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Alexander Hamilton and Administrative Law: How America's First Great Public Administrator Informs and Challenges Our Understanding of Contemporary Administrative Law

Rodger D. Citron
Touro Law Center, rcitron@tourolaw.edu

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ALEXANDER HAMILTON AND ADMINISTRATIVE LAW: HOW AMERICA'S FIRST GREAT PUBLIC ADMINISTRATOR INFORMS AND CHALLENGES OUR UNDERSTANDING OF CONTEMPORARY ADMINISTRATIVE LAW

RODGER D. CITRON*

ABSTRACT

Alexander Hamilton's recognition and reputation have soared since the premiere of "Hamilton," Lin-Manuel Miranda's musical about him in 2015. For lawyers, Hamilton's work on the Federalist Papers and service as the nation's first Treasury Secretary likely stand out more than other aspects of his extraordinary life. Politics and economics were fundamental concerns addressed by the Framers in a number of ways, including what we now refer to as administrative law—the laws and procedures that guide government departments (or, as we say today, agencies). Indeed, "Hamilton" reminds us that questions of administration and administrative law have been with us since the first days of the Republic.

Inspired by the musical, this Article examines three related aspects of Hamilton and administrative law. First, while the typical administrative law course is preoccupied with the last century and is anchored in the New Deal, Hamilton's tenure as Treasury Secretary shows that (administrative) law guided the Treasury Department's operations and, moreover, that Hamilton took the law into account when leading the Department. Second, in law school, administrative law focuses on legal constraints on the agency rather than internal aspects of administration. Hamilton's career, which fused contemporary notions of public administration and administrative law, challenges the separation of these two disciplines. Third, separation of powers is the foundation of the administrative law course. As the Article discusses, the Supreme Court considered Hamilton's views on this subject, specifically in the context of the President's removal authority, when deciding *Seila Law LLC v. Consumer Protection Final Bureau* in 2020. In sum, Hamilton and "Hamilton" have much to say about contemporary administrative law.

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* Rodger D. Citron is the Associate Dean for Research and Scholarship and Professor of Law at Touro University, Jacob F. Fuchsberg College of Law. He thanks Andrea Cohen, Bill Petersen, Andrew Robertson, and Irene McDermott and her excellent staff on the Touro Law Library for their assistance with this Article.

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I. INTRODUCTION

Alexander Hamilton was hardly unknown prior to 2015. Among other things, the former Treasury Secretary could be found on the ten-dollar bill.[1] Nonetheless, Hamilton's recognition and reputation have soared since the premiere of Lin-Manuel Miranda's musical about him in 2015.[2] Inspired by Ron Chernow's biography,[3] "Hamilton" has generated its own adoring commentary, including a collection of essays on the legal issues addressed in and raised by the show.[4] Although the collection covers many topics, it does not expressly address the subject of Hamilton and administrative law.[5]

This omission may be due to the fact that while the show properly depicts Hamilton as an extraordinarily able and energetic administrator, it is not focused on the emerging

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[1] Alexander Hamilton has been the "sole portrait" on the ten-dollar bill since 1929. *See* Jennifer Gloade, *Hamilton: How money tells his story*, NAT'L MUSEUM OF AM. HIST. (Jan. 11, 2018), https://americanhistory.si.edu/blog/hamilton-how-money-tells-his-story.

[2] Claudia Morales, *Alexander Hamilton: Why is He So Popular Today?*, POLITICIANCOMPARE (Nov. 6, 2020), https://www.politiciancompare.com/alexander-hamilton-why-is-he-so-popular-today/.

[3] *See* RON CHERNOW, ALEXANDER HAMILTON (Penguin Books 2004).

[4] LISA A. TUCKER (ED.), HAMILTON AND THE LAW: READING TODAY'S MOST CONTENTIOUS LEGAL ISSUES THROUGH A HIT MUSICAL vii (Cornell University Press, 2020). Hamilton and the Law includes chapters on, among other things, "Hamilton" and the Constitution and the three branches of government; "America, You Great Unfinished Symphony;" and the musical and race, women, and immigration. *Id.* at vii.

[5] *See generally id.*

legal regime that Hamilton helped to create. To be fair, there is at least one song in which the Federalist Papers—the essays written by Hamilton, James Madison, and John Jay in support of ratifying the Constitution—are discussed.[6] And it may be that only an administrative law professor would attend a musical show about our first Treasury Secretary expecting to hear songs about the "fourth branch" of government.[7]

"Hamilton" nevertheless reminds us that questions of administration and administrative law have been with us since the first days of the Republic and shows us why Hamilton is such a pivotal figure of that era. As Chernow and others have explained, Hamilton made vital contributions to the development of the United States' rejection of British rule and adoption of a republican form of government—one of the "great" political "transformations [of] the late eighteenth century."[8] Furthermore, as Chernow observed, in the realm of economics and commerce, "Hamilton was an American prophet without peer."[9] As the United States approached the industrial revolution and expanded commercially—internally with "the growth of banks and stock exchanges," internationally through greater "global trade"—Hamilton developed economic policies and institutions that responded to and encouraged those developments.[10]

Politics and economics were fundamental concerns of the Framers. They were addressed in a number of ways, including what we now refer to as administrative law—the laws and procedures that guide government departments (or, as we say today, agencies).[11] Inspired by "Hamilton," this Article examines three related aspects of Hamilton and administrative law. Initially it sets out three premises that inform the way in which administrative law is taught today. First, as Part II discusses, the typical administrative law course is preoccupied with the last century and is anchored in the New Deal. Second, the foundation of the course is separation of powers—the idea that Constitution divides power between three different branches of government and assigns each branch certain responsibilities and authority.[12] And third, the focus is on

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6 *See* Lin-Manuel Miranda, *Non-Stop*, THE MUSICAL LYRICS, https://www.themusicallyrics.com/h/351-hamilton-the-musical-lyrics/3684-non-stop-lyrics.html (last visited Mar. 5, 2023).

7 *See, e.g.*, Justice Robert Jackson's use of the phrase in his dissent in FTC v. Ruberold Co., 343 U.S. 470, 487 (1952) (stating that agencies "have become a veritable fourth branch of government").

8 CHERNOW, *supra* note 3, at 344; *see also, e.g.*, Thomas K. McCraw, *The Strategic Vision of Alexander Hamilton*, 63 THE AM. SCHOLAR 31, 41 (2001) ("There had never before been a successful revolution against a mother country.").

9 CHERNOW, *supra* note 3, at 344; *see also* Broadus Mitchell, *Alexander Hamilton as Finance Minister*, 102 PROCEEDINGS THE AM. PHI. SOC. 117, 119 (1958) ("If anything, Hamilton was more the prophet and practitioner of government than he was the patron of finance, trade and manufactures.").

10 CHERNOW, *supra* note 3, at 344; *see infra* Part III.

11 *Administrative Law*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/administrative_law (last visited Jan. 21, 2023).

12 THE FEDERALIST NO. 47, at 300-01 (James Madison) (Clinton Rossiter ed., 1961).

legal constraints on the agency rather than internal aspects of administration. Internal agency operations are the province of public administration, a discipline separate from administrative law.

This Article argues that Hamilton's career challenges the premises of contemporary administrative law. As discussed in Part II, Hamilton's career fused contemporary notions of administration and administrative law. Part III provides a brief account of Hamilton's tenure as Treasury Secretary. This Part focuses on how the Treasury Department operated under Hamilton's direction. This account is meant to correct the notion that administrative law either did not exist (the stronger version of the argument) or was not significant (the weaker version) until the New Deal in the twentieth century. It draws on Professor Jerry Mashaw's account of American administrative law under Federalist Presidents George Washington and John Adams.[13] From the start, law guided the Treasury Department's operations. Moreover, Hamilton took the law into account when leading the Department.

