, such as continuity of personnel at both the career and political levels.<sup>259</sup> This continuity did play a role in encumbering the closure process, but the known examples of bureaucratic intransigence suggest that bureaucrats neither exceeded the scope of their formal authority, nor could they have prevented the President from closing the facility had he been willing to expend the political capital to do so.

Several bureaucratic factors both encumbered quick closure of the facility and guided the incoming Obama administration toward adopting certain legal theories the prior administration had espoused in continuing to defend detention at the facility. I have written about the bureaucratic factors that influenced the perhaps surprising continuity of legal positions between the Bush and Obama administrations in the war on terror.<sup>260</sup> These factors include the continuity in the executive branch personnel populating all relevant agencies: At DOD, which was charged with assessing risk of individual detainees, even the Secretary of Defense himself, Robert Gates, appointed by President Bush, remained in his position for years into the Obama administration, in addition to career officials. Career officials continued to serve through the transition at DOJ as well, which was charged with defending their detention in court,<sup>261</sup> as well as on the executive order-created task force for determining whether to transfer or release individual detainees—necessary for closing the facility—which was staffed with many of the same individuals who had been making these risk assessments for years under the prior administration.<sup>262</sup>

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257. See Exec. Order No. 13,492, 3 C.F.R. § 13492 (2009) (requiring an interagency review of the status of each detainee to be conducted by officials drawn from the national security agencies).

258. Greg Jaffe, *Obama Regrets Not Closing Guantanamo on First Day in Office*, WASH. POST (Mar. 18, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/03/18/obama-regrets-not-closing-guantanamo-on-first-day-in-office>.

259. See Connie Bruck, *Why Obama Has Failed to Close Guantánamo*, NEW YORKER (Aug. 1, 2016), <https://www.newyorker.com/magazine/2016/08/01/why-obama-has-failed-to-close-guantanamo> (discussing DOD opposition to closing Guantanamo); Huq, *supra* note 44, at 540–47 (discussing the role of “bureaucratic resistance” in hindering the President’s efforts to close Guantanamo—as part of a “bureaucratic-legislative alliance”). I have also discussed the role of these forces in a prior work, which focused specifically on the bureaucratic reasons for continuity between President Bush and Obama’s legal positions relating to the war on terror. See Ingber, *supra* note 6, at 687–99.

260. Ingber, *supra* note 6, at 682–84.

261. Bruck, *supra* note 259; Huq, *supra* note 44, at 540–47; Ingber, *supra* note 27, at 114–18; Ingber, *supra* note 15, at 372–77; Ingber, *supra* note 6, at 687–99.

262. BRAD WIEGMANN & MARK MARTINS, DETENTION POLICY TASK FORCE, PRELIMINARY REPORT 1–5 (2009), <https://www.justice.gov/archive/opa/documents/preliminary-rpt-dptf-072009.pdf>; see also GUANTANAMO REV. TASK FORCE, FINAL REPORT 3 (2010), <https://www.justice.gov/sites/>

Though some of the bureaucratic actors in these agencies may have opposed the new President's decision to close Guantanamo on policy grounds, the mechanisms I discuss here that resulted in "resistance"—risk assessment, or zealously defending the government in litigation—were hardly outside the zone of their authority, allocated not only by Congress and courts and past presidential action, but by the sitting President himself through his executive orders and other sub-delegations.

Nor did resistance to the President's stated goal of closing Guantanamo divide along a clear career-political dichotomy. While some actors within the entrenched bureaucracy may have opposed the plan, others—particularly at agencies like the State department—had long been working to effectuate closure.<sup>263</sup> Moreover, members of the President's own team were not all on the same page. Some of the President's own appointees shared the views of those in their agencies and seemed reticent to effectuate closure or to change the government's legal positions.<sup>264</sup> Even some of the President's inner circle in the White House were not sufficiently on board with the plan; many prioritized other goals over Guantanamo closure.<sup>265</sup> And just five months into his presidency, Obama himself gave a speech suggesting he would retain military detention as one of the options for the disposition of Guantanamo detainees, thus yielding on one of the most controversial issues related to the facility before his first year in office was even halfway through.<sup>266</sup>

Even the bureaucratic dynamic on Guantanamo within the Obama administration was hardly as simple as the career bureaucracy resisting the President. Some members of the entrenched bureaucracy sided with some members of the political leadership in opposing some or all of the President's

default/files/ag/legacy/2010/06/02/guantanamo-review-final-report.pdf (describing the structure as making up "60 career professionals" from across the national security agencies).

