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ARTICLE

POOLING POWERS

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By "pooling" legal and other resources allocated to different agencies, the executive creates joint structures capable of ends that no single agency could otherwise achieve. Pooling destabilizes core conceptions of administrative law. According to one influential account, for example, Congress exercises control over the bureaucracy through agency design. Pooling, however, calls into question the stickiness of those initial structural bargains. Through pooling, the executive reconfigures administration from within. If pooling renegotiates boundaries inside the administrative state, we might expect courts to actively police it. Yet judicial supervision, under current doctrines of administrative law, is quite spotty. Pooling can be a salutary response to administrative silos in our fast-changing and interconnected times. But pooling has a dark side. It can make administrative action less accountable and render legal safeguards less resilient. The Article documents pooling across a range of policy domains, identifies its mechanisms, explores its structural and analytic implications, exposes legal questions that it raises, and provides a preliminary normative assessment.

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INTRODUCTION

Much scholarship on the design of the administrative state shares a common premise: Presidents use structural tools to amplify power over

the agencies.[1] Yet for the institutional players inside the executive, political control is only part of the game. Executive structuring is also about augmenting administrative capacity. The overriding focus on presidential power over the agencies has obscured a significant tool of the executive—what this Article labels *pooling*. Through pooling, the executive augments capacity by mixing and matching resources dispersed across the bureaucracy. Pooling blends the legal authorities that different agencies derive from distinct statutory schemes. And it enables the executive to combine one agency's expertise with legal authority allocated to another. While pooling has implications for the enduring debates on presidential "power over" the agencies, it brings into view a different puzzle. For a legal order built on structural separations, what are the consequences of administrative integration—or "power to"?[2]

Pooling touches some of the most pressing and politically contested policy spaces of the present day. Consider two recent snapshots. The executive perceives the cyberthreat to critical infrastructure inside the United States to be a top security concern. The National Security Agency (NSA) possesses the relevant expertise, but legal and political constraints prevent it from taking the lead in domestic cybersecurity. The Department of Homeland Security (DHS) does not confront the same hurdles, but it also does not possess the relevant expertise. The executive addressed this challenge through pooling. The DHS and the NSA entered into a memorandum of agreement that brings the NSA's tech-

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1. See, e.g., William G. Howell & David E. Lewis, Agencies by Presidential Design, 64 J. Pol. 1095, 1096 (2002) (arguing Presidents design agencies to maximize presidential control); Terry M. Moe & Scott A. Wilson, Presidents and the Politics of Structure, Law & Contemp. Probs., Spring 1994, at 1, 17–19 (arguing Presidents use institutional strategies to assert control over bureaucracy). The legal literature is vast and rich. It includes, for example, debates over the legality and desirability of regulatory review by the Office of Information and Regulatory Affairs, see, e.g., Kirti Datla & Richard L. Revesz, Deconstructing Independent Agencies (and Executive Agencies), 98 Cornell L. Rev. 769, 774 (2013) (arguing President has legal authority to subject all agencies, including independent agencies, to regulatory review); the use of presidential directives, compare, e.g., Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245, 2251 (2001) (defending practice of presidential directives to agencies), with Peter L. Strauss, Overseer, or "The Decider"? The President in Administrative Law, 75 Geo. Wash. L. Rev. 696, 704–05 (2007) [hereinafter Strauss, Overseer or Decider?] (arguing Presidents lawfully exercise supervision, but not decisional authority over agencies); and the growth of White House "czars," see, e.g., Aaron J. Saiger, Obama's "Czars" for Domestic Policy and the Law of the White House Staff, 79 Fordham L. Rev. 2577, 2583 (2011) (arguing President Barack Obama's "proliferation of high-profile czars is his particular instantiation of a policy, common to all modern Presidents, of seeking to magnify his control over agency action").

2. In this sense, the federal executive resembles Clarence Stone's conception of a "regime." Stone rejected a model of urban governance oriented around "the difficulty of maintaining a comprehensive scheme of control." Clarence N. Stone, Regime Politics: Governing Atlanta, 1946–1988, at 222 (1989). Instead, Stone argued, "In a world of diffuse authority, a concentration of resources is attractive . . . . The power struggle concerns, not control and resistance, but gaining and fusing a capacity to act—*power to*, not *power over*." Id. at 229.

nical prowess to bear on DHS-led efforts to secure critical infrastructure. Through the joint structure, the DHS gains the capacity to achieve cybersecurity objectives that, as a practical matter, would otherwise be unobtainable. And the NSA is able to influence those activities in the domestic space. Though entered into by the heads of the agencies, the memorandum of agreement also fulfills a presidential structural and policy vision.[3]

Telecommunications licensing provides another example. "Team Telecom" is an interagency group made up of the Department of Justice (DoJ), the Department of Defense (DoD), and the DHS. Team Telecom advises the Federal Communications Commission (FCC) on licensing applications that involve foreign ownership. But the FCC's licensing authority becomes a lever for Team Telecom to bring those cable companies to the negotiating table. Team Telecom enters into security agreements with a company while its license application is under review by the FCC, and the FCC conditions its grant of the license on compliance with the agreement. These agreements impose various obligations and U.S. inspection rights on the companies. The FCC's licensing authority becomes a legal lever for Team Telecom to create effective regulatory power that it would not otherwise possess.[4]

Pooling is neither required nor prohibited by express statutory text. Pooling instead thrives in the interstices—in the holes of statutory tapestry. Augmenting capacity by bridging institutional divides is, of course, a phenomenon not limited to the federal executive. As a governance strategy, pooling has analogues both global and local; it is longstanding and increasingly salient.[5] But pooling's implications for national governance are provocative and worthy of separate study.

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3. See infra notes 45–70 and accompanying text.

4. See infra notes 30–44 and accompanying text.

5. Pooling is of a piece with broader institutional shifts, for example, toward networks of government actors in the transnational context. See, e.g., Anne-Marie Slaughter, A New World Order 1–3 (2005) (arguing networks of government officials, such as police investigators, financial regulators, and legislators are "key feature of world order in the twenty-first century"). Pooling has domestic cognates in fields such federalism, see, e.g., Abbe R. Gluck, Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond, 121 Yale L.J. 534, 543 (2011) (arguing Congress designates states to implement federal statutes both as means to "give some effect to the states' traditional authority over areas that Congress is now entering" and as "nationalizing mechanism utilized by Congress to facilitate its takeover of a new field"); Daniel Richman, The Past, Present, and Future of Violent Crime Federalism, 34 Crime & Just.: Rev. Res. 377, 404–05 (2006) [hereinafter Richman, Past, Present, and Future] (discussing preferences of local law enforcers to cooperate with federal enforcers, allowing them to leverage "federal shadow"); interlocal deals, see, e.g., Clayton P. Gillette, The Conditions of Interlocal Cooperation, 21 J.L. & Pol. 365 (2005) (proposing changes to legal and institutional structure to facilitate cross-subsidies from one locality to another); and privatization, see, e.g., Jon D. Michaels, Privatization's Pretensions, 77 U. Chi. L. Rev. 717, 719 (2010) [hereinafter Michaels, Privatization's Pretensions] (arguing privatization

A significant tool of the executive, pooling has been obscured by two overlapping blind spots in administrative law theory to which others have begun to draw attention. Administrative law, first, has tended to underplay the work of executive and legislative practice, not only in constraining but also in "constituting" administration.[6] So framed, much of the study of administrative law has focused on formal authority, at the expense of actual or effective power.[7] This project joins recent efforts to readjust the frame through which we think about administrative law in order to make the realities of administration more visible.[8]

Second, until recently the field of administrative law focused almost exclusively on single-agency processes, overlooking the interagency dynamics that permeate this space. A budding literature today explores the interactions between agencies.[9] The Article embraces this shift but

enables federal agencies to achieve policy goals that, but for outsourcing, would be "impossible or much more difficult to attain" as matter of law and politics).

6. See Jerry L. Mashaw, Federal Administration and Administrative Law in the Gilded Age, 119 Yale L.J. 1362, 1470 (2010) ("Forgetting that administrative law both constitutes and empowers administrative action at the same time that it structures and constrains administrative behavior, administrative law is often thought of as just that set of external constraints that limit agency discretion.").

7. Administrative law scholarship shares this preoccupation with presidential studies. See, e.g., Richard H. Pildes, Law and the President, 125 Harv. L. Rev. 1381, 1392–93 (2012) [hereinafter Pildes, Law and the President] (reviewing Eric A. Posner & Adrian Vermeule, The Executive Unbound: After the Madisonian Republic (2010)) (observing that "[f]or many decades, legal scholarship on presidential power was confined to assessing how much formal legal power the President should be understood to have, as a matter of [constitutional interpretation]," and celebrating emergent focus on "actual (rather than formal) scope of presidential power").

8. See, e.g., Daniel A. Farber & Anne Joseph O'Connell, The Lost World of Administrative Law, 92 Tex. L. Rev. 1137, 1140 (2014) ("[T]he actual workings of the administrative state have increasingly diverged from the assumptions animating the [Administrative Procedure Act] and classic judicial decisions that followed."); Jacob E. Gersen, Administrative Law Goes to Wall Street: The New Administrative Process, 65 Admin. L. Rev. 689, 690 (2013) (observing "we are in the midst of something of an agency design renaissance—a time period of fundamental change with respect to the federal bureaucracy"—and arguing these changes "deriv[e] mainly, although not exclusively, from the emergence of new administrative forms of financial regulation").

9. See, e.g., Rachel E. Barkow, Insulating Agencies: Avoiding Capture Through Institutional Design, 89 Tex. L. Rev. 15, 49–55 (2010) [hereinafter Barkow, Insulating Agencies] (discussing how "shared responsibilities [between agencies] can either foster or frustrate the goals of insulation"); Keith Bradley, The Design of Agency Interactions, 111 Colum. L. Rev. 745, 783–85 (2011) (identifying "rule-based interface" as design tool through which executive "preserve[s] the division of authority" between agencies so "[e]ach agency . . . is discouraged from considering interest-dimensions outside of its part of the problem"); J.R. DeShazo & Jody Freeman, Public Agencies as Lobbyists, 105 Colum. L. Rev. 2217, 2221 (2005) (arguing Congress can control delegated power by using other agencies as "lobbyists"); Jody Freeman & Jim Rossi, Agency Coordination in Shared Regulatory Space, 125 Harv. L. Rev. 1131, 1155–81 (2012) (identifying and assessing available agency-coordination instruments); Jacob E. Gersen, Overlapping and Underlapping Jurisdiction in Administrative Law, 2006 Sup. Ct. Rev. 201, 203 [hereinafter Gersen, Overlapping] (examining "use by Congress and subsequent treatment by courts of

draws attention to significant nuances in the emergent conceptual space. Much of the interagency literature frames coordination as a remedy to the problem of Congress's creation of overlapping jurisdictional schemes.[10] On this view, agency coordination is often conceptualized as the fulfillment of a congressional design.[11] Scholars also emphasize the constraining and disciplining effects of interagency structures on administrative actors.[12]

Pooling brings into view a different set of dynamics. The executive accretes discretion by reconfiguring administrative boundaries. Pooling is not limited to those contexts when agencies respond to overlapping jurisdictional assignments; the executive can pick and choose resources from across the administrative state.

Pooling destabilizes core conceptions of administration. Administrative law theory typically views agency design as exogenous to the

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overlapping and underlapping jurisdictional statutes in administrative law"); Neal Kumar Katyal, Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within, 115 Yale L.J. 2314, 2324–27 (2006) (arguing bureaucratic overlap can serve as important internal check on President); Jason Marisam, Duplicative Delegations, 63 Admin. L. Rev. 181, 185 (2011) [hereinafter Marisam, Duplicative] (discussing causes, effects, and implications of "duplicative delegations" to multiple agencies); Jason Marisam, Interagency Administration, 45 Ariz. St. L.J. 183, 185–86 (2013) (analyzing how and why agencies seek to shape each other's regulatory decisions and implications for separation of powers); Jason Marisam, The Interagency Marketplace, 96 Minn. L. Rev. 886, 887 (2012) [hereinafter Marisam, Interagency Marketplace] (describing legal framework governing interagency outsourcing and proposing statutory reforms); Anne Joseph O'Connell, The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World, 94 Calif. L. Rev. 1655, 1673–1716 (2006) (analyzing tradeoffs of unification and redundancy in structure of intelligence agencies). See generally Eric Biber, The More the Merrier: Multiple Agencies and the Future of Administrative Law Scholarship, 125 Harv. L. Rev. F. 78, 78–83 (2012), http://cdn.harvardlawreview.org/wp-content/uploads/pdfs/forvol125_biber.pdf (examining new focus on agency interactions in administrative law scholarship).

10. See, e.g., Freeman & Rossi, supra note 9, at 1151 (arguing coordination tools reduce dysfunction created by overlapping and fragmented jurisdiction); Marisam, Duplicative, supra note 9, at 183–84 (examining how agencies divide tasks and coordinate to avoid regulatory overlap).

11. See, e.g., DeShazo & Freeman, supra note 9, at 2288–92 (discussing congressional intent to foster agency coordination through fragmentation of authority); Freeman & Rossi, supra note 9, at 1140–42 (asserting lawmakers might prefer overlapping delegations where coordinated interagency response will more closely resemble what "lawmakers would negotiate if they were to bargain among themselves"); Gersen, Overlapping, supra note 9, at 211–16 (theorizing use of overlapping jurisdiction as tool to foster interagency information sharing). Scholars recognize that regulatory overlap also creates opportunities for presidential control. See, e.g., Jason Marisam, The President's Agency Selection Powers, 65 Admin. L. Rev. 821, 825 (2013) [hereinafter Marisam, President's Agency Selection Powers] ("[W]hen Congress creates overlapping authority among several agencies, it enables presidents to select which of these agencies will act in the overlapping space.").

12. See, e.g., Bradley, supra note 9, at 783–87 (contending executive can carve up responsibilities between agencies using structural tools ultimately enforceable by courts).

administrative state—it is imposed by Congress.[13] Yet pooling enables the executive to renegotiate divides, sometimes longstanding, between agencies. Congress can still react to pooling, including by rejecting or codifying the executive's unilateral designs. Congress, for instance, responded to the DHS–NSA memorandum of agreement on cybersecurity through legislation ratifying it.[14] But pooling makes the executive less dependent on Congress to rebind administration.

Pooling also accumulates discretion in another respect. It creates opportunities for the executive to work around agency-specific legal and political constraints. The legal checks on an individual agency have less purchase when it pools with actors not subject to those same restrictions.

Pooling, finally, enables the executive to create regulatory power that would not otherwise exist. The obligations that Team Telecom imposes through security agreements—by using the FCC's licensing authority as legal leverage—effectively regulate communications carriers. But Team Telecom's power to so regulate the carriers is not rooted in any legislative scheme.[15]

If pooling reconfigures boundaries inside the administrative state, we might expect courts to actively police it. Yet judicial supervision, under current doctrines of administrative law, is quite spotty. While courts have some capacity to oversee pooling indirectly in the rulemaking context, their ability to supervise pooling in other contexts is considerably more limited.[16]

Pooling implicates competing values. It is a salutary response to administrative silos in our fast-changing and interconnected times. But pooling has a dark side. It can make administrative action less accountable, and it can make legal safeguards less resilient. It might be tempting in those instances to seek out mechanisms for *unpooling*—for fortifying structural divides between institutional actors. Indeed, such walls were previously erected, for example, between foreign intelligence and law enforcement agencies.[17] This Article resists a return to that siloed legal order. It looks instead for strategies to better govern the interstices of administration.

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13. See Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, Administrative Procedures as Instruments of Political Control, 3 J.L. Econ. & Org. 243, 254 (1987) [hereinafter McCubbins, Noll & Weingast, Administrative Procedures] (hypothesizing administrative procedures enacted in legislation "help[] elected politicians retain control over policymaking"); Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies, 75 Va. L. Rev. 431, 432 (1989) (discussing legislator design of administrative structure).

14. See infra note 235 and accompanying text.

15. See infra notes 29–42 and accompanying text.

16. See infra notes 289–315 and accompanying text.

17. See infra notes 96–99 and accompanying text.

The Article unfolds as follows. Part I begins with some conceptual work. It identifies the contours of pooling and uses examples that span several policy domains to show concretely how pooling augments capacity endogenously. Part II explains pooling's utility for the modern executive. Part III mines pooling's effects on the structural relationships at the core of the administrative state. Part IV shifts to a preliminary normative frame; it provides an initial assessment of pooling's tradeoffs and exposes novel legal questions that pooling raises for administrative governance.

Before commencing, let me note one clarification and one caveat. The clarification: I use the term "the executive" to include the varied swath of political institutions that are not part of the judicial or legislative branch. The executive thus includes both the presidency and the agencies.[18] Sensitivity to the different institutional relationships inside the executive is of course crucial to the project, and the Article elaborates those distinctions throughout.[19] But my use of the term "the executive" is intended to capture this collection of interests and interactions.

Finally, my claim is not that the executive's ability to pool is unbounded. The executive confronts limits on pooling, including through statutory prohibitions, appropriations riders, and political and institutional constraints. Notwithstanding those constraints, however, pooling is a considerable executive tool, as these pages aim to show.

I. Pooling Inside the Executive

The goal of this Part is to establish that pooling is a distinct and genuine phenomenon inside the executive. Part I.A begins by defining pooling. Part I.B turns to the "how"—that is, to the mechanisms through which pooling augments capacity from within. To better see pooling, Part I.C concludes by suggesting the foil of *unpooling*.

A. *Definitional Criteria*

Three definitional criteria bound the concept. First, pooling is unilateral structuring by the executive.[20] It is executive-initiated design not specified in legislation. The relevant statutory scheme might contemplate some level of interaction between the agencies (or it might not), but the joint structure created by the executive is not prescribed by Congress.

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18. See Eric A. Posner & Adrian Vermeule, The Executive Unbound: After the Madisonian Republic 5–6 (2010) (adopting same definition).

19. Pooling's implications for the relationship between the President and the agencies are discussed in detail in Part III.A.

20. See Terry M. Moe & William G. Howell, The Presidential Power of Unilateral Action, 15 J.L. Econ. & Org. 132, 133 (1999) (elaborating theory of unilateral executive action).

Second, pooling involves two or more distinct entities working together. Pooling is thus different from consolidation or agency merger. It is a type of coordination.

Third, pooling integrates legal and other resources possessed by—and dispersed across—the agencies. The President may supervise pooling (a dynamic discussed below[21]), but pooling occurs at the administrative level. Interagency coordination can be a mechanism to ameliorate governance challenges rooted in regulatory redundancy by streamlining agency interactions, divvying up responsibilities, or otherwise diminishing interagency conflicts in a common regulatory domain. Pooling, by contrast, shows how the executive uses interstitial design to accumulate power from within. The capabilities of the joint structure are different from those of the individual members acting alone. In this way, pooling enables the executive to augment capacity endogenously.[22]

This initial foray into pooling will focus on the federal interagency space. But the phenomenon is not so limited. Pooling's power is only bolstered to the extent that the executive's joint structures include, for example, private-sector participants.[23] Such extension, and the implications of those pooling types, is reserved for future work.

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21. See infra Part III.A.

22. If we understand each agency as its own "system"—with its own legal rules, politics, and practical resources—then pooling is a "system of systems." See Adrian Vermeule, The System of the Constitution 3 (2011) (defining "systems" as "aggregates, whose properties are determined by the interaction of their components"). And the aggregate system can have qualities that are not shared by each of the components—they might not be shared by any of them. See id. at 3–4. As Adrian Vermeule explains of system effects, "This is possible not because the aggregate has some mysterious existence of its own, over and above the . . . institutions that comprise it. Rather it can occur just because the particular structure of interaction among the members or components produces emergent properties at the systemic level." Id. at 5.

23. Jon Michaels has identified a type of executive outsourcing to the private sector that he calls "workarounds." Michaels, Privatization's Pretensions, supra note 5, at 717. As Michaels uses the term, workarounds are government contracts that enable an outsourcing agency to "achiev[e] distinct public policy goals that—but for the pretext of technocratic outsourcing—would be impossible or much more difficult to attain in the ordinary course of nonprivatized public administration." Id. at 719. Other types of pooling might involve interbranch participants. A task force founded by the Special Inspector General of the Troubled Asset Relief Program, for example, included the Comptroller General, an officer within the legislative branch, as well as inspectors general of both independent and executive branch agencies. See, e.g., Financial Services and General Government Appropriations for 2011: Hearing Before the Subcomm. on Fin. Servs. & Gen. Gov't of the H. Comm. on Appropriations, 111th Cong. 202 (2010) (statement of Neil Barofsky, Special Inspector General, Troubled Asset Relief Program) (describing purpose of newly created council as "augment[ing] audit and investigative resources" across participants). Meanwhile, an extensive literature shows how joint federal, state, and local investigatory practices create opportunities for circumventing legal or political constraints. See, e.g., Barbara S. Jones et al., Panel Discussion: The Prosecutor's Role in Light of Expanding Federal Criminal Jurisdiction, 26 Fordham Urb. L.J. 657, 661–64 (1999) (transcribing remarks by Philip Heyman on how local governments can use federal prosecution of locally investigated cases to circumvent procedures, statutes, and penalties mandated by

B. *Mechanisms*

Administrative power or capacity may be augmented (or curtailed) along three dimensions: legal, political, and practical.[24] As a legal matter, an agency requires affirmative authority to undertake any type of action.[25] The source of that legal authority is generally statutes, though in rarer instances it might be constitutional authority delegated by the President.[26] Every agency also confronts substantive and procedural legal constraints and operates under legal mandates that define and confine its mission.[27]

Administrative capacity is also shaped by politics. The President's actual or effective power is determined in part by his political credibility.[28] An agency's actual or effective power also is determined in part by its credibility—with respect to the American public, interest groups, and its political and judicial overseers.[29] Finally, administrative capacity is defined by a residual set of considerations that can be lumped together as the practical—these include information, skill or technical expertise, professional norms, and fiscal resources.

An agency's distinct set of resources—legal, political, and practical—can be thought of as its administrative toolkit. Through pooling, the executive augments capacity by, in effect, constructing a new toolkit that

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state legislatures); Wayne A. Logan, Dirty Silver Platters: The Enduring Challenge of Intergovernmental Investigative Illegality, 99 Iowa L. Rev. 293, 295–98, 316–22 (2013) (examining consequences of "failure of courts to regulate the evasion of legal norms" enabled by "modern intergovernmental 'working arrangements'"); Richman, Past, Present, and Future, supra note 5, at 426–27.

24. The terms "capacity" and "administrative power" are used interchangeably throughout.

25. See Henry P. Monaghan, The Protective Power of the Presidency, 93 Colum. L. Rev. 1, 5 n.27 (1993) (observing this requirement "is today so deeply ingrained in our constitutional tradition that it is seldom articulated").

26. See, e.g., id. at 11 (arguing President possesses "narrow[], inherent executive authority . . . to protect and defend the personnel, property, and instrumentalities of the United States from harm").

27. See Harry T. Edwards & Linda A. Elliott, Federal Courts: Standards of Review 97 (2007) (noting organic statutes generally "set[] forth the basic mission of an agency, its principal responsibilities, and its authority to act").

28. See, e.g., Richard E. Neustadt, Presidential Power and the Modern Presidents 185–87 (1990) (emphasizing credibility in elaborating sources of presidential power); Posner & Vermeule, supra note 18, at 12–15 (discussing political constraints on executive power). See generally Pildes, Law and the President, supra note 7, at 1388 ("[S]cholars have [long] . . . recognized[] the actual, effective powers of a President (as opposed to the formal powers of the office) are directly rooted in, and limited by, his or her ongoing credibility.").

29. See Daniel Carpenter, Reputation and Power: Organizational Image and Pharmaceutical Regulation at the FDA 33 (2010) [hereinafter Carpenter, Reputation and Power] ("[O]rganizational reputations animate, empower, and constrain the manifold agencies of government."); see also David Zaring, Regulating by Repute, 110 Mich. L. Rev. 1003, 1006 (2012) (reviewing Carpenter, Reputation and Power, supra) ("[T]he merits of reputation as a governance tool . . . are real but limited.").

no single agency possesses. Using functional criteria, this section identifies three mechanisms through which pooling enhances administrative power.

1. *Using Levers.* — The executive can use one agency's legal capacity as a lever to augment the regulatory capacity of other agencies. This type of pooling has enabled the executive to respond to challenges that it perceives in a globalizing and data-driven world.

Fiber-optic cables on the ocean floor today carry ninety-nine percent of intercontinental communications.[30] Law enforcement and intelligence agencies in the United States regard access to those communications as a critical investigatory and intelligence tool.[31] Those agencies are concerned that a globalizing telecommunications industry will impede their surveillance capabilities.[32] The executive also is increasingly concerned with vulnerabilities in telecommunications infrastructure, on which the executive itself depends.[33]

Pooling has enabled the executive to navigate this increasingly significant terrain using the FCC's licensing authority as a legal lever. Any company seeking to land its fiber-optic cable on our shore or to otherwise provide a telecommunications service to the United States requires a license from the FCC.[34] The FCC also must approve licenses to companies with more than twenty-five percent foreign ownership,[35] and it must authorize the transfer of any wireless license.[36] The FCC reviews license applications under an expansive "public interest" standard.[37]

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30. Craig Timberg & Ellen Nakashima, Agreements with Private Companies Protect U.S. Access to Cables' Data for Surveillance, Wash. Post (July 6, 2013), http://www.washingtonpost.com/business/technology/agreements-with-private-companies-protect-us-access-to-cables-data-for-surveillance/2013/07/06/aa5d017a-df77-11e2-b2d4-ea6d8f477a01_story.html (on file with the *Columbia Law Review*).

31. See, e.g., Neil King Jr. & David S. Cloud, Global Phone Deals Face Scrutiny from a New Source: The FBI, Wall St. J. (Aug. 24, 2000, 12:01 AM), http://online.wsj.com/articles/SB967070342424493183 (on file with the *Columbia Law Review*).

32. See id. ("The FBI feared it would have no legal or practical way to wiretap a phone service operated entirely outside the U.S.").

33. See Kent Bressie, More Unwritten Rules: Developments in U.S. National Security Regulation of Undersea Cable Systems 8–11 (Jan. 18, 2009), http://www.hwglaw.com/siteFiles/News/7DF1C8D035660E8FBEF0AAC7BA8DA103.pdf (on file with the *Columbia Law Review*) (describing Team Telecom's increased focus on securing telecommunications infrastructure); see also infra notes 45–49 and accompanying text (describing cyberthreat to domestic critical infrastructure).

34. This authority is rooted in section 214 of the Communications Act of 1934, as amended. See 47 U.S.C. § 214(a) (2012) (requiring license for carriers wishing to construct, extend, or utilize communications lines); see also 47 C.F.R. § 63.18 (2013) (specifying application requirements).

35. See 47 U.S.C. § 310(b).

36. Id. § 310(d).

37. See, e.g., Rachel E. Barkow & Peter W. Huber, A Tale of Two Agencies: A Comparative Analysis of FCC and DOJ Review of Telecommunications Mergers, 2000 U. Chi. Legal F. 29, 42–48 (describing "amorphous" public interest standard).