Part IV turns to separation of powers. This Part is both historical and contemporary. It examines an important legal question addressed by the Supreme Court in 2020: the extent to which Congress may limit the President's authority to remove the head of an administrative agency. In *Seila Law LLC v. Consumer Protection Financial Bureau*, the Court ruled in a 5-4 decision that Congress could limit that authority only in certain specific circumstances.[14] Chief Justice John Roberts' majority opinion emphasizes the need for an agency to be accountable to the President.[15] In challenging this view, Justice Elena Kagan's dissent stresses Congress's role in creating an agency such as the Consumer Financial Protection Bureau ("CFPB") and delegating its various responsibilities and powers as a financial regulator.[16] Both the majority and the dissent drew on the early history of the Republic, including Hamilton's views expressed in the Federalist Papers and elsewhere, to support their positions.[17] *Seila Law* shows that Hamilton's views

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13 Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 YALE L.J. 1256 (2006). Mashaw's lengthy article is, in part, a response to the view "that the national government, from 1787 until the late nineteenth century, was a government of courts and parties." *Id.* at 1258. As Mashaw observes, this view "is particularly associated with Stephen Skowronek." *Id.* at 1258 n.3. *See* Julian E. Zelizer, *Stephen Skowronek's "Building a New American State" and the Origins of American Political Development*, SOC. SCI. HIST. 425, 434 (2003). For a representative statement of Skowronek's views, *see id.* at 8: While "Early America exemplified an emergent pattern among Western states with its legal supports for democracy and capitalism," he writes, it was exceptional in that "it maintained a meager concentration of governmental controls at the national level." *See also* Daniel P. Carpenter, *The Multiple and Material Legacies of Stephen Skowronek*, 27 SOC. SCI. HIST. 465, 468 (2003) (according to Skowronek, "the Progressive Era spawned a structural replacement for nineteenth century government. Party rotation was traded in for a European-style merit system. Judicial governance of the industrial economy was agonizingly discarded in favor of regulation by independent commission").

14 Seila Law LLC v. Consumer Prot. Fin. Bureau, 140 S. Ct. 2183, 2192 (2020).

15 *Id.* at 2197–2207 (majority opinion).

16 *Id.* at 2204–06 (Kagan, J., dissenting in part).

17 *Id.* at 2202–03. *See also id.* at 2229 (Kagan, J., dissenting in part).

continue to inform how the United States governs itself, specifically in this case in litigation over the President's removal authority.

The Article concludes in Part V with thoughts on the lessons of Hamilton (and "Hamilton") for those who teach, study, and practice administrative law.

II. ADMINISTRATIVE LAW AS IT IS TAUGHT TODAY AND HAMILTON

A. The Contemporary Administrative Law Course

A typical recently-published Administrative Law casebook defines the subject as "the law that agencies make."[18] Inevitably, the Administrative Law course is rooted in the New Deal, when administrative agencies proliferated during Franklin D. Roosevelt's ("FDR's") presidency.[19] As has been recounted extensively, there were significant political and legal challenges to the many agencies Congress created at FDR's urging.[20] While nearly all of FDR's administrative agencies survived those attacks, the administrative state continues to be controversial.[21]

Even as the contours of the administrative state continue to be litigated, it is safe to say that the typical administrative law class has three basic premises. The first, as indicated in the preceding paragraph, is that the course is anchored in the New Deal. The New Deal refers to the economic programs and policies adopted by President Roosevelt after he took office in 1933. FDR introduced these measures to combat the Great Depression, which followed the Stock Market Crash of 1929.[22] As Professor Reuel Schiller summarized:

> The Roosevelt administration's vision of policymaking was based on three premises. First, the Depression proved that laissez-faire capitalism no longer

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[18] WILLIAM F. FUNK ET AL., ADMINISTRATIVE PROCEDURE AND PRACTICE 5 (6th ed. 2019); *see also, e.g.*, *Administrative Law*, BLACK'S LAW DICTIONARY ("That branch of public law which deals with various organs of the sovereign power considered as in motion, and prescribes in detail the manner of their activity, being concerned with such topics, the collection of the revenue, the regulation of the military and naval forces, citizenship and naturalization, sanitary measures, poor laws, coinage, police, the public safety and morals, etc.").

[19] William E. Leuchtenburg, *Franklin D. Roosevelt: Domestic Affairs*, MILLER CTR., https://millercenter.org/president/fdroosevelt/domestic-affairs (last visited Mar. 6, 2023).

[20] *See* Daniel B. Rodriguez & Barry R. Weingast, *Engineering the Modern Administrative State: Political Accommodation and Legal Strategy in the New Deal Era*, 46 BYU L. REV. 147, 148–49 nn.1 & 2 (collecting sources).

[21] *See, e.g.*, Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994) ("The post New-Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution."). This Article will not take up the challenges President Trump posed to the administrative state nor will it address in detail the legal challenges to core administrative law principles posed by the development of the "major questions" doctrine. *See* West Virginia v. Env't Prot. Agency, 142 S. Ct. 2587, 2609 (2022) (noting that the major questions doctrine applies when an agency asserts "highly consequential power beyond what Congress could reasonably be understood to have granted").

[22] *See generally* IRA KATZNELSON, FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME (2013).

> worked in the United States. Second, there were objectively correct solutions to the Depression that could be arrived at through expert investigation. Third, these solutions, which would replace discredited laissez-faire capitalism, would entail a concentration of planning power in the federal government. The government was to become a prescriptive entity, managing the economy through incentives and direct control.[23]

As Schiller notes, the New Deal represented a new economic vision and involved the federal government—including federal agencies—more than ever in the management and regulation of the economy.

The second premise is that the legal foundation for administrative law is separation of powers.[24] The typical administrative law case involves all three branches of the federal government. It begins with Congress, under Article I, legislating in response to a public policy problem—for example, fraud in the sale of securities to members of the public, or the conflict between economic productivity and environmental protection in the air pollutant levels permitted by emissions rules.[25] In its legislation, Congress delegates to an Article II executive branch agency authority to promulgate rules or exercise its adjudicatory authority to address the problem identified by

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[23] Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 415 (2007).

[24] I am drawing on my own experience teaching administrative law for the points made in this paragraph. For support, see, for example, the table of contents for KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., FEDERAL ADMINISTRATIVE LAW: CASES AND MATERIALS, xi-xii (3d ed. 2020). The introduction in chapter one sketches a brief history of administrative law. Chapter two launches the study of the subject with the nondelegation doctrine cases decided by the Supreme Court in the 1930s. These cases, in which the Supreme Court endorsed Congress's broad delegation of rulemaking and adjudicatory authority to administrative agencies, provided the foundation for the modern administrative state. As Justice Antonin Scalia stated in *Whitman v. American Trucking Associations, Inc.*, "[w]e have 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'" 531 U.S. 457, 474 (2001) (quoting his dissent in Mistretta v. United States, 488 U.S. 361, 417 (1989)). It must be noted that in the 2022 supplement to their casebook, the authors note that the "most recent Supreme Court term saw the full-throated emergence of the major questions doctrine as a limitation on congressional delegations of policymaking discretion to agencies, albeit ultimately as a substantive canon of statutory interpretation influenced by separation of powers principles rather than as an outright replacement for the intelligible principle standard as an interpretation of Article I, Section 1 of the U.S. Constitution." KRISTIN E. HICKMAN, RICHARD J. PIERCE, JR., & CHRISTOPHER J. WALKER, SUMMER 2022 UPDATE, FEDERAL ADMINISTRATIVE LAW CASES AND MATERIALS (copy on file with author).