263. See generally, e.g., Declaration of Pierre-Richard Prosper at paras. \*1–8, *O.K. v. Bush*, 77 F. Supp. 2d 102 (D.D.C. 2005) (No. 1:04CV01136), 2005 WL 5727872 (Mar. 8, 2005) (describing efforts by the Bush Administration State Department Office of War Crimes Issues ("S/WCI"), in coordination with the Department of Defense, to transfer detainees to foreign countries).

264. See ROSA BROOKS, *HOW EVERYTHING BECAME WAR AND THE MILITARY BECAME EVERYTHING: TALES FROM THE PENTAGON* 62–67 (2016); Bruck, *supra* note 259 (citing a string of Defense Secretaries under Obama as reticent to approve transfers).

265. KLAIMAN, *supra* note 214, at 2 (noting that White House staffers "used the abbreviation AHC, or 'after health care,' to refer to everything else they hoped to accomplish"); SAVAGE, *supra* note 98, at 24 (noting that national security matters were "one ball among many being juggled," including the "top domestic-policy goal"—health insurance overhaul).

266. Barack Obama, Remarks by the President On National Security, 5-21-09 (May 21, 2009, 10:28 AM), <https://obamawhitehouse.archives.gov/the-press-office/remarks-President-national-security-5-21-09> (noting that after a review of the detainee cases, there would remain a group who could be neither prosecuted or released); see also Stephen I. Vladeck & Benjamin Wittes, *How to Get Congress and Obama to Agree on Closing Guantanamo*, WASH. POST (Jan. 21, 2016), [https://www.washingtonpost.com/opinions/how-to-get-congress-and-obama-to-agree-on-closing-guantanamo/2016/01/21/cbda2b50-bfad-11e5-bcda-62a36b394160\\_story.html](https://www.washingtonpost.com/opinions/how-to-get-congress-and-obama-to-agree-on-closing-guantanamo/2016/01/21/cbda2b50-bfad-11e5-bcda-62a36b394160_story.html) ("The main political obstacle to closing Guantanamo is a fundamental disagreement over whether military detention should be a legally available option—not just for those already in custody, but for future terrorism suspects.").

plan; and other members of the entrenched bureaucracy sided with other members of the political leadership in aggressively supporting it, and this fell somewhat, although not perfectly, along agency lines, rather than a division between the career and political bureaucracies.<sup>267</sup>

Moreover, while the holdover of personnel from the Bush to Obama administration, particularly in the national security space, contributed to the status quo bias that encumbered any change of course, these bureaucratic actors could not have actually *prevented* the President from closing the facility had he insisted on doing so, at least before Congress enacted restrictions in 2012.<sup>268</sup> In fact, many of the bureaucratic hurdles to closing Guantanamo were well within the President's and political leadership's power to modify, as well as Congress and the courts. Political leadership had authority to change the staffing and standards employed for both the transfer and detainee litigation decision-making processes. For example, attorneys at DOJ who had defended "war on terror" cases under the Bush administration continued to do so under the Obama administration and, until directed otherwise, continued to file the same briefs.<sup>269</sup> But when political leadership stepped in, they could—and did—amend the positions the government took in litigation.<sup>270</sup> The courts, for their part, need not have upheld the administration's detention standards. Congress could have stopped appropriations, or legislated different detention standards; instead, they enacted statutory restrictions.<sup>271</sup> But before they did, President Obama could simply have released all of the detainees into the United States, or transferred them to countries willing to take them, without insisting on any security guarantees above what they were willing to provide. He did not do so. And he did not do so, not because he was prevented from doing so by the career bureaucracy, though this was a hurdle, or because he was prevented from doing so by his political leadership, though this was another hurdle. He did not do so because he did not choose to expend the capital necessary to force the bureaucracy—including his own appointees—to effectuate this plan.

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267. KLAIDMAN, *supra* note 214, at 162–67 (describing internal battles between Rahm Emanuel, Greg Craig, and Eric Holder over whether to move the 9/11 trial from a military commission at Guantanamo to an Article III trial in the SDNY and its effect on Guantanamo closure plans); SAVAGE, *supra* note 98, at 149–52 (describing battles between State Department and DOD officials over Guantanamo and the government's legal theory for detention).