The executive has leveraged the FCC's licensing authority to augment its control over cable companies involving foreign ownership. An interagency structure, dubbed "Team Telecom," consists of officials from the DoJ, the FBI, the DoD, and the DHS.[38] Team Telecom negotiates a "Network Security Agreement" with the company, and the FCC makes its licenses contingent on this agreement and the company's ongoing compliance with it.[39]

Network Security Agreements may require the company to maintain infrastructure and customer data on U.S. soil; they may dictate how and by whom surveillance requests from the U.S. government will be handled within the company, such as by including the right to approve a director to the company's board; they may require the company to provide a "comprehensive description" of its network and telecommunications architecture; and they may require notice or even preapproval by the U.S. government for certain equipment purchases.[40] The agreements also impose ongoing auditing and reporting requirements on the company and may grant inspection rights to the U.S. government.[41]

In effect, then, Team Telecom is able to *regulate* foreign-owned communications carriers by using the FCC's licensing authority as a legal lever.[42] The executive has used Network Security Agreements not only to protect its surveillance capabilities and to impose infrastructure-security

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38. FCC, FCC Homeland Security Liaison Activities 6–7 (2012), available at http://transition.fcc.gov/pshs/docs/liaison.pdf (on file with the *Columbia Law Review*).

39. This approach was formalized in a decision in the late 1990s by the FCC to defer to the executive branch on law enforcement, national security, and foreign policy issues relevant to the FCC's licensing authorities when the application involves foreign ownership. See Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, 12 FCC Rcd. 23,891, 23,919–20 (1997) (Report and Order and Order on Reconsideration).

40. See, e.g., Agreement at 4, 9, 18, Applications Filed by Global Crossing Ltd. & Level 3 Commc'ns, Inc. for Consent to Transfer Control, 26 FCC Rcd. 14,056 (2011) (IB Docket No. 11-78) [hereinafter Global Crossing Agreement], available at http://apps.fcc.gov/ecfs/document/view?id=7021711201 (on file with the *Columbia Law Review*) (laying out terms of agreement between Level 3 Communications and DoJ, DHS, and DoD); see also Timberg & Nakashima, supra note 30 (reporting on Team Telecom's Network Security Agreement with Global Crossing and Level 3 Communications). News accounts suggest that such Network Security Agreements are "growing in scope." Spencer E. Ante & Ryan Knutson, U.S. Tightens Grip on Telecom, Wall St. J. (Aug. 27, 2013, 9:38 PM), http://online.wsj.com/articles/SB10001424127887324906304579037292831912078 (on file with the *Columbia Law Review*). An attorney involved in negotiating such agreements is quoted as saying, "Each agreement seems to become more restrictive as the government recognizes the benefits of access to networks and databases and as threats to national security increase." Id. (quoting Warren Lavey, former partner, Skadden, Arps, Slate, Meagher & Flom LLP).

41. See Global Crossing Agreement, supra note 40.

42. Ante and Knutson report that "consolidation in the industry and an influx of overseas investment have left much of the industry under the government's sway." Ante & Knutson, supra note 40. "Three of the top four wireless carriers now operate under such agreements . . . ." Id.

measures, but also to enhance the law enforcement and intelligence agencies' expertise in emergent telecommunications technologies.[43] As one lawyer involved in negotiating these agreements on behalf of telecommunications clients indicated, the agreements give the executive a window into communications networks and infrastructure the government would not otherwise have.[44]

2. *Combining Legal Authority with Expertise.* — Sometimes an agency will have the practical resources, but not the legal capacity, to achieve a desired policy objective. Another agency will have the legal authority, but it will lack the relevant expertise. Pooling enables the executive to combine these resources.

This type of pooling is at the crux of the executive's response to the "cyberthreat." Cybersecurity is today one of the executive's top security concerns.[45] Recent attacks on the financial, defense-contracting, and energy sectors domestically—and even more severe actions abroad—highlight the emergent threat to critical infrastructure.[46] A complex cyberattack on Iran's nuclear power plant is widely viewed as a game changer in the use of cyberweapons against critical infrastructure.[47]

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43. See id. ("[I]nspection rights have improved the government's understanding of how the networks are put together . . . ."); King & Cloud, supra note 31 (reporting FBI asked telecom company to "train FBI agents on new technology that came along").

44. See Ante & Knutson, supra note 40 (reporting Team Telecom uses Network Security Agreements to "'go to school' on network operations").

45. See, e.g., Current and Projected National Security Threats to the United States: Hearing Before the S. Select Comm. on Intelligence, 113th Cong. 9 (2013) (statement of James R. Clapper, Director of National Intelligence) ("[W]hen it comes to the distinct threat areas, our statement this year leads with cyber."); Remarks on Securing the Nation's Information and Communications Infrastructure, 1 Pub. Papers 731, 732 (May 29, 2009) ("America's economic prosperity in the 21st century will depend on cybersecurity.").

46. See, e.g., Homeland Threats and Agency Responses: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs, 112th Cong. 12 (2012) (statement of Kevin L. Perkins, Associate Deputy Director, Federal Bureau of Investigation) ("Cyber threats . . . pose a significant risk to our Nation's critical infrastructure."); William J. Lynn III, The Pentagon's Cyberstrategy, One Year Later, Foreign Aff. (Sept. 28, 2011), http://www.foreignaffairs.com/articles/68305/william-j-lynn-iii/the-pentagons-cyberstrategy-one-year-later [hereinafter Lynn, Pentagon's Cyberstrategy] (on file with the *Columbia Law Review*) ("The United States is now in the midst of a strategic shift in the cyberthreat. Until now, intrusions have largely been for the purpose of exploitation. . . . [C]yber technologies now exist that are capable of destroying critical networks, causing physical damage, or altering the performance of key systems."); Leon E. Panetta, U.S. Sec'y of Def., Remarks on Cybersecurity to the Business Executives for National Security (Oct. 11, 2012), available at http://www.defense.gov/transcripts/transcript.aspx?transcriptid=5136 (on file with the *Columbia Law Review*) (describing cyberattacks on U.S. financial institutions, destructive computer virus directed at oil and energy companies in Middle East, and federal government's "intense daily struggle[s] against thousands of cyber actors who probe the Defense Department's networks, millions of times a day").

47. E.g., Pam Benson, Computer Virus Stuxnet a "Game Changer," DHS Official Tells Senate, CNN (Nov. 18, 2010, 6:21 AM), http://www.cnn.com/2010/TECH/web/11/17/stuxnet.virus/index.html (on file with the *Columbia Law Review*).

The challenges in structuring the executive's cybersecurity activities have proven tenacious. While a fundamental objective is protecting privately owned critical infrastructure inside the United States,[48] the core governmental expertise resides in the NSA, the spy agency that is the nation's cryptographic expert.[49] The NSA's expertise in the cyber domain is unparalleled in the federal government.[50] For this reason, the agency is also charged, pursuant to presidential directives, with protecting the federal government's national security information systems—that is, the executive's classified and military computer systems.[51] But the NSA's secret and sprawling capabilities are in part what accounts for a political legitimacy or trust deficit with the American public—or, at a minimum, with privacy and civil liberties groups.[52] Longstanding legal norms further constrain the NSA's conduct in the domestic space.[53] The DHS,

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48. See Lynn, Pentagon's Cyberstrategy, supra note 46 (explaining program developed by Defense Industrial Base to provide "more robust protection for private networks" and how private network protection is crucial to critical public infrastructure).

49. See, e.g., William J. Lynn III, Defending a New Domain: The Pentagon's Cyberstrategy, Foreign Aff. (Sept.–Oct. 2010), http://www.foreignaffairs.com/articles/66552/william-j-lynn-iii/defending-a-new-domain (on file with the *Columbia Law Review*) (describing capabilities developed by NSA).

50. See, e.g., Harrison Donnelly, Q&A: General Keith B. Alexander, Mil. Info. Tech. (Dec. 17, 2010), http://www.kmimediagroup.com/military-information-technology/articles/288-military-information-technology/mit-2010-volume-14-issue-10-november/3650-qaa-general-keith-b-alexander-sp-454 (on file with the *Columbia Law Review*) (describing NSA's capabilities and how they relate to cybersecurity objectives).

51. See, e.g., Rajesh De, The NSA and Accountability in an Era of Big Data, 7 J. Nat'l Sec. L. & Pol'y 301, 302–03 (2014) (collecting and describing these authorities).

52. See, e.g., Pew Research Ctr., Few See Adequate Limits on NSA Surveillance Program: But More Approve than Disapprove 2 (2013) (indicating "first time in Pew Research polling that more have expressed concern over civil liberties than protection from terrorism since the question was first asked in 2004"); Timothy B. Lee, Here's Why 'Trust Us' Isn't Working for the NSA Any More, Wash. Post: Switch (July 30, 2013), http://www.washingtonpost.com/blogs/the-switch/wp/2013/07/30/heres-why-trust-us-isnt-working-for-the-nsa-any-more/ (on file with the *Columbia Law Review*) (reporting "NSA's penchant for secrecy initially sheltered its activities from public scrutiny, but it now seems to be working against the agency").

53. Constraints on the NSA's surveillance activities in the domestic space and directed at U.S. persons are contained in Executive Order 12,333 and the Foreign Intelligence Surveillance Act (FISA). Legal debates over the NSA's role in "information assurance"—that is, the protection of government computer systems—date to the 1980s. President Ronald Reagan in 1984 issued a national security directive that would have expanded the NSA's authority to set information security standards for the federal government's unclassified systems. In response, Congress passed the Computer Security Act of 1987, which assigned this function to the National Bureau of Standards (today the National Institute of Standards and Technology) and reserved only an advisory role for the NSA. See Computer Security Act of 1987, Pub. L. No. 100-235, § 2, 101 Stat. 1724, 1724 (discussing purpose of Act). The Act's legislative history emphasizes Congress's desire to shift the information security role away from the NSA. See H.R. Rep. No. 100-153, pt. 2, at 19 (1987). This history is recounted in Susan Landau et al., Codes, Keys and Conflicts: Issues in U.S. Crypto Policy, Report of a Special Panel of the ACM U.S. Public Policy Committee (1994).

meanwhile, was created in part to interact with the domestic public on homeland security issues.[54] Yet the DHS itself does not possess the expertise that the NSA has acquired over years.[55]

Here, then, is the structural puzzle: The executive perceives the defense of privately owned critical infrastructure inside the United States to require pressing and urgent attention; the requisite expertise is with the NSA, but that agency is legally and politically constrained. The DHS does not confront those same obstacles, but it also does not possess the relevant expertise.[56]

The executive's response was pooling. In September 2010, the Secretary of Homeland Security and the Secretary of Defense entered into a memorandum of agreement on cybersecurity.[57] The purpose of the interagency agreement is "to increase interdepartmental collaboration" relating to cybersecurity[58] and thereby "increas[e] the overall capacity and capability of both DHS's homeland security and DoD's national security missions."[59] The interagency agreement creates a joint organizational structure, the "Joint Coordination Element," located within the NSA and led by senior officials of both the DHS and the NSA.[60] It requires the NSA to collaborate with and provide cybersecurity support to the DHS.[61] And it assigns a senior DHS official the task of requesting and "advocat[ing] for" specific cybersecurity assistance from the NSA.[62] Finally, the agreement requires the Deputy Secretary of Homeland Security and the Deputy Secretary of Defense to conduct monthly meetings "[t]o oversee

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54. See Homeland Security Act of 2002, Pub. L. No. 107-296, § 101, 116 Stat. 2135, 2142 (discussing purpose of DHS).

55. See supra note 49–51 and accompanying text (discussing NSA's unique capabilities and its importance to cybersecurity).

56. While the DHS does not confront the legal constraints imposed on the NSA, the DHS's own legal authorities relating to critical infrastructure protection are themselves quite murky. See, e.g., Homeland Sec. Studies & Analysis Inst., An Analysis of the Primary Authorities Supporting and Governing the Efforts of the Department of Homeland Security to Secure the Cyberspace of the United States, at v, 7–8 (2011), available at http://www.homelandsecurity.org/docs/reports/MHF-and-EG-Analysis-of-authorities-supporting-efforts-of-DHS-to-secure-cyberspace-2011.pdf (on file with the *Columbia Law Review*) (concluding relevant authorities lack sufficient clarity).

57. Memorandum of Agreement Between the Department of Homeland Security and the Department of Defense Regarding Cybersecurity (Sept. 27, 2010) [hereinafter DHS–DoD Agreement], available at http://www.dhs.gov/xlibrary/assets/20101013-dod-dhs-cyber-moa.pdf (on file with the *Columbia Law Review*); see also Securing America's Future: The Cybersecurity Act of 2012: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs, 112th Cong. 16–17 (2012) (statement of Janet Napolitano, Secretary, U.S. Department of Homeland Security) (discussing interagency agreement).

58. DHS–DoD Agreement, supra note 57, at 1.

59. Id.

60. Id. at 1–3.

61. Id. at 3.

62. Id. at 2.

the activities" that the memorandum of agreement prescribes.[63] As one DHS undersecretary explained, the purpose of those monthly meetings is to ensure that the two agencies are "fully synced at a leadership level."[64]

The cybersecurity memorandum of agreement and the joint operational and policy structures that it creates thus enable the executive to leverage the NSA's unique expertise in the service of the DHS's mission. The DHS becomes more capable, as a practical matter, of advancing its mandate, and the NSA is able to expand its influence over domestic cybersecurity.[65] The Secretary of Defense at the time later described this joint structure as a "part[ing] [of] the bureaucratic Red Sea."[66]

The memorandum of agreement was entered into by agency leadership. But presidential involvement is also a part of the story. The President personally approved this joint effort,[67] and he created a White House post to coordinate cybersecurity policy[68] and "green light" related initiatives.[69] A joint statement by the Secretary of Defense and the Secretary of Homeland Security announcing the memorandum of agreement emphasized that the agreement reflects the President's policy and structural vision.[70]

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63. Id. at 4.

64. Protecting Cyberspace: Assessing the White House Proposal: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs, 112th Cong. 17 (2011) (statement of Philip R. Reitinger, Deputy Under Secretary, National Protection and Programs Directorate, U.S. Department of Homeland Security).

65. Close followers of the executive's cybersecurity efforts observed that the memorandum of agreement "clarifies how the National Security Agency (NSA) will support DHS in its cybersecurity efforts, allowing NSA's technical and intelligence capabilities to be used for homeland defense." Ctr. for Strategic & Int'l Studies Comm'n on Cybersecurity for the 44th Presidency, Cybersecurity Two Years Later 6 (Jan. 2011), available at http://csis.org/files/publication/110128_Lewis_CybersecurityTwoYearsLater{Web.pdf (on file with the *Columbia Law Review*). Pursuant to the memorandum, the NSA provides the DHS with "access to specialized intelligence and technical skills." Id.

66. Robert M. Gates, Duty: Memoirs of a Secretary at War 451 (2014). Robert Gates goes on to express the view that this "new authority" has been underutilized by the DHS. Id. The extent to which the joint structure was put into practice is unclear on the public record. For a discussion of pooling's self-inhibiting features, see infra Part IV.B.2.a.

67. See Gates, supra note 66, at 451 (describing Obama's role in approving and advancing joint effort).

68. See Macon Phillips, Introducing the New Cybersecurity Coordinator, White House Blog (Dec. 22, 2009, 7:30 AM), http://www.whitehouse.gov/blog/2009/12/22/introducing-new-cybersecurity-coordinator (on file with the *Columbia Law Review*) (announcing new White House Cybersecurity Coordinator post).

69. See Howard A. Schmidt, Partnership Developments in Cybersecurity, White House Blog (May 21, 2012, 2:17 PM), http://www.whitehouse.gov/blog/2012/05/21/partnership-developments-cybersecurity (on file with the *Columbia Law Review*) (describing "green light[ing]" of two cybersecurity initiatives).

70. See Press Release, U.S. Dep't of Homeland Sec., Joint Statement by Secretary of Defense Robert Gates and Secretary of Homeland Security Janet Napolitano on Enhancing Coordination to Secure America's Cyber Networks (Oct. 13, 2010), http://www.dhs.gov/news/2010/10/13/joint-statement-enhancing-coordination-secure-americas-

The joint rulemaking at the crux of the national "car deal" offers another illustration of combining one agency's legal authority with another's expertise. Initiated at the direction of the White House, the joint rulemaking set the first federal greenhouse gas emissions standards and the most stringent fuel efficiency standards to date.[71] In 2009, the Environmental Protection Agency (EPA) and the National Highway Traffic Safety Administration (NHTSA) commenced, for the first time, the joint standard-setting effort.[72]

Joint rulemaking enabled NHTSA to borrow and rely upon the EPA's expertise in automotive engineering—expertise that the EPA was able to develop over years and during a time when Congress had prohibited NHTSA from accruing such information, knowledge, and skill.[73] For six years, Congress had imposed a moratorium on appropriations relating to NHTSA's fuel economy standards.[74] As a result, NHTSA experienced a substantial expertise drain in this area, including loss of professional staff and stagnating research.[75] Through the joint-rulemaking process, NHTSA was able to rely on expertise, including research and technical skill, which the EPA had continued to accrue during those intervening years.[76]

Legislation requires NHTSA to consult with the EPA and the Department of Energy in issuing fuel economy standards.[77] Some level of interaction between NHTSA and the EPA is thus contemplated. But their

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cyber-networks (on file with the *Columbia Law Review*) ("Reflecting President Obama's strong commitment to . . . combating threats to . . . cyber networks and infrastructure, the Department of Defense . . . and the Department of Homeland Security . . . have signed a memorandum of agreement that will align and enhance America's capabilities to protect against threats to . . . critical civilian and military computer systems and networks.").

71. See Jody Freeman, The Obama Administration's National Auto Policy: Lessons from the "Car Deal," 35 Harv. Envtl. L. Rev. 343, 344 (2011) (providing close study of "car deal" and its implications for administrative and environmental law).

72. U.S. Gov't Accountability Office, GAO-10-336, Vehicle Fuel Economy: NHTSA and EPA's Partnership for Setting Fuel Economy and Greenhouse Gas Emissions Standards Improved Analysis and Should Be Maintained 7 (2010) [hereinafter GAO-10-336], available at http://www.gao.gov/assets/310/301194.pdf (on file with the *Columbia Law Review*) (describing background surrounding commencement of joint rulemaking process).

73. See id. at 21–24 (discussing differences in EPA and NHTSA expertise and resulting contribution to joint rulemaking).

74. Id. at 23.

75. See id. (discussing loss of NHTSA staff and difference in extent of research conducted by NHTSA and EPA).

76. See id. ("The difference in the extent of new research that NHTSA and EPA conducted for this rulemaking likely results from differences in resources available to the agencies in the recent past.").

77. See 49 U.S.C. § 32902(b)(1) (2012) ("The Secretary of Transportation, after consultation with . . . the Administrator of the Environmental Protection Agency, shall prescribe . . . average fuel economy standards . . . ."). The statute delegates authority to issue fuel economy standards to the Department of Transportation, which has internally delegated that authority to NHTSA. GAO-10-336, supra note 71, at 3.

joint rulemaking went beyond anything envisioned in the statutory scheme.[78] The joint effort generated NHTSA's first increase in fuel economy standards for cars in nearly thirty years.[79]

3. Blending Legal Tools. — Finally, the varied legal authorities that, over time, have accrued to the administrative state bolster the executive's ability to mix and match existing legal resources to address emergent societal challenges or policy goals.[80]

So-called "Title 10–Title 50" operations overseas provide one vivid illustration. These overseas task forces blend the legal authorities for military operations, codified at Title 10 of the U.S. Code, with the distinct legal authorities for intelligence operations contained in Title 50.[81] The CIA and the military "construct and execute operations jointly," shifting between their CIA and military authorities "as circumstances may dictate."[82] Hybrid units, sometimes called "cross matrix" teams, operate in what some have described as an "expanding netherworld" between the military and the intelligence space, capable of achieving joint goals by integrating disparate legal resources.[83]

If the Title 10–Title 50 task forces illustrate the pooling of intelligence and military legal authorities, another example shows the pooling of intelligence and domestic law enforcement authorities. Section 702 of the Foreign Intelligence Surveillance Act (FISA) authorizes foreign intelligence collection conducted inside the United States but directed at non-U.S. persons reasonably believed to be overseas, pursuant to procedures that do not require a judicial probable cause determination.[84]

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78. Joint rulemaking also created opportunities for the two agencies, which have different missions and operate under distinct political pressures, to exercise considerable influence over each other's rulemaking. See Freeman & Rossi, supra note 9, at 1171 n.188, 1172–73 (emphasizing two agencies' distinct "missions and cultures" and describing effect of joint rulemaking in "align[ing] their compliance programs"); see also GAO-10-336, supra note 72, at 19–20 (noting "increased involvement by EPA as an equal partner" in emissions rulemaking).

79. See GAO-10-336, supra note 72, at 3.

80. See Moe & Wilson, supra note 1, at 23 ("[A]lthough Congress can try to limit presidential prerogatives through statute, the president is greatly *empowered* through statutory law whether Congress intends it or not.").

81. See Robert Chesney, Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate, 5 J. Nat'l Security L. & Pol'y 539, 539 n.2 (2012) ("[T]he argot of national security lawyers uses 'Title 50 authority' and 'Title 10 authority' as shorthands for the notion that there are distinct spheres of intelligence and military operations . . . .").

82. Id. at 578.

83. Greg Miller & Julie Tate, CIA Shifts Focus to Killing Targets, Wash. Post (Sept. 1, 2011), http://www.washingtonpost.com/world/national-security/cia-shifts-focus-to-killing-targets/2011/08/30/gIQA7MZGvJ_story.html (on file with the *Columbia Law Review*); see also Chesney, supra note 81, at 580 (describing "operational integration" between military and intelligence functions in "cross matrix" teams).

84. See 50 U.S.C. § 1881a (2012) (authorizing "targeting of persons reasonably believed to be located outside of the United States to acquire foreign intelligence information," provided in part they are not "United States person").

Under section 702, the NSA acquires hundreds of millions of communications annually.[85] Myriad domestic and U.S.-person-related communications are swept up in this acquisition.[86] Most of the information collected under section 702 is acquired through what is called "PRISM collection."[87] Only the NSA can initiate collection under section 702.[88] But the FBI also receives the raw data acquired under PRISM.[89] And the FBI, "[w]ith some frequency," queries those datasets in the exercise of its criminal law enforcement activities,[90] including to search for specific U.S. persons.[91] Pooling thus enables the FBI to use vast datasets collected pursuant to the NSA's foreign intelligence authority in the service of its domestic law enforcement mission.

The executive also uses pooling to blend legal tools in the domestic policy space. An interagency task force including the Occupational Safety and Health Administration (OSHA), the EPA, and the DoJ, for example, was established to augment executive capacity with respect to workplace safety. The initiative combines OSHA's workplace safety authorities with the EPA's environmental law tools and other criminal laws enforced by the DoJ.[92] A goal of the task force is to bring legal authorities distinct

85. See Privacy & Civil Liberties Oversight Bd., Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act 86 (2014) [hereinafter PCLOB, Section 702 Report], available at www.pclob.gov/library/702-Report.pdf (on file with the *Columbia Law Review*).

86. See id. at 25–26 (identifying "variety of ways" "information of or concerning U.S. persons" may be acquired through section 702 surveillance); see also id. at 152 (describing "incidental collection" of Americans' communications and arguing scope of such collection is "likely . . . substantial").

87. See id. at 33–34 ("As of mid-2011, 91 percent of the Internet communications [collected under section 702] each year were obtained through PRISM collection.").

88. Id. at 42 ("[T]he NSA initiates all Section 702 targeting . . . [but] the CIA and FBI have processes to 'nominate' targets to the NSA for Section 702 targeting."); see also id. at 41 ("[T]he government targets persons under Section 702 by tasking selectors—communication facilities, such as email addresses and telephone numbers—that the government assesses will be used by those persons to communicate or receive [certain categories of] foreign intelligence information[.]").

89. Id. at 34. The CIA also may receive copies of the data acquired under PRISM. Id. at 34, 42. There is a separate type of section 702 collection called "upstream" collection, and neither the FBI nor the CIA receives copies of the data that the NSA collects through this second type of collection. Id. at 35.

90. Id. at 59 ("[W]henever the FBI opens a new national security investigation or assessment, FBI personnel will query previously acquired information from a variety of sources, including Section 702 . . . . With some frequency, FBI personnel will also query this data . . . in the course of criminal investigations and assessments that are unrelated to national security efforts.").

91. Id. at 59 (noting "FBI does not track the number of queries using U.S. person identifiers . . . [but] [t]he number of such queries . . . is substantial").

92. See Protecting America's Workers Act: Modernizing OSHA Penalties: Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Educ. & Labor, 111th Cong. 15 (2010) [hereinafter Cruden Testimony] (describing worker endangerment initiative) (statement of John C. Cruden, Deputy Assistant Att'y Gen., Environmental and Natural Resources Division, U.S. Department of Justice).

from workplace safety—which carry considerably more severe penalties—to bear on the policy goal of improving conditions in the worksite.[93] The DoJ and the EPA provide trainings for OSHA officers instructing them on how environmental crime laws might be brought to bear on the workplace, and OSHA identifies high-priority candidates to those agencies for prosecution.[94] In this sense, the initiative also augments the resources that the criminal law enforcement agencies have to investigate environmental crimes.[95] The task force appeared to languish with limited political support during the Bush Administration, but it was expanded and made part of a vice presidential policy initiative when President Obama took office.[96]

Across policy domains, then, the executive has turned to pooling.[97] By mixing and matching resources across the administrative state, pool-

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93. David Barstow & Lowell Bergman, With Little Fanfare, a New Effort to Prosecute Employers that Flout Safety Laws, N.Y. Times (May 2, 2005), http://www.nytimes.com/2005/05/02/politics/02osha.html (on file with the *Columbia Law Review*). The primary criminal provision of the Occupational Safety and Health Act of 1970 provides a misdemeanor punishable by imprisonment for not more than six months or a fine of not more than $10,000, and it requires a willful violation of OSHA rules that causes the death of an employee. 29 U.S.C. § 666(e) (2012). By contrast, the interagency initiative has been able to impose millions of dollars in fines and secure extensive prison terms under the environmental laws. See Cruden Testimony, supra note 92, at 19–21 (explaining that "[a]lthough OSHA currently has limitations on the remedies available to it to address workplace safety issues, [it] ha[s] been able to address some of these issues indirectly through [criminal] environmental laws," as part of worker endangerment initiative).

94. Barstow & Bergman, supra note 93 (noting interagency partnership "seeks to marshal a spectrum of existing laws that carry considerably stiffer penalties than those governing workplace safety alone"). The *New York Times* report described an EPA official's reaction to the training: "It has been a revelation of sorts, he says, to watch [OSHA officers] grasp the chance at last to seek significant criminal penalties against defiant employers." Id.; see also Worker Endangerment, U.S. Dep't of Justice, http://www.justice.gov/enrd/3391.htm (on file with the *Columbia Law Review*) (last updated Oct. 2010) (describing worker endangerment initiative).

95. See Cruden Testimony, supra note 92, at 17 ("One key component of the Initiative is to develop additional resources to identify and investigate environmental crimes . . . .").

96. See Kate Andrias, The President's Enforcement Power, 88 N.Y.U. L. Rev. 1031, 1087 (2013) (noting initiative experienced "unexplained problems" under President George W. Bush, but was revamped and made part of Vice President's Middle Class Task Force initiative under Obama).

97. Others have provided nuanced accounts of the blending of legal tools from different agencies in particular policy domains. For a discussion of those dynamics in the financial regulatory context, see, e.g., Brandon L. Garrett, Collaborative Organizational Prosecution [hereinafter Garrett, Collaborative Organizational Prosecution], *in* Prosecutors in the Boardroom: Using Criminal Law to Regulate Corporate Conduct 154, 154 (Anthony S. Barkow & Rachel E. Barkow eds., 2011) [hereinafter Prosecutors in the Boardroom] (observing "relationship between federal regulators and prosecutors has grown surprisingly close" in corporate cases, and describing emergent collaborative approach); see also Brandon L. Garrett, Structural Reform Prosecution, 93 Va. L. Rev. 853, 896 (2007) (describing compliance agreements between corporations and DoJ reached in conjunction with other agencies, including SEC, IRS, and CFTC). For a discussion of the

ing enables the executive to augment capacity from within. Pooling is a distinct type of interagency coordination, and it warrants close scrutiny.