[25] The examples are based on classic exercises of regulatory authority under, first, the New Deal, and second, the wave of regulation that occurred during the 1960s and early 1970s. As to the former, *see, e.g.*, Adam C. Pritchard & Robert B. Thompson, *Securities Law and the New Deal Justices*, 95 VA. L. REV. 894 (2009). As to the latter, *see, e.g.*, Reuel E. Schiller, *Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 ADMIN. L. REV. 1139, 1149 (2001) ("Rulemaking also increased because Congress began extending the reach of the administrative state into new areas—particularly consumer and environmental protection.").

Congress (or both). Then an aggrieved party challenges the agency's action in an Article III federal court, with a judicial decision sustaining or rejecting the challenge.

Competing interpretations of separation of powers vie for supremacy in the foundational cases. One view, formalism, insists that there are clear boundaries between the different branches of government; separation of powers means exactly that, with each branch limited to the extent possible of performing the tasks assigned to it under the Constitution.[26] As Dean John F. Manning explains, "conventional wisdom" holds that formalism "calls upon interpreters to adhere to the conventional meaning of the text instead of resorting to the broad purposes underlying it."[27] A quintessential example of the Supreme Court taking a formalist approach is *Immigration and Natural Service v. Chadha*.[28] Champions of the formalist approach insist that it protects individual liberty.[29]

The other view of separation of powers, functionalism, denies the imperative of keeping the branches separate. Its organizing principle is checks and balances; liberty is an important goal and value, but so is workability.[30] As Dean Manning explains, "functionalists view their job as primarily to ensure that Congress has respected a broad background purpose to establish and maintain a rough balance or creative tension among the branches."[31] The determinative question for a functionalist is whether the government action or arrangement being challenged *impermissibly* prevents one branch of government from performing its constitutionally assigned

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[26] *See* John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1958–70 (2011).

[27] *Id.* at 1958.

[28] INS v. Chadha, 462 U.S. 919, 956–58 (1983) (invalidating the "one-House veto" because it permitted Congress to engage in legislative action without satisfying Article I's requirements of bicameralism and presentment for legislation). *See also* William J. Wagner, *Balancing as Art: Justice White and the Separation of Powers*, 52 CATH. U. L. REV. 958, 963 (2003) ("A triumphant instance of formalism was *Chadha*, which universalized the procedures of bicameralism and presentment as requirements of all legislative action."). Another example of the Supreme Court taking a formalist approach in a separation-of-powers case is Clinton v. City of New York, 524 U.S. 417, 421 (1998) (invalidating Line Item Veto Act for violating the Constitution's Presentment Clause, *see* Art. I, § 7, cl. 2).

[29] *See, e.g.*, Bowsher v. Synar, 478 U.S. 714, 722 (1986) ("Even a cursory examination of the Constitution reveals the influence of Montesquieu's thesis that checks and balances were the foundation of a structure of government that would protect liberty. The Framers provided a vigorous Legislative Branch and a *separate and wholly independent* Executive Branch, with each branch responsible ultimately to the people.") (emphasis added).

[30] *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

[31] *See* Manning, *supra* note 26, at 1951. *See also* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 626 (1984) (contrasting formalist, or "strict separation-of-powers analysis," with functionalist, or "checks-and-balances analysis," in three Supreme Court cases decided in 1982 and 1983); *see also id.* at 605–39.

functions.[32] That was the approach taken by the Court in *Morrison v. Olson*,[33] in which the Court upheld the constitutionality of the independent counsel statute adopted by Congress in the aftermath of Watergate over the constitutional claim that the law's restrictions on the President's removal authority violated separation of powers.[34]

The competing views of separation of powers in the foundational cases indicate the ubiquity of the administrative state in contemporary society today along with its constitutional vulnerability. The functionalist emphasizes the need for agencies to do the heavy lifting of governance in an ever-increasing, complex, and inter-connected world.[35] The formalist, meanwhile, never has made peace with the "headless fourth branch of government" and seeks to constrain it.[36] The conflict between these two views plays out over much of the entire administrative law course.[37]

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[32] *See* Manning, *supra* note 26, at 1951 n.48 (collecting law review commentary on functionalist approach to separation of powers).

[33] Morrison v. Olsen, 487 U.S. 654, 660 (1988) (holding that the independent counsel provisions of the Ethics in Government Act of 1978 do not "*impermissibly interfere* with the President's authority under Article II in violation of the constitutional principle of separation of powers") (emphasis added).

[34] As discussed below in Part IV, the Court discussed *Morrison v. Olson* when it revisited the scope of the President's removal authority in *Seila Law*. *See infra* Part IV.

[35] *See* Manning, *supra* note 26, at 1956.

[36] The phrase "headless fourth branch" comes from the Brownlow Report, issued in 1937. *See* Paul Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L.J. 257, 257 n.1. (1988). Defenders of the administrative state are well aware of the criticism that agency heads lack political and legal legitimacy because they are not elected. One response is that agencies are politically accountable to the President who appointed their heads and the Congress that authorized their actions. The Supreme Court sounded this note in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, when it explained that courts should defer to an agency's reasonable interpretation of an ambiguous regulation. The agency is the expert, the Court noted, and the agency has a political "constituency" that courts lack. 467 U.S. 837, 866 (1984). Another response is that courts, in response to concerns about the political legitimacy of administrative agencies raised during the 1960s, acted to open up the administrative process to those affected by agency action. This included "[a] series of series of judicial decisions" that "expanded public access to the judicial review of agency decisions . . . . Perhaps most notably, courts liberalized the legal standards for standing." Jud Matthews, *Minimally Democratic Administrative Law*, 68 ADMIN. L. REV. 605, 618 (2016).

[37] For example, compare the contrasting approaches taken by the United States Court of Appeals for the D.C. Circuit regarding *ex parte* communications with agency officials. In Home Box Office v. FCC, 567 F.2d 9, 62 (D.C. Cir. 1977), the court took a formalist approach, adopting strict regulations for when such contacts could occur and how they should be documented. Subsequently, in a case involving a different agency, the court took a more relaxed approach to *ex parte* contacts, acknowledging that they were an inevitable part of the rulemaking process. Sierra Club v. Costle, 657 F.2d 298, 408 (D.C. Cir. 1981) ("[W]e do not believe that Congress intended that the courts convert informal rulemaking into a rarified technocratic process, unaffected by political considerations or the presence of Presidential power.").

The third and final premise of administrative law is the law school course's emphasis on legal—external—restraints on agency action, such as the Administrative Procedure Act.[38] Internal agency operations are the province of another discipline: public administration.[39] Professor Gillian Metzger notes that "as administrative law has grown and matured, it has moved further away from critical aspects of how agencies function."[40]

In turning their focus away from how agencies organize themselves and operate, the academy has followed the courts. As Professor Metzger summarizes, "[c]ourts insistently exclude more systemic aspects of agency functioning from their purview and from administrative law doctrines. Key internal agency dynamics—such as planning, assessment, oversight mechanisms and managerial methods, budgeting, personnel practices, reliance on private contractors, and the like—are left instead to public administration."[41] These internal agency concerns are "political" or "administrative" and therefore beyond the purview of judicial review.[42] Accordingly, they are barely taken up, if at all, in the typical administrative law course. As Professor William H. Simon summarizes:

> [C]anonical administrative law suffers in two broad respects from its inattention to performance-based organization. First, descriptively, the canon gives an arbitrarily truncated picture of the role of law in the administrative state. Second, normatively, its interventions are often poorly designed for the central task on which it focuses—judicial control of administrative action.[43]

B. The Fusion of Administrative Law and Administration in Alexander Hamilton

The contemporary administrative law course is anchored in the New Deal, has a separation of powers foundation, and explores legal constraints on agency action while giving short shrift to agency administration. Part IV will discuss how Hamilton helps us understand the first two points. As to the last point, the separation of administrative law and administration, Hamilton—the man and the musical—offer a challenge. Quite

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[38] 5 U.S.C. §§ 551–59.