268. See National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298; Stephen Vladeck, *The Bass-Ackwards Detainee Transfer Provision in the FY2016 NDAA*, JUST SECURITY (Oct. 1, 2015), <https://www.justsecurity.org/26491/bass-ackward-detainee-transfer-provision-fy2016-ndaa> (explaining the line of statutory restrictions in recent years further hindering the President's ability to close the detention facilities at Guantanamo).

269. See *supra* note 87 and accompanying text.

270. See KLAIDMAN, *supra* note 214, at 58–60 (discussing the high-level involvement in the "March 13" brief).

271. See *supra* note 269 and accompanying text.

Thus, while bureaucratic resistance did play a role in President Obama's failure to close Guantanamo, it was not a clear-cut matter of career resistance to political leadership. Nor was it dispositive of the outcome. Bureaucratic resistance can be overcome if political actors are willing to pay the cost of doing so. Here, that cost would have involved new staffing and new standards for risk assessment decisions about transfer. It would also have involved insisting that the stream of Secretaries of Defense under the President get on board with his plan or resign. And ultimately, because much of this would be subject to public scrutiny, it would have involved shouldering the responsibility for the release of detainees, without the full support of the military and intelligence agencies who could absorb some of the political hit should any detainee later engage in violence. Instead of doing so, the President simply prioritized other policies, liking passing healthcare legislation. Prioritization of policies, and decisions on where to expend political capital are well within the President's prerogative, just as continuity of analysis and fact-finding are well within the prerogative of bureaucrats. Bureaucratic friction of this sort may be a hurdle to aggressive presidential change, but it hardly suggests bureaucrats have taken the wheel.

C. *PRESIDENT TRUMP'S CLASHES WITH DOJ AND THE FBI OVER INVESTIGATIONS INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL CAMPAIGN*

The Trump presidency provides a deluge of well-reported examples of tension between the President and his inner circle and the broader executive branch bureaucracy. The first year of the administration has involved conflict and firewalling between the political leadership and scientists at the EPA; between the Secretary of State and career foreign service officers; and between the Interior Secretary and civil servants within the agency, to name a few, as well as a steady stream of resignations among the upper tier of the career bureaucracy.<sup>272</sup> Reports suggest that the political leadership at these agencies has frequently isolated itself from and sought to disempower career bureaucrats within their respective spheres, professedly based on a belief that these career bureaucrats themselves would attempt to undermine the will of the political leadership.<sup>273</sup>

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272. See, e.g., Coral Davenport & Eric Lipton, *Scott Pruitt Is Carrying Out His E.P.A. Agenda in Secret, Critics Say*, N.Y. TIMES (Aug. 11, 2017), <https://www.nytimes.com/2017/08/11/us/politics/scott-pruitt-epa.html>; Evan Halper, *Civil Servants Charge Trump Is Sidelining Workers with Expertise on Climate Change and Environment*, L.A. TIMES (Oct. 4, 2017), <http://www.latimes.com/politics/la-na-pol-trump-civil-servants-201709-story.html>; Nik Steinberg, *Rex Tillerson Is Running the State Department Into the Ground: Skilled and Patriotic Diplomats Are Leaving Like Never Before in an Exodus that is Damaging the United States*, POLITICO (Oct. 4, 2017), <https://www.politico.com/magazine/story/2017/10/04/rex-tillerson-is-running-the-state-department-into-the-ground-215677>.

273. See Halper, *supra* note 272.

I focus here on just one of these fraught relationships: The President's repeated—and thus far failed<sup>274</sup>—attempts to shutter the ongoing investigation of Russian interference<sup>274</sup> in his presidential campaign by several executive branch agencies, and his related efforts to break down the norm of independence between his White House and the law enforcement agencies of the executive branch. The President and his surrogates have expressed surprise at the President's encumbrances in commanding law enforcement directly, and—as an alternative to simply shutting down the Russia probe directly, at least for now—have sought to delegitimize the investigation by tainting it as politicized resistance to his presidency.