C. *Unpooling as Foil*

To better see pooling, it might be helpful to contrast it with the concept of *unpooling*. We might think of unpooling as design by the executive *to fortify* an institutional divide—to prevent, for instance, the blending of legal tools. If pooling bridges boundaries inside the bureaucracy, unpooling erects them.

A set of structural and procedural rules that became known as "the wall" between criminal law enforcement and foreign intelligence agents provides an illustration of unpooling.[98] An objective of the wall was to prevent the blending of two types of legal tools—criminal law and foreign intelligence surveillance tools.[99] When federal law enforcement seeks to intercept the content of communications as part of a criminal investigation, it must comply with Title III of the Omnibus Crime Control and Safe Streets Act.[100] Foreign intelligence collection operates under a distinct set of substantive and procedural rules under the FISA and executive orders.[101]

There are important differences between the two legal regimes. Title III, for example, requires probable cause that the target "is committing, has committed, or is about to commit" a specified predicate offense.[102] Distinct requirements govern foreign intelligence collection, even when it is directed at a U.S. person inside the United States. In those circumstances, FISA requires probable cause that the target is an "agent of a

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intermeshed use of criminal and immigration law authorities and the hybrid structural designs that emerge in the "crimmigration" space, see, e.g., Ingrid V. Eagly, Prosecuting Immigration, 104 Nw. U. L. Rev. 1281, 1288 (2010) (describing "evolving dynamic relationship between immigration and criminal enforcement" across "major axes" of adjudication, prosecutorial screening, and role reversal of agencies and prosecutors); David Alan Sklansky, Crime, Immigration, and Ad Hoc Instrumentalism, 15 New Crim. L. Rev. 157, 163 (2012) (positing "ad hoc instrumentalism" is cause of "disappearing line between criminal justice and immigration enforcement").

98. For a history of "the wall," see generally David S. Kris & J. Douglas Wilson, National Security Investigations & Prosecutions ch. 10 (2007); Nat'l Comm'n on Terrorist Attacks upon the United States, The 9/11 Commission Report 78–80 (2004) [hereinafter 9/11 Commission Report], available at http://www.9-11commission.gov/report/911Report.pdf (on file with the *Columbia Law Review*); David S. Kris, The Rise and Fall of the FISA Wall, 17 Stan. L. & Pol'y Rev. 487, 488 (2006).

99. See supra note 98 (listing sources relaying history and purpose of "the wall").

100. See 18 U.S.C. § 2518 (2012) (providing procedure for interception of wire, oral, or electronic communications).

101. See 50 U.S.C. §§ 1801–1885 (2012) (codifying Foreign Intelligence Surveillance Act of 1978, which prescribes rules for foreign intelligence collection); Exec. Order No. 12,333, 3 C.F.R. 200 (1982) (specifying goals, duties, and responsibilities "to provide for the effective conduct of United States intelligence activities and the protection of constitutional rights").

102. 18 U.S.C. § 2518(3)(a).

foreign power."[103] Though FISA defines an "agent of a foreign power" more narrowly when the target is a U.S. person,[104] this is still a more permissive standard than Title III's probable cause requirement.[105] Title III also requires criminal prosecutors to provide the underlying affidavit in support of the warrant to defense counsel,[106] whereas FISA generally authorizes disclosure of the application only in camera and ex parte to the court.[107] This means that, in practice, defendants are unable to meaningfully challenge the constitutional adequacy or veracity of a FISA application, in contrast to a Title III affidavit.[108]

FISA specifies that "the purpose" of the surveillance must be obtaining foreign intelligence information.[109] Prior to the recent FISA amendments, courts of appeals had construed FISA to require that foreign intelligence collection be the "primary" purpose of collection, so that FISA could not be used to circumvent Title III's more stringent requirements.[110]

Throughout the 1980s and early 1990s, federal prosecutors could informally interact with intelligence agents; they were apprised of various intelligence-gathering efforts and could decide that an intelligence investigation be converted to a criminal investigation.[111] But concerns mounted within the executive that law enforcement–intelligence pooling might result in a court ruling that FISA's primary purpose requirement

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103. 50 U.S.C. § 1805(a)(2)(A).

104. Compare id. § 1801(b)(1) (defining "agent of a foreign power" as "any person other than a United States citizen" who engages in specified activity), with id. § 1801(b)(2) (defining "agent of a foreign power" as "any person" who engages in narrower ranges of specified activity more closely tied to potential criminal law violations).

105. For a comparison of FISA and Title III, see In re Sealed Case, 310 F.3d 717, 737–42 (FISA Ct. Rev. 2002); Kris & Wilson, supra note 98, § 11.6.

106. See 18 U.S.C. § 2518(9).

107. When a criminal defendant seeks to obtain the underlying FISA application, the Attorney General may file an affidavit indicating that disclosure will harm national security. The court is then required to review the application in camera and ex parte "to determine whether the surveillance . . . was lawfully authorized and conducted." 50 U.S.C. § 1806(f). The court may only make disclosures to counsel for the defendant when it determines that "such disclosure is necessary to make an accurate determination of the legality of the surveillance." Id.; see United States v. Daoud, 755 F.3d 479, 481 (7th Cir. 2014) (observing district court noted "no court has ever allowed disclosure of FISA materials to the defense" and reversing lower court's grant of disclosure of such materials).

108. See *Daoud*, 755 F.3d at 485–96 (Rovner, J., concurring) (elaborating challenges of "proceeding in which the defense has no access to the FISA application that resulted in court-authorized surveillance of the defendant").

109. 50 U.S.C. § 1804(a)(6)(B).

110. See *In re Sealed Case*, 310 F.3d at 725 (describing courts of appeals' "'primary purpose' test"); see also 9/11 Commission Report, supra note 98, at 79 (describing "primary purpose" test and noting as result FISA "could not be used to circumvent traditional criminal warrant requirement").

111. See supra note 98 (noting sources where history of "the wall" is recounted).

had been violated.[112] The Deputy Attorney General issued an initial memorandum cabining law enforcement–intelligence interactions, and more formal procedures were adopted by Attorney General Janet Reno. The procedures, for instance, prevented the U.S. Attorneys' Offices or the Criminal Division from "direct[ing] or control[ling]" intelligence investigations or providing advice aimed at "enhancing" a potential prosecution.[113] The procedures were further expanded in practice by subordinate administrative actors. The FBI, for example, created additional boundaries within its organization between intelligence and law enforcement agents. And the Office of Intelligence Policy and Review inside the DoJ "interposed itself between the FBI and the Criminal Division" to further cabin contact between the two entities.[114]

It has been suggested that the wall contributed to intelligence-sharing failures culminating in the 9/11 attacks,[115] and a series of legislative, judicial, and executive interventions ultimately brought the wall down. But the wall's construction underscores the very real concern that pooling can enable agencies to circumvent constraints that attach to the use of a particular legal tool—a dynamic discussed further below.[116] The wall's resilience, moreover, and the interbranch efforts needed to tear it down highlight the institutional scaffolding that can emerge to reinforce interstitial executive design.

Institutional dynamics also can work to entrench pooling. And those effects were on display in recent debates over whether to unpool a different interagency structure. The executive in 2009 pooled foreign intelligence and military capabilities in cyberspace through the instrument of "dual hatting"—that is, control over both the NSA and the military's nascent U.S. Cyber Command was allocated to a single commander.[117] The pooled structure was reinforced through institutional and organizational designs created to accommodate it. These designs included the colocation of the two agencies at Fort Meade and the sharing of personnel trained to toggle between the two sets of legal authorities.[118] The pooled structure also created dependencies "in the field," including

112. These concerns surfaced in connection to the investigation of Aldrich Ames for espionage, during which collaboration between intelligence and law enforcement was "quite robust." Kris, supra note 98, at 501.

113. See, e.g., id. at 511–12 & n.139.

114. Id. at 505.

115. See 9/11 Commission Report, supra note 98, at 79 (noting "unfortunate consequences" of "exaggerated belief that the FBI could not share any intelligence information with criminal prosecutors").

116. See infra Part III.A.3.b.

117. See Chesney, supra note 81, at 581 ("CYBERCOM and NSA today are deeply intertwined [and] are . . . headed by the same official.").

118. See id. ("CYBERCOM and NSA are co-located at Fort Meade, [and] they share some personnel (many of whom are trained in procedures meant to preserve a distinction between their actions as CYBERCOM personnel and their potentially identical actions wearing their hats as NSA personnel).").

those of combatant commanders that came to rely on the two agencies' joint production.[119]

Obama came under pressure to dismantle the dual structure—that is, to unpool it—when its first commander stepped down, including from his advisory committee on intelligence reform.[120] Many voiced concerns that this type of pooling had concentrated too much power in a single individual and had blurred significant lines between the military and intelligence authorities.[121] The President ultimately chose to preserve the joint structure, in part, it seems, as a result of the bureaucratic designs and institutional dependencies that pooling itself forged.[122]

Pooling may be entrenching, then, at least where institutional structures evolve to accommodate and exploit it, where dependencies form, or where pooling empowers other political constituencies that will, in turn, organize to protect it.[123] These challenges for unpooling only raise the stakes for understanding pooling, the incentives that fuel it, and its consequences for the administrative state.

II. Explaining Pooling's Utility for the Executive

Pooling is of a piece with broader shifts toward presidential administration in the face of party polarization and divided government. Yet pooling can be distinctly valuable for the executive. Formal mechanisms

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119. See David E. Sanger & Thom Shanker, Obama to Keep Security Agency and Cyberwarfare Under a Single Commander, N.Y. Times (Dec. 13, 2013), http://www.nytimes.com/2013/12/14/us/politics/obama-to-keep-security-agency-and-cyberwarfare-under-a-single-commander.html (on file with the *Columbia Law Review*).

120. Id.; see President's Review Grp. on Intelligence & Commc'ns Techs., Liberty and Security in a Changing World 190–91 (2013), available at http://www.whitehouse.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf (on file with the *Columbia Law Review*) (recommending decoupling of U.S. Cyber Command and NSA).

121. See Sanger & Shanker, supra note 119.

122. See id. (reporting dependencies formed by combatant commanders and impact on decision to preserve dual structure).

123. Daryl Levinson identifies a variety of entrenchment mechanisms that might illuminate why some pooling arrangements are more likely than others to persist. See Daryl J. Levinson, Parchment and Politics: The Positive Puzzle of Constitutional Commitment, 124 Harv. L. Rev. 657, 686–91 (2011) ("[O]nce political arrangements have been put in place, a further set of [entrenchment] mechanisms contributes to their increasing stability over time."). These include "asset-specific investments," or the investment by political actors in setting up new organizational structures and decisionmaking arrangements. Id. at 686 (emphasis omitted). As Levinson explains, "To the extent these investments are specific and cannot easily be reallocated to alternative organizational structures or processes, political actors will want to avoid duplicating these investments and so will have a stake in maintaining existing arrangements and resisting reforms." Id. In addition, new structures may generate "positive political feedback"—that is, they may recreate politics in ways that sustain them, for example, by empowering or disempowering certain interest groups or constituencies. Id. at 687–88 (emphasis omitted). Each of these mechanisms is visible in the discussion of the Joint Coordination Element detailed in the text. See supra notes 45–70 and accompanying text.

for presidential reorganization of the bureaucracy have receded, giving special appeal to a functional tool for achieving some of those same ends. Meanwhile, the executive's desire to break down administrative silos is fueled by technological advances that have made our world, and our agencies, more interdependent. Finally, contemporary security challenges press on separations that have long defined our legal order, making a tool for bridging boundaries especially significant. These features of our legal and political landscape help to explain pooling's utility, and they might even suggest its growing vitality.

A. *Expectations and Gridlock*

A now-standard account explains the "multifaceted bind" that propels unilateral executive action.[124] The American public increasingly has looked to the President to address pressing societal and security challenges.[125] At the same time, our age of divided and polarized government has made new legislative responses more difficult for the executive to achieve.[126] Presidents thus have strong incentives to press their powers of unilateral action.[127] The scope of those powers is ambiguous, and that ambiguity is itself a virtue for Presidents in pushing their bounds.[128] Presidents have engaged in direct presidential lawmaking,[129] and they have achieved policy objectives through the bureaucracy.[130]

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124. Kagan, supra note 1, at 2310–12.

125. See, e.g., id. at 2310–11 & n.257 (describing "broad consensus" in political science scholarship "on the extent to which Americans view the President as the center of government and invest their hopes and expectations for governance primarily in his person"); Terry M. Moe, The Politicized Presidency, *in* The New Direction in American Politics 235, 238–39 (John E. Chubb & Paul E. Peterson eds., 1985) [hereinafter, Moe, Politicized Presidency] (explaining personal ambition and "popular, political, and media expectations" lead Presidents to "pursue some broader notion of the public interest"); Moe & Howell, supra note 20, at 136 ("[T]he public . . . hold[s] the president, as the symbol and focus of national leadership, responsible for the successes and failures of government.").

126. See, e.g., Kagan, supra note 1, at 2311–12 ("[H]eightened polarization . . . dim[s] the prospect for real legislative achievement in the context of divided government."); Daryl J. Levinson & Richard H. Pildes, Separation of Parties, Not Powers, 119 Harv. L. Rev. 2312, 2338–42 (2006) (explaining divided party government increases the likelihood of interbranch "confrontation, indecision and deadlock"). For an exploration of the causes of polarization in the legal scholarship, see generally Richard H. Pildes, Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America, 99 Calif. L. Rev. 273, 281–325 (2011) (discussing persons, history, and institutions as causes of hyperpolarization).

127. Moe & Howell, supra note 20, at 134–35.

128. See id. at 134 ("[T]he president's powers of unilateral action are a force in American politics precisely because they are *not* specified in the Constitution.").

129. See id. at 154–55 ("Presidents began making law right away, from the earliest years of the Republic.").

130. See, e.g., Kagan, supra note 1, at 2281–2303 (discussing President Bill Clinton's use of presidential directives "to trigger . . . agency action and to drive this action in a regulatory, not deregulatory, direction").

This account of unilateral presidential action extends to pooling. Indeed, unilateral structuring of the bureaucracy may be particularly appealing for the executive. For when Congress does legislate under divided government, one important study found, "[it] delegates less and constrains more."[131] Even when it does not lead to legislative stalemate, then, divided government "may result in procedural gridlock—that is, producing executive branch agencies with less authority to make well-reasoned policy and increasingly hamstrung by oversight from congressional committees, interest groups, and the courts."[132] Pooling enables the executive to take the reins on design choice.[133]

Pooling thus holds special promise for the executive in times of polarized and divided government. The capacity that the executive seeks is less likely to be forthcoming from Congress. And even when legislation is ultimately achieved—often at great political cost to the executive—it is less likely to permit the executive to operate as it desires, with the latitude it prefers.

If the conventional account of unilateral presidential action extends to unilateral design of the bureaucracy, several additional features of the legal and political landscape enhance the utility of pooling in particular.

B. *Curtailment of Reorganization Authority Post-*Chadha

Pooling enables the effective recombining of administrative actors without the exercise of formal reorganization power, a legal authority that lapsed in the aftermath of *INS v. Chadha*.[134]

Since its inception in the 1930s and until *Chadha*, presidential reorganizations were a core tool of presidential administration. Presidents routinely deployed the reorganization power delegated by Congress, submitting over 100 plans between 1932 and 1984.[135] The

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131. David Epstein & Sharyn O'Halloran, Delegating Powers: A Transaction Cost Politics Approach to Policy Making Under Separate Powers 11 (1999).

132. Id. at 11, 77–78.

133. Those unilateral designs may ultimately inform any legislative structuring that follows. For example, an interagency Financial Stability Oversight Council (FSOC), established by the Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 111, 124 Stat. 1376, 1392–94 (2010) (codified at 12 U.S.C. § 5321 (2012)), codified and expanded the authority of what was initially a presidentially designed pooling structure. The FSOC's antecedent is a presidential working group on financial markets, created by Reagan in response to the stock market crash of 1987. See Exec. Order No. 12,631, 3 C.F.R. 559 (1988) (establishing composition, purposes, and functions of working group).

134. 462 U.S. 919 (1983).

135. See id. at 969 (White, J., dissenting) ("Presidents submitted 115 Reorganization Plans to Congress [prior to *Chadha*] of which 23 were disapproved by Congress pursuant to legislative veto provisions."); see also Henry B. Hogue, Cong. Research Serv., R42852, Presidential Reorganization Authority: History, Recent Initiatives, and Options for Congress 1–34 (2012), available at http://fas.org/sgp/crs/misc/R42852.pdf (on file with

President's authority to reorganize bureaucratic structures had an important string attached, however: the legislative veto. Congress tended to delegate administrative reorganization power to the President only under circumstances that permitted the legislature to invalidate reorganization plans without the passage of new legislation, either pursuant to a one-House or a two-House veto mechanism.[136]

Indeed, the idea of the legislative veto originated, at President Herbert Hoover's own urging, in debates over enactment of the first statute to authorize presidential reorganization.[137] The Economy Act authorized the President to propose agency reorganizations through executive orders that would take effect within sixty days, unless disapproved by either House.[138] As statutes containing legislative veto provisions proliferated,[139] the executive increasingly contested the constitutional legitimacy of the legislative veto, but Presidents routinely made exceptions in the context of reorganization authority. Reorganization authority was simply too prized to risk losing it over a legislative veto fight.[140]

All of this changed with *Chadha*. The case concerned a constitutional challenge to the Immigration and Nationality Act, which at the time permitted either House of Congress, by resolution, to invalidate the decision of the executive branch to allow a deportable alien to remain in the United States.[141] Although two Justices pressed for a decision on narrower grounds, which would have removed reorganization statutes from the scope of the holding,[142] the majority opinion was not so

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the *Columbia Law Review*) (recounting evolution and use of reorganization authority prior to *Chadha*).

136. See Hogue, supra note 135, at 1–2.

137. See Louis Fisher, The Legislative Veto: Invalidated, It Survives, Law & Contemp. Probs., Autumn 1993, at 273, 277–79 ("Frustrated by an uncooperative Congress, [Hoover] wanted to make changes in legal structures without having to go through the regular legislative process where his proposals might be ignored or amended beyond recognition."); see also *Chadha*, 462 U.S. at 969 (White, J., dissenting) (describing Hoover's role in development of legislative veto).

138. See Economy Act, ch. 314, pt. 2, § 407, 47 Stat. 382, 414 (1932).

139. See *Chadha*, 462 U.S. at 977 (White, J., dissenting) (noting Congress had used legislative veto mechanism "in nearly 200 separate laws over a period of 50 years").

140. President Franklin D. Roosevelt initially disputed the legitimacy of the legislative veto, but acquiesced to its inclusion in a bill granting him reorganization authority. See Fisher, supra note 137, at 280–82. Legislation granting reorganization authority attached to a legislative veto provision was also signed by Presidents Harry S. Truman and Dwight D. Eisenhower. See id. President Carter initially sought to defend the constitutionality of the legislative veto in the reorganization context but to otherwise dispute it. See id. at 285. Carter ultimately changed course, however, rejecting the legislative veto's constitutionality in any context and eventually supporting the legal challenge in the courts that would become *INS v. Chadha*. See id. at 284–85.

141. See *Chadha*, 462 U.S. at 925.

142. See id. at 960 & n.1 (Powell, J., concurring in the judgment) ("[O]ur holding should be no more extensive than necessary to decide these cases."); id. at 967 (White, J., dissenting) ("[T]he Court would have been well advised to decide the cases, if possible, on the narrower grounds of separation of powers, leaving for full consideration the

constrained. The Court held that the legislative veto mechanism violated the Constitution's bicameralism and presentment requirements.[143]

After *Chadha*, Congress amended the statutory grant of presidential reorganization authority to require a joint resolution of *approval*.[144] Presidents had to obtain the approval of both houses of Congress within sixty days. While the prior regime had adopted a presumption of congressional approval, rebuttable by Congress, presidential reorganization after *Chadha* required affirmative congressional action, as with any legislation. The modified authority expired at the end of 1984, and it has not been reauthorized since.[145] To pursue formal reorganization today, the President must seek new legislation.[146] As with any legislative push, this requires the President to invest political capital, and it confronts the obstacles that inhere in divided government.

As a mechanism for structural change *without* Congress, pooling presents a substitute for the exercise of formal reorganization authority. Pooling is not a perfect substitute. The President cannot terminate or formally merge agencies through pooling, as he could through the exercise of formal reorganization authority. But he can generate joint production by existing administrative actors.

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constitutionality of other congressional review statutes . . . ."). In dissent, Justice Byron White recounted the origins of the legislative veto in the Reorganization Acts. Id. at 968–70. Justice White concluded that the device was "a necessary check on the unavoidably expanding power of the agencies, both Executive and independent, as they engage in exercising authority delegated by Congress." Id. at 1002.

143. See id. at 944–59 (majority opinion) (calling requirements "integral parts of the constitutional design for the separation of powers" and explaining failure of legislative veto to satisfy them).

144. See Reorganization Act Amendments of 1984, Pub. L. No. 98-614, § 3, 98 Stat. 3192, 3192. At the same time that Congress revised the procedures for presidential reorganization, Congress preserved the now-unlawful and legally unenforceable legislative veto in other statutory schemes. See Fisher, supra note 137, at 273–75 (noting "practical accommodation between executive agencies and congressional committees" facilitated continued use of legislative veto after *Chadha*).

145. See Hogue, supra note 135, at 2 (describing evolution of President's reorganization authority); see also Phillip J. Cooper, By Order of the President: The Use and Abuse of Executive Direct Action 30 (2002) (observing reorganization process "fell into disuse because it required reorganization plans to be supported with a joint resolution of approval"); David E. Lewis, Presidents and the Politics of Agency Design 80 (2003) [hereinafter Lewis, Politics of Agency Design] (noting "lapse[]" of presidential reorganization authority after *Chadha*).

146. See James Q. Wilson, Bureaucracy: What Government Agencies Do and Why They Do It 268 (1989) (emphasizing executive's difficulty in obtaining legislation authorizing reorganization after legislative veto was rendered unconstitutional because "Congress is exceptionally sensitive to the implications of any reorganization for its own internal allocation of power").

C. *Technological Change*

Pooling also is fueled by technological change, which underlies and manifests in the highly complex, volatile, and interconnected nature of many contemporary social and security challenges.[147] Technological developments exacerbate "problems of fit"—that is, a sense that agencies charged with undertaking specific policy mandates lack the legal resources to effectively confront them.[148] These fit problems are in part about stale statutes and fast-changing societal needs.[149] But problems of fit also are about an allocation of administrative resources across the bureaucracy that seems less sustainable as traditionally distinct policy domains increasingly interrelate.

Technological change fuels, for example, the interdependence, if not the fusion, of the historically and conceptually distinct spheres of domestic and global.[150] And technology drives the mammoth growth and primacy of information and communications systems. In this sense, technological change also empowers private actors (both foreign and domestic). Our communications infrastructure, for example, is almost entirely privately owned, but increasingly vital to public safety and domestic security. As the role of private actors increasingly affects U.S. interests, there is a growing emphasis on how agencies can exercise some measure of control over them.

Pooling by the FCC and Team Telecom illustrates both the problems and the opportunities created by technological change for the executive.[151] The significance of transcontinental data and global communica-

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147. Technological change may itself interact with other dynamics—what William Scheuerman has collectively labeled "social acceleration." See generally William E. Scheuerman, Liberal Democracy and the Social Acceleration of Time, at xv (2004). As Scheuerman defines the term, social acceleration is

> a long-term yet relatively recent historical process consisting of three central elements: technological acceleration (e.g., the heightening of the rate of technological innovation), the acceleration of social change (referring to accelerated patterns of basic change in the workplace or family, e.g.), and the acceleration of everyday life (e.g., via new means of high-speed communication or transportation).

Id.

148. See Jody Freeman & David B. Spence, Old Statutes, New Problems, 163 U. Pa. L. Rev. 1, 2–5, 10–11 (2014) (arguing "fit problems are more severe now than at any time in the modern regulatory era," in light of "unprecedented congressional paralysis" and fast-moving technological and scientific developments in fields of energy and environmental protection and beyond).

149. See id. (noting "problem of static statutes . . . is profoundly important at a time of rapid change and limited congressional productivity"); see also, e.g., Jeffrey E. Shuren, The Modern Regulatory Administrative State: A Response to Changing Circumstances, 38 Harv. J. on Legis. 291, 327–29 (2001) (arguing agencies need broad judicial deference to adapt older statutes to changing social circumstances).

150. See, e.g., Joseph S. Nye, Jr., The Paradox of American Power 78 (2002) (describing globalization as "growth of worldwide networks of interdependence").

151. See supra Part I.B.1.

tions infrastructure for domestic law enforcement and intelligence agencies makes urgent for the executive the question of how to advance these missions in a globalizing telecommunications age. But the inflow of foreign capital also has presented the executive with an opportunity to exercise greater control over the telecommunications industry under the FCC's licensing authority.

Technology also makes pooling more feasible. It is easier than ever before to aggregate, store, analyze, and disseminate information. These technological changes make possible, for example, the NSA–FBI pooling under section 702 of FISA. While NSA formally acquires the data, it is today technologically feasible for the FBI also to receive mirror images of these vast datasets and to use them, in combination with other FBI datasets, to run individuated searches in the service of the FBI's domestic law enforcement mission.[152]

Finally, technological change creates or exacerbates pressures for high-speed governance and more flexible administration.[153] Pooling in this regard might be even more valuable for the executive than formal reorganization authority would be. For pooling allows a more agile reconfiguring of the administrative state.

D. *The New Security*

The features identified to this point have been transsubstantive; they suggest pooling's utility for the executive across a variety of regulatory domains. This section focuses on a particular area of law and policy and its role in emboldening pooling: the administration of security functions.[154] While pooling is certainly not limited to this space, the impact of the security domain warrants separate consideration for two reasons. First, pooling's longstanding resonance in this space combined with the significance of the security domain in contemporary politics elevates pooling's importance for the executive. Second, the nature of security

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152. See supra notes 84–91 and accompanying text.

153. See, e.g., Scheuerman, supra note 147, at xvii (describing "misfit between the fast-paced contours of social life and . . . legislative decision making"); Freeman & Spence, supra note 148, at 3–6 ("When agencies charged with a regulatory mission fail to address new policy problems that arguably fall within their core domain, society may be deprived of important gains—public health, safety, environmental benefits, consumer protection and market efficiencies—which may be hard to recapture later.").

154. Though often "take[n] as a given" in security studies, "national security" is in practice a highly contested and fluid concept. Mariano-Florentino Cuéllar, Governing Security: The Hidden Origins of American Security Agencies 21 (2013) [hereinafter Cuéllar, Governing Security]. Tino Cuéllar has offered an account of how political actors define security to serve strategic ends. See id. at 14 ("Debates about national security . . . can provide different actors in the system with an opportunity to increase their control over the functions of government."). This Article's use of the term "security" does not intend to classify activities in the first instance, but to highlight the content and scope of the domain as currently elaborated by the political branches.

policy is evolving in ways that make pooling a distinctly valuable tool for the executive with consequences for administrative law.