[39] Robert Longley, *What is Public Administration*, THOUGHTCO (Nov. 29, 2022), https://www.thoughtco.com/public-administration-6822941.

[40] Gillian Metzger, *Administrative Law, Public Administration, and the Administrative Conference of the U.S. Courts*, 83 GEO. WASH. L. REV. 1517, 1517 (2015). *See also* William H. Simon, *The Organizational Premises of Administrative Law*, 79 J.L. & CONTEMP. PROBS. 61, 61 (2015).

[41] Metzger, *supra* note 40, at 1519.

[42] *Id.*

[43] Simon, *supra* note 40, at 63. *See also* Elizabeth Fisher & Sidney Shapiro, *Disagreement about Chevron: Is Administrative Law the "Law of Public Administration"?*, 70 DUKE L.J. ONLINE 111, 112 (2021) ("[M]any administrative lawyers since the 1970s have adopted a narrower understanding [of administrative law], one that maintains that the sole purpose of this area of law is the constraint of administrative agencies.").

simply, the disciplines of administrative law and administration were fused in his person.

Let us start with the story in "Hamilton." One recurring theme of the musical is Hamilton's administrative brilliance. He is such an able administrator that General George Washington refuses to give him a command on the front lines and instead enlists him as his "right hand man."[44] In addition, as discussed in Part III, Hamilton was our first great administrator (or bureaucrat) in his service as first Secretary of the Treasury Department. This is shown in the musical in Act II, in which Hamilton, as Secretary of the Treasury, brokers the compromise of 1790 to secure support for his financial plan.[45]

Hamilton was more than an extraordinarily capable administrator, of course. He also was a brilliant, deeply-read lawyer who thought and wrote extensively about the structure of government.[46] This is referred to in "Hamilton" in a number of ways, most notably in his work on the Federalist Papers.[47] Along with other Founding Fathers, Hamilton viewed the Articles of Confederation as ineffectual and participated in the Constitutional Convention of 1787.[48] Subsequently, he took the lead with the Federalist Papers as part of the campaign to get New York to ratify the Constitution. As Chernow summarizes, "Hamilton supervised the entire Federalist project. He dreamed up the idea, enlisted the participants, wrote the overwhelming bulk of the essays, and oversaw the publication."[49] Hamilton's writings focused on the executive, the judiciary, and certain aspects of the Senate. In addition, he wrote about taxation and the military.[50]

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44 *See* Lin-Manuel Miranda, *Right Hand Man*, THE MUSICAL LYRICS, https://www.themusicallyrics.com/h/351-hamilton-the-musical-lyrics/3699-right-hand-man-lyrics.html (last visited Mar. 5, 2023).

45 As told in Lin-Manuel Miranda, *The Room Where it Happens*, THE MUSICAL LYRICS, https://www.themusicallyrics.com/h/351-hamilton-the-musical-lyrics/3699-right-hand-man-lyrics.html (last visited Mar. 5, 2023).

46 Peter McNamara, *Alexander Hamilton*, THE FIRST AMEND. ENCYC., https://www.mtsu.edu/first-amendment/article/1162/alexander-hamilton (last visited Mar. 5, 2023).

47 THE FEDERALIST NO. 75, at 449 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

48 NCC Staff, *10 Reasons Why America's First Constitution Failed*, NAT'L CONST. CTR. (Nov. 17, 2022), https://constitutioncenter.org/blog/10-reasons-why-americas-first-constitution-failed.

49 CHERNOW, *supra* note 3, at 247. Hamilton wrote fifty-one of the eighty-five essays. Madison wrote twenty-nine and Jay wrote five.; *see also* JAMES T. KLOPPENBERG, TOWARD DEMOCRACY: THE STRUGGLE FOR SELF-RULE IN EUROPEAN AND AMERICAN THOUGHT 425 (2016) ("The eighty-five essays of the Federalist appeared in multiple publications from October 27, 1787, through May 28, 1788."); Ira C. Lupu, *The Most Cited Federalist Papers*, 15 Const. Comm. 403, 410 n.26 (1998).

50 CHERNOW, *supra* note 3, at 248. As Chernow elaborates, Jay "handled foreign relations," while "Madison, versed in the history of republics and confederacies, covered much of that ground." *Id.* at 247–48. In addition, as "author of the Virginia Plan, [Madison] also undertook to explain the general anatomy of the new government." *Id.* at 248.

Hamilton's career combined or encompassed what we refer to today as administrative law and public administration. Even acknowledging his extraordinary talents and accomplishments, this is not as remarkable as it may seem given the fact that the United States was in its infancy when Hamilton wrote the Federalist Papers and then served as Secretary of the Treasury. He was one of a number of Founders who was both a thinker as an influential political philosopher and a doer as a top government official. Such men were imperative at the founding, when the United States was in the process of creating itself; separating law from administration would have been an unaffordable luxury at the time.

Nevertheless, it is noteworthy that Hamilton defended the Constitution's structure of government on the ground that it would produce effective administration. In Federalist No. 68, a defense of the Electoral College, Hamilton stated, "the true test of a good government is its aptitude and tendency to produce a good administration."[51] A single chief executive—the "Chief Magistrate," as Hamilton refers to the position in that essay—would be a better administrator than the Continental Congress.[52] This single executive would have the "energy" celebrated by Hamilton in Federalist No. 70.[53]

Under the Continental Congress, administration by committee was ineffectual. Under the Constitution, the President could be decisive and would not be frustrated by having to secure committee consensus or approval.[54] Furthermore, Hamilton insisted there would be greater political accountability with a single chief executive.[55] He argued in Federalist No. 70 that "it is far more safe there should be a single object for the jealousy and watchfulness of the people."[56]

At the same time the Framers of the Constitution sought to establish a single chief executive, they structured the office so that this official would not be, and would not have the same powers and authority as, a king. The President would be elected;[57] the

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[51] THE FEDERALIST NO. 68, at 414 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Professor Mashaw observes: "But why [Hamilton] thought the scheme devised in 1787 would have that quality [of promoting good administration] remains somewhat obscure. Hamilton's defense of the new Constitution's provisions on the executive branch . . . are devoted almost exclusively to the defense of the organization and powers of the presidency." Mashaw, *supra* note 13, at 1272.

[52] THE FEDERALIST NO. 68, at 411 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[53] THE FEDERALIST NO. 70, at 423 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("Energy in the Executive is a leading character in the definition of good government."). *See also* CHERNOW, *supra* note 3, at 258 (discussing Federalist No. 70).

[54] *See* Mashaw, *supra* note 13, at 1272–74.

[55] *Id.* at 1299.