These efforts have included the President's referral to the continuing investigation—which has involved not only DOJ and the FBI but also the intelligence community—as a “witch hunt” by actors bent on discrediting his election.<sup>275</sup> He has criticized both political appointees and career officials in the intelligence community, the FBI, and DOJ. His efforts to discredit them have involved frequent suggestions that they are tainted by partisan politics, and therefore are biased against him.<sup>276</sup> The President's supporters have run with this narrative.<sup>277</sup> The overarching message is that the Russia investigation is politically-inflected, wrongful resistance by the career bureaucracy against the President.

Intertwined within these critiques, the President has expressed alarm and confusion at the prospect that actors within the executive branch—here specifically the law enforcement and intelligence communities—might act

<sup>274</sup>. Even as this Article enters the final stage of the editing process, media reports suggest that one of the central figures in this story—Deputy Attorney General Rod Rosenstein—may resign or face imminent dismissal. Michael D. Shear et al., *Rod Rosenstein's Job Is Safe, for Now: Inside His Dramatic Day*, N.Y. TIMES (Sept. 24, 2018), <https://www.nytimes.com/2018/09/24/us/politics/rod-rosenstein-justice-department-trump.html>.

<sup>275</sup>. Mark Landler, *Trump, Citing 'a Witch Hunt,' Denies Any Collusion With Russia*, N.Y. TIMES (May 18, 2017), <https://www.nytimes.com/2017/05/18/us/politics/trump-back-on-twitter-complains-of-witch-hunt.html>.

<sup>276</sup>. Sarah N. Lynch, *U.S. Attorney General Orders Probe of FBI Agents' Text Messages*, REUTERS (Jan. 23, 2018, 1:02 PM), <https://www.reuters.com/article/us-usa-trump-texts/us-attorney-general-orders-probe-of-fbi-agents-text-messages-idUSKBN1FC2OQ>; Michael D. Shear et al., *Trump Attacks Rosenstein in Latest Rebuke of Justice Department*, N.Y. TIMES (June 16, 2017), <https://www.nytimes.com/2017/06/16/us/politics/trump-investigation-comey-russia.html>.

<sup>277</sup>. Devlin Barrett & Sean Sullivan, *Republicans Hammer Mueller, FBI as Russia Investigation Intensifies*, WASH. POST (Dec. 6, 2017), [https://www.washingtonpost.com/world/national-security/republicans-hammer-mueller-fbi-as-russia-investigation-intensifies/2017/12/06/4a6097ca-dabb-11e7-b1a8-62589434a581\\_story.html](https://www.washingtonpost.com/world/national-security/republicans-hammer-mueller-fbi-as-russia-investigation-intensifies/2017/12/06/4a6097ca-dabb-11e7-b1a8-62589434a581_story.html); Maggie Haberman & Nicholas Fandos, *Donald Trump Jr. Demands Leak Inquiry of House Intelligence Committee*, N.Y. TIMES (Dec. 12, 2017), <https://www.nytimes.com/2017/12/12/us/donald-trump-jr-leak-investigation.html> (quoting Mr. Trump's lawyer, Alan S. Futerfas, as saying, “[t]his committee should determine whether any member or staff member violated the rules by leaking information to the media” (internal quotation marks omitted)); *Hannity on New FBI Revelations: 'Powerful People' Must be Investigated, Indicted & Probably 'Thrown in Jail'*, FOX NEWS (Jan. 24, 2018, 8:18 AM), <http://insider.foxnews.com/2018/01/24/sean-hannity-monologue-fbi-peter-strzok-texts-powerful-people-should-go-jail>.

independently and against his explicit wishes.<sup>278</sup> According to reports and direct testimony, he has sought—and failed—to confirm the personal loyalty of key actors throughout these agencies, political and career, reportedly asking them direct questions about their loyalty or their election votes, and publicly denigrating his own appointees when they have acted independently.<sup>279</sup> And furthermore, he has sought to fire or pressure the resignation of those who have disappointed him in this regard.<sup>280</sup>

The President's attempts to challenge perceived disloyalty have had mixed results. He fired James Comey, then the FBI director, which led not to a weakening of the investigation but rather a formalized entrenching of it.<sup>281</sup> The Deputy Attorney General, Rod Rosenstein, appointed a special counsel to continue the investigation in Comey's stead.<sup>282</sup> Rosenstein, as Deputy, had the authority to do so only because the Attorney General, Jeff Sessions, had recused himself from the Russian investigation—also in contravention of the stated preference of the President. The President has pressured Sessions himself to resign, which would ultimately result in a new Trump-appointed AG taking oversight of the Mueller investigation, but he has as yet been unsuccessful.<sup>283</sup> The deputy head of the FBI, a career official named Andrew

