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# The Role of Departments in the Design of the Federal Government

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Blake Emerson, [\*The Departmental Structure of Executive Power: Subordinate Checks from Madison to Mueller\*](#), 38 **Yale J. Reg.** 90 (2021).

Adherents to the unitary executive theory, which posits that the Constitution grants the President complete and absolute control over the execution of the law, claim that their view is required by the text of the Constitution, especially Article II's vesting clause which proclaims that the "Executive Power shall be vested in a President of the United States of America." As Justice Scalia [put it](#), "this does not mean *some* of the executive power, but *all* of the executive power." In Scalia's view, the separation of powers demands that the President must have the power even to prevent the prosecution of Executive Branch officials, including those who have engaged in serious job-related criminal misconduct that threatens to undermine the accountability of the Executive Branch. Adherents to the theory on the Supreme Court may be in the process of dismantling all checks Congress has placed on presidential control over the administration of the law, including, among others, limitations on removal of Officers of the United States, the discretion of agency experts, and the independence of independent agencies.

Even assuming that Justice Scalia's heavily textualist form of originalism is an appropriate methodology for applying the Constitution, the unitary executive theory has never successfully accounted for what, in light of the theory, must be puzzling constitutional text. Examples include, the provision that grants the President the right to "require the Opinion, in writing, of the principal Officer in each of the executive Department," the Constitution's expression of the President's role in carrying out federal law as a duty (not a power) to "take Care that the Laws be faithfully executed" and the Constitution's assignment to Congress of the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution...all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." As one of many possible examples of how this language undercuts the absolutist claims underlying the unitary executive theory, if the Constitution already establishes that the President personally possesses all possible executive power, why would we need a clause granting the President the power to compel department heads to answer his queries? Enter Blake Emerson's excellent article [\*The Departmental Structure of Executive Power: Subordinate Checks from Madison to Mueller\*](#).

In this article, Emerson demonstrates that the Constitution contemplates a departmentalized Executive Branch that "enable[s] but also channel[s] and constrain[s] the discretionary authority wielded by the President, as well as that of the principal officers he appoints." His analysis is based on the premise that checks and balances are vital to preserving the rule of law and enabling just and responsive governance. We have been hearing for some time now about the virtues of the "internal separation of powers" as checks on arbitrary action by federal agencies, but Emerson's article, in my view, provides the firmest constitutional grounding for tempering the President's authority over the execution of the laws from within the Executive Branch. As Emerson puts it, "[d]epartments establish 'subordinate distributions of power' that internalize the checks and balances that exists between the legislative, executive, and judicial branches."

While the emerging scholarly work on the internal separation of powers has focused largely on how agency structure creates checks and balances within agencies that ameliorate the potential consequences of the combination of governmental functions in a single entity, Emerson takes a step back and looks at the "constitutional architecture" that posits a role for departments as centers of power that can check the President and even the departments' own principal (and political) officers. In a sense, Emerson's analysis provides support for understanding that the "deep state" that President Donald Trump and his allies railed against as standing in the way of their efforts to remake the

federal government is actually a feature of the constitutional design and a highly valuable one at that.

Beyond formalist, originalist understandings of the departmental design, Emerson explains the value that the departmental understanding provides in supporting the rule of law and rational, non-capricious government. As he puts it:

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

While I find the normative aspect of the analysis more attractive and persuasive, I recognize that in the current legal/constitutional environment that fetishizes textualism and other forms of originalism, an argument's power depends at least in part on its connection to a plausible originalist account, which Emerson ably provides. He understands that, in his words, "if a department is an empty placeholder, then the President and other officers' discretion under the applicable legal norms would remain fully intact." On the other hand, "if these departmental constraints originate from Congress or from some other actor or agency, then the President's power is hemmed in by those actors, rather than by any form of self-limitation. Emerson provides a convincing account of a "Founding-era discourse" within which the Constitution's references to departments, in both Article II and Article I's Necessary and Proper Clause, signify departments as independent centers of normative power and discretion that would check abuses by other governmental actors, including the President and officials appointed to positions created and structured by Congress. In other words, departments were not understood to be devoid of independent significance in the governmental structure created by the Constitution. The so-called "headless fourth branch" of government is a feature, not a bug.

In a more normative vein, Emerson's understanding is vital in light of the abuses of the Trump administration and the potential that a future populist insurgency might succeed in inflicting serious damage to our constitutional system. In what I think was a surprise to many of us, a significant segment of the people of the United States appear ready to accept severe limits on democracy and rational governance in exchange for government policies more to their liking on matters such as immigration, environmental protection, women's right to choose, and foreign relations. Through his examination of history and contemporary struggles, Emerson reassures us that the Constitution provides tools, including the departmental structure of government, to resist this potential catastrophe. He cautions, however, that this bulwark against authoritarian government is not self-activating. Rather, it requires a commitment by government officials, judges, and the people, among others, to maintain it and protect the political system of the United States from those who would subvert it to their own ends. In the end, in a democratic nation, it's the people, not the parchment, that produces results, for better or for worse.

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