[56] THE FEDERALIST NO. 70, at 430 (Alexander Hamilton) (Clinton Rossiter ed., 1961). This sentence concludes, "all multiplication of the Executive is rather dangerous than friendly to liberty." *Id.*

[57] CHERNOW, *supra* note 3, at 258.

office would not be hereditary. The President would be subject to impeachment.[58] And the President would not have supreme power over the legislature.[59] Furthermore, as Hamilton explained in the Federalist Papers, the Senate would check the President's power in a number of ways under the Constitution.[60] Treaties required two-thirds approval from the Senate, for example, and the President's appointment of certain officers, including ambassadors and Supreme Court justices, was subject to Senate confirmation.[61]

III. HAMILTON AS AN ADMINISTRATOR: OUR NATION'S FIRST GREAT ADMINISTRATOR

When we turn from the Federalist Papers to Hamilton's record as an administrator as Secretary of the Treasury, it is necessary to understand the context in which Hamilton served. First, the Founders were building the federal government at the same time they were responsible for operating it. As Professor Mashaw states, each branch of government had to construct a system of government—one with "political, managerial, and legal controls over administration"—while performing the tasks with which it was charged.[62] "These early years of the Republic," he observes, "were in some sense a continuation of the Constitutional Convention."[63]

Second, the Framers did not say much about administration in the Constitution. Article I, establishing the legislative branch, has ten sections, including Section 8, which specifies the powers of Congress in no less than 18 clauses. By contrast, Article II, establishing the executive branch, has only four sections. Section 1 vests "executive Power . . . in a President of the United States."[64] Section 3, meanwhile, includes the "take care" clause, often invoked to justify broad assertions of executive authority.[65] Article II specifies only two offices: the President and Vice President.[66] It refers to "executive departments" that will be headed by "principal officer[s]" appointed by the

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58 *Id.* at 258–59.

59 *Id.* at 258.

60 *Id.* at 259.

61 THE FEDERALIST NOS. 75 & 76, at 449, 454 (Alexander Hamilton) (Clinton Rossiter ed., 1961). *See also* CHERNOW, *supra* note 3, at 259.

62 Mashaw, *supra* note 13, at 1266. *See also* JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA 5 (2018).

63 Mashaw, *supra* note 13, at 1266. GIENAPP, *supra* note 62, at 2.

64 U.S. CONST., art. II, § 1. This clause is said to be the source of much of the President's constitutional authority. *See* Julian Davis Mortenson, *Article II Vests the Executive Power, not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1172–73 (2019). The literature here is substantial.

65 U.S. CONST., art. II, § 3, provides that the President "shall take care that the laws be faithfully executed." *See generally* Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PENN. L. REV. 1835, 1848 (2016).

66 U.S. CONST., art. II, § 1.

President.[67] As noted earlier, the President's appointments of such officers were subject to Senate confirmation.[68] Given the minimal discussion of administration in the text of the Article II, it would be up to Congress to establish executive departments and provide appropriate direction for them.

Accordingly, Congress had substantial power over an executive department like the Treasury. It exercised this power by giving the Secretary "a substantial number of specific functions" and "vest[ing] important powers in other officers in the Department, such as the Comptroller, the Auditor, the Treasurer, and the Registrar."[69] Because of the fundamental importance of raising revenues for the new government, Congress legislated in substantial detail in this area, seeking to balance "effective tax collection" with "protection of the individual rights of reluctant taxpayers."[70] Consider, for example, the law enacted in 1791 authorizing taxes on distilled spirits.[71] Professor Mashaw summarizes:

> [T]he statute contained strong inspection provisions, but made a nice distinction between administrative inspections and criminal investigations . . . .
>
> In addition, taxpayers were given a special statutory suit for any injury resulting from an officer's failure to perform his duties in accordance with the Act. And while officers were protected against damages when they seized goods with reasonable cause, claimants could nevertheless recover damages for loss, waste, or detention from the United States, if the seizure was determined to be improper. . . .
>
> Given the (rightly) anticipated resistance to payment of the whiskey tax, collectors were handsomely compensated.[72]

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[67] *Id.* art. II, § 2. This clause also provides that "Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments." *Id.*

[68] U.S. CONST., art. II, § 2.

[69] Mashaw, *supra* note 13, at 1284–85.

[70] *Id.* at 1278 ("The revenue statutes were the most complexly articulated administrative system devised by the early Congresses.").

[71] *An Act Repealing, After the Last Day of June Next, the Duties Heretofore Laid Upon Distilled Spirits*, FOUNDERS ONLINE (1791), https://founders.archives.gov/documents/Hamilton/01-06-02-0076-0002-0013#print_view. *See also* Mashaw, *supra* note 13, at 1280 n.66.

[72] Mashaw, *supra* note 13, at 1280–81.

Washington asked Hamilton to serve as his Treasury Secretary in 1789.[73] It was the position for which Hamilton seemed to have been preparing for his entire life.[74] He was sufficiently able, accomplished, and well-known that he would fit in well with a "regime of notables" assembled by Washington to serve in the first administration.[75] As Secretary, Hamilton brought his enormous intellect and organizational abilities to the largest and most important department in the federal government.[76]

Hamilton wrote a number of reports that laid an economic foundation for the new nation and advanced Hamilton's vision of the federal government's powers and role in its development. His Report on Public Credit called for the federal government to pay its foreign debt in full and its domestic debt at par and to assume state debts.[77] At the time, the outstanding debt was "enormous: $54 million in national debt, coupled with $25 million in state debt, for a total of $79 million."[78] The plan was controversial and debated vigorously in Congress.[79] James Madison, Hamilton's principal co-author of the Federalist Papers, fell out with Hamilton over the plan's funding scheme.[80] Ultimately, as memorialized in "Hamilton," Congress approved the plan, after "the most celebrated meal in American history."[81] For Hamilton, the debt plan,

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73 *Id.* at 1286.

74 CHERNOW, *supra* note 3, at 287. As Chernow recounts, Hamilton turned his law practice over to Robert Troup, severing "all sources of outside income while in office, something that neither Washington, nor Jefferson nor Madison dared to do." *Id.* at 287.

75 Mashaw, *supra* note 13, at 1318–19 (quoting Martin Shefter, "Party, Bureaucracy and Political Change in the United States," in POLITICAL PARTIES: DEVELOPMENT AND DECAY 211, 213 (Louis Maisel & Joseph Cooper eds. 1978)).

76 For a detailed account of Hamilton's views and experiences about public administration, *see* RICHARD T. GREEN, ALEXANDER HAMILTON'S PUBLIC ADMINISTRATION (2019).

77 CHERNOW, *supra* note 3, at 295.

78 *Id.* at 297.

79 *Id.* at 304.

80 *Id.* at 304–05. Per Chernow, while "Madison was prepared to allow current holders of government debt to profit from past appreciation of their government securities," he opposed the "windfall" of "future appreciation resulting from Hamilton's program" to go to "*original* holders" even though they already sold off their securities. *Id.* (emphasis in original). Hamilton rejected Madison's approach as "unworkable" and contrary to "the invaluable principle that buyers of securities should reap all future dividends and profits." *Id.*

81 *Id.* at 328. In exchange for support for the plan, Hamilton agreed that the capital would be located on the Potomac. *Id.* at 328–29; *see* Lin-Manuel Miranda, *The Room Where it Happens*, THE MUSICAL LYRICS, https://www.themusicallyrics.com/h/351-hamilton-the-musical-lyrics/3699-right-hand-man-lyrics.html (last visited Mar. 5, 2023). According to Chernow, the "dinner consecrated a deal that was probably already close to achievement." CHERNOW, *supra* note 3, at 329.

which included assumption, would provide a foundation for the federal government's power while promoting confidence in it as well.[82]