278. See Ashley Parker et al., *Trump Sought Release of Classified Russia Memo, Putting Him at Odds with Justice Department*, WASH. POST (Jan. 27, 2018), [https://www.washingtonpost.com/politics/trump-sought-release-of-classified-russia-memo-putting-him-at-odds-with-justice-department/2018/01/27/a0of2a4c-02bb-11e8-9d31-d72cf78dbee\\_story.html](https://www.washingtonpost.com/politics/trump-sought-release-of-classified-russia-memo-putting-him-at-odds-with-justice-department/2018/01/27/a0of2a4c-02bb-11e8-9d31-d72cf78dbee_story.html) (reporting that “Trump, appearing frustrated and at times angry, has complained to confidants and aides in recent weeks that he does not understand why he cannot simply give orders to ‘my guys’ at what he sometimes calls the ‘Trump Justice Department’”).

279. *Statement for the Record: Hearing Before the Select Comm. on Intelligence*, 115th Cong. 3–4 (June 8, 2017), <https://www.intelligence.senate.gov/sites/default/files/documents/os-jcomey-06o817.pdf> (statement of James Comey, former Dir. of the Fed. Bureau of Investigation) (testifying that the President had said to him, “I need loyalty, I expect loyalty”); Pamela Brown et al., *Trump Asked Rosenstein If He Was ‘on My Team’*, CNN (Feb. 1, 2018, 6:15 AM), <http://www.cnn.com/2018/01/31/politics/donald-trump-rod-rostenstein-december-meeting/index.html>; Seung Min Kim, *Sessions Won’t Recuse Himself from DOJ Trump Probes*, POLITICO (Jan. 23, 2017, 8:38 PM), <https://www.politico.com/story/2017/01/jeff-sessions-trump-probes-234087>.

280. See, e.g., Michael S. Schmidt & Maggie Haberman, *Trump Ordered Mueller Fired, but Backed Off When White House Counsel Threatened to Quit*, N.Y. TIMES (Jan. 25, 2018), <https://www.nytimes.com/2018/01/25/us/politics/trump-mueller-special-counsel-russia.html>; Eric Tucker & Sadie Gurman, *FBI Deputy Director McCabe, a Frequent Trump Target, Abruptly Leaves Post*, CHI. TRIBUNE (Jan. 29 2018, 7:33 PM), <http://www.chicagotribune.com/news/nationworld/politics/ct-andrew-mccabe-fbi-stepping-down-20180129-story.html>.

281. Michael D. Shear & Matt Apuzzo, *F.B.I. Director James Comey Is Fired by Trump*, N.Y. TIMES (May 9, 2017), <https://www.nytimes.com/2017/05/09/us/politics/james-comey-fired-fbi.html>.

282. Appointment Memo from Rod J. Rosenstein, Acting Attorney Gen., to Appointment of Special Counsel to Investigate Russian Interference with the 2016 Presidential Election and Related Matters (May 17, 2017), <https://www.justice.gov/opa/press-release/file/967231/download> (appointing Robert Mueller as special counsel).

283. If Sessions were to resign, a new Attorney General—once confirmed—presumably would not recuse himself from the Russia investigation, and thus would be able to take back oversight from Rosenstein.

McCabe, stepped down, reportedly under political pressure to do so.<sup>284</sup> The President reportedly tried, and failed, to fire Mueller earlier this year, and there is constant speculation that the President will try to fire Rosenstein, or is pressuring him to resign.<sup>285</sup>

And still the investigations continue, at least for now, against the quite explicit preferences of the President. Certainly, this is an example of bureaucratic “resistance” to the President’s will. But is it a politicized attempt to bring down his presidency, based in partisan or policy differences, by “unaccountable” bureaucrats at DOJ and the FBI, as the President suggests? If not, what is the justification for their marked resistance? And, perhaps most important of all, should we be afraid of this power? If the President himself has not been able to shut down this investigation, is the power of these bureaucrats unaccountable to any democratic source?