Pooling is a signature facet of the administration of national security functions. Partisanship may inform the extent to which a President seeks to grow administrative capacity, for instance, with respect to environmental policy. But capacity-building in the national security domain appears to transcend party politics; it is a prerogative of the modern presidency. Because Presidents from either party are likely to be forward-leaning on national security, pooling in this area is likely to be a focus of the executive irrespective of which party is in office. As security threats evolve, the executive has strong incentives to take innovative approaches that leverage existing resources in order to augment its capacity to address them. Pooling disparate authorities and bridging compartmentalized expertise across the administrative state become mechanisms to put old resources to new and creative uses. Indeed, it may be that Presidents, even at times when they have been more timid about restructuring generally, have afforded themselves greater leeway in the security context, because security is traditionally conceived of as a core presidential function.[155]

Pooling, moreover, is in part a tool through which the President augments political feasibility through joint structures internal to the executive. In the security domain, the President has a long history of using pooling in this way. Whether motivated purely by political concerns or also by a desire to improve sensitive and high-stakes decisionmaking within the executive branch, pooling is distinctly useful to the executive in the security space where outside-the-executive constraints are less prevalent and in some ways more problematic.[156] Indeed, pooling may even stave off, soften, or shape intervention by the other branches. If pooling is a signature facet of the administration of national security functions, then the rise of national security priorities in politics since the attacks of September 11 and the expansive notion of security in current times augment pooling's salience for the executive.

The nature of security is also evolving in ways that bolster pooling's significance. National security policy and practice is increasingly perva-

155. Presidents might also use the concept of security strategically to enhance their ability to achieve policy ends. See Mariano-Florentino Cuéllar, "Securing" the Nation: Law, Politics, and Organization at the Federal Security Agency, 1939–1953, 76 U. Chi. L. Rev. 587, 598–600 (2009) (describing Roosevelt's use of security concerns to frame and achieve broader domestic reorganization and regulatory agenda).

156. See, e.g., Jon D. Michaels, The (Willingly) Fettered Executive: Presidential Spinoffs in National Security Domains and Beyond, 97 Va. L. Rev. 801, 828–33 (2011) [hereinafter Michaels, Fettered Executive] (describing accountability deficit in national security context). Amy Zegart has argued that "national security agencies live in a much more tightly knit, stable bureaucratic world than their domestic counterparts." Amy B. Zegart, Flawed by Design: The Evolution of the CIA, JCS, and NSC 37 (1999). Whether or not agency interdependence is a distinctive feature of the national security space, it certainly appears that joint structuring, for the reasons discussed in the text, is firmly rooted in it.

sive, ongoing, preventative, and inescapably domestic. The government's current efforts to secure the state depend inextricably on the actions of domestic industry and on the expertise of agencies historically confined to operations abroad. The cyberthreat, today a top security concern, illustrates these transformations. The emergent security domain pushes against existing norms of structural separation among agencies (and potentially between the public and private sectors), creating a need for innovative mechanisms to broach those divides—even in contexts where structural separations are quite entrenched.[157]

In the new security environment, the push for greater collaboration stems in part from the blurring of the local and the global, as detailed above. It is also an innovative response to path dependence.[158] For instance, the NSA's unique cyber capabilities developed over decades and in response to a very different mission. The agency's technical skill and informational advantages emerged from its role breaking code and leading the government's "signals intelligence" operations. The NSA's expertise, honed in the service of its espionage and counterespionage mission, is today crucial to the federal government's efforts to protect critical infrastructure in the United States.[159] And it is exceedingly difficult to recreate that expertise in another agency. Pooling thus offers a distinctly valuable structural response for the executive to the challenges that inhere in the new security environment.

Ongoing preventative domestic activity by federal agencies is at the crux of administrative law. And yet, agencies such as the NSA have traditionally fallen outside of administrative law's gaze.[160] Indeed, national security functions are often exempted from administrative law, both expressly and implicitly.[161] But the relationship between security studies and administrative law was forged against certain assumptions that the new security unsettles: distinctions between an emergency and "steady

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157. See supra notes 57–70 and accompanying text (describing pooling in response to cybersecurity challenge).

158. For helpful definitions of path dependence, see Paul Pierson, Politics in Time 21 (2004) ("[T]he term 'path dependence' . . . refer[s] to social processes that exhibit positive feedback [or self-reinforcement] and thus generate branching patterns of historical development."); Margaret Levi, A Model, a Method, and a Map: Rational Choice in Comparative and Historical Analysis, *in* Comparative Politics: Rationality, Culture, and Structure 23, 28 (Mark Irving Lichbach & Alan S. Zuckerman eds., 1997) ("Path dependence has to mean . . . that once a country or region has started down a track, the costs of reversal are very high. There will be other choice points, but the entrenchments of certain institutional arrangements obstruct an easy reversal of the initial choice.").

159. See supra notes 46–49 and accompanying text.

160. See, e.g., David J. Barron, From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization, 76 Geo. Wash. L. Rev. 1095, 1122 (2008) ("[T]he Department of Defense is itself not an agency with which administrative law scholars usually concern themselves. The bread-and-butter of the field are the health, safety, and welfare agencies.").

161. See Adrian Vermeule, Our Schmittian Administrative Law, 122 Harv. L. Rev. 1095, 1113–28 (2009).

state"; between external-oriented security and domestic security; and between the public and the private sector's roles in securing the nation. Domestic administration is evolving to meet the needs of the new security, with profound implications for administrative law theory and practice. Pooling is one manifestation of this considerable and underexplored transformation. Pooling also is a core mechanism through which this transformation is taking place.

III. STRUCTURAL IMPLICATIONS FOR THE ADMINISTRATIVE STATE

Bill Stuntz famously described the criminal law as "items on a menu from which the prosecutor may order as she wishes."[162] As Stuntz explained, the prosecutor's "incentive is to get whatever meal she wants, as long as the menu offers it. The menu does not define the meal; the diner does."[163] So too inside the administrative state, administrative actors are items on a menu, each with a distinct set of legal, political, and practical ingredients. Congress has created the menu. But pooling enables the executive to define the meal. This Part unpacks pooling's structural implications. It begins inside the executive and then turns to the relationships between the branches.

A. *Inside the Executive*

In Terry Moe's classic account, Presidents deploy two institutional strategies with respect to the agencies—what Moe termed politicization and centralization.[164] Politicization operates at the periphery; it consists of efforts to increase the penetration of political appointees (as opposed to civil servants) inside the agencies.[165] Centralization is the cluster of structural tools that Presidents use to shift effective policymaking to the White House or, more precisely, to the Executive Office of the President.[166] Prominent examples of centralization include rulemaking

162. William J. Stuntz, Plea Bargaining and Criminal Law's Disappearing Shadow, 117 Harv. L. Rev. 2548, 2549 (2004).

163. Id.

164. See Moe, Politicized Presidency, supra note 125, at 244–45 (identifying "increasing centralization of the institutional presidency" and "increasing politicization of the institutional system" as "two basic developmental thrusts" of modern presidencies); Moe & Wilson, supra note 1, at 17–18 ("Two institutional strategies stand out [for the President]: he can 'politicize' and he can 'centralize.'").

165. See Moe & Wilson, supra note 1, at 17–18 (stating politicization consists of appointment of "loyal, ideologically compatible people in pivotal positions"); see also David E. Lewis, The Politics of Presidential Appointments 2 (2008) ("People commonly refer to the act of increasing the number and penetration of appointees as 'politicization.' Politicized agencies, then, are those that have the largest percentage and deepest penetration of appointees.").

166. See Moe & Wilson, supra note 1, at 18 ("Instead of infiltrating the agencies to ensure they make the right kinds of decisions out on the periphery, presidents can use structure to shift the locus of effective decisionmaking authority to the center."); see also Barron, supra note 160, at 1102 ("Centralization involves efforts to shift policymaking

review by the Office of Information and Regulatory Affairs (OIRA) and presidential directives to the agencies.[167] Both politicization and centralization impose a layer of oversight over the bureaucracy—either by "thickening" the cadre of political supervisors within the agencies,[168] or by creating an additional layer of centralized White House review.

Something very different is at work with pooling. Rather than injecting a political perspective into the administrative process, pooling integrates administrative resources. Pooling might be fueled by the White House, but it occurs at the periphery—that is, among the agencies. Unlike centralization and politicization, pooling does not require presidential action; the agencies can, and sometimes do, pool on their own. But as the foregoing has shown, there are many instances of pooling that advance a presidential policy vision. The President has both the incentives and the institutional capabilities to nurture pooling.[169] If

power from the bureaucracy to the Executive Office of the President, which includes the mix of offices and aides that are housed mainly in the White House itself and the Old Executive Office Building.").

167. Regulatory review by OIRA has its proponents. See generally Steven Croley, White House Review of Agency Rulemaking: An Empirical Investigation, 70 U. Chi. L. Rev. 821, 824, 879–82 (2003) (offering "qualified defense" of OIRA based on empirical assessment of rulemaking review focused on period between 1993 to 2000); Christopher C. DeMuth & Douglas H. Ginsburg, White House Review of Agency Rulemaking, 99 Harv. L. Rev. 1075, 1082 (1986) (arguing benefits of White House review include coordinating agency activities to avoid conflicts, establishing presidential priorities, and adjusting rulemaking schedules); Richard H. Pildes & Cass R. Sunstein, Reinventing the Regulatory State, 62 U. Chi. L. Rev. 1, 3–4 (1995) ("Some degree of presidential review of the regulatory process is probably necessary to promote political accountability and to centralize and coordinate the regulatory process."). It also has its opponents. See, e.g., Rena Steinzor, The Case for Abolishing Centralized White House Regulatory Review, 1 Mich. J. Envtl. & Admin. L. 209, 214–15 (2012) ("Centralized review shoves policymaking behind closed doors, wastes increasingly limited government resources, confuses agency priorities, demoralizes civil servants, and . . . costs the nation dearly in lost lives, avoidable illness and injury, and destruction of irreplaceable natural resources."). Scholars have also elaborated how OIRA review might be improved to better serve goals independent of presidential control. See, e.g., Nicholas Bagley & Richard L. Revesz, Centralized Oversight of the Regulatory State, 106 Colum. L. Rev. 1260, 1328–29 (2006) (arguing "centralized agency with command over the regulatory state should make distributional analysis a core feature of its agenda"); Michael A. Livermore & Richard L. Revesz, Regulatory Review, Capture, and Agency Inaction, 101 Geo. L.J. 1337, 1382–83 (2013) (proposing mechanism for OIRA review of agency inaction to better address anticapture concerns). Debates over the use of presidential directives to the agencies have centered on the perhaps elusive line between supervision and direction. See sources cited infra note 355. Other centralization efforts, more sweeping in ambition, were also less successful and ultimately less enduring. For a discussion of President Richard Nixon's efforts effectively to create a shadow bureaucracy within the White House, for instance, see Richard P. Nathan, The Administrative Presidency 7–11 (1983).

168. Lewis, Politics of Agency Design, supra note 145, at 75–86.

169. See Freeman & Rossi, supra note 9, at 1173–74 (discussing President as having strong incentives to manage agency coordination, while White House policy offices and centralized regulatory review provide him with distinct tools for doing so).

politicization and centralization support the President's administrative agenda, pooling is the third leg of the tripod.

1. *The Third Leg of the Tripod.* — Pooling can be centralization and politicization's complement. Opportunities for pooling are enhanced by those two presidential strategies. And opportunities for centralization and politicization are enriched by pooling. The various centralization mechanisms that the presidency has developed promote pooling. The President directs pooling through executive orders and memoranda to the agencies. And his myriad councils and "czars" fuel pooling by convening agencies and by nudging and rewarding their collaborations.[170] Politicization also enables pooling. The President's appointees inside the agencies have strong incentives to engage in pooling when it is desired by the White House or beneficial to presidential priorities. Pooling thus thrives in part because of centralization and politicization. And, as elaborated next, pooling also creates opportunities for greater centralization and more far-reaching politicization.[171]

The pooling narrative, however, is not exclusively—and, quite possibly, not primarily—one of agency independence from the President overborne. It is at least as much a story of administrative fragmentation overcome. It is worth pausing here to distinguish between administrative capacity and presidential control. The President and his staff exercise political control over the bureaucracy by, in effect, displacing the agency's judgment with their own.[172] By contrast, when the President augments administrative capacity, he bolsters the resources available to the agencies themselves to effect policy change.[173]

Recent works have argued that a key centralization tool of the executive—OIRA review—also is better conceived as a capacity builder. On this view, when OIRA reviews an agency's rule, it does not displace the agency's view with the President's. Rather it brings other agency perspectives to bear on the policy judgment.[174] To the extent that centralization

170. See id. at 1175–78.

171. See Cuéllar, Governing Security, supra note 154, at 214 ("Questions about agency architecture—whether legal authority is wielded by a single administrator or a fragmented board, how easy or difficult it is to fire . . . senior agency official[s], what essential missions an agency prioritizes—therefore also inevitably affect the president's power to control the legal machinery of the regulatory state.").

172. See Barron, supra note 160, at 1111.

173. As David Barron explains, "[T]he whole idea of the administrative state . . . was to establish a policymaking apparatus [built on] . . . [n]orms of independence, expertise, and professionalism . . . . But the fact that the New Deal system was administrative in orientation hardly made it antagonistic to President Roosevelt's political goals." Id. Indeed, Roosevelt achieved those policy objectives through a robust expansion of the bureaucracy. Id.

174. See, e.g., Freeman & Rossi, supra note 9, at 1178–81 (discussing regulatory review as mechanism to improve agency coordination to "reduce regulatory burdens and to simplify and harmonize rules"); Livermore & Revesz, supra note 167, at 1367–69 ("Coordination [by OIRA] can thus blunt the capture-induced bias of any one particular agency.");

can be understood in this way, pooling also emerges as its *substitute.* Indeed, pooling in some respects can be a more effective capacity builder than OIRA. Unlike OIRA, pooling has the ability effectively to reconfigure structural divides at the administrative level and over the course of agency policymaking.

The next section first takes up the question of how pooling extends the usual account of the President's structural strategies to bolster political influence, or power over an expert bureaucracy. It then turns to another set of dynamics that pooling brings into view: pooling's ability to displace one agency's legal and political restraints with another agency's discretion.

2. *Power Over.* — Where pooling generates a choice among regulatory regimes—for example, by blending the legal resources available to different agencies—it can amplify opportunities for presidential influence. Pooling agencies designed to be more insulated from White House control with agencies lacking those resiliency features also creates opportunities for greater White House influence.

a. *Teeing Up Presidential Choice.* — Pooling can shift policymaking to the White House by generating a choice among legal authorities. The High-Value Interrogation Group, or "HIG," for example, was created pursuant to presidential order and is overseen by the National Security Council inside the White House.[175] The HIG interrogates "high-value" terrorist suspects both domestically and abroad.[176] The unit is headed by the FBI, with two deputies—one from the CIA and one from the DoD.[177] The choice *among* administrative toolkits is not clearly the province of any one agency. And many decisions in practice appear to be made by the President and his White House staff.[178]

Legal scholars (and courts) have long recognized a role for the President where Congress creates seemingly conflicting jurisdictional

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Cass R. Sunstein, Commentary, The Office of Information and Regulatory Affairs: Myths and Realities, 126 Harv. L. Rev. 1838, 1840 (2013) (emphasizing OIRA's role as "information aggregator," rather than simply vehicle for executive agency rulemaking).

175. See Anne E. Kornblut, New Unit to Question Key Terror Suspects: Move Shifts Interrogation Oversight from the CIA to the White House, Wash. Post (Aug. 24, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/08/23/AR2009082302598.html (on file with the *Columbia Law Review*) (discussing Obama's signoff on creating HIG as "elite team of interrogators to question key terrorism suspects").

176. See id. (discussing HIG members' "authority to travel around the world to talk to suspects"); Tara McKelvey, Boston Bombings: How to Interrogate a Suspected Terrorist, BBC News (Apr. 23, 2013), http://www.bbc.com/news/magazine-22227704 (on file with the *Columbia Law Review*) (discussing HIG member's involvement in interviewing domestic suspects).

177. See Kimberley Dozier, WH Adviser: Interrogation Team Questions Shahzad, NBC News (May 31, 2011, 6:02 AM), http://www.nbcnews.com/id/37225759 (on file with the *Columbia Law Review*).

178. See Kornblut, supra note 175 (noting HIG has "shift[ed] the center of gravity away from the CIA and . . . [to] the White House").

schemes.[179] In the classic example, two agencies claim that, under their enabling statutes, they each have jurisdiction to administer a particular program or to regulate a particular activity. The interstatutory (or, sometimes intrastatutory) conflict calls for an arbiter outside of the affected agencies.[180]

Pooling is distinct from this conventional practice in significant respects. In the usual account, the need to resolve an interstatutory (or intrastatutory) conflict is an inherent limit on the White House's reach. And the statutory terms supply a relevant framework for navigating the interagency tension. Put differently, regulatory redundancy is both a predicate for and a constraint on executive action. With pooling, however, the President's canvas is the entire administrative state. The opportunities to choose among regulatory tools are no longer grounded in, or constrained by, a particular statutory scheme.

b. *Encroaching on Agency Independence.* — Pooling executive and independent agencies also creates opportunities for White House influence that do not exist where an independent agency acts alone. The strategies of centralization and politicization are both limited when it comes to "the independents." Politicization is weakened by the requirement of for-cause removal.[181] With respect to centralization, the independent agencies are excluded from the mandatory requirements of OIRA regulatory review, and they generally are excluded from presidential orders directing specific agency action.[182]

These constraints have not extended to pooling. For instance, a presidential task force to combat financial fraud combines both executive and independent agencies. Obama created the Financial Fraud Enforcement Task Force by executive order.[183] It is chaired by the Attorney General and includes a number of independent agencies such as the Securities and Exchange Commission (SEC).[184]

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179. See, e.g., Peter L. Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch, 84 Colum. L. Rev. 573, 588 (1984) (describing how President resolves jurisdictional disputes through Office of Management and Budget).

180. See id.

181. See Lisa Schultz Bressman & Robert B. Thompson, The Future of Agency Independence, 63 Vand. L. Rev. 599, 610 (2010) ("[Independent agencies] are generally run by multi-member commissions or boards, whose members serve fixed, staggered terms, rather than a cabinet secretary or single administrator who serves at the pleasure of the President[.]").

182. Whether independent agencies may be brought within the President's regulatory review process is an open legal question. See Adrian Vermeule, Conventions of Agency Independence, 113 Colum. L. Rev. 1163, 1215 (2013) [hereinafter Vermeule, Conventions] (noting "it is unclear whether [independent agencies] are legally obliged to" submit their anticipated legislation for clearance). At least as a matter of longstanding practice, the independent agencies have been excluded from this review. See id.

183. See Exec. Order No. 13,519, 3 C.F.R. 271, 271 (2010) (establishing interagency Financial Fraud Enforcement Task Force).

184. Id. at 272.

Independent–executive agency structures can augment White House influence in two ways. Because interagency activity is not clearly the province of any one agency, interagency conduct is inherently more susceptible to White House influence. Indeed, a core function of today's White House policy offices is convening, fostering, and overseeing interagency interactions.[185] In this sense, the White House is in a position to exercise oversight over the joint structure that it would not be in a position to exercise over an independent agency's conduct alone. Combining executive and independent agencies also augments presidential influence indirectly. The joint structure creates opportunities for the executive agency to influence the independent agency. And that executive agency is more amenable to White House control.[186]

Pooling's implications for presidential control in this regard may be taken one step further. As some scholars have recently argued, various features of agency design—including whether the agency has litigation authority or a direct channel to Congress for budgetary review—have a considerable impact on presidential control.[187] Indeed, Richard Revesz and Kirti Datla have suggested that, in light of these various design features, agency independence should be viewed as a continuum, not a binary.[188] Pooling enables the President to combine agencies designed to be less amenable to White House pressures—for example, agencies with independent litigation authority or budgets—with agencies lacking those resiliency features. Pooling thus highlights an additional structural strategy through which Presidents can calibrate their influence over the bureaucracy.

Pooling's capacity to displace administrative judgment with that of the President, however, tells only part of the story. For pooling also shows a different way in which presidential administration interacts with expertise inside the administrative state.

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185. See Freeman & Rossi, supra note 9, at 1176–78 (noting "proliferation in recent years of councils, task forces, and high-level offices within the Executive Office of the President . . . aimed at promoting interagency 'collaboration'").

186. J.R. DeShazo and Jody Freeman have observed that congressional schemes that empower executive agencies to influence independent agencies may diminish the independent agency's insulation from presidential influence. DeShazo & Freeman, supra note 9, at 2300–01; see also Marisam, President's Agency Selection Powers, supra note 11, at 823 ("[P]residents continually exercise statutory and constitutional powers to select which agencies act, and the President's use of these powers is expanding and creating new areas of legal contestation.").

187. See Barkow, Insulating Agencies, supra note 9, at 42–64 (identifying set of design tools well suited to ameliorate problem of capture in context of asymmetrical political pressure); Datla & Revesz, supra note 1, at 784–812 (identifying seven indicia of independence in agency design, ranging from removal protection to litigation and budget authority).

188. See Datla & Revesz, supra, note 1, at 824–27 (arguing conception of agencies as either "independent" or "executive" is wrong because they cannot be divided "into categories based on their common structural or functional features").

3. *Power To.* — Pooling integrates administrative perspectives. Bureaucracy is built in part on the idea of compartmentalized authority and expertise.[189] But pooling breaks down those separations. Pooling invites administrative law theory to confront those very different insulation considerations.[190]

Legal scholars in recent years have emphasized how institutional actors on either side of a structural divide or boundary interact in the administrative space—for example, federal agencies collaborate with state agencies,[191] or public and private actors jointly engage in administration.[192] Policy-specific accounts in the legal scholarship, meanwhile, have drawn attention to "convergence" trends—or the idea that traditionally insulated domains of public law, such as criminal law and immigration, are increasingly interacting.[193] Putting these literatures in dialogue reveals structural boundaries within the bureaucracy.[194]

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189. See Max Weber, The Essentials of Bureaucratic Organization: An Ideal Type Construction, *in* Reader in Bureaucracy 19, 19–21 (Robert K. Merton et al. eds., 1952) (describing bureaucracy as divided into spheres of competence and governed by principle of hierarchy).

190. In his study of the convergence of criminal law and immigration law, David Sklansky has explored a development that he terms "ad hoc instrumentalism." See Sklansky, supra note 97, at 161. Sklansky explains that ad hoc instrumentalism is a way of thinking about law or legal institutions that "places little stock in formal legal categories, but instead sees legal rules and legal procedures simply as a set of interchangeable tools. In any given situation, . . . officials are encouraged to use whichever tools are most effective against the person or persons causing the problem." Id. Sklansky describes this development as "ad hoc as opposed to systematic"; it accretes discretion to low-level officials, who are "encouraged to select among enforcement regimes opportunistically, on a case-by-case basis." Id. at 161–63. Pooling highlights how this more instrumental approach to legal categories or institutions also operates at a systemic and structural level.

191. See, e.g., Gluck, supra note 5, at 615–19 ("[T]here is a critical, state–federal interagency relationship that not only is complex but also is where the central issues of interpretation are being worked out.").

192. See, e.g., Jody Freeman, Collaborative Governance in the Administrative State, 45 UCLA L. Rev. 1, 6 (1997) (proposing regulatory model focused on "adaptive problem solving" between agencies and regulated parties); Michaels, Privatization's Pretensions, supra note 5, at 719 (arguing government outsourcing to private contractors enables executive to circumvent legal and political constraints). Anne Joseph O'Connell has studied organizational units that themselves straddle a boundary—such as government corporations (which are part public, part private) or entities like the National Guard that straddle the federal–state divide. See Anne Joseph O'Connell, Bureaucracy at the Boundary, 162 U. Pa. L. Rev. 841, 843–52 (2014) (offering explanatory theory of agencies that exist at boundary and exploring legal issues raised by these designs).

193. See, e.g., Sklansky, supra note 97, at 159 & n.8 (exploring causes and implications of "merged field of 'crimmigration'"). For accounts of convergence in other legal domains, see, e.g., Anthony S. Barkow & Rachel E. Barkow, Introduction, *in* Prosecutors in the Boardroom, supra note 97, at 1, 1–5 (identifying trend of prosecutors leveraging adjudicative authority to engage in corporate regulation together with enforcement agencies); Chesney, supra note 81, at 539–44 (analyzing implications of convergence among military and intelligence activities and institutions).

194. There is a filial relation here with the "separation of functions" literature—an earlier genre of insulation considerations in administrative law. Separation of functions

For example, there is a longstanding divide between the national security agencies, such as the NSA, which have focused on foreign targets and external threats, and the domestic security apparatuses, such as the FBI.[195] Just as the federal–state boundary or the public–private boundary developed against distinct constitutional norms, so too have boundaries emerged against this backdrop inside the administrative state. The external security–internal security divide, for instance, stems from a mix of factors including legal rules at the intersection of structural constitutionalism and individual rights[196] and the development of congressional oversight regimes and political pressures resulting from specific instances of historical abuse.[197] It is reflected in and, in turn, reinforced by statutory regimes codifying and amplifying the separation.[198]

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implicates the concern that the investigatory or standard-setting arm of an agency should not also adjudicate individual disputes arising out of those investigations or standards. See, e.g., Michael Asimow, When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies, 81 Colum. L. Rev. 759, 759–61 (1981) (noting principle bars from participation in administrative-agency decisions "staff members who have prepared or presented evidence or argument on behalf of or against a party to an administrative proceeding"). The distinction arises out of due process and individual fairness considerations that inhere in the more court-like nature of the adjudicatory function. It is reflected in the provisions of the Administrative Procedure Act, as well as in specific enabling statutes. See 5 U.S.C. § 554(d) (2012) ("An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not . . . participate or advise in the decision . . . ."). But the focus of separation-of-functions theory has remained quite narrow and generally limited to structural and procedural protections of the investigatory–adjudicatory distinction.

195. Philip Bobbitt refers to the "separation between the domestic and the international" as one of "[a] half-dozen basic antinomies [that] provide the foundation for the American nation state's approach to the collection and use of intelligence." Philip Bobbitt, Terror and Consent 296–97 (2009); see also Gregory F. Treverton, Reshaping National Intelligence for an Age of Information 180 (2001) (noting traditional intelligence community distinction "between foreign and domestic").

196. The so-called *Keith* case considered whether the warrant requirement of the Fourth Amendment limits the executive's power "to authorize electronic surveillance in internal security matters" without prior court approval. United States v. U.S. District Court (*Keith*), 407 U.S. 297, 299–308 (1972). The Court in *Keith* held that intelligence collection *as to domestic security* required a judicial warrant. The Court reserved the question whether the Fourth Amendment requires judicial authorization for foreign intelligence collection, as distinct from domestic security surveillance. Id. at 308, 321–22. By reserving that question, and concluding that the warrant requirement applied to internal security collection, the Court preserved a potential legal divide between internal and external security functions.

197. As Zegart has emphasized, when public attention has turned to the external security agencies, it generally has focused on their interaction with U.S. citizens or the domestic public. See Zegart, supra note 156, at 215–16. The comprehensive investigations of the Church Committee and the more recent emphasis on the executive's post-9/11 surveillance activities illustrate this dynamic. See, e.g., id. at 195–200 (discussing Church Committee investigation).

198. The National Security Act of 1947, for instance, proscribes the CIA from exercising "internal security functions." 50 U.S.C. § 403-4a(d)(1) (2012). A key reason for the

Through pooling, the executive can use administrative design to enmesh regulatory regimes—to moderate or mediate boundaries, sometimes longstanding, between administrative actors. Pooling is a mechanism through which the executive can create or amplify convergence.

a. *Mediating Separation Values and Collaboration Needs.* — Pooling, in some instances, will enable the executive to thread the needle: to use the joint (but not consolidated) structure to preserve a measure of structural separation and, as significantly, to signal a commitment to a particular interagency divide but still facilitate bold collaborations. And yet, pooling arrangements are themselves boundary shifting. Through pooling, then, the executive may signal a commitment to, but simultaneously also soften, the boundaries inside the administrative state.[199]

A significant line of scholarship has viewed structural change as symbolic, with no real effect on the exercise of administrative power.[200] Unlike symbolic structuring, pooling is no empty gesture. It does in fact preserve to a point—though it also inevitably moderates—the structural separations at issue.