Hamilton also championed a national bank. As Treasury Secretary, he saw the need for "an institution that could expand the money supply, extend credit to government and business, collect revenues, make debt payments, handle foreign exchange, and provide a depository for government funds."[83] His most noteworthy writing regarding the first national bank may have been his defense of its constitutionality. Though the Constitution said nothing about a central bank, Hamilton believed that it was within Congress's "implied powers" to create such an institution.[84] As the legislation authorizing the bank was pending before the President, Hamilton dashed off a brief treatise that not only persuaded Washington to sign the law, but also subsequently influenced Chief Justice John Marshall when the Supreme Court rejected a constitutional challenge to the bank decades later in *McCulloch v. Maryland*.[85]

Regarding our understanding of administrative law, Hamilton's organization and supervision of the Treasury Department were just as important as his ideas. Treasury was by far the largest department in Washington's administration. As Chernow describes: "Swollen by the Customs Service, the Treasury Department payroll ballooned to more than five hundred employees under Hamilton, while Henry Knox had a mere dozen civilian employees in the War Department and Jefferson a paltry six at State, along with two charges d'affaires in Europe."[86]

The vast size of Treasury did not prevent Hamilton from maintaining close and efficient supervision of the department. He developed systems for bookkeeping and auditing, prepared forms and procedures for revenue collection, and closely supervised tax collectors.[87] After Congress authorized an excise tax on spirits, noted earlier, Hamilton promulgated detailed rules that gave inspectors substantial

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82 *See* Broadus Mitchell, *Alexander Hamilton as Finance Minister*, 102 PROC. THE AM. PHI. SOC. 117, 122 (1958) ("There is no occasion for questioning [Hamilton's] sincerity in giving precedence to fiscal uniformity and economy" as he "knew only too intimately the mischiefs of the contest between states and Congress for revenue during the war and under the Confederation.").

83 CHERNOW, *supra* note 3, at 347.

84 *Id.* at 354.

85 McCulloch v. Maryland, 17 U.S. 316, 424 (1819); *see* CHERNOW, *supra* note 3, at 355; *see also* RICHARD BROOKHISER, JOHN MARSHALL: THE MAN WHO MADE THE SUPREME COURT 161 (2018). Hamilton also was the author of the Report on Manufactures, which outlined "how America might promote manufacturing." CHERNOW, *supra* note 3, at 374. Although the report did not result in legislation—Chernow says it "ultimately came to naught," *id.* at 378, —it "was the first government-sponsored plan for selective industrial planning in America" and anticipated the industrial nation that America would become in the late nineteenth century. *Id.* at 374.

86 CHERNOW, *supra* note 3, at 339.

87 *Id.* at 291; Mashaw, *supra* note 13, at 1306–07. Mashaw notes that the procedures developed by tax collection for Hamilton were codified by Congress in the Collection Acts of 1799. *Id.*

enforcement powers.[88] In fact, his vigilant efforts at collecting this tax "may have contributed to the Whiskey Rebellion" in 1794.[89]

Not only did Hamilton build an effective department, but he also developed the idea of its authority and expertise regarding the revenue laws it enforced. Mashaw elaborates that Hamilton "acted vigorously to stamp out the view that the collectors' oath to uphold the laws of the United States meant that they should uphold their own construction of the laws rather than the Secretary's or to rely on private lawsuits to settle matters of interpretation."[90] Accordingly, Mashaw notes, "Hamilton's instructions and rulings are thus the predecessors of the thousands of pages of IRS regulations and revenue rulings with which every modern tax attorney is familiar."[91]

This sketch of Hamilton's service as Secretary of the Treasury Department provides an understanding of administrative law at the founding. While Congress legislated in some detail, establishing parameters for Hamilton's actions as head of the Department, it also is the case that Hamilton employed his position to articulate an economic vision and to develop an effective agency for revenue collection. Politics influenced Hamilton's conduct; consider, for example, the political maneuverings over his debt plans.[92] So did law, not just in the legislation passed by Congress but also in the recourse to suit in federal court available to citizens if they were aggrieved by misconduct by tax collectors.[93] As Mashaw argues, the federal government was more than "courts and parties," and Hamilton's writings and actions were integral to the development of the early administrative state.[94]

IV. HAMILTON AND THE DEBATE OVER THE PRESIDENT'S REMOVAL AUTHORITY

A. A Brief History of the Removal Debate

While Hamilton's work on the Federalist Papers and certain aspects of his tenure as Secretary of the Treasury are referred to in "Hamilton," neither the story nor the songs in the musical is about whether Congress may restrict the President's authority to remove officials who serve in his administration. Nevertheless, the question of whether Congress could be involved in removal raised critical separation-of-powers issues from the earliest days of the Republic—issues that Hamilton addressed more than once over the course of his professional life.

To situate this removal question in constitutional context: The Constitution expressly provides Congress the authority to remove "[t]he President, Vice President, and all civil Officers of the United States" on "Impeachment for, and Conviction of

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88 CHERNOW, *supra* note 3, at 342–43.

89 Mashaw, *supra* note 13, at 1306 n.154.

90 *Id.* at 1307.

91 *Id.*

92 CHERNOW, *supra* note 3, at 326–27.

93 During this period, federal courts also acted, in effect, as administrative tribunals in determining whether to mitigate or remit tax penalties. Mashaw, *supra* note 13, at 1332 & n.266.

94 *Id.* at 1258, 1272.

Treason, Bribery, or other high Crimes and Misdemeanors."[95] It is not clear from the text of the Constitution whether impeachment is the exclusive means for congressional involvement in removal of the President's officers. Besides impeachment, does Congress have a role in the removal process?

On the one hand, under Article I, Congress has the authority to create and fund government departments; proponents of the view that Congress has a role in removal argue that this authority encompasses the possibility of a role for Congress regarding whether that official could be removed.[96] Critics of this view contend, on the other hand, that given the executive power vested in the President under Article II and the charge that he take care that the laws be "faithfully executed," the President must have unfettered removal authority in order to fully perform those responsibilities.[97]

Hamilton addressed removal in Federalist No. 77, advocating a position consistent with the view that Congress had a role in the removal process. Subsequently, while serving as Treasury Secretary, he took a position in accord with view Congress did not have such a role and that only the President had removal authority. His views reflect the fundamental dispute over removal. Those who argue that Congress has a role in removal invoke Federalist No. 77, in which Hamilton opined that the Senate would be involved in removal as well as appointment of the President's officers.[98] Those who contend that removal is exclusively the prerogative of the President cite to Hamilton's views while serving as Secretary, when he took a more robust view of the executive power vested in the President.[99] Hamilton contrasted the silence on removal in Article II of the Constitution with its discussion of the Senate's role in the appointment process.[100] This silence, Hamilton argued, indicated that only the President possessed this authority.[101]

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95 U.S. CONST., art. II, § 4.

96 *See, e.g.*, CHARLES C. THACH, JR., THE CREATION OF THE PRESIDENCY, 1775-1789: A STUDY IN CONSTITUTIONAL HISTORY, 150 (1923).

97 *See, e.g.*, THACH, JR., *supra* note 96, at 146–47.

98 As Justice Kagan summarizes, Hamilton believed the requirement of Senate consent in removal "would promote 'steady administration': 'Where a man in any station had given satisfactory evidence of his fitness for it, a new president would be restrained' from substituting 'a person more agreeable to him.'" Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2229 (2020) (Kagan, J., dissenting).

99 Myers v. United States, 272 U.S. 52, 136–37 (1926).

100 *Id.* at 137–39.