In employing the framework I lay out in this Article to assess the “resistance” at hand, we first must consider who are the precise actors here. While the President has deployed language suggesting a conflict between his administration, on the one hand, and “holdover” career bureaucrats, loyal to his opponents, on the other, the relevant individuals in fact cut across many of the different axes discussed above. These include high-level political actors appointed by Trump himself (Sessions, Rosenstein, Wray); high-level political actors appointed by Trump appointees (Mueller); high-level political actors appointed by the prior President but hailing from the President’s own political party (Comey); and high-level career officials who have risen to positions of power but who continue to have statutory protections from partisan coercion (McCabe). To be sure, many lower-level civil servants have been involved in the investigations as well, and some have been reported to have expressed political preferences—both in favor of and against this President.<sup>286</sup>

All of these individuals face different kinds of practical constraints on their power—the most obvious being constant threat of dismissal or reassignment; these are vertical constraints coming from the President or

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284. Adam Goldman & Matt Apuzzo, *Taunted by Trump and Pressured from Above, McCabe Steps Down as F.B.I. Deputy*, N.Y. TIMES (Jan. 29, 2018), <https://www.nytimes.com/2018/01/29/us/politics/andrew-mccabe-fbi.html>. McCabe was ultimately fired before he could receive his pension. *Id.*

285. Schmidt & Haberman, *supra* note 280.

286. Compare David A. Graham, *The Peril of Taking on the FBI*, ATLANTIC (Jan. 31, 2018), <https://www.theatlantic.com/politics/archive/2018/01/trump-fbi/552062> (describing that during the campaign, “some FBI employees were leaking anti-Clinton information, including to Trump adviser Rudy Giuliani”), with Devlin Barrett, *FBI Texts Reveal Anti-Trump, Pro-Clinton Comments*, WASH. POST (Dec. 12, 2017), [https://www.washingtonpost.com/world/national-security/fbi-texts-reveal-anti-trump-pro-clinton-comments/2017/12/12/e0685f80-dfa4-11e7-bbdo-gdfb2e37492a\\_story.html](https://www.washingtonpost.com/world/national-security/fbi-texts-reveal-anti-trump-pro-clinton-comments/2017/12/12/e0685f80-dfa4-11e7-bbdo-gdfb2e37492a_story.html) (discussing “[t]exts between two senior FBI officials involved in both the probe of Hillary Clinton’s emails and possible connections between Trump associates and Russia” which “show[ed] [that] the pair frequently discussed their political views, their intense dislike of candidate Donald Trump and their fear he might win”).



political leadership itself.<sup>287</sup> They face horizontal constraints as well, from the formal guidelines of their agencies, the norms of professionalism and non-partisanship of their office, and from the Inspector General, who has been reviewing this entire set of events.<sup>288</sup> And they face external constraints—in this case the constant spotlight of media attention on their actions, and the heightened scrutiny from congressional officials, aligned with the President, seeking to ferret out any potential evidence of partisanship against him.<sup>289</sup>

The formal authority these actors wield in continuing to adhere to their investigation, even against the President's professed will, is well-sourced to an array of authorities. But this authority is not immutable. It stems from the norms of professionalism and independence among the law enforcement entities, some of which have been codified in internal documents; the delegations and sub-delegations from this President who has appointed many of the relevant officials (and can remove them), and from past presidents and political officials who appointed others; congressional statutes delegating internal organization authority to the heads of agencies,<sup>290</sup> to the Attorney General specifically,<sup>291</sup> and investigatory power to the Office of the Inspector General,<sup>292</sup> as well as the executive branch regulation delegating to the Attorney General the power to appoint—and sole power to remove, under specific circumstances, a Special Counsel.<sup>293</sup> Each of these authorities is reliant upon actors inside and outside the executive branch continuing to support institutional checks on the President. The President has already made clear his interest in disposing of these checks, but he continues to be reined in by other internal advisers, who are no doubt warning him of the political consequences to doing so. Should those actors change course, and should a