Consider the interagency memorandum of agreement on cybersecurity. That pooling arrangement appears to straddle two significant goals: protecting against NSA encroachment into the domestic sphere, while leveraging the distinct expertise that only the NSA possesses to confront a significant security threat.[201] The push for innovative collaborations bringing the NSA into the domestic space in cybersecurity stems from a variety of factors including path dependence and the instability of the

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provision was to prevent Gestapo-like intermingling of internal and external security. See Kris, supra note 98, at 496–97 n.62 ("The purposes of [50 U.S.C. § 403-4a(d)(1)] are to prevent the CIA from exercising the kind of combined internal security and external intelligence functions that have been characteristic of intelligence agencies in police states and to prevent jurisdictional conflicts between the CIA and the FBI."); see also Gregory F. Treverton, The Century Foundation Homeland Security Project, Intelligence, Law Enforcement, and Homeland Security 1 (Aug. 21, 2002), available at http://webzoom.freewebs.com/swnmia/treverton-intelligence.pdf (on file with the *Columbia Law Review*) (noting President Truman, in creating CIA, "worried openly about a 'Gestapo-like organization'"). See generally William N. Eskridge, Jr. & John Ferejohn, A Republic of Statutes: The New American Constitution 165–170 (2010) (describing process of "statutory entrenchment").

199. Abbe Gluck has pointed to analogous trends in the federalism context, focusing on the congressional designer. Elaborating on what she terms "field-claiming federalism," Gluck suggests that "Congress might design statutes around state-based implementation for the purpose of *gradual field entry* into areas traditionally dominated by state law." Gluck, supra note 5, at 572. Gluck emphasizes the interplay of federalism-respecting and boundary-shifting moves in this statutory space: "Even by doing so in a manner that seems respectful of preexisting state authority, [the statutory scheme] make[s] clear that the federal government *can* regulate in these areas and that it is appropriate for the federal government to do so." Id. at 587.

200. See, e.g., Murray Edelman, The Symbolic Uses of Politics 1–4 (1985) (suggesting "most cherished forms of popular participation in government are largely symbolic" and "only in a minor degree is it participation in policy formation").

201. See supra notes 45–70 and accompanying text.

foreign–domestic distinction.[202] This is in part because, in our globalized world, societal problems are genuinely interdependent in ways that cut against preexisting norms of compartmentalized regulatory action.[203]

Pooling no doubt moderates the structural separation—that is, the NSA's insulation from the domestic sphere—but it might also render more viable a softer version of it. The pooled structures involving the DHS and NSA appear to have displaced an alternative structural vision, which would have placed the NSA in the lead for domestic cybersecurity.[204] Pooling has instead allowed the executive to signal a commitment to confining the role of the intelligence agency in the cybersecurity domain, while still leveraging the NSA's distinctive expertise. Perhaps counterintuitively, then, even as pooling enables the executive to signal a commitment to some form of structural separation, it simultaneously pushes on those very bounds in the service of administrative capacity building.

The Gordian Knot that this pooling arrangement unravels does not concern a separation between the President and the bureaucrat (the conventional politics-versus-expertise framing of intraexecutive dynamics). Instead, at issue is pressure to insulate—and yet leverage—particular agency expertise. Pooling, as a political matter, might enable deals that both soften and, to a point, sustain administrative boundaries. But pooling also renders more fragile legal barriers inside the bureaucracy.

b. *Circumventing Legal Constraints.* — Pooling can make less resilient the legal safeguards pursuant to which individual agencies carry out their missions. Each agency's toolkit is not only a set of resources; it also is a set of restraints, including specific legal checks on that agency's conduct. Pooling can distort, soften, or even lift some of those agency-specific constraints.

We see this, for example, in the "crimmigration" context. Pooling creates a toolkit different in kind from the set of tools available to either immigration authorities or criminal law enforcement on their own. By pooling with the Immigration and Customs Enforcement (ICE), law

202. See supra note 158 and accompanying text.

203. See supra notes 147–148 and accompanying text.

204. That structural arrangement has been pressed by former officials. See, e.g., Mike McConnell, Op-Ed., Mike McConnell on How to Win the Cyber-War We're Losing, Wash. Post (Feb. 28, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/02/25/AR2010022502493.html (on file with the *Columbia Law Review*) ("The NSA is the only agency in the United States with the legal authority, oversight and budget dedicated to breaking the codes and understanding the capabilities and intentions of potential enemies."). It has also been proposed in several cybersecurity bills that the Obama Administration declined to support. See Office of Mgmt. & Budget, Exec. Office of the President, Statement of Administration Policy: H.R. 3523—Cyber Intelligence Sharing and Protection Act 1 (Apr. 25, 2012), available at http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saphr3523r_20120425.pdf (on file with the *Columbia Law Review*) (advancing position that treatment of domestic cybersecurity is within civilian sphere rather than intelligence sphere).

enforcement agencies like the FBI can investigate crimes unconstrained by the legal requirements that would otherwise govern their arrests, interrogations, and detentions.[205] The consequences of pooling between the FBI and immigration authorities was perhaps most stark in the aftermath of September 11, when a joint task force between the FBI and what was then the Immigration and Naturalization Service (INS) resulted in the detention of nearly 1,000 mostly Middle Eastern individuals by the INS in the service of an FBI investigation.[206] The detainees were placed on an "INS Custody List" and detained by the immigration authority when the FBI was "unable to determine" whether they were connected to terrorism.[207]

Although pooling between the FBI and INS (today, ICE) accelerated in the aftermath of September 11, the agencies' resort to pooling to work around agency-specific legal restraints is not new. *Abel v. United States*[208] provides a vivid account of this dynamic. The FBI was investigating Rudolf Abel on potential espionage charges, but lacked the probable cause required for the FBI to search or arrest him.[209] Instead, the INS arrested Abel on deportation grounds and searched his hotel room, providing the FBI with the fruits of the search.[210] Abel was held by the INS at a detention center for several weeks until the FBI developed the evidence necessary to arrest him and ultimately to try him for espionage.[211]

Pooling loosens agency-specific restraints in the financial regulatory context as well. There is a trend toward greater pooling between civil enforcement agencies like the SEC and criminal prosecutors at the

205. See Eagly, supra note 97, at 1304–39 (showing how immigration agency involvement affects rights in the criminal process in pretrial detention, *Miranda*, search and seizure, and sentencing).

206. See Office of the Inspector Gen., U.S. Dep't of Justice, The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks 2 (2003) [hereinafter DOJ IG Report], available at http://www.justice.gov/oig/special/0306/full.pdf (on file with the *Columbia Law Review*) (finding INS detained 762 aliens as result of "PENTTBOM" (Pentagon, Twin Towers Bombing) investigation); see also David Cole, The New McCarthyism: Repeating History in the War on Terrorism, 38 Harv. C.R.-C.L. L. Rev. 1, 24–25 (2003) ("[E]ven a conservative estimate would number the detentions at approximately two thousand as of November 2002, fourteen months after the campaign began."). At the time, the INS and the FBI were both components of the DoJ. But the INS had previously been housed in the Department of Labor and is today ICE, a component of the DHS.

207. DOJ IG Report, supra note 206, at 2.

208. 362 U.S. 217 (1960).

209. Id. at 222–25.

210. See id.

211. See id. At trial, Abel sought unsuccessfully to exclude the evidence collected by the INS during the hotel-room search. See id. at 228 ("[T]o hold illegitimate, in the absence of bad faith, the cooperation between I.N.S. and F.B.I. would be to ignore the scope of [their] rightful cooperation . . . ."). But see id. at 245 (Douglas, J., dissenting) ("F.B.I. agents wore the mask of I.N.S. to do what otherwise they could not have done.").

DoJ.[212] The trend may be fueled by recent presidential task forces on financial crimes.[213] Pooling enables criminal prosecutors at the Justice Department and regulators like the SEC to work collaboratively in response to complex financial crimes.[214]

Yet pooling also can enable criminal prosecutors, working with and through the SEC, to collect information that the criminal investigators would not have been able to obtain on their own given the stronger constitutional protections and distinct rules that operate in the criminal law space.[215] In one case, a trial court found that DoJ prosecutors "spent years hiding behind the [SEC's] civil investigation,"[216] refraining from disclosing the criminal investigation to defendants and instead gathering evidence through the SEC because "[t]he government was concerned that the presence of a criminal investigation would halt the successful discovery by the SEC [and] witnesses would be less cooperative and more likely to invoke their constitutional rights."[217]

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212. See, e.g., Garrett, Collaborative Organizational Prosecution, supra note 97, at 154 ("The relationship between federal regulators and prosecutors has grown surprisingly close, and a largely collaborative approach has emerged . . . ."); Walter P. Loughlin, Parallel Civil and Criminal Proceedings, Prac. Litigator, Mar. 2011, at 19, 19 ("The trend toward government coordination of civil and criminal investigations and proceedings to enhance its enforcement efforts is accelerating."); Peter Lattman & Kara Scannell, Slapping Down a Dynamic Duo: SEC and the Justice Department Fight Financial Crime Together, but Is It an Unfair Double-Team?, Wall St. J. (Jan. 25, 2006), http://online.wsj.com/news/articles/SB113815854524255591 (on file with the *Columbia Law Review*) (noting federal judges had "taken [the SEC and DoJ] to task for using what the judges deemed an unfair one-two-punch approach in criminal cases").

213. See Exec. Order No. 13,519, 3 C.F.R. 271 (2010) (establishing Financial Fraud Enforcement Task Force); Exec. Order No. 13,271, 3 C.F.R. 245 (2003) (establishing Corporate Fraud Task Force). But see Daniel Richman, Federal Sentencing in 2007: The Supreme Court Holds—The Center Doesn't, 117 Yale L.J. 1374, 1383 (2008) (describing Corporate Fraud Task Force as "branding device" with little practical effect during Bush Administration).

214. See Daniel Richman, Political Control of Federal Prosecutions: Looking Back and Looking Forward, 58 Duke L.J. 2087, 2119 (2009) [hereinafter Richman, Federal Prosecutions] (arguing, notwithstanding limited practical effect of initial Bush task force, task-force model "offers a helpful framework for coordinating across enforcement agencies and between Washington and the districts").

215. See, e.g., David Gourevitch & Richard M. Gelb, Government Manipulation of Regulatory and Criminal Investigations: A New Judicial Willingness to Scrutinize, A.B.A. Sec. Litig. J., Summer 2006, at 1, 1 (cautioning DoJ prosecutors use regulatory investigations by SEC as "stalking horses to gather evidence for the criminal [case]").

216. United States v. Stringer, 408 F. Supp. 2d 1083, 1088–89 (D. Or. 2006), rev'd in part, vacated in part, 535 F.3d 929 (9th Cir. 2008).

217. Id. at 1087. The district court found that, on those facts, the government had violated the defendant's Fourth and Fifth Amendment rights. See id. at 1084. The Ninth Circuit reversed, holding that a routine "Form 1662," which the SEC provides to all witnesses that it subpoenas, provided the defendant with sufficient notice of the pooled investigation. See *Stringer*, 535 F.3d at 940–41. Form 1662 states that the SEC "often makes files available to other government agencies, particularly the United States Attorneys and state prosecutors [and that] [t]here is likelihood that information supplied . . . will be

Pooling also can enable regulatory agencies to operate without the legal constraints that attach to their ordinary policymaking tools. By participating in the DoJ's negotiation of deferred prosecution agreements, for example, regulatory agencies can impose legal obligations on companies without exercising formal rulemaking power—and, therefore, absent the procedural protections that govern the rulemaking process.[218]

In this sense, pooling does not simply orient discretion that administrative actors already possess. It can *create* discretion by softening the impact of legal checks on the exercise of agency power. Integrating administrative resources creates a toolkit different in kind from the tools available to either agency acting alone.

B. *Congress*

Legal and political theory generally regards Congress as the designer-in-chief of the administrative state. Congress generates administrative capacity and supervises the work of administration, including through agency design. Pooling qualifies this narrative. By bridging a fragmentary bureaucracy, the executive can generate capacity that would not otherwise exist. Pooling thus becomes a substitute, concededly imperfect, for capacity building through legislation. Pooling also challenges a central analytic claim—that Congress controls future agency outputs through legislation designing the agency's structure and process. Pooling reveals a shape-shifting bureaucracy, reconfiguring its own organizational and procedural boundaries from within.

1. *Pooling Generates Capacity Without Congress.* — The executive's resort to administration to effect policy change, particularly where legislative achievement becomes less viable, is a dynamic well trodden in the administrative law scholarship.[219] That literature has focused on centralization tools like presidential directives to the agencies to undertake (or to decline to take) particular administrative action, and regulatory review by the White House.[220]

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made available to such agencies where appropriate." Id. at 934 (quoting Form 1662) (internal quotation mark omitted).

218. Brandon Garrett describes the IRS's involvement in a deferred prosecution agreement involving the use of tax shelters by KPMG. See Garrett, Collaborative Organizational Prosecution, supra note 97, at 167–68. The deferred prosecution agreement included detailed factual findings on the criminality of specific tax shelters. Id. at 167. Garrett explains the admissions "were presumably included to use criminal adjudication to further establish the illegality of the shelters," enabling the IRS to "avoid the regulatory process," and the procedural requirements that attend to it. Id. Garrett observes, however, that criminal procedure rules in subsequent prosecutions limited the reach of those admissions. Id. at 168.

219. See, e.g., Kagan, supra note 1, at 2311–13 (noting increased difficulty of passing legislation makes presidential administration more attractive to modern Presidents).

220. See id. at 2295–96 (describing how Clinton used presidential directives to "spur[] administration initiatives"); see also sources cited supra note 167 (commenting on, criticizing, or defending use of presidential directives).

Part of what makes pooling distinctive, however, is the executive's ability to generate power of administration not otherwise available to any single administrative actor. To be sure, at the margins, the scope of plausible authority each agency can exercise is pliable. Presidential directives may energize a given agency's mission, and legal interpretation may press the bounds of what is permissible.[221] But the synergistic potential of pooling is different in degree, if not in kind.

The joint efforts by the FCC and the federal agencies constituting Team Telecom, for instance, enable the executive to augment its law enforcement and surveillance capabilities. The requirements that Team Telecom imposes through the Network Security Agreements effectively *regulate* the cable carriers. But while legal leverage is supplied by the FCC's licensing authority, Team Telecom's effective power to so regulate the carriers is not rooted in any legislative scheme.[222]

Pooling's ability to create regulatory space is illuminated by comparing Team Telecom's effective jurisdiction to the formal jurisdiction that the same agencies have through participation in another structure that has been codified by Congress—the Committee on Foreign Investment in the United States (CFIUS). Congress has authorized CFIUS to review proposed foreign acquisitions that could result in the transfer of control of a U.S. business to a foreign entity in order to determine the effects of such a transaction on national security.[223] The members of Team Telecom—the DoD, the DoJ, and the DHS—are also members of CFIUS (though CFIUS includes additional agencies as well).[224] Congress has authorized CFIUS to enter into "mitigation agreements," pursuant to which the acquirer agrees to certain conditions to mitigate national security concerns.[225] But CFIUS lacks jurisdiction over so-called greenfield investments (or startups), where there is no transfer of control over an

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221. See, e.g., Freeman & Spence, supra note 148, at 3–5, 64–67 (providing examples from energy and environmental law of "administrative flexibility" when agencies "adapt[] old statutes to new problems" and highlighting how alignment of President's agenda and agency mission can spur "creativity and initiative").

222. See supra notes 30–47 and accompanying text.

223. See 50 U.S.C. app. § 2170(b)(1)(B) (2012) ("If [CFIUS] determines that the covered transaction is a foreign government-controlled transaction [CFIUS] shall conduct an investigation of the transaction . . . ."); see also The Committee on Foreign Investment in the United States (CFIUS), U.S. Dep't of the Treasury, http://www.treasury.gov/resource-center/international/Pages/Committee-on-Foreign-Investment-in-US.aspx (on file with the *Columbia Law Review*) (last updated Dec. 20, 2012, 1:37 PM) (describing CFIUS's role).

224. See Composition of CFIUS, U.S. Dep't of the Treasury, http://www.treasury.gov/resource-center/international/foreign-investment/Pages/cfius-members.aspx (on file with the *Columbia Law Review*) (last updated Dec. 1, 2010, 8:08 AM) (listing agencies whose heads make up membership of CFIUS).

225. See 50 U.S.C. app. § 2170(*l*)(1)(A) (allowing CFIUS or agency on behalf of CFIUS to negotiate and enter into agreements to "mitigate any threat to the national security of the United States"); see also David Zaring, CFIUS as a Congressional Notification Service, 83 S. Cal. L. Rev. 81, 84–85 (2009) (discussing mitigation agreements entered into under CFIUS).

existing U.S. business.[226] And CFIUS's authority to require mitigation conditions is limited to threats to national security.[227]

Team Telecom's effective power, by contrast, stems not from CFIUS but from the FCC's authority to review and grant licenses in the "public interest" under the Communications Act.[228] Team Telecom reviews greenfield investments in addition to transfers of control,[229] and the security agreements it negotiates can consider aspects of public safety beyond national security.[230] Team Telecom's effective "jurisdiction," then, is distinct from CFIUS, the closest statutory analog.[231]

Pooling thus enables the executive to create capacity without Congress. Pooling also poses challenges for core tools through which Congress superintends the administrative state.

2. *Pooling Is a Mechanism of Bureaucratic Drift.* — Administrative design theory owes its current incarnation in large part to positive political theory. That theory conceptualizes Congress's delegation of authority to agencies as a principal–agent problem: How can Congress (the principal) bring its agent (the agency) into line with its policy preferences?[232] This problem implicates two types of uncertainty—what theorists have termed bureaucratic drift and coalitional drift. Bureaucratic drift is the difference between the policy preferences of Congress and

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226. See, e.g., Review of Foreign Ownership Policies for Common Carrier and Aeronautical Radio Licensees Under Section 310(b)(4) of the Communications Act of 1934, as Amended, 28 FCC Rcd. 5741, 5760–61 (2013) ("[CFIUS] does not review start-up (or 'greenfield') investments.").

227. See 50 U.S.C. app. § 2170(b)(1)(A), (f) (stating President acting through CFIUS may review transactions to determine effects on national security and detailing factors to consider).

228. See 47 U.S.C. §§ 214(d), 310(d) (2012) (conditioning authorizations upon FCC finding that action is in public interest).

229. See, e.g., SatCom Sys., Inc., 14 FCC Rcd. 20,798, 20,798–99 (1999) (granting application to provide mobile satellite service via Canadian-licensed satellite).

230. See, e.g., id. at 20,823–25.

231. Team Telecom's use of the FCC's licensing authority to expand the federal executive's regulatory reach has raised concerns within the FCC. See, e.g., id. at 20,847–49 (statement of Furchtgott-Roth, Comm'r) (arguing "if the DOJ or FBI have [security] concerns, they should utilize their independent authority to address those issues" and, "[i]f they lack such authority, then the Administration should turn to Congress for the appropriate delegation of authority"); see also AT&T Corp., 14 FCC Rcd. 19,140, 19,225–26 (1999) (statement of Furchtgott-Roth, Comm'r) (arguing conditions adopted as part of security agreement "are not voluntary conditions, they are the Commission's (and now other government agencies') price for doing business through license modifications" and that "[s]uch a process vastly exceeds the role of these other agencies as envisioned by Section 214").

232. See, e.g., Barry R. Weingast, The Congressional-Bureaucratic System: A Principal Agent Perspective (with Applications to the SEC), 44 Pub. Choice 147, 153–58 (1984) (developing principal–agent framework); see also John D. Huber & Charles R. Shipan, Deliberate Discretion? The Institutional Foundations of Bureaucratic Autonomy 26 (2002) ("The principal–agent framework . . . has played an extremely prominent and powerful role in [the] institutional approach to relations between politicians and bureaucrats.").

the policy preferences of the agency.[233] Coalitional drift is the difference between the policy preferences of the enacting Congress and the policy preferences of a future Congress.[234]

Pooling is a tool through which the executive can achieve policy objectives distinct from those Congress set out to achieve in the initial allocation of power. It can facilitate bureaucratic drift. Agencies can use resources designed for a particular purpose to achieve a different policy objective.

As with other mechanisms of bureaucratic drift, Congress can still respond to pooling, including to ratify or prohibit it. For example, Congress embraced the DHS–NSA collaboration in the cybersecurity context. In 2012, Congress included a provision in the National Defense Authorization Act to mandate "interdepartmental collaboration" between the DHS and NSA on cybersecurity.[235] In introducing the amendment, Senator John McCain indicated that it was intended to codify the 2010 cybersecurity memorandum of agreement between the two agencies.[236] Congress also can terminate pooling after it has occurred (when pooling is visible to Congress). But the status quo has been changed. And Congress will now need to overcome its own collective action hurdles to alter the executive's design.[237]

In part because Congress's ability to correct bureaucratic drift after it occurs is often quite difficult, theorists have looked for ways in which

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233. Murray J. Horn & Kenneth A. Shepsle, Commentary on "Administrative Arrangements and the Political Control of Agencies": Administrative Process and Organizational Form as Legislative Responses to Agency Costs, 75 Va. L. Rev. 499, 501–02 (1989) (bureaucratic drift occurs when "policy implemented by bureaucratic agents [differs] from that enacted by the coalition"); see also Jonathan R. Macey, Organizational Design and Political Control of Administrative Agencies, 8 J.L. Econ. & Org. 93, 94 (1992) (defining bureaucratic drift as "elected officials' concern that administrative agencies will act in ways contrary to their interests[,] [which] prompts them to develop complex rules to control the future conduct of agencies").

234. See Macey, supra note 233, at 94 ("[B]ecause of shifting preferences, monitoring by subsequent political coalitions will not be a reliable tool for protecting previously obtained political gains.").

235. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1090, 125 Stat. 1298, 1603–04 (2011).

236. See 157 Cong. Rec. S8050 (daily ed. Nov. 30, 2011) (statement of Sen. McCain) (identifying memorandum of agreement between DoD and DHS in explaining proposed amendment).

237. See Moe & Howell, supra note 20, at 145 ("[A]genda control[] rooted . . . in unilateral action[] gives the president what he wants immediately—a shift in status quo, and perhaps a new increment to his power—and depends for its success on Congress's not being able to pass new (and veto-proof) legislation that would overturn or change it." (emphasis omitted)).

As a means to negotiate around limits that inhere in statutory design, pooling also may be a mechanism for coalitional drift. By responding to contemporary societal challenges, pooling in some instances may advance interests of the sitting legislature as well. Thus, while pooling enables unilateral administrative redesign by the executive, the power play will not always be zero sum for the current political bodies.

Congress can exercise ex ante control over administration. Here, again, pooling complicates a central narrative.

An influential argument in administrative law theory is that Congress exercises ex ante control over the bureaucracy through administrative design. The claim was initially advanced by political scientists Matthew McCubbins, Roger Noll, and Barry Weingast ("McNollgast"),[238] and it has been refined by others.[239] Through a mix of structural and procedural controls enacted in legislation, the argument goes, Congress ameliorates bureaucratic drift. Administrative design injects the interest groups that formed the enacting coalition into the administrative process, thereby enabling those interest groups to influence the agency's policy outputs and to alert Congress when issues warranting its oversight arise.[240] As McNollgast explains, "By structuring who gets to make what decisions when, as well as by establishing the process by which those decisions are made, the details of enabling legislation can stack the deck in an agency's decision-making."[241]

Pooling complicates this account. It suggests that at least some of the action occurs through joint structures that bridge those initial agency

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238. See McCubbins, Noll & Weingast, Administrative Procedures, supra note 13, at 243–44 (arguing administrative procedures can be effective mechanism to induce bureaucratic compliance).

239. See, e.g., DeShazo & Freeman, supra note 9, at 2289 ("Congress [can] rely specifically on interagency lobbying as a mechanism of control."); Macey, supra note 233, at 93 (arguing political actors can manipulate organizational design of agencies to keep current political understanding in place).

240. See McNollgast, The Political Economy of Law, *in* 2 Handbook of Law and Economics 1651, 1710 (A. Mitchell Polinsky & Stephen Shavel eds., 2007).

241. Id. Scholars have challenged McNollgast's thesis on a variety of empirical and theoretical grounds. See, e.g., Steven J. Balla, Administrative Procedures and Political Control of the Bureaucracy, 92 Am. Pol. Sci. Rev. 663, 671 (1998) (showing empirical assessment of notice-and-comment process in context of Medicare physician-payment reform did not support deck-stacking thesis); Glen O. Robinson, Commentary on "Administrative Arrangements and the Political Control of Agencies": Political Uses of Structure and Process, 75 Va. L. Rev. 483, 484 (1989) ("[McNollgast's] model is too general in its description of processes and structure to permit useful generalizations about how they can be used to 'stack the deck' in favor of specific political interests."); David B. Spence, Managing Delegation Ex Ante: Using Law to Steer Administrative Agencies, 28 J. Legal Stud. 413, 415 (1999) (analyzing two sets of decisions made by Federal Energy Regulatory Commission and finding only "limited, qualified support" for hypothesis that political actors can influence agency decisionmaking through administrative process); Michael Asimow, On Pressing McNollgast to the Limits: The Problem of Regulatory Costs, Law & Contemp. Probs., Winter 1994, at 127, 131 ("[W]hen groups that oppose agency action trip legislative fire alarms, the fire will be doused (or fed or ignored) by the existing power balance in the legislature rather than by the coalition that existed at the time the legislation was enacted."). McNollgast's thesis continues to play an influential role in administrative law theory, however. See, e.g., Lisa Schultz Bressman, Procedures as Politics in Administrative Law, 107 Colum. L. Rev. 1749, 1752–58 (2007) (seeking to reconcile McNollgast approach to administrative procedures with more traditional legal view of procedural formality serving due process and rule-of-law values); see also sources cited supra note 239 (describing various refinements of McNollgast argument).

design choices. Pooling, in effect, can alter who makes what decisions when, and through what process. It calls into question the stickiness of those initial structural bargains.

a. *Overcoming Procedural Constraints.* — Congress uses a variety of design tools, including temporal constraints, to control agencies through legislation.[242] An agency facing such limits on its delegated authority, however, can in effect circumvent those statutory constraints by pooling with another agency that Congress has not subjected to the same limitations.

For example, under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act"), Congress has delegated to the DoJ the authority to review certain mergers before they occur to ensure compliance with antitrust laws.[243] But the HSR Act establishes a strict timetable for the Department's review. The DoJ has an initial thirty-day period to conduct its review,[244] which the agency may extend for an additional thirty days when additional information is requested from the companies.[245] After this waiting period expires, the companies are free to consummate their proposed merger unless the government files suit in district court and seeks a preliminary injunction.[246] The HSR Act's stringent deadlines address congressional concern that "protracted delays . . . might effectively 'kill' most mergers."[247]

When reviewing potential telecommunications mergers, however, the DoJ is able to work around the HSR Act deadlines and the obligation to seek a preliminary injunction in court by pooling with the FCC. The FCC reviews proposed mergers pursuant to its licensing authority under the Communications Act of 1934.[248] Unlike the DoJ's review under the HSR Act, the FCC confronts no statutory deadlines for its premerger review under the Communications Act. As a matter of policy, the FCC has adopted an aspirational "benchmark" of 180 days from public notice to

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242. See Jacob E. Gersen & Anne Joseph O'Connell, Deadlines in Administrative Law, 156 U. Pa. L. Rev. 923, 931–32 (2008) (describing "menu" of procedural restrictions available to Congress to control agencies).