101 Hamilton's views on removal are canvassed by Chief Justice William Howard Taft in *Myers*. *Id.* at 136–39. Taft quotes Hamilton as saying, "[t]he general doctrine of our Constitution then is that the executive power of the nation is vested in the President, subject only to the exceptions and qualifications, which are expressed in the instrument." *Id.* at 138–39 (quoting 7 J. C. Hamilton's *Works of Hamilton*, 80, 81). According to Taft, because the Constitution did not discuss removal, it did not limit or qualify the President's removal authority. Accordingly, the Court in *Myers* held that an 1876 law requiring the Senate to approve the removal of certain postmaster officials was unconstitutional. *Id.* at 176.

The challenge in resolving the conflicting views over removal is that there is not an authoritative answer. The Constitution does not say anything about the President's removal authority.[102] In 1789, the First Congress addressed removal when considering legislation that would create the Department of Foreign Affairs.[103] Although Congress ultimately approved a bill that permitted the President to fire the Secretary of this department at will, it is a stretch to read this legislative history as conclusively removing Congress from the removal question.[104] In fact, the only conclusive determination from the congressional debate is that Congress rejected Hamilton's position in Federalist No. 77 that the Senate would have to consent to the President's removal of an official.[105]

Subsequently, and not surprisingly, the absence of an authoritative answer to the question of Congress's role in the removal process generated litigation. In *Myers v. United States*, the Court rejected the claim by a postmaster that he could not be removed from his position by the President.[106] Myers, the petitioner, relied on a nineteenth century law known as the Tenure of Office Act, which required the President to obtain Senate consent before removing certain executive officers.[107] In rejecting Myers' claim, the Court held that the postmaster was a subordinate of the President and could be removed unilaterally at will.[108] The Court reasoned that the President has "the exclusive power of removal" so that the President can take care "that the laws be faithfully executed."[109]

Less than a decade later, in a case decided during the New Deal, the Supreme Court distinguished *Myers* when it upheld Congress's restriction on the President's removal authority in *Humphrey's Executor v. United States*.[110] In upholding the claim brought by the estate of a member of the Federal Trade Commission ("FTC"), the Court

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102 *See* U.S. CONST. art. II.

103 Justice Kagan recounts this history in her *Seila Law* dissent. *See Seila Law LLC*, 140 S. Ct. at 2229–31 (Kagan, J., dissenting); *see also* Mashaw, *supra* note 13, at 1282 (noting extensive debate but "little definitive guidance" regarding Congress's role in removal). *See generally* THACH, JR., *supra* note 96, at 124–65.

104 *See Seila Law LLC*, 140 S. Ct. at 2230 (Kagan, J., dissenting) ("As even strong proponents of executive power have shown, Congress never 'endorse[d] the view that [it] lacked authority to modify' the President's removal authority when it wished to.") (citing Saikrishna Bangalore Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1073 (2006)).

105 *Seila Law LLC*, 140 S. Ct. at 2230 (Kagan, J., dissenting).

106 Myers v. United States, 272 U.S. 52, 176 (1926).

107 *Id.* at 166, 170.

108 *Id.* at 176.

109 *Id.* at 106, 135; *see also* Jerry Mashaw, *Of Angels, Pins, and For-Cause Removal: A Requiem for the Passive Virtues*, U. CHI. L. REV. ONLINE (Aug. 27, 2020), https://lawreviewblog.uchicago.edu/2020/08/27/seila-mashaw/ ("Dicta in the *Myers* majority opinion, however, questioned Congress's power to qualify the president's removal authority at all.").

110 Humphrey's Executor v. United States, 295 U.S. 602, 627, 631 (1935).

reasoned that the agency warranted a degree of independence because it was exercising "mostly quasi-legislative and quasi-judicial powers, rather than purely executive powers."[111] Humphrey's Executor was the first of several cases in which the Supreme Court upheld congressional restrictions on the President's removal authority when Congress creates an independent agency.

The next significant case involving a legal challenge to Congress's removal authority was *Morrison v. Olson*.[112] In that case, the Court upheld the independent counsel provisions of the Ethics in Government Act despite a forceful constitutional challenge based, in part, upon Congress's restrictions on the President's authority to remove the independent counsel.[113] The Court acknowledged that the independent counsel had the power to investigate and prosecute criminal activity—that is, the independent counsel was engaged in a "core executive function."[114] Nonetheless, the Court upheld the law, including its removal provision, concluding that the restriction would not "impede the President's ability to perform his constitutional duty."[115] In the decades since *Myers* and *Humphrey's Executor* had been decided, *Morrison* suggested, the former had been cabined while the latter had been expanded.[116] As the next Part describes, the trajectory of each case would change with *Seila Law*.[117]

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111 *Id.* at 629 ("The authority of Congress, in creating *quasi*legislative or *quasi*judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime.") (emphasis added).

112 Morrison v. Olson, 487 U.S. 654 (1988). Before *Morrison*, the Supreme Court held in *Wiener v. United States*, 357 U.S. 349 (1958), that the President could not "dismiss without cause members of the War Claims Commission, an entity charged with compensating injuries arising from World War II." Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2234 (2020) (Kagan, J., dissenting). In *Bowsher v. Synar*, 478 U.S. 714 (1986), the Court invalidated the Balanced Budget and Emergency Deficit Control Act of 1985 (also known as Gramm-Rudman-Hollings Act), in part because the law permitted removal for cause of the Comptroller General by a joint resolution of Congress. *Morrison*, 487 U.S. at 729–30, 736.

113 *Morrison*, 487 U.S. at 696–97.

114 *Id.* at 688.

115 *Id.* at 691, 696–97.

116 *Id.* at 690–91.

117 This discussion of prior removal cases would not be complete without noting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010), in which the Court refused "to extend the *Humphrey's* exception to the novel situation of a for-cause protection (for members of the Public Company Oversight Accounting Board (PCAOB)) that could be invoked only by another commission (the Securities Exchange Commission (SEC)) whose members were also subject only to for-cause removal." Mashaw, *Of Angels, Pins, and For-Cause Removal*, *supra* note 109.

B. The Supreme Court Decides Seila Law *in Accordance with Hamilton's Views as Secretary of Treasury*

In 2020, the Supreme Court decided *Seila Law*, its most important case on removal since *Morrison v. Olson*, which involved the constitutionality of the independent counsel law and was decided more than three decades earlier. In the context of a discovery dispute that arose during an investigation by the Consumer Financial Protection Bureau ("CFPB"), a law firm objected that the structure of the agency was unconstitutional.[118] The CFPB was an independent agency headed by a single director who could be removed by the President only for cause; the law firm contended that Congress's restriction of the President's removal authority violated separation of powers.[119]

The case was superbly litigated and closely decided. By a 5-4 vote, the Supreme Court agreed with Seila Law that the structure of the CFPB was unconstitutional.[120] Then, by a 7-2 vote, the Court remedied the constitutional violation by severing the "for cause" removal provision from the law creating the CFPB.[121] The agency would continue to operate; the only change after the Court's decision was that the agency's director could be terminated at will.[122]

The Supreme Court considered Hamilton's views on removal in deciding the case. It considered the views of a number of other Founders as well, including James Madison and Chief Justice John Marshall.[123] To be clear, neither Chief Justice Roberts' opinion for the Court nor Justice Kagan's dissent should be viewed as an exercise in originalism, the interpretive approach championed by Justice Antonin Scalia that gives primacy to the views of the Framers.[124] In part, that is because, as noted above, there was not a clear or authoritative position taken by the Framers on whether Congress may restrict the President's removal authority.

The difference between the majority and the dissent falls along the formalist-functionalist lines sketched out earlier in Part II.A. Chief Justice Roberts emphasized the President's powers under Article II of the Constitution.[125] His approach is bolstered by an account of separation of powers that divides power across the branches—and within them as well, as shown by the fact that Congress has both the House and the Senate—*except* with respect to the Presidency. According to the Chief Justice:

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118 Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2194 (2020).