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287. McCabe reportedly stepped down in the face of a demotion; the former FBI General Counsel, James Baker, has reportedly been reassigned as well. Devlin Barrett et al., *FBI's Top Lawyer Said to Be Reassigned*, WASH. POST (Dec. 21, 2017), [https://www.washingtonpost.com/world/national-security/fbis-top-lawyer-said-to-be-reassigned/2017/12/21/2ac76640-e6b5-11e7-833f-155031558ff4\\_story.html](https://www.washingtonpost.com/world/national-security/fbis-top-lawyer-said-to-be-reassigned/2017/12/21/2ac76640-e6b5-11e7-833f-155031558ff4_story.html); Goldman & Apuzzo, *supra* note 284. Reports suggest that Mueller removed a career assigned to his team upon discovering he had expressed antipathy toward the President. *Id.*

288. See *supra* Section III.B.

289. See Memorandum from the U.S. House Intelligence Comm. Staff to the U.S. Permanent Selection Comm. on Intelligence (2018), [https://intelligence.house.gov/uploadedfiles/hpsci\\_fisa\\_memo\\_charge\\_and\\_response.pdf](https://intelligence.house.gov/uploadedfiles/hpsci_fisa_memo_charge_and_response.pdf).

290. 5 U.S.C. § 301 (2012).

291. 28 U.S.C. §§ 509-10, 515-19.

292. Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101 (codified as amended at 5 U.S.C. §§ 5315-16).

293. 28 C.F.R. § 600.1 (2018); see also *id.* § 600.7(d) (“The Attorney General may remove a Special Counsel for misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including violation of Departmental policies.”).

sufficient segment of Congress take up the President's crusade, these powers could—and are currently being—eroded, and these checks could fail.<sup>294</sup>

As the practical constraints on the exercise of these authorities suggest, each of the actors involved in the continuing investigation, officials who sit at every end on the various bureaucratic spectra I have laid out in this Article, are heavily circumscribed and—while they have both authority and internal support in continuing to act independently of the President here, they are hardly firewalled entirely from his or other political influence. The recent spate of firings, demotions, and political spotlight highlights this precariousness. The President, for his part, does wield practical capacity to end the internal investigations. He could, for example, fire Rosenstein or Sessions and appoint someone willing to fire Mueller. He has in fact previously directed his White House Counsel to do so, though when faced with the prospect of internal hurdles and the political consequences of undermining the norms of DOJ independence, he has—thus far—backed down. Ultimately, however, internal constraints are doing significant work here in the daily checking of the President, but they are not alone sufficient to keep the investigation on track. This example well highlights the extent to which internal constraints play a critical role in the regular circumscribing of presidential power, but ultimately rely upon external constraints to create, protect, and continuously support them.

The examples I discuss in this Part involve well-known accounts of bureaucratic resistance that have been painted, sometimes in nefarious tones, as undermining the sitting President's authority. And yet in each, the specific mechanisms employed for the purposes at hand were within the formal authority of the relevant bureaucratic actors; moreover, these actors were far more constrained, as a matter of functional power, than the common narratives suggest. I certainly do not contend that illegitimate or unauthorized bureaucratic behavior never occurs. Officials at any locus within the bureaucracy might exceed their authority to act. Such *ultra vires* action could be due to confusion over the authorities in question, or simple missteps, or true acts of intentional malfeasance. Sometimes, officials might face a genuine conflict in obligations to different sources of authority, or a situation in which the legal requirements may be genuinely ambiguous. The appropriate response to each of these may include a reining in or even an expanding of power, based, respectively, on whether the problem is an abuse of power, or insufficient power to accomplish necessary tasks, or insufficient clarity in the law. But that response should be based on the reality of

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294. For example, reports suggest that intelligence officials have declined to accept “kompromat” on the President (which under normal circumstances would be worth analyzing whether accurate or not, for defensive purposes) from Russian interlocutors for fear of political blowback from superiors or Congress. Matthew Rosenberg, *U.S. Spies, Seeking to Retrieve Cyberweapons, Paid Russian Peddling Trump Secrets*, N.Y. TIMES (Feb. 9, 2018), <https://www.nytimes.com/2018/02/09/us/politics/us-cyberweapons-russia-trump.html>.

bureaucratic behavior, authority, and constraint, rather than on unfounded fear or over-reliance on what such bureaucrats are capable of—and actually are—undertaking.