243. See Pub. L. No. 94-435, § 201, 90 Stat. 1383, 1390–94 (codified as amended at 15 U.S.C. § 18a (2012)) (instituting premerger notification and waiting periods allowing DoJ and Federal Trade Commission (FTC) to review merger).

244. See 15 U.S.C. § 18a(b)(1)(B) (establishing thirty-day premerger waiting period).

245. See id. § 18a(e).

246. See id. § 18a(e), (f).

247. 122 Cong. Rec. 30,877 (1976) (statement of Rep. Rodino) (explaining why committees in Senate and House had removed "automatic stay" provision initially included in bill); see also, e.g., William J. Rinner, Comment, Optimizing Dual Agency Review of Telecommunications Mergers, 118 Yale L.J. 1571, 1572 (2009) (describing "HSR Act's goal of expediting complex merger review").

248. See 47 U.S.C. § 310(d) (2012) (describing FCC approval authority over all assignments and transfers of construction permits and station licenses).

complete its review.[249] But it has made clear that even this timeline is flexible and that the Commission may depart from it.[250]

There is a trend toward greater collaboration between the DoJ and the FCC in reviewing proposed telecommunications mergers.[251] The agencies' joint efforts, in practice, enable the DoJ to work around the stringent procedural constraints that the statutory scheme imposes.[252]

b. *Diversifying Interest Groups.* — Another mechanism through which Congress can curb bureaucratic drift is the organizational design of the agency.[253] That initial design choice, shows Jonathan Macey, has the effect of "perpetuat[ing] the power and legitimacy of certain groups and undermin[ing] the power and legitimacy of others."[254] By choosing winners and losers upfront through the agency's organizational design, Congress "hardwire[s]" into the agency structure the legislature's policy preferences.[255]

Consider the congressional design choice to create a single-industry agency, beholden to a single interest group, rather than a multi-industry agency. Congress's decision to create the single-industry agency, Macey

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249. Informal Timeline for Consideration of Applications for Transfers or Assignments of Licenses or Authorizations Relating to Complex Mergers, FCC, http://www.fcc.gov/encyclopedia/informal-timeline-consideration-applications-transfers-or-assignments-licenses-or-autho (on file with the *Columbia Law Review*) (last visited Nov. 13, 2014).

250. Id. The HSR Act's timing rules are not the only procedural constraints that pooling enables the DoJ to avoid. See, e.g., Laura Kaplan, Note, One Merger, Two Agencies: Dual Review in the Breakdown of the AT&T/T-Mobile Merger and a Proposal for Reform, 53 B.C. L. Rev. 1571, 1577–80, 1586–88 (2012) (describing different burdens of proof that apply under FCC's and DoJ's legal authorities).

251. See, e.g., Press Release, U.S. Dep't of Justice, Justice Department Allows Comcast–NBCU Joint Venture to Proceed with Conditions (Jan. 18, 2011), http://www.justice.gov/opa/pr/justice-department-allows-comcast-nbcu-joint-venture-proceed-conditions (on file with the *Columbia Law Review*) (highlighting DoJ–FCC collaboration); Jonathan Baker, Continuing a Conversation About the FCC's Merger Review Process, FCC: Reboot (Mar. 17, 2011), http://reboot.fcc.gov/blog?entryId=1340463 (on file with the *Columbia Law Review*) (emphasizing "close coordination" between DoJ and FCC).

252. See Kaplan, supra note 250, at 1589 (describing this dynamic in AT&T–T-Mobile merger); Rinner, supra note 247, at 1578–79 (discussing how statutory overlap undermines procedural constraints).

253. Macey, supra note 233, at 98. Macey argues that the initial organizational design of an agency enables Congress to overcome a limitation of other design tools—the possibility that procedural constraints that curb bureaucratic drift will also *exacerbate* coalitional drift. Id.; see also Horn & Shepsle, supra note 233, at 501–04 (identifying this problem with design tools initially suggested by McNollgast); Kenneth A. Shepsle, Bureaucratic Drift, Coalitional Drift, and Time Consistency: A Comment on Macey, 8 J.L. Econ. & Org. 111, 113–14 (1992) (same). Macey argues that the initial organizational design of the agency provides a mechanism for Congress to ameliorate both bureaucratic and coalitional drift. Macey, supra note 233, at 99.

254. Macey, supra note 233, at 99.

255. Id. at 100–01.

argues, bolsters Congress's control over the agency's policy outputs.[256] The single-industry design choice augments that particular interest group's access to the agency, and it shapes the type of expertise that will be relevant to the agency's mission—expertise that the interest group itself possesses.[257] By empowering a particular interest group, Congress has hardwired certain preferences into the design of the agency.

Through pooling, however, the executive can convert a single-industry regulatory space into a multi-industry—or multi-interest group—regulatory space. The joint structure's preferences will look different from those of the single agency acting alone. Pooling thus enables the executive to work around Congress's initial structural hardwiring.

The EPA–NHTSA joint rulemaking illustrates how pooling can diversify the interest groups influencing a regulatory task, as well as how pooling can overcome other constraints on expertise building that Congress imposes through legislation. The joint rulemaking enabled the EPA to exercise influence over NHTSA,[258] an agency with a very different, and in some respects historically incapacitating, relationship to the auto industry.[259] Coordination in any form might diversify the operative interest groups.[260] But pooling can be particularly effective at altering the impact of particular interest groups as compared, for instance, to OIRA review.

Pooling can affect more of the lifecycle of agency policymaking than centralization tools like OIRA have the practical ability to influence, and pooling can be accompanied by institutional changes inside the agencies that deepen collaboration. Both of these dimensions are evident in the EPA–NHTSA joint rulemaking. The EPA and NHTSA collaborated on a variety of major tasks including syncing up the timing of "key milestones

256. Id. at 99–104 ("Congress's ability to control access [to an agency] . . . enables the enacting political coalition to have its preferences reflected in regulatory outcomes long after Congress passes legislation organizing an agency.").

257. Id.

258. See, e.g., GAO-10-336, supra note 71, at 19–24 (describing expanded EPA influence in collaboration with NHTSA during development of vehicle fuel economy standards); Freeman & Rossi, supra note 9, at 1171 ("Among its most important effects, the joint rulemaking allowed EPA and NHTSA to move beyond their traditional arm's-length relationship.").

259. See, e.g., Jerry L. Mashaw & David L. Harfst, Regulation and Legal Culture: The Case of Motor Vehicle Safety, 4 Yale J. on Reg. 257, 315–16 (1987) (arguing regulation by NHTSA has failed to live up to original goals, warning of "paralysis" absent "agency risk-taking"); Ellen L. Theroff, Note, Preemption of Airbag Litigation: Just a Lot of Hot Air?, 76 Va. L. Rev. 577, 620–22 (1990) (highlighting problem of automobile-industry capture of NHTSA).

260. See, e.g., Barkow, Insulating Agencies, supra note 9, at 51–52 ("Consultation may bring more experts into the process and improve decision making by presenting competing viewpoints."); Freeman & Rossi, supra note 9, at 1187 ("Coordination tools that . . . dilute the strength of powerful constituencies by introducing the perspectives of others . . . should help to buttress accountability as well as effectiveness . . . ."); Livermore & Revesz, supra note 167, at 1367–68 (noting coordination may reduce risk of agency capture).

of each rulemaking."[261] And the two agencies formed a number of joint structures to support the pooled effort, including "joint technical teams," which drove the effects of coordination deep into the two agencies' bureaucratic cores.[262] In this sense, pooling is able to affect some of the more subtle dynamics of organizational design that Macey identified. For example, "hardwiring" turns in part on the makeup of the experts populating the regulatory space, which Macey emphasizes are often drawn from the regulated industry.[263]

Pooling in the EPA–NHTSA example also enabled the executive to overcome a specific statutory impediment to NHTSA's own expertise building. While Congress had curbed NHTSA's ability to build expertise through a multiyear appropriations restriction, the joint structure enabled NHTSA to "borrow" that expertise from the EPA after the ban was lifted.[264]

Pooling thus adds complexity to a central causal claim in administrative law theory: that Congress exercises control over the agency's ongoing policy outputs through agency design. It illuminates an assumption implicit in that theory—the stability of the initial structural bargain as a matter of actual, or effective, administrative decisionmaking. I do not want to overstate the claim. To be sure, initial design has effects on the agency's policymaking. But pooling suggests that the reliance the existing account places on ex ante design choice might be overdrawn.[265]

3. *Pooling Can Diminish the Effectiveness of Congress's Committee Oversight Structures.* — Pooling also can muddle ongoing congressional oversight of administrative decisionmaking. It can obscure which administrative actor is responsible for a given course of conduct. It can mask the true mover behind an administrative decision. And it can diminish Congress's ability to exercise effective oversight to the extent that pooled structures bridge Congress's own oversight committee structures.

For example, the intelligence oversight committees in Congress differ from the armed services oversight committees, and the executive's reporting requirements with respect to intelligence collection and military action are distinct. Pooling arrangements combining intelligence and military authorities—that is, the Title 10–Title 50 joint structures—

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261. GAO-10-336, supra note 72, at 19.

262. See id. (describing creation of joint technical teams).

263. See Macey, supra note 233, at 103–04 ("[A]dministrative agencies are staffed by 'experts' whose knowledge of the circumstances and conditions within a particular industry . . . inevitably [leads] to regulators being drawn from the industry to be regulated.").

264. See supra notes 71–79 and accompanying text (describing benefits of joint rulemaking effort).

265. Pooling points to a set of significant and underexplored theoretical and empirical questions. For instance, are there types of ex ante controls that fare better in the face of pooling? Are there types of pooling that present more of a threat to Congress's structural checks?

have created confusion, if not obfuscation, regarding congressional oversight.[266]

Indeed, the House Permanent Select Committee on Intelligence has publicly expressed concerns that certain intelligence activities are not being reported to it and to the Senate Select Committee on Intelligence because they are being aggressively categorized as military activity instead.[267] Those activities also are slipping through gaps in the oversight practices of the Senate and House Armed Services Committees because the executive's notification obligations to those committees were designed with very different considerations in mind.[268]

4. *Pooling Circumvents Some of Congress's Funding-Related Constraints.* — A final tool through which Congress exercises control over executive action is funding. Congress can discipline specific pooling arrangements through its funding decisions. Congress can choose to defund a particular program or agency or to prohibit a particular interagency effort, including as a mechanism to penalize pooling.[269]

But Congress also structures executive design at a more systematic level through appropriations law, and pooling poses challenges to this more systematic form of congressional control.

a. *The Russell Amendment.* — Unilateral structuring by the executive can range from purely hortatory entities to those intended to take joint action (that is, to be operational or directive). Where the structure is action oriented, pooling enables the executive to overcome a significant obstacle that Congress has placed on the executive's unilateral designs: the so-called Russell Amendment.[270] That provision is itself a product of the push and pull between the executive and Congress in the design of the administrative state.[271]

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266. See Chesney, supra note 81, at 610–15 (explaining how "convergence" of information-sharing rules has created information gaps affecting congressional military and intelligence oversight).

267. See id. at 611 ("HPSCI objected that the profligate invocation of the [military activity] label was being used to shield intelligence collection activity from being categorized as such, thereby providing a fig leaf for avoiding reporting to SSCI and HPSCI.").

268. See id. at 612–13 (describing misfit between statutory reporting requirements to particular committees and realities of intelligence–military convergence).

269. For a discussion of Congress's exercise of budget controls and other structural tools to limit specific agencies or enforcement activities in the criminal law context, see Daniel C. Richman, Federal Criminal Law, Congressional Delegation, and Enforcement Discretion, 46 UCLA L. Rev. 757, 789–810 (1999).

270. See 3 U.S. Gen. Accounting Office, GAO-08-987SP, Principles of Federal Appropriations Law 15-15 (3d ed. 2008) [hereinafter GAO Red Book], available at http://www.gao.gov/special.pubs/d08978sp.pdf (on file with the *Columbia Law Review*) (discussing origins of Russell Amendment).

271. See Moe & Howell, supra note 20, at 167 (describing Senator Russell's amendment as "aimed at reversing what presidents were accomplishing through unilateral action").

The Russell Amendment provides that any executive-created instrumentality of government "in existence for more than one year" must have "a specific appropriation or specific authorization by law" in order to receive funding.[272] The amendment was Congress's attempt to clamp down on unilateral structuring by the executive. Its passage was a response to a set of executive orders, issued by President Franklin D. Roosevelt in the 1940s, that created a civil rights infrastructure that could not then be achieved legislatively.[273] In particular, Roosevelt created the Committee on Fair Employment Practice and charged it with receiving, investigating, and redressing grievances against the federal government for racial discrimination in defense contracting.[274] The Committee was to be funded through the executive's discretionary funds.[275]

Senator Richard Russell, a Democratic member of the Senate Committee on Appropriations, opposed those efforts. And Senator Russell sought to curtail the President's ability to achieve those policy objectives through unilateral design. He introduced an amendment to legislation then before his committee, which would effectively terminate executive-created entities after one year in existence if they did not receive express congressional ratification.[276]

Originally enacted in 1944, the Russell Amendment remains a principal constraint on unilateral structuring by the executive.[277] The amendment has been construed by both the executive branch and Congress (through the Comptroller General) to apply only to operational or "action" entities; it does not limit the executive's ability to create purely advisory structures.[278] But Presidents continue to seek out the ability to create operational structures unilaterally. And pooling provides

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272. 31 U.S.C. § 1347(a) (2012).

273. See Richard P. Nathan, Jobs and Civil Rights: The Role of the Federal Government in Promoting Equal Opportunity in Employment and Training 87–89 (1969) [hereinafter Nathan, Jobs and Civil Rights] (describing opposition to Roosevelt's orders); Moe & Howell, supra note 20, at 167 (explaining Russell Amendment as response to Roosevelt's civil rights orders).

274. See Exec. Order No. 9346, 3 C.F.R. 1280, 1280–81 (1943) (establishing Committee on Fair Employment Practice).

275. See Nathan, Jobs and Civil Rights, supra note 273, at 88 (explaining financing of committee).

276. Introducing the amendment, Senator Russell stated that its purpose "is to retain in the Congress the power of legislating and creating bureaus and departments of the Government, and of giving to Congress the right to know what the bureaus and departments of the Government which have been created by Executive order, are doing." GAO Red Book, supra note 270, at 15-15 (quoting 90 Cong. Rec. 3119 (1994) (statement of Sen. Russell)).

277. See id. at 15-15 to -16 (explaining scope of amendment today).

278. See, e.g., Establishment of the President's Council for International Youth Exchange, 6 Op. O.L.C. 541, 551 (1982) (interpreting Russell Amendment to apply to fundraising body created by executive); Advisory Committees—Application of the Russell Amendment, 3 Op. O.L.C. 263, 263 (1979) (concurring in view of Office of Management and Budget that Russell Amendment does not apply to advisory committees).

an alternative. Pooling augments legal capacity by combining authorities that already exist across the bureaucracy. So long as pooling utilizes agencies' existing legal authorities, it does not create a new entity for purposes of the Russell Amendment.

Indeed, pooling is precisely how Presidents ultimately worked around the Russell Amendment in the context of the architecture of civil rights. Relying on joint structuring, President Harry S. Truman and his successors to office created and funded a variety of interagency committees and joint efforts focused on augmenting the capacity of the executive to implement civil rights through existing contracting-related authorities.[279]

b. *The Economy Act.* — Through pooling, the executive also can work around some of the constraints that Congress has imposed under the Economy Act. In 1932, Congress passed legislation authorizing agencies to contract with one another for their services or materials.[280] The Act, as amended, authorizes "[t]he head of an agency or major organizational unit within an agency" to "place an order with a major organizational unit within the same agency or another agency for goods or services" where certain conditions are met.[281] The Act was designed to address intraexecutive outsourcing, and so its constraints generally focus on the *transfer* of funds or legal authority from one agency to another.[282]

There are anticircumvention ideas driving interpretations of the Economy Act by the Comptroller General. For example, an outsourcing agency cannot use an Economy Act agreement to fund work that it would not itself be authorized to undertake.[283] Nor can the outsourcing agency obtain under the Economy Act services from another agency that its own enabling statute prohibits.[284]

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279. The first such joint structure to follow the Russell Amendment's passage was the interagency Committee on Government Contract Compliance. See Exec. Order No. 10,308, 3 C.F.R. 519 (1951) (creating eleven-member committee composed of agency directors and presidential appointees); Nathan, Jobs and Civil Rights, supra note 273, at 88. Subsequent executive orders elaborated, revised, and strengthened the interagency effort. See id. at 88–89 (describing executive orders of Presidents Eisenhower, John F. Kennedy, and Lyndon B. Johnson).

280. Economy Act, ch. 314, pt. 2, § 601, 47 Stat. 382, 417–18 (1932) (codified as amended at 31 U.S.C. § 1535 (2012)). For an overview of the Economy Act, see generally Marisam, Interagency Marketplace, supra note 9.

281. 31 U.S.C. § 1535.

282. See id. § 1535(a)(1)–(4) (providing for transfers within and between agencies); see also GAO Red Book, supra note 270, at 12-26 to -70 (analyzing Economy Act provisions); Marisam, Interagency Marketplace, supra note 9, at 906–18 (describing Act's substantive restrictions on transfer of funds and authority).

283. See GAO Red Book, supra note 270, at 12-26 ("[T]he ordering agency must have funds which are available for the contemplated purpose [which in turn must be] something the ordering agency is authorized to do.").

284. See id. ("[T]he Economy Act does not authorize an agency to use another agency to do anything it could not lawfully do itself.").

Those constraints do not easily translate to pooling, however. There is no transfer of authority with pooling. And the *aggregation* of authorities that pooling achieves, sometimes formally and sometimes informally, is not clearly governed by the Economy Act.

The foregoing suggests a deeper implication for Congress. It may be that Congress is in practice unable systematically to prevent pooling through appropriations law. To be sure, Congress can prohibit specific instances of interagency interactions, either through funding decisions or through other procedural and substantive rules.[285]

Congress also can and has raised the transaction costs of pooling for the executive. A longtime appropriations rider known as the "pass the hat" prohibition restricts how the executive can fund its interagency designs.[286] Any funding needed to support an interagency structure must be provided by only one of the participating agencies.[287]

But the more general architecture that Congress can build through appropriations law may be too crude to restrict pooling systematically without also inhibiting interactions between agencies that are both desirable to Congress and essential to the functioning of the administrative state. Pooling thus blossoms in the interstices of administrative law.[288] Where statutory schemes neither mandate nor prohibit pooling, the executive's discretion to pool has, in practice, thrived.

As elaborated above, the key tools through which Congress superintends the administrative state are limited in their capacity to supervise pooling. Do courts fare better?

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285. For instance, a set of enactments proscribes military assistance to civilian law enforcement in certain circumstances and permits law enforcement's reliance on military expertise in others. Those provisions prohibit participation by the military in a "search, seizure, arrest, or other similar activity," 10 U.S.C. § 375 (2012), but they allow certain military assistance to civilian law enforcement such as the sharing of information resulting from training missions and the use of equipment and facilities owned and operated by the military, see 10 U.S.C. §§ 371–374.

286. See GAO Red Book, supra note 270, at 15-20 to -22 (discussing congressional prohibition on interagency financing that lacks "prior and specific statutory approval to receive financial support from more than one agency or instrumentality" (citation omitted)).

287. See id. at 15-24 (noting GAO determination that "single entity with a primary interest in the success of the interagency venture . . . [could] pick[] up the entire costs" of interagency structure (citation omitted)). Executive orders creating interagency structures routinely designate a particular agency to provide the administrative and financial support for the joint structure, consistent with available appropriations. See, e.g., Exec. Order No. 13,519, § 6, 3 C.F.R. 271, 273 (2010) (requiring DoJ to fund structure comprising dozens of agencies).

288. Cf. Moe & Howell, supra note 20, at 136–39 (emphasizing role of constitutional ambiguity in enabling unilateral action).

C. *Courts*

A core conception of the administrative state is that judicial review tames and legitimates the exercise of executive discretion. But administrative law doctrines do little to police pooling, at least directly. This raises the question whether courts supervise pooling indirectly by regulating its effects through administrative law. Such "indirect" judicial oversight turns out to be inconsistent and largely dependent on the type of agency action that pooling affects. As an exercise of executive discretion, then, pooling is more insulated from judicial supervision than conventional assumptions about the administrative state would suggest.

1. *Direct Oversight Through Administrative Law.* — Administrative law has not developed with an eye to pooling. The model of administrative action that underlies the legal doctrine consists of a single agency operating in relative insularity from other administrative actors, exercising formal legal authority through discrete actions that resemble lawmaking or adjudication. Each facet of this model works to occlude pooling.

This means that, in contrast to basic principles of administrative law, the executive generally will not have to explain to a court why it has chosen to pool or what effects pooling will have on the implementation of the participants' legal mandates. Judicial oversight of pooling is thus out of step with the role that administrative law typically affords courts in checking the affirmative exercise of administrative discretion.[289]

The diminished role for courts in superintending pooling is analogous to their role in reviewing agencies' selection among available "policymaking forms"—that is, the largely unreviewed choice that an agency makes among available policymaking instruments such as licensing or rulemaking authority.[290] In that context, Elizabeth Magill has revealed how courts fulfill their oversight function *indirectly*, by shaping the legal consequences that flow from the agency's choice of a particular policymaking instrument.[291] By shaping consequences like the procedures the agency must follow in using a particular policymaking instrument, the legal effects of that instrument, and the standards of judicial review that attach to it, courts indirectly regulate the agency's ex ante choice among policymaking instruments.[292]

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289. Cf. M. Elizabeth Magill, Agency Choice of Policymaking Form, 71 U. Chi. L. Rev. 1383, 1405 (2004) (explaining absence of agency's obligation to explain to courts reasons for its choice among policymaking forms is "out of step with the remainder of the law of judicial review of agency action").

290. See id.

291. See id. ("[B]ecause the judiciary has indirect opportunities to shape the consequences of an agency's choice of form, it need not directly evaluate the choice of form in any given case.").

292. See id. at 1425 ("The courts' ability to shape the consequences of agencies' choices of procedure provides a positive explanation for the otherwise puzzling disjunction between the judicial reaction to most agency exercises of discretion on the one hand, and judicial reaction to agency choices of form on the other.").

In contrast to their oversight of the choice among policymaking instruments, however, courts' ability to regulate pooling indirectly is inconsistent. In fact, it turns in part on the type of policymaking instrument that pooling affects.

2. *Indirect Oversight Through Rulemaking Review.* — The capacity of courts to supervise pooling indirectly turns on the extent to which pooling's effects resemble the familiar model of agency action. If a pooled structure undertakes or affects rulemaking, the opportunities for judicial supervision will be relatively robust. Each agency promulgating a rule must be prepared to defend it under that agency's enabling statute. And the agency will need to comply with the procedural requirements of the Administrative Procedure Act (APA) (as well as its own enabling statute) in developing the rule. By supervising rulemaking, then, courts can police the bounds of permissible pooling.

A recent case from the D.C. Circuit—the court of appeals principally responsible for the elaboration of administrative law—illustrates the point. *National Mining Ass'n v. McCarthy* concerned, in part, a pooled structure involving the EPA and the U.S. Army Corps of Engineers ("Corps").[293] Section 404 of the Clean Water Act delegates to the Corps the legal authority to issue permits for the discharge of "dredge and fill material" at particular disposal sites.[294] While the statute provides for certain interactions between the Corps and the EPA, the case concerned a joint process that the agencies initiated in excess of the statutory coordination requirements.

In particular, the Clean Water Act requires the Corps, in issuing section 404 permits, to apply guidelines that it develops in conjunction with the EPA.[295] The Clean Water Act then authorizes the EPA to veto the Corps's permitting decisions under certain circumstances.[296] The statute authorizes the EPA to prohibit or restrict the specification of any particular area as a disposal site when the EPA determines, "after notice and opportunity for public hearings, that the discharge of such materials into such area will have unacceptable adverse [environmental] effect[s]."[297]

As part of an Obama Administration effort to reduce the environmental impact of coal mining in Appalachia, the EPA and the Corps in 2009 entered into two memoranda of agreement establishing new procedures for the issuance of certain section 404 permits.[298] The

293. 758 F.3d 243 (D.C. Cir. 2014).

294. 33 U.S.C. § 1344(a) (2012).

295. Id. § 1344(b).

296. Id. § 1344(c).

297. Id.

298. The Chair of the White House Council on Environmental Quality stated in a press release that the joint effort "represents federal agencies working together to take the President's message on mountaintop coal mining into action." Press Release, EPA, Obama Administration Takes Unprecedented Steps to Reduce Environmental Impacts of Mountaintop Coal Mining, Announces Interagency Action Plan to Implement Reforms

new procedures applied to roughly 100 permit applications for which the Corps's ordinary comment period had closed.[299] The new procedures authorized the EPA to sort the permit applications on the front end of the permit-review process (prior to the Corps's disposition), and to assign certain applications to an additional set of "enhanced coordination procedures" involving the EPA and the Corps.[300]

The National Mining Association and others brought suit arguing that the enhanced coordination procedures exceeded the EPA's authority under the Clean Water Act and that the agencies' adoption of the new joint structure without notice and comment, through a memorandum of agreement, violated the APA. The district court agreed with the challengers, but the court of appeals reversed.[301] The case shows how courts can calibrate administrative law doctrines to adjust their scrutiny of pooling in the rulemaking context.

The district court found that the EPA acted in excess of its jurisdiction and authority under the Clean Water Act, in violation of section 706(2)(C) of the APA, by taking control of the front end of the permitting process, rather than limiting its role to the back-end veto authorized by the Clean Water Act. "[T]he carving out of limited circumstances for the EPA involvement in the issuance of Section 404 permits," the district court concluded, was "a statutory ceiling on that involvement," not a floor.[302]

The D.C. Circuit disagreed. The Corps and the EPA "have complementary roles in the Section 404 process," the court of appeals concluded, and the statutory scheme was not circumvented by the enhanced

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(June 11, 2009), http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/e7d3e5608bba2651852575d200590f23 (on file with the *Columbia Law Review*); see also Nat'l Mining Ass'n v. Jackson, 816 F. Supp. 2d 37, 40–41 (D.D.C. 2011) (describing 2009 memoranda of agreement), rev'd sub nom. *Nat'l Mining Ass'n*, 758 F.3d 243.

299. See Letter from Lisa P. Jackson, Adm'r of EPA, to Terrence Salt, Acting Assistant Sec'y (Civil Works), Dep't of the Army 1–3 (June 11, 2009), reprinted in 3 Joint Appendix at 671–73, *Nat'l Mining Ass'n*, 758 F.3d 243 (No. 12-5310) [hereinafter Joint Appendix] (indicating EPA is reviewing "approximately 110 pending permit applications subject to these enhanced procedures").

300. See Memorandum of Understanding Among the U.S. Department of the Army, U.S. Department of the Interior, and U.S. Environmental Protection Agency Implementing the Interagency Action Plan on Appalachian Surface Coal Mining (June 11, 2009), reprinted in Joint Appendix, supra note 299, at 665–70 (authorizing EPA to sort applications and assign some to enhanced coordination procedures); Letter from Lisa P. Jackson to Terrence Salt, supra note 299, at 1–3, reprinted in 3 Joint Appendix, supra note 299, at 671–73 (explaining EPA's permit sorting and evaluation process).

301. See *Jackson*, 816 F. Supp. 2d at 44–45, 49 ("[T]he EPA has exceeded the statutory authority conferred upon it by the Clean Water Act . . . ."), rev'd sub nom. *Nat'l Mining Ass'n*, 758 F.3d at 253 ("We conclude that the Enhanced Coordination Process memorandum is a procedural rule that EPA and the Corps had authority to enact under the Clean Water Act.").