119 *Id.* at 2193–94.

120 *Id.* at 2207.

121 *Id.* at 2207–11.

122 *Id.* at 2192.

123 *Id.* at 2205.

124 *See* Antonin Scalia, *Originalism*, 57 U. CIN. L. REV. 849, 851–52 (1989).

125 *Seila Law LLC*, 140 S. Ct. at 2190–91.

> To justify and check [the] authority [of the power vested in a single official]—unique in our constitutional structure—the Framers made the President the most democratic and politically accountable official in Government. Only the President (along with the Vice President) is elected by the entire Nation. And the President's political accountability is enhanced by the solitary nature of the Executive Branch, which provides "a single object for the jealousy and watchfulness of the people."[126]

The Court held that, as "an independent agency led by a single Director and vested with significant executive power," the CFPB was an agency with "no basis in history and no place in our constitutional structure."[127] Chief Justice Roberts acknowledged exceptions to the President's unilateral removal authority in prior Supreme Court decisions, notably *Humphrey's Executor* and *Morrison*.[128] He read those cases narrowly, found they don't apply to the organizational structure of the CFPB, and concluded that the "CFPB's single-Director structure contravenes this carefully calibrated system by vesting significant governmental power in the hands of a single individual accountable to no one."[129] As to Hamilton's prior views in Federalist No. 77, Chief Justice Roberts dismissed those as "initial impressions later abandoned."[130]

In dissent, Justice Kagan challenged the majority decision on every fundamental point. In contrast to the rigidity of Chief Justice Roberts's formalist approach, Justice Kagan sounded a functionalist note.[131] Indeed, in her account, the Framers were more functionalist than formalist regarding the structure of government: "The Framers took pains to craft a document that would allow the structures of governance to change, as times and needs change."[132] Justice Kagan noted that "[t]he Constitution says only a few words about administration" in recognition of the need for this flexibility.[133] And whereas Chief Justice Roberts's decision was organized around the President's powers

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126 *Id.* at 2203 (quoting The Federalist No. 70).

127 *Id.* at 2201.

128 *Id.* at 2192.

129 *Id.* at 2203. In his concurring opinion, Justice Clarence Thomas, joined by Justice Neil Gorsuch, argued that the Court should overrule *Humphrey's Executor*. *Seila Law LLC*, 140 S. Ct. at 2211 (Thomas, J., concurring). Thomas quoted The Federalist No. 70, written by Hamilton, in his discussion of importance of accountability in connection with the exercise of executive power. *Id.* at 2218.

130 *Seila Law LLC*, 140 S. Ct. at 2205.

131 *Id.* at 2227 (Kagan, J., dissenting).

132 *Id.* at 2245; *see also id.* at 2226 ("The problem lies in treating the beginning as an ending too—in failing to recognize that the separation of powers is, by design, neither rigid nor complete.").

133 *Id.* at 2245.

under Article II, Justice Kagan insisted upon Congress's role as a coordinate branch of government with broad authority to establish and organize the executive branch.[134]

As to the majority's historical account, Justice Kagan did not dispute the facts. She did not argue, for example, that Hamilton's views as Treasury Secretary were authoritative while his views in the Federalist Papers had been abandoned. Instead, Justice Kagan noted that the "early history . . . shows mostly debate and division about removal authority."[135] Whereas Hamilton argued in Federalist No. 77 that the Senate would have to consent in the removal as well as the appointment of officers of the United States, for example, Madison "thought the Constitution allowed Congress to decide how any executive official could be removed."[136]

This account strengthened her argument that Congress retained the legislative power to structure a government agency in the manner most appropriate to its responsibilities. It also showed a history of Congress distinguishing financial officials from "diplomatic and military officers," upon whom the President had to rely for the most sensitive and strategic political assignments.[137] Furthermore, for Justice Kagan, the fact that Hamilton and other Founders expressed different views on removal argued against elevating one position over another when resolving a constitutional claim involving separation of powers.[138]

Justice Kagan also challenged a central premise of the majority opinion, which insisted that a single agency head limited to for-cause removal would not be accountable to the President (and therefore was unconstitutional) while an agency headed by a multi-member commission would be.[139] Quite simply, Justice Kagan argued, "individuals are easier than groups to supervise."[140] Moreover, in her view, this was the only difference between the leadership structure of the FTC, in which the Court upheld Congress's restriction on removal in *Humphrey's Executor*, and the CFPB, in which the Court invalidated the "for-cause" protection of the Director.[141]

Justice Kagan concluded her dissent with an argument about separation of powers, judicial review, and democracy. She noted that Congress and the President—the political branches—reached agreement on The Consumer Financial Protection Act,

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134 *See, e.g.*, *id.* at 2232–33; *see also id.* at 2225 ("[T]he Constitution—both as originally drafted and as practiced—mostly leaves disagreements about administrative structure to Congress and the President, who have the knowledge and experience to address them.").

135 *Id.* at 2229 (Kagan, J., dissenting).

136 *Id.* (discussing The Federalist No. 39, written by Madison).

137 *Id.* at 2231.

138 *Id.* at 2229 n.4 ("[S]uch changing minds and inconstant opinions don't usually prove the existence of constitutional rules.").

139 *Id.* at 2242.

140 *Id.* As Kagan elaborated: "Just consider your everyday experience: It's easier to get one person to do what you want than a gaggle. So too, you know exactly whom to blame when an individual—but not when a group—does a job badly. The same is true in bureaucracies." *Id.* at 2243.

141 *Id.* at 2243–44.

the law establishing the CFPB.[142] Under the Act, the agency would have a single director who could not be removed except for cause.[143] In establishing this structure for the agency, Congress followed the example of certain prior independent agencies it established. By invalidating that part of the Act limiting removal, the Court's exercise of judicial review frustrated the political process, she argued. "[C]onsider how the dispute ends," Justice Kagan wrote, "with five unelected judges rejecting the result of that democratic process."[144]

V. CONCLUSION

Hamilton and "Hamilton" have much to say about administrative law. Hamilton's career reminds us that administration is a vital part of administrative law. In addition, his tenure as Treasury Secretary challenges the conventional understanding that administrative law is, at most, a century old. Hamilton's masterful supervision of the Treasury Department, informed by law as well as politics, demonstrates that administrative law is as old as the Republic. Finally, as the Supreme Court forges ahead with its separation-of-powers jurisprudence, we see in *Seila Law* that the debate over Hamilton's views not only is alive today, but consequential as well.

Two years after *Seila Law*, the Supreme Court decided another important administrative law case. In *West Virginia v. Environmental Protection Agency*, the Court applied the major questions doctrine to invalidate an Environmental Protection Agency rule that would have required "existing coal-fired power plants" to "reduce their own production of electricity, or subsidize increased generation by natural gas, wind, or solar sources."[145] Chief Justice Roberts wrote the opinion for a 6-3 majority while Justice Kagan wrote a dissent joined by Justices Stephen Breyer and Sonia Sotomayor. Chief Justice Roberts did not cite to Hamilton or any other framer in his decision, nor did Justice Kagan in her dissent.

However, in his concurrence, Justice Gorsuch invoked Hamilton and Madison in setting out "some additional observations" on the major questions doctrine.[146] Indeed, Justice Gorsuch cited to two of Madison's most well-known Federalist Papers—No. 10 on the role of factions and No. 51 on checks and balances—when explaining the

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142 *Id.* at 2245.

143 *See id.* at 2