## VII. CONCLUSION

The vast and multifaceted executive branch bureaucracy is a complex ecosystem essential to checking modern executive power, but it is neither unaccountable nor all-powerful. Its internal checks are not “second-best” alternatives to the traditional Madisonian separation of powers;<sup>295</sup> rather, they are necessary modern-day extensions of those powers. Internal checks operate symbiotically alongside the external checks of the courts and Congress, extending their reach into the darkest, secret corners of the executive branch, where judges and members of Congress are themselves unable to tread. In addition to extending the practical reach of the other branches, bureaucratic constraints provide checks tied specifically to the traits of non-partisanship, expertise, knowledge, competence, and professionalism that are expected of them, and which are lacking in their political counterparts. Judges rely on those traits in areas of competence they themselves do not possess, and Congress relies upon them to operate responsibly to effectuate good government at a remove from the political chaos of any given moment, which is a luxury that members of Congress do not themselves have. Abuses do occur, as with any human-based institution, and the balance of accountability is rarely perfect. Thus the power allocated to bureaucratic actors does and should ebb and flow with their actual embodiment of the above traits that inspire that grant.

In fact, even when highly-functioning, these internal checks are not the complete solution to presidential tyranny or executive aggrandizement. The institutional forces of the bureaucracy do constrain a President seeking radical change at a useful remove from the partisan politics of the twenty-four-hour news cycle, and those overarching forces of continuity may stymie some dangers emanating from the President himself. But as I demonstrate in this Article, bureaucratic resistance to presidential prerogative—and bureaucratic action generally—is itself severely circumscribed. Ultimately, internal constraints alone will not defeat a President willing to pay the political price for thwarting them.

Moreover, there is one presidential threat that the bureaucracy does not even impede: While the multifarious components of the bureaucracy have a range of competing interests, the one interest they share is the protection of executive power. This may manifest as resistance in the occasional instances when a President seeks to dial back that power, but more often in this realm

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295. Katyal, *supra* note 3, at 2322 (arguing that “[b]ureaucracy can be reformed” to become a “second-best solution[] to the traditional separation of powers”).

the President and the broader bureaucracy are in alignment.<sup>296</sup> Executive branch protection of its turf is not itself evidence of a “deep state”—it is an open and notorious expression of precisely what the founders expected of each branch of government, yet which the executive branch may be alone today in fulfilling. It is the insufficiency in external competition to the executive branch, from the courts and especially from Congress—and not the internal tension that is only able to pick up some of the slack—that is the real threat to our intended form of government.

The internal executive branch ecosystem of bureaucratic checks is thus essential but not sufficient, and it cannot sustain itself. It requires constant support and deliberate calibration by the external sources that create and protect it. The risks of unbalancing this symbiosis make it critical to grapple with the full complexity of bureaucratic behavior and dismantle misconceptions about bureaucratic resistance. Over-reliance on internal checks to constrain the President may result in complacency on the part of the courts and Congress, who may find it easier to let internal actors take the heat, and may as a result abdicate some of their responsibility to rein in the President directly.<sup>297</sup> This is all the more likely when the politics of the moment do not favor tussles with the President. And yet, as this Article demonstrates, the bureaucracy acting alone is an insufficient to rein in a President who can ultimately surmount bureaucratic hurdles when there are no external costs to doing so.

Likewise, unfounded fear of the bureaucracy is itself pernicious. Because bureaucratic power depends on external sources, it is not a constant. Those sources—such as the courts and Congress—may, and sometimes should, recalibrate it. But it may be eroded imprudently should unfounded fears cloud our understanding of how bureaucratic behavior actually works. Bureaucratic constraints rely upon and cannot continue to exist without the support of the sources that created them. Norms of professionalism may be shattered; protections for whistleblowers or civil servants may be diluted; buffers of independence can be ground down. Complacency and fear are thus complementary dangers vis-à-vis bureaucratic behavior. They can lead, alternatively, to over-reliance on or over-erosion of bureaucratic power. Both approaches result in an insufficiently constrained President, which should concern most advocates *and* opponents of the administrative state. Bureaucratic resistance is a partial answer to the threat of presidential tyranny in the modern state, but it depends for its life on a healthy symbiosis with the traditional safeguards on presidential power.

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296. See Ingber, *supra* note 6, at 680.

297. Adrian Vermeule more forcefully calls this “abnegation,” by courts in particular, but also by Congress, to the administrative state. ADRIAN VERMEULE, *LAW’S ABNEGATION: FROM LAW’S EMPIRE TO THE ADMINISTRATIVE STATE* 1–11 (2016).