302. *Jackson*, 816 F. Supp. 2d at 44.

coordination procedures.[303] The statute did not explicitly forbid the Corps and the EPA from coordinating, the D.C. Circuit reasoned, and the lower court erred in construing the statute's specifications as a ceiling on their collaboration.[304]

Whether the pooled structure violates the Clean Water Act is a close question, but what is relevant here is the structural point that it was the courts that ultimately decided it. *National Mining Ass'n* also illustrates a deeper point—that courts have some ability to tame pooling by deciding *what counts as rulemaking* for purposes of the APA. A key issue in the case was whether the memorandum of agreement setting out the enhanced coordination process constituted a "legislative" or a "procedural" rule.[305] Both are terms of art under the APA, and a holding that the rules are legislative in nature brings them within the APA's notice-and-comment requirements.[306]

The D.C. Circuit in *National Mining Ass'n* held that the enhanced coordination process constituted a procedural rule because it did not alter the rights or interests of the permit applicants.[307] In so ruling, the court of appeals again reversed the district court. The lower court, in finding a legislative rule, had emphasized that the new interagency process created an initial screening phase conducted by a different agency, and that the legal basis for the EPA's review on the front end of the permit process would not have existed but for the memorandum of agreement setting forth the enhanced coordination process.[308] Had the D.C. Circuit upheld the district court's finding of a legislative rule, the APA would have required a transparent and participatory process for the adoption of the pooled structure.

Courts also have capacity to calibrate their supervision of pooling in the rulemaking context through their selection among judicial deference doctrines. The parties in *National Mining Ass'n*, for instance, disagreed over the governing standard of review. The challengers argued for, and the district court applied, the *Chevron* test.[309] The executive pressed for

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303. See *Nat'l Mining Ass'n*, 758 F.3d at 247.

304. Id. at 249.

305. See *Jackson*, 816 F. Supp. 2d at 45–46.

306. See 5 U.S.C. § 553(b)(3)(A) (2012) (exempting "rules of agency organization, procedure, or practice" from notice-and-comment rulemaking).

307. See *Nat'l Mining Ass'n*, 758 F.3d at 250.

308. See *Jackson*, 816 F. Supp. 2d at 47–49 (concluding that Act "carves out a limited . . . role for the EPA in the permitting process" and that absent memorandum "there would not be an adequate legislative basis for the EPA to [assess] pending permit applications" (quoting Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.3d 1106, 1112 (D.C. Cir. 2005)) (internal quotation marks omitted)).

309. See id. at 42. Under *Chevron*, a reviewing court must first determine whether "Congress has directly spoken to the precise question at issue." Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984). If the answer is affirmative, then the court construes the statute in the first instance. Id. at 842–43. But if the court concludes that the statute "is silent or ambiguous with respect to the specific issue," then

an even more deferential standard. It argued that an agency has near-absolute discretion to fashion procedural rules, which courts should not disturb absent an explicit congressional prohibition.[310] The court of appeals did not specify a deference standard, but embraced an approach that, in practice, is similarly expansive to the standard pressed by the executive. The court used the constitutional avoidance canon to find that, absent a specific congressional prohibition, the court would uphold interagency collaborations adopted by the executive. Any other approach, the D.C. Circuit suggested, would raise "significant constitutional concerns" under Article II, at least where the interaction concerns executive branch agencies.[311]

I return below to the normative questions raised by *National Mining Ass'n*. The point here, however, is that when pooling affects agency rulemaking, courts do have some capacity to supervise it through the ordinary tools of administrative law. Courts, moreover, can use those doctrinal tools to adjust the scrutiny that they will give to pooling in the rulemaking context, and the procedural protections that will attach to it.[312]

3. *Limits to Indirect Oversight Through Administrative Law.* — In other contexts, however, pooling is considerably less amenable to indirect judicial oversight through administrative law. Consider, for example, Team Telecom's activities in connection to the FCC's licensing authority. Pooling in that context gives Team Telecom the power effectively to regulate private actors without judicial oversight. It shifts the action outside of the licensing proceeding itself and into a more murky substatutory space.[313] The FCC's licensing authority becomes legal leverage to shift the executive's regulatory activity into "voluntary" Network Security Agreements that are effectively insulated from judicial review.[314] So too, administrative

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the agency resolves the ambiguity in the first instance; the court decides only "whether the agency's answer is based on a permissible construction." Id.

310. See Final Reply Brief of the United States of America at 3–7, *Nat'l Mining Ass'n*, 758 F.3d 243 (No. 12-5310), 2013 WL 5770642 (arguing "agencies have broad discretion 'to fashion their own rules of procedure' absent an express Congressional prohibition" (quoting FCC v. Pottsville Broad. Co., 309 U.S. 134, 143 (1940))).

311. See *Nat'l Mining Ass'n,* 758 F.3d at 249.

312. Of course, barriers to judicial review can impede opportunities for oversight in this context as well, and those barriers have become more formidable. See generally Elizabeth Magill, Standing for the Public: A Lost History, 95 Va. L. Rev. 1131, 1185–98 (2009) (describing development of public interest litigation and judicial response, "expand[ing] what a party had to show to demonstrate an injury in fact," thereby "stamp[ing] out the standing for the public principle"). For a discussion of additional constraints on modern judicial oversight of agency policymaking, see generally Farber & O'Connell, supra note 8, at 1170–73.

313. See supra notes 30–44 and accompanying text.

314. The FCC in other contexts similarly has used its licensing authority to effect policy changes that it could not achieve through rulemaking by imposing "voluntary" conditions on those licenses. See, e.g., Barkow & Huber, supra note 37, at 69–71 (discussing judicial review of FCC rules and observing "'voluntary conditions' [are] especially likely to

law's generally hands-off approach to investigations and enforcement decisions leaves pooling in those contexts largely unsupervised by courts.[315]

Administrative law's failure to tame pooling in those contexts resounds to the broader project of judicial oversight of the administrative state. Because pooling can mask the true mover behind a course of conduct, it can inhibit judicial supervision over the responsible agency and the statutes that it implements. Pooling between the DoJ and NSA provides a well-publicized recent example. The DoJ sometimes relies in criminal prosecutions on data acquired by the NSA under section 702 of FISA.[316] As detailed above, this legal authority permits foreign intelligence collection directed at non-U.S. persons abroad without the safeguards that ordinarily restrain electronic surveillance domestically, like a judicial probable cause determination. The extent of permissible FBI–NSA pooling under the section 702 authority presents an open question.[317] Without notice to the defendant and to the court that the information used against the defendant originated from the NSA under this legal authority, however, judicial review of its proper scope and use is impeded. Until recently, the DoJ had just such a policy of nondisclosure.[318]

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shield the agencies [sic] policies from judicial review"). As other scholars have elaborated, the FCC's use of voluntary conditions effectively insulates FCC policymaking from judicial review. Id. Pooling enables other agencies to enter the space created by the FCC's less constrained policymaking form.

315. See Heckler v. Chaney, 470 U.S. 821, 823, 837–38 (1985) (holding FDA's refusal to investigate claimed violation of Federal Food, Drug, and Cosmetic Act unreviewable); see also, e.g., M. Elizabeth Magill, Courts and Regulatory Capture, *in* Preventing Regulatory Capture 397, 413 (Daniel Carpenter & David A. Moss eds., 2014) ("It is exceedingly difficult to attack an agency's general administration of a program, including its pattern of enforcement decisions."); Eric Biber, Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction, 26 Va. Envtl. L.J. 461, 469–84 (2008) (examining judicial review of agency inaction).

316. See, e.g., Charlie Savage, Door May Open for Challenge to Secret Wiretaps, N.Y. Times (Oct. 16, 2013), http://www.nytimes.com/2013/10/17/us/politics/us-legal-shift-may-open-door-for-challenge-to-secret-wiretaps.html [hereinafter Savage, Wiretaps Challenge] (on file with the *Columbia Law Review*) (discussing use of such evidence in criminal prosecutions).

317. The scope of permissible law enforcement uses of the section 702 data is debated even within the executive by the members of the Privacy and Civil Liberties Oversight Board. Compare PCLOB, Section 702 Report, supra note 85, at 151–52 (statement of Medine, Chairman, and Wald, Board Member) (arguing U.S.-person identifiers should be subject to court approval before querying data under section 702), with id. at 163–65 (statement of Brand & Cook, Board Members) (positing court approval requirement would be counterproductive and unnecessary).

318. See Savage, Wiretaps Challenge, supra note 316 (discussing potential Supreme Court review of DoJ policy not to disclose to criminal defendants warrantless wiretapping undertaken under FISA Amendments Act of 2008); Charlie Savage, Federal Prosecutors, in a Policy Shift, Cite Warrantless Wiretaps as Evidence, N.Y. Times (Oct. 26, 2013), http://www.nytimes.com/2013/10/27/us/federal-prosecutors-in-a-policy-shift-cite-warrantless-wiretaps-as-evidence.html (on file with the *Columbia Law Review*) (reporting shift away from previous policy of nondisclosure).

Other investigatory contexts also reveal executive policies that obscure pooling. For instance, a Drug Enforcement Administration (DEA) program collects and disseminates information and intelligence to other agencies for use in those agencies' enforcement of their legal mandates.[319] The Internal Revenue Service (IRS) is one of the agencies that receives and relies on this information from the DEA's Special Operations Division.[320] A government manual, for a period of years, instructed IRS agents to omit references to the role of the Special Operations Division in court filings and to recreate their investigatory trails using other sources.[321]

Courts might have tools outside of administrative law to make pooling more visible. For example, the Supreme Court has left open the possibility that commingling a civil and criminal investigation could violate a criminal defendant's constitutional rights where the executive has "failed to advise the defendant in its civil proceeding that it contemplates his criminal prosecution."[322] But the sufficiency or advisability of using constitutional criminal procedure instead of administrative law to superintend pooling presents an unexamined question.

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319. See John Shiffman & David Ingram, Exclusive: IRS Manual Detailed DEA's Use of Hidden Intel Evidence, Reuters (Aug. 7, 2013, 6:23 PM), http://www.reuters.com/article/2013/08/07/us-dea-irs-idUSBRE9761AZ20130807 (on file with the *Columbia Law Review*) (discussing operation of this program and debate surrounding it); see also IRM 9.4.2.7 (2005), 2005 WL 5989556 (detailing IRS procedures for dealing with information from DEA Special Operations Division).

320. See IRM 9.4.2.7, supra note 319.

321. See id. ("Usable information regarding these leads must be developed from . . . independent sources . . . ."); see also Shiffman & Ingram, supra note 319 (stating DEA Special Operations Division "entry was published and posted online in 2005 and 2006, and was removed in early 2007").

322. United States v. Kordel, 397 U.S. 1, 11–12 (1970). *Kordel* considered the use by criminal prosecutors of interrogatories submitted by the defendants in a parallel civil proceeding brought by the FDA. Id. at 2–3. The Court declined to find on the facts before it a violation of due process. Id. at 11. But it noted that "special circumstances" such as "where the Government has brought a civil action solely to obtain evidence for its criminal prosecution or has failed to advise the defendant in its civil proceeding that it contemplates his criminal prosecution . . . might suggest the unconstitutionality or even the impropriety of [a] criminal prosecution." Id. at 11–12 (footnotes omitted). Some lower court opinions have used constitutional criminal procedure or their inherent supervisory powers over criminal justice to police pooling in the context of joint investigations by civil enforcement agencies and the DoJ. See, e.g., United States v. Scrushy, 366 F. Supp. 2d 1134, 1139–40 (N.D. Ala. 2005) (suppressing SEC evidence in criminal trial, resulting in dismissal of indictment, because court found that two agencies' investigations had effectively merged, while presence of criminal investigation had been concealed from defendant). But see United States v. Stringer, 535 F.3d 929, 933 (9th Cir. 2008) (holding use of SEC's standard form disclosing routine uses, including information sharing with DoJ, constituted sufficient notice to defendant notwithstanding strategic efforts by executive to conceal its joint investigation, and reversing district court's dismissal of indictment).

IV. CHEMISTRY OR ALCHEMY?

The foregoing descriptive and analytic account constitutes the heart of this project. In closing, this Part shifts to a more preliminary normative lens. Pooling implicates competing values. It can be a salutary response to the challenges of national governance and a mechanism for renegotiating boundaries that are no longer sensible. Pooling breaks down administrative silos and enables a more agile form of administrative design. Pooling, on this view, might be the structural chemistry needed in current times. At the same time, pooling can make legal checks on individual agencies less resilient and administration less accountable. Pooling, on this narrative, might be the alchemy of illegitimate power. Part IV.A suggests tradeoffs that pooling poses, and begins the work of parsing constructive pooling from its more pernicious strains. Parts IV.B and IV.C expose two sets of legal questions that pooling raises. The first is what "constitutes" or creates the power to pool. The second is what institutional and doctrinal tools might exist to regulate it. There are features internal to pooling that operate to inhibit the phenomenon. Understanding those internal features will help to evaluate the desirability of external constraints. Together, Part IV's sections aim to begin a conversation about governance at the interstices of the administrative state.

A. *Evaluating Pooling*

If pooling aggregates powers otherwise diffused, what does it mean for the values underlying our system of separated powers? This section offers a preliminary assessment of pooling's tradeoffs using a metric familiar to separation of powers theory: efficacy, democratic accountability, and protection of liberty and other fundamental rights.[323]

1. *Efficacy.* — Pooling brings new energy to administration. It is a valuable tool for the executive to respond to some of the pathologies of polarized and divided government. Pooling can enable the executive to meet genuine societal and security challenges, even in the face of legislative gridlock. Indeed, pooling offers a potential check for the executive on congressional stalemate, one that prods Congress to act—as opposed to obstruct—if it seeks to reassert control over the structures of administration.[324]

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323. Scholars have debated the underlying goals of the separation of powers, but these three goals cut across a variety of approaches. See, e.g., Bruce Ackerman, The New Separation of Powers, 113 Harv. L. Rev. 633, 640 (2000) (arguing "three legitimating ideals" motivate separation-of-powers doctrine: democracy, professionalism, and protecting fundamental rights); Jacob E. Gersen, Unbundled Powers, 96 Va. L. Rev. 301, 324–52 (2010) [hereinafter Gersen, Unbundled Powers] (identifying collection of constitutional design principles).

324. There is, of course, the theoretical and empirical question of whether Congress does in fact defend its prerogatives. The legal and political science scholarship has cast

Pooling also enables structural experimentation and fosters more agile administration. The push for greater flexibility and resourcefulness in administration is reflected, for example, in the atrophy of command-and-control regulation.[325] And it may be particularly salient in technology-rich environments. Pooling responds to such needs by building a measure of flexibility, shared learning, and collaborative innovation into the working of bureaucracy.[326] Indeed, Congress itself might exploit pooling as a source of structural experimentation, which the legislature may ultimately codify, modify, or reject.[327]

Pooling also responds to the interdependence that today inheres in a variety of social and security domains. It is a tool for bridging silos of expertise in interconnected times, where effective regulatory action may no longer track stark organizational and policy divides. By reconfiguring boundaries, pooling also enables agencies with greater topical, technical, or informational expertise to help agencies with more muscular legal authorities to make complex resource allocation or other prosecutorial discretion determinations. Indeed, this is an important benefit of pooling between regulatory enforcement agencies like the SEC and criminal prosecutors at the DoJ.[328]

Pooling also can bring detached expertise and the professional norms of one agency to bear on the more pressurized environment of

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doubt on this conventional assumption. See, e.g., Curtis A. Bradley & Trevor W. Morrison, Historical Gloss and the Separation of Powers, 126 Harv. L. Rev. 411, 413–17 (2012) [hereinafter Bradley & Morrison, Historical Gloss] (synthesizing legal and political science scholarship elaborating this set of claims and discussing their implications for use of historical gloss in resolving separation-of-powers questions); Levinson & Pildes, supra note 126, at 2317 (disputing Madisonian vision of government, in which branches possess "wills or interest of their own" and defend their own prerogatives). See generally Moe & Howell, supra note 20, at 143–48 (describing factors disabling Congress from responding to "presidential drive for power").

325. See Charles F. Sabel & William H. Simon, Minimalism and Experimentalism in the Administrative State, 100 Geo. L.J. 53, 54–56 (2011) (classifying counter-command-and-control trends through two models—minimalism and experimentalism—and assessing relative advantages of each); Richard B. Stewart, Administrative Law in the Twenty-First Century, 78 N.Y.U. L. Rev. 437, 446–53 (2003) (describing emergence of "new regulatory methods and instruments," including government–stakeholder networks and economic incentive systems, "to ease the problems created by overreliance on centralized command-and-control methods").

326. Cf. Michael C. Dorf & Charles F. Sabel, A Constitution of Democratic Experimentalism, 98 Colum. L. Rev. 267, 314–23 (1998) (developing theory of democratic experimentalism).

327. This is reflected, for example, in Congress's codification of DHS–NSA collaboration in the cybersecurity context. See supra note 235 and accompanying text.

328. See Richman, Federal Prosecutions, supra note 214, at 2119 (describing task force comprising DoJ and regulatory officials as "forum in which prosecutors join regulators to figure out the role that criminal prosecutions can play within an integrated regulatory program").

another.[329] In so doing, pooling might fuel greater intraexecutive deliberation and reason giving, including in pressurized policy domains like security.

Pooling, finally, can enable effective administration by overcoming a "captured" legislative process. By concentrating resources dispersed across the bureaucracy, pooling diminishes the ability of an interest groups–dominated legislature to create administrative structures deliberately designed to fail at carrying out their statutory mandates.[330] And where pooling engages agencies with diverse political ties to the public or different degrees of political independence, pooling can make it more difficult for powerful interest groups to capture the working of administration.[331]

Pooling, then, has real benefits in a political climate dependent on presidential administration to address societal and security challenges, and in a world with genuinely interconnected policy problems.

2. *Democratic Accountability.* — Pooling, in some respects, can strengthen presidential oversight of the bureaucracy. For those who believe that presidential administration promotes democratic accountability,[332] pooling might be seen as salutary. Instead of distinct agencies pursuing isolated missions in separate spheres, pooling can enable the President and his staff to concentrate the resources of administration in the service of a presidential policy vision.

That said, pooling also can diminish democratic accountability—including through the President—in those instances when it obscures where the boundaries between administrative actors are in practice. One response might be that this boundary blurring is irrelevant to democratic accountability through the President, because the President is held to account for the work of government as a whole. But the question of which agency undertakes what set of actions can matter to the public. When pooling obscures the role of national security agencies engaged in

329. See Jack Goldsmith, Power and Constraint 92–108 (2012) (detailing role of intraexecutive oversight of CIA from 1970s to current war on terror); Katyal, supra note 9, at 2322–27 (proposing "better bureaucracy" in part by giving agencies overlapping jurisdiction); Michaels, Fettered Executive, supra note 156, at 858–64 (describing how executive branch uses interagency CFIUS to overcome limitations of any one agency).

330. See Terry M. Moe, The Politics of Bureaucratic Structure, *in* Can the Government Govern? 267, 323–29 (John E. Chubb & Paul E. Peterson eds., 1989) (developing designed to fail thesis).

331. See, e.g., Barkow, Insulating Agencies, supra note 9, at 49–53 (discussing how dividing agency authority insulates agency from interest group capture); Richman, Federal Prosecutions, supra note 214, at 2118 (noting mediating potential of multiple agencies being involved in investigations of alleged corporate fraud).

332. See, e.g., Steven G. Calabresi, Some Normative Arguments for the Unitary Executive, 48 Ark. L. Rev. 23, 42–45 (1995) (arguing unitary executive better serves Madisonian goal of accountability); Kagan, supra note 1, at 2331–39 (asserting presidential administration promotes accountability by "enhanc[ing] transparency" and "establish[ing] an electoral link between the public and the bureaucracy").

the domestic space, for example, pooling might limit opportunities for democratic responsiveness. Pooling also might obscure how legal authorities are being used in practice—for example, to what extent foreign intelligence tools are being used in the administration of ordinary criminal law enforcement.[333] And pooling can blur lines of responsibility and decisional authority on the ground. This problem of "institutional clarity"[334]—that is, the concern that pooling can make it more difficult to determine which institutional actors are ultimately responsible for a course of action—also can diminish opportunities for accountability through Congress, including as a result of Congress's own committee oversight structures.[335]

Pooling also can undermine "institutional control" through Congress.[336] The enacting Congress is less able to control agency outputs through ex ante agency design. Whether obstacles to the enacting Congress's control over future agency outputs are protective of or corrosive to democratic accountability is itself a highly contested question beyond the scope of this Article.[337] But pooling also diminishes opportunities for accountability through the current Congress, including by making the executive less dependent on it.

These costs of pooling can be ameliorated in those instances when pooling is subject to other mechanisms designed to achieve accountability. For example, the EPA–NHTSA joint rulemaking does not raise the concerns that we might have with pooling between Team Telecom and the FCC. The EPA–NHTSA joint rulemaking preserved clear lines of decisional authority, proceeded pursuant to each agency's enabling statute, and was subject to a visible and participatory process. Unlike the NHTSA–EPA joint rulemaking, pooling between Team Telecom and the FCC enables the Team Telecom agencies effectively to regulate communications companies through the backdoor, absent a transparent and predetermined regulatory framework.[338]

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333. See supra notes 88–91 and accompanying text (describing FBI's use of data collected under NSA's legal authority).

334. See Gersen, Unbundled Powers, supra note 323, at 324–25 (explaining accountability entails "clarity of responsibility" so credit or blame for any particular policy can be properly allocated).

335. See supra notes 266–268 and accompanying text (describing how pooling arrangements combining intelligence and military authorities have created confusion regarding congressional oversight).

336. See Gersen, Unbundled Powers, supra note 323, at 324–25 (identifying institutional clarity and institutional control as two preconditions for accountability).

337. See, e.g., McNollgast & Daniel B. Rodriguez, Administrative Law Agonistes, 108 Colum. L. Rev. Sidebar 15, 15–16 (2008), http://www.columbialawreview.org/wp-content/uploads/2008/04/15_McNollgast.pdf ("[A] serious normative dispute remains about whether and to what extent [the] enacting coalition should be preferred over the current coalition in Congress.").

338. For a discussion of additional accountability mechanisms internal to the administrative state, see infra notes 385–391 and accompanying text.

3. *Protecting Fundamental Rights.* — Pooling also can pose a threat to fundamental rights. Congress's role in allocating power among agencies can be seen as a bulwark against an overly powerful executive—a safeguard that pooling diminishes. This less constrained executive is not contingent on congressional intent. Irrespective of whether Congress desires to curb pooling or is content to rely on it, pooling loosens the force of interbranch checks. Even without pooling, the extent to which our system of separated powers can protect rights by preventing the concentration of executive power at the expense of Congress has been questioned from a variety of directions.[339] This has led some scholars to look to the diffusion of power inside the administrative state.[340] Fragmentary administration in some instances might reflect the idea that diffuse power preserves liberty and other fundamental rights.[341] We do not have a single administrative structure regulating finance, health and food safety, internal security, foreign intelligence, and war. We instead have differentiated and institutionally bounded policy domains.[342] Pooling can compromise this topical separation of powers inside the administrative state.

At the same time, though, pooling also can facilitate rights-protective action by the executive. As the history of the Russell Amendment shows, Presidents have used unilateral design of the bureaucracy to address discrimination and advance civil rights.[343] Pooling today also enables the executive to undertake initiatives protective of political minorities and other disadvantaged groups.[344]

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339. See, e.g., Bradley & Morrison, Historical Gloss, supra note 324, at 414–15 ("Congress as a body does not systematically seek to protect its prerogatives against presidential encroachment."); Daryl J. Levinson, Empire-Building Government in Constitutional Law, 118 Harv. L. Rev. 915, 917–23 (2005) (arguing government actors not motivated to aggrandize their institutions); Levinson & Pildes, supra note 126, at 2314–16 (arguing competition between legislative and executive branches is minimized during periods of party-unified government); M. Elizabeth Magill, Beyond Powers and Branches in Separation of Powers Law, 150 U. Pa. L. Rev. 603, 603–06 (2001) (arguing efforts to separate powers and maintain balance among branches have failed).

340. See, e.g., Katyal, supra note 9, at 2316–19 (explaining virtues of "internal separation of powers" in foreign affairs); Gillian E. Metzger, The Interdependent Relationship Between Internal and External Separation of Powers, 59 Emory L.J. 423, 423–26 (2009) (discussing relationship between internal and external checks on executive branch).

341. See Gersen, Unbundled Powers, supra note 323, at 305–06 (describing separation of topical domains as alternative design choice to constitutional separation of functions, and highlighting agencies as example of this type of topical separation).

342. See id. (explaining agencies have functionally blended authority in substantively limited domains).

343. See supra note 279 and accompanying text (recounting presidential efforts to address civil rights unilaterally before and then in response to Russell Amendment).

344. See Cynthia Caporizzo, Office of Nat'l Drug Control Policy, Prisoner Reentry Programs: Ensuring a Safe and Successful Return to the Community (Nov. 30, 2011, 1:09 PM), http://www.whitehouse.gov/blog/2011/11/30/prisoner-reentry-programs-ensuring-safe-and-successful-return-community (on file with the *Columbia Law Review*) (describing interagency reentry council); supra notes 92–94 and accompanying text (discussing worker endangerment initiative).

Pooling might pose a more specific threat when it enables agencies to circumvent legal constraints designed to protect individual rights. The legal restraints on a criminal investigation by the FBI and the U.S. Attorneys' Office, for example, differ from those that guide a regulatory enforcement action by the SEC or a foreign intelligence operation by the NSA or an immigration action by ICE. We might be especially concerned, then, when pooling bridges boundaries that alter the effective scope of rights protections.[345]

Pooling, in those instances, also can undermine safeguards against factions. The legal limits on individual administrative actors can protect political minorities from prevailing majoritarian winds. Yet pooling enables the executive to bend the structures of administration in the service of dominant political forces. Pooling between the FBI and the INS in the aftermath of September 11, resulting in the detention of nearly 1,000 mostly Middle Eastern individuals, provides a potent example.[346]

At a deeper level, pooling might unsettle an idea behind separated powers. The boundaries inside the administrative state are not simply guarded turf. They are also opportunities. Because the legal and political tools on either side of a boundary will differ, their concentration is considerably more potent. Boundary building incentivizes boundary crossing. And fortifying formal separations may just shift pooling to more informal and less visible channels.

Effectively taming the types of pooling that can undermine constitutional values—without unduly impeding valuable interstitial experimentation and innovation—opens a set of difficult and underexamined questions. The aim of the two closing sections is to begin that conversation by identifying relevant questions and considerations. A complete resolution of these questions is itself a considerable undertaking reserved for future work.

B. *Constituting Pooling*

Agencies require affirmative authority to act.[347] Where does the legal authority to pool come from, and what is the scope of this authority? At the outset, it is worth emphasizing a difference between pooling and other types of interagency coordination. Sometimes the agencies' authority to engage in a particular interagency design will be specified by statute. Legislation might impose consultation requirements or otherwise structure interagency interactions.[348] Pooling, however, is executive-initiated design. The terms of the interagency interaction are not specified by the underlying statutory scheme.

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345. See supra notes 205–218 and accompanying text.

346. See supra notes 206–207 and accompanying text.

347. See supra note 25 and accompanying text.

348. See, e.g., Freeman & Rossi, supra note 9, at 1157–61 (discussing congressionally authorized or required interagency consultation).

One response, then, might be that pooling is unlawful—that agencies lack the affirmative authority to engage in it altogether. On this view, statutory coordination requirements or explicit allowances set both a "ceiling" and a "floor" for interagency interactions. The executive is powerless to collaborate beyond them.[349] The fact of pooling across policy domains, on this telling, would be one more example of how the executive, in practice, is unfettered by law.[350]

At the other pole, one might argue that pooling is an inherent constitutional power of the President that may not be curtailed by Congress.[351] Because the agencies are all subordinates of a unitary executive, this argument would go, the President has the constitutional authority to combine administrative resources in any way he chooses. Congress, according to this argument, encroaches on presidential power to the extent that it impedes pooling. This approach has some currency in recent D.C. Circuit precedent. In *National Mining Ass'n*, the court of appeals suggested that construing the Clean Water Act to proscribe the joint structure between the EPA and the Corps would raise "significant constitutional concerns" under Article II.[352] One implication of this view is the extent to which it limits judicial oversight of pooling. Another consideration is the extent to which it might understate Congress's role in structuring administration.

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349. This was the position pressed by the challengers in *National Mining Ass'n*, and the district court in that case agreed that the provisions of the Clean Water Act created both a ceiling and a floor for EPA–Corps collaborations in the implementation of section 404 permits. See supra notes 293–310 and accompanying text.

350. The question whether law constrains the executive is contested and the source of a robust exchange in the current scholarship. For arguments that law acts as a meaningful constraint, see, e.g., Goldsmith, supra note 329, at 207–08 ("[N]ever before has the Commander in Chief been so influenced, and constrained, by law."); Trevor W. Morrison, Constitutional Alarmism, 124 Harv. L. Rev. 1688, 1707–20, 1731 (2011) (reviewing Bruce Ackerman, The Decline and Fall of the American Republic (2010)) (countering claims that Office of Legal Counsel is rubber stamp to executive). For scholarship disputing the idea that law constrains the President, see Bruce Ackerman, The Decline and Fall of the American Republic 182–85 (2010) (asserting President can undermine "legal establishment headed by the Supreme Court"); Posner & Vermeule, supra note 18, at 4–5 ("[M]ajor constraints on the executive, especially in crises, do not arise from law or from the separation-of-powers framework . . . ."). See generally Curtis A. Bradley & Trevor W. Morrison, Presidential Power, Historical Practice, and Legal Constraint, 113 Colum. L. Rev. 1097, 1102–30 (2013) (synthesizing literature on both sides of this question, and suggesting mechanisms by which "politics and law operate in either reinforcing or countervailing ways").

351. There is a longstanding debate over the extent to which Congress can limit the President's Article II authority. See generally Steven G. Calabresi & Christopher S. Yoo, The Unitary Executive: Presidential Power from Washington to Bush 2–3 (2008) (noting some action of every President has sparked discussion of scope of Article II authority); Lawrence Lessig & Cass R. Sunstein, The President and the Administration, 94 Colum. L. Rev. 1, 5 (1994) (noting debate over President's Article II authority is subject of intense controversy in nation's history).

352. See Nat'l Mining Ass'n v. McCarthy, 758 F.3d 243, 249 (D.C. Cir. 2014).

Between these poles, a more moderate approach—and the one suggested here—would understand presidential authority over pooling to be defeasible by Congress.[353] Just as Congress may impose statutory constraints on presidential oversight of agency policymaking, Congress also may impose constraints on presidential structuring of the bureaucracy.[354] Such an approach would permit executive innovation within bounds determined by Congress and in some respects be more amenable to judicial oversight.

Significantly, the question of whether the President can control pooling does not answer the question what is the source of legal authority for agencies to *undertake* pooling. The debate over presidential administration generally focuses on the question whether the President can direct an agency in that agency's exercise of discretion—that is, whether the President can control the agency's exercise of legal authority.[355] The

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353. Cf. John F. Manning, The Supreme Court, 2013 Term—Foreword: The Means of Constitutional Power, 128 Harv. L. Rev. 1, 5 (2014) (positing Constitution favors deferring to Congress in implementing federal powers). There might still be limits on the extent to which Congress can impede pooling. See, e.g., Morrison v. Olson, 487 U.S. 654, 691 (1988) (stating relevant question is whether limitation "impede[s] the President's ability to perform his constitutional duty"). Those limits would turn at least in part on the extent to which the underlying authority for agencies to pool is Article II, a question discussed below. See infra notes 354–359 and accompanying text.

354. Cf. Datla & Revesz, supra note 1, at 831–32 ("Congress can by statute impose certain constraints on the President's exercise of his Article II powers.").

355. Some defenders of a strongly unitary executive argue that the President has constitutional authority to control the exercise of agency discretion, notwithstanding attempts by Congress to curtail that authority. See, e.g., Steven G. Calabresi & Kevin H. Rhodes, The Structural Constitution: Unitary Executive, Plural Judiciary, 105 Harv. L. Rev. 1153, 1166 (1992) (arguing President has "direct power to supplant any discretionary executive action taken by a subordinate with which he disagrees, notwithstanding any statute that attempts to vest discretionary executive power only in the subordinate"); Steven G. Calabresi & Saikrishna B. Prakash, The President's Power to Execute the Laws, 104 Yale L.J. 541, 599 (1994) ("The Executive Power Clause is a grant of exclusive power to the President that allows him to control the execution of all federal laws."). Other scholars defend presidential directive authority on policy grounds and argue for a presumption in favor of it when legislation has not foreclosed it. See, e.g., Kagan, supra note 1, at 2250–52 (arguing presidential directive authority is "more transparent and responsive to the public, while also better promoting important kinds of regulatory competence and dynamism"). Meanwhile, some scholars argue that the President may supervise the agencies, but he may not direct their decisions. See, e.g., Strauss, Overseer or Decider?, supra note 1, at 704–05 ("[T]he President's role . . . is that of overseer and not decider."); Peter L. Strauss, Presidential Rulemaking, 72 Chi.-Kent L. Rev. 965, 984–86 (1997) (arguing Congressional authority delegated to agencies is not given to President); cf. Kevin M. Stack, The President's Statutory Powers to Administer the Laws, 106 Colum. L. Rev. 263, 267 (2006) (arguing Presidents only have authority to direct administrative action where such authority is expressly conferred by statute). Others challenge this distinction between oversight and control as too faint to be legally meaningful. See Andrias, supra note 96, at 1110–11 ("[I]n application, the two versions of Presidential control—direction versus oversight—have much in common."); Cary Coglianese, Presidential Control of Administrative Agencies: A Debate over Law or Politics?, 12 U. Pa. J. Const. L. 637, 645–46 (2010)

source of the agency's legal authority—the legal basis for discretion—is generally not Article II, but rather the agency's enabling statute.[356] To make the issue more concrete: In the pooling arrangement at issue in *National Mining Ass'n*, pursuant to what legal authority did the EPA undertake a new screening and sorting function on the front end of the permitting process?

Deriving the source of agency's legal authority from Article II might be both under- and overinclusive. It might be underinclusive because pooling can occur absent presidential direction or delegation of Article II authority. The EPA–Corps design, for example, was created pursuant to an interagency memorandum of agreement, not a presidential directive.[357] Grounding the agencies' authority to pool in Article II might also be unsatisfying for a different reason. It is a substantial claim of presidential power to suggest that agencies, in the course of routine administration, exercise Article II authority.[358]

An alternative would be to understand an agency's legal authority to pool with another agency as a type of implicit or de facto delegation from Congress, ancillary to the delegation of substantive policymaking power.[359] Drawing the authority to pool from silences or ambiguity in statutory schemes would afford agencies some leeway to reconfigure boundaries, while simultaneously suggesting one way to cabin that

("Unfortunately, any theoretical difference between influence and control, or between oversight and decision will not be observed in practice.").

356. See supra notes 25–27 and accompanying text (discussing source of agencies' affirmative legal authorities).

357. See supra notes 293–300 and accompanying text.

358. Such a claim finds some support in the legal scholarship. See, e.g., Calabresi & Yoo, supra note 351, at 4 ("All subordinate nonlegislative and nonjudicial officials exercise executive power, and they do so only by implicit or explicit delegation from the president."); Jack Goldsmith & John F. Manning, The President's Completion Power, 115 Yale L.J. 2280, 2298–2302 (2006) (discussing binding deference to agency interpretation of statutes—*Chevron* doctrine—as grounded in Article II power). But it is controversial and highly contestable.

A narrower approach to the Article II question might still cover a subset of pooling. Henry Monaghan has argued that there is "a narrower, inherent executive . . . 'protective' power," by which he means "a general authority to protect and defend the personnel, property, and instrumentalities of the United States from harm." Monaghan, supra note 25, at 11. Such an inherent constitutional power might support pooling, for example, between the NSA and the DHS to protect government systems from a cyberattack. But the scope of that inherent constitutional authority is uncertain. And, more significantly, such an approach to Article II would not answer the more general legal authority question that cuts across the foregoing examples of pooling in various policy domains.

359. See Adam B. Cox & Cristina M. Rodríguez, The President and Immigration Law, 119 Yale L.J. 458, 463 (2009) (arguing immigration law has "consequence of delegating tremendous authority to the President to set immigration screening policy by making a huge fraction of noncitizens deportable at the option of the Executive" and labeling this source of presidential power "*de facto* delegation" from Congress).

authority.[360] An agency may only pool to the extent that pooling is in the service of its own mission, generally prescribed in legislation. And pooling may not contravene constraints imposed by the underlying statutory scheme.

The Supreme Court has long held that agencies are free to design their own procedural rules.[361] This tenet of administrative law is grounded in the idea that the delegation of policymaking power includes the delegation of power to resolve subordinate design questions.[362] This approach to administrative procedure is rooted in a conception of agencies as better situated than either courts or Congress to design processes "adapted to the peculiarities of the industry and the tasks of the agency involved."[363] For this reason, the Court has construed statutory silence as an effective delegation of such authority from Congress.[364] The delegation is not boundless. Administrative design must be in the service of the agency's substantive policy mandate.[365] But the Court has cautioned that "[a]bsent constitutional constraints or extremely compelling circumstances the administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties."[366]

360. It is possible that such limitations also can define a theory of presidential power to pool, along lines similar to those suggested by Jack Goldsmith and John Manning in their study of a presidential "completion power." See Goldsmith & Manning, supra note 358, at 2302–11 ("Where Congress has failed to specify in full the manner of enforcement, the executive necessarily exercises some discretion in specifying incidental details necessary to carry into execution a legislative program."). In such circumstances, as Goldsmith and Manning suggest, the source of the legal authority may be less significant than its scope. See id. at 2308 ("This means that the important questions about the completion power have less to do with its source and more to do with its scope . . . and limits . . . .").

361. See FCC v. Schreiber, 381 U.S. 279, 290 (1965) (noting "established principle that administrative agencies 'should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties'" (quoting FCC v. Pottsville Broad. Co., 309 U.S. 134, 143 (1940))).

362. See Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 525 (1978) (holding legislation delegates to FCC "power to resolve 'subordinate questions of procedure . . . [such as] the scope of the inquiry, whether applications should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another's proceedings, and similar questions'" (alteration in original) (quoting *Pottsville Broad.*, 309 U.S. at 138)).

363. *Schreiber*, 381 U.S. at 290.

364. See, e.g., *Vt. Yankee*, 435 U.S. at 524–25 ("Even apart from the Administrative Procedure Act this Court has for more than four decades emphasized that the formulation of procedures was basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments.").

365. See *Schreiber*, 381 U.S. at 291–92 (acknowledging courts have continuing role in reviewing administrative procedural rulemaking to ensure "consistency with governing statutes and the demands of the Constitution").

366. *Vt. Yankee*, 435 U.S. at 543 (quoting *Schreiber*, 381 U.S. at 290) (internal quotation marks omitted).

This approach to agency-made process, however, has focused on the individual agency's self-governance. That is, it has focused on the agency's creation of structures and processes to govern its own conduct. The idea of interstitial design choice as a delegation from Congress raises some similar considerations. But it also raises some different concerns.

As in the agency's designation of its own procedural rules, agencies are often in the best position to determine how to structure their interactions with other agencies to advance their respective missions. And a rule that agencies are prohibited from collaborating save pursuant to specific authorizations detailed by Congress would upset basic efficacy goals of the administrative state.

That said, pooling can pose risks that are not present in the conventional context of an agency's design of its own procedures to implement its own policy mandate. Pooling can raise three types of concerns that are, at a minimum, less salient in the context of intra-agency governance. The first concern is structural. The creation of regulatory power without Congress, as in the Team Telecom example, might be seen as a type of executive encroachment. The executive also might encroach on the legislature to the extent that executive designs override a specific interagency design set out by statute. The second type of concern is individuated. Individual protections have less purchase if the executive can work around those protections through another institutional actor.[367] A final set of concerns is less about circumvention than about aggregation—the cumulative effects of government activity may look different than the isolated actions of any individual participant.

These considerations might suggest that pooling is a type of unilateral design worthy of closer scrutiny than the agency's creation of its own internal procedures.

C. *Regulating Pooling*

Another set of questions to pursue is whether pooling is self-inhibiting. That is, are there features of pooling that might make the phenomenon itself contained? Understanding those internal features is relevant to a discussion of whether and how pooling should be regulated by external forces.

There are internal qualities to pooling that might inhibit the phenomenon overall. But those features might not tame the types of pooling that raise normative concerns. After identifying those internal

367. Another way to see this danger is as itself a structural concern: The executive accretes discretion at the expense of *courts* by working around rules that otherwise would empower the judiciary to exercise oversight. See, e.g., Abel v. United States, 362 U.S. 217, 246–47 (1960) (Douglas, J., dissenting) ("Here the F.B.I. works exclusively through an administrative agency—the I.N.S.—to accomplish what the Fourth Amendment says can be done only by a judicial officer.").

constraints, the Article concludes by beginning to explore what more robust external checks might look like.

1. *Internal Constraints.* — Even looking exclusively at internal dynamics, pooling is not an unbounded phenomenon. While it occurs across a range of significant policy domains, there are certain qualities that likely work to inhibit it. Some of those institutional dynamics will be highly context specific. For example, there are distinctive qualities to the interaction between prosecutors and a particular regulatory agency, like the FCC or the SEC, and even to the interactions between discrete subcomponents of a particular agency with that agency's leadership and with the subcomponents of other agencies.[368]

More generalizable dynamics are also at play. For example, while the foregoing has shown how path dependence can augment the utility of pooling when specific actors develop expertise now relevant to a different agency's mission, path dependence itself can inhibit pooling by creating obstacles to administrative innovation.[369]

In addition, facets of group decisionmaking, well documented elsewhere, also are likely to slow down pooling. Pooling, for instance, is subject to "vetogates" that can inhibit the phenomenon.[370] Consider Team Telecom's pooling arrangement with the FCC, which enables Team Telecom to impose obligations on cable carriers. That pooling arrangement depends, first, on the FCC's agreement to defer license determinations pending Team Telecom's negotiation with the cable companies. The Team Telecom agencies also must agree to each other's priorities and preferences in negotiating the security agreement. The FCC must then agree to condition the grant of a license on the Network Security Agreement. At each of these stages, multimember dynamics could have disabled pooling.[371]

Pooling also crowds out other potential activity by the participating agencies by absorbing administrative resources. Congress has accentuated this internal constraint through the pass-the-hat prohibition.[372] This

368. See, e.g., Garrett, Collaborative Organizational Prosecution, supra note 97, at 162–63 (emphasizing "degree of collaboration" between agencies and prosecutors "depends very much on which federal agency is involved, in which type of matter, and with which prosecutors," and "[a]gencies [themselves] must also be disaggregated"); Daniel Richman, Institutional Competence and Organizational Prosecutions, 93 Va. L. Rev. Brief 115, 117–18 (2007), http://www.virginialawreview.org/volumes/content/institutional-competence-and-organizational-prosecutions (on file with the *Columbia Law Review*) (noting ability of some state attorney general offices "to shift seamlessly between criminal and civil tracks").

369. See supra notes 200–204.

370. See William N. Eskridge, Jr., Vetogates, *Chevron*, Preemption, 83 Notre Dame L. Rev. 1441, 1442–43 (2008) (defining "vetogates" as requirement that law pass House, Senate, and presentment to President, as well as internal congressional hurdles before enactment, and describing effects on public law).

371. See supra notes 29–42 and accompanying text.

372. See supra notes 281–287 and accompanying text.

might suggest that pooling is more likely to occur when resource allocation goals of the different agencies already are closely aligned or when there is strong pressure to pool from the White House. Because the category of policy initiatives to which White House staff can devote attention is inherently limited, this might further inhibit the size of pooling across the administrative state.

These internal constraints on the scope of pooling, however, might not effectively regulate the types of pooling that do proliferate. A significant concern, for example, is the use of pooling to work around legal limits put in place to protect political or other minorities.[373]

2. *External Checks.* — Agencies are strategic actors, and they are likely to calibrate their behavior to what they think their external overseers will tolerate.[374] This means that, when pooling is more visible, agencies are likely to make pooling decisions that anticipate, or try to anticipate, where external overseers would draw the line. External checks might matter, then, not only because courts and Congress can rein in an overreaching executive, but also because agencies might behave differently in the shadow of judicial review or congressional oversight. A modest first step, then, might be to make pooling more visible. Indeed, a more complete normative assessment of pooling is difficult given the dearth of empirical data on its scope and current uses.

Even if pooling is not always subject to judicial review, moreover, the existence of *some* judicial review might be valuable because it enables courts to determine the legal rules that lawyers inside the executive will then apply to pooling. Though the issue is contested, I agree with those scholars who argue that legal rules matter inside the executive.[375] As those scholars have shown, lawyers today flyspeck administration.[376] And this is true for the creation of interagency structures as well. The Office of Legal Counsel, for example, reviews the legality of every proposed executive order, including those that create new interagency designs.[377]

But the question of who (or which institutional actor) creates the governing legal rules is significant. Precedent suggests that the legal rules that the executive develops to govern its own conduct can be more

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373. See supra notes 202–210 and accompanying text.

374. See, e.g., Freeman & Spence, supra note 148, at 3 (arguing when agencies confront problem of fit, "they proceed strategically, cognizant of the preferences of their political overseers"); Jennifer Nou, Agency Self-Insulation Under Presidential Review, 126 Harv. L. Rev. 1755, 1756–61 (2013) (arguing agencies act strategically to make executive branch review of agency rulemaking more costly and insulate agency decisions from potential reversal).

375. See supra note 350 (identifying literature on both sides of debate).

376. See, e.g., Goldsmith, supra note 350, at xii (describing executive branch lawyers' efforts to "ensur[e] that the Commander in Chief complied with thousands of laws and regulations" during wars following 9/11).

377. Office of Legal Counsel, About the Office, U.S. Dep't of Justice, http://www.justice.gov/olc (on file with the *Columbia Law Review*) (last visited Jan. 21, 2015).

permissive than the legal rules that the courts will adopt when they take up the same question.[378] There may be value in courts devising some of the legal rules for pooling, even if it is the executive that will police them in many instances.

If pooling complicates separation of powers ideas, it might be tempting to turn to separation of powers doctrine to police it.[379] Separation of powers law, however, offers a blunt instrument for policing boundaries internal to the executive. Potential alternatives to regulation through separation of powers law are worthy of close study. Indeed, modern administrative law emerged in part as a substitute for a robust doctrine of nondelegation rooted in the separation of powers. Rather than curtail Congress's sweeping delegations to the agencies, the project of administrative law has sought to structure, constrain, regularize, and legitimate those delegations—and, in current times, to curb executive excess in the implementation of congressional schemes.[380]

A dominant doctrinal strategy in contemporary administrative law is the creation of *zones of tolerance*—that is, spaces for permissible policy experimentation within judicially enforced bounds. *Chevron* doctrine creates a space for executive policy innovation, while preserving boundaries on administrative policymaking that are policed by courts.[381] To the extent *United States v. Mead Corp.* rewards agency action that is subject to notice-and-comment rulemaking with the greater likelihood of *Chevron* deference, *Mead* can be understood to make these zones of tolerance contingent on visibility, reason giving, and participatory opportunities.[382]

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378. NLRB v. Noel Canning, 134 S. Ct. 2550 (2014), provides a recent illustration. The Supreme Court unanimously rejected the executive branch's legal position that the Senate's pro forma sessions should be evaluated functionally and counted as periods of recess for purposes of calculating the length of the Senate recess in question. Id. at 2573–77. Four Justices would have gone further in constraining the President's recess appointment power. Id. at 2592 (Scalia, J., concurring in the judgment).

379. Cf. Metzger, supra note 340, at 426 (arguing for "greater exploration of how separation of powers doctrine could be used to reinforce internal Executive Branch constraints").

380. See, e.g., David J. Barron & Todd D. Rakoff, In Defense of Big Waiver, 113 Colum. L. Rev. 265, 266 (2013) (noting modern administrative law emerged in response to broad delegation of power to specify law where Congress left it open ended).

381. See E. Donald Elliott, *Chevron* Matters: How the *Chevron* Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law, 16 Vill. Envtl. L.J. 1, 11–12 (2005) (arguing *Chevron*'s effect inside EPA was to open up "policy space" for agency action); Matthew C. Stephenson & Adrian Vermeule, *Chevron* Has Only One Step, 95 Va. L. Rev. 597, 602 (2009) ("*Chevron* supposes that interpretation is an exercise in identifying the statute's range of reasonable interpretations, [which the authors depict as a] zone of ambiguity."); Peter L. Strauss, "Deference" Is Too Confusing—Let's Call Them "*Chevron* Space" and "*Skidmore* Weight," 112 Colum. L. Rev. 1143, 1143 (2012) (developing concept of *Chevron* space). See generally Elizabeth Magill & Adrian Vermeule, Allocating Power Within Agencies, 120 Yale L.J. 1032 (2011) (describing how administrative law doctrines including *Chevron* allocate power inside agencies).

382. See 533 U.S. 218, 226–27 (2001) (holding administrative implementation of statutory provision qualifies for *Chevron* deference when Congress delegated authority to

One set of prescriptive questions, then, is whether we should create a permissible zone for executive innovation and experimentation in interstitial design, with boundaries policed by courts under the relevant statutory scheme.

If zones of tolerance help to mediate between the value of executive innovation and the vice of executive encroachment, another type of doctrinal strategy might help to guard against the circumvention of individual rights. Courts could create *links* between actors on different sides of a substantive or procedural boundary. For example, some resourceful judges have extended protections like the *Brady* rule that attach to government conduct on one side of the criminal–administrative boundary to the government actors on the other side of that boundary.[383] Doctrinal innovations like this one illuminate another dimension of regulating pooling: the interaction between administrative governance and criminal procedure. In the SEC–DoJ pooling context, for instance, courts have cobbled together requirements to notify defendants of a joint investigation through interpretations of the Fourth and Fifth Amendments.[384] The interrelationship between administrative law and criminal procedure warrants further exploration.

Considerable barriers to judicial oversight are likely to remain, however. Greater judicial scrutiny also raises costs of its own. It might stymie pooling that is beneficial to effective administration. There also is the risk that judicial scrutiny of more visible forms of pooling will only drive pooling deeper into the shadows. Finally, it may be difficult for courts to effectively sort constructive pooling from its more pernicious strains.

Institutional strategies might not have the same drawbacks and, at a minimum, offer an additional course to pursue. We might ask how Congress can use institutions embedded inside the executive to make pooling more accountable. Congress, for instance, has tasked inspectors general inside individual agencies with preventing fraud and abuse.[385] Because they are ensconced within the agencies, inspectors general can be more sensitive than courts or Congress to nuanced forms of legal evasion. And their formal and informal features of independence can help protect their ability to scrutinize the conduct of the agencies within

agency generally to make rules carrying force of law and agency interpretation claiming deference was promulgated in exercise of that authority).

383. For example, Judge Jed Rakoff has applied the *Brady* rule of criminal procedure to discovery obligations relating to SEC materials in a joint DoJ–SEC investigation. See United States v. Gupta, 848 F. Supp. 2d 491, 493 (S.D.N.Y. 2012) (holding U.S. Attorney's Office must "review the SEC's memoranda and interview notes and disclose to defendant any '*Brady*' materials therein").

384. See supra notes 217, 322 and accompanying text (discussing court opinions using constitutional criminal procedure to police pooling in joint investigations).

385. Inspectors general today exist, pursuant to legislation, in over fifty federal agencies. Shirin Sinnar, Protecting Rights from Within? Inspectors General and National Security Oversight, 65 Stan. L. Rev. 1027, 1030 (2013).

which they are housed.[386] Though inspectors general have not performed uniformly, they have had beneficial effects on administrative compliance.[387] We might use this type of oversight structure but think about how to extend it into the interstices. One possibility would be for Congress to task inspectors general with investigating when pooling exceeds an agency's legal mandate or poses a threat to civil rights and civil liberties.[388]

We might also envision other institutional overseers addressing dangers posed by pooling in policy-specific domains. For example, the Privacy and Civil Liberties Oversight Board (PCLOB) is an agency created by Congress to oversee counterterrorism activities.[389] This board, which is just getting off the ground, has already drawn attention to pooling in the course of its review of specific surveillance programs. A recent report by the PCLOB on the "Section 702 Program," for example, brought to light the FBI practice of using data acquired by the NSA under section 702 in the course of the FBI's routine criminal law enforcement activity.[390] Congress could augment the function and resources of this board to investigate and report on the cumulative and systemic risks to privacy resulting from interagency pooling. This institutional approach might also have the effect of making the subregulatory space where pooling thrives more visible and perhaps more open to participatory process.[391]

In the end, then, regulating pooling may itself be boundary shifting. Administrative law has developed a robust set of doctrinal and institutional tools to simultaneously enable and constrain the exercise of administrative power. But those tools operate on only a sliver of

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386. Statutory features such as a direct reporting role to Congress ensure some measure of independence for inspectors general. Inspectors general also benefit from conventions of independence. See Vermeule, Conventions, supra note 182, at 1166 (describing conventions providing independence to agency actors through "unwritten political norms" constraining influence of other actors and carrying sanctions for perceived violations).

387. See Sinnar, supra note 385, at 1085–86 (arguing inspectors general in some national security agencies exposed abuses and protected rights where other political actors had failed, but observing inconsistent efficacy of inspectors general across agencies).

388. Another site for this oversight role might be civil liberties offices inside the agencies. For a discussion of the role of structures internal to the agencies focused on administrative adherence to civil liberties and other external values, see Margo Schlanger, Offices of Goodness: Influence Without Authority in Federal Agencies, 36 Cardozo L. Rev. 53, 54–60 (2014) (describing and evaluating "Offices of Goodness" as subsidiary offices created within agencies by Congress to instill and safeguard desired values, such as civil rights).

389. See 42 U.S.C. § 2000ee (2012) (identifying PCLOB's purpose to "ensure that liberty concerns are appropriately considered" in national counterterrorism activities).

390. PCLOB, Section 702 Report, supra note 85.

391. See Daphna Renan, Administering Surveillance: The Fourth Amendment as Administrative Procedure 1, 25 (Oct. 21, 2014) (unpublished manuscript) (on file with the *Columbia Law Review*).

administration. A question for the normative project of administrative law is how to develop a more robust sense of governance at the interstices without unduly impeding the work of government.

CONCLUSION

Executive power scholars have emphasized in recent writings the accretion of power to the modern-day executive. But their account of *how* power so accretes, particularly in contexts where statutes remain unchanged, remains incomplete. Pooling supplies a missing link. It is a mechanism through which the executive accumulates discretion in times where societal and security challenges are different from what they were when Congress undertook the initial allocation of authorities across agencies.

Pooling augments capacity by sharing authority among administrative actors. It concentrates administrative resources dispersed across the bureaucracy. And it does so through joint efforts that bridge sometimes longstanding structural divides. Pooling challenges us to explore the salience of those underlying structural separations in current times; to deliberate on the extent to which they are sustaining and sustainable; and, where the values resonate but the separations falter, to examine the role of administrative law in instantiating those core values by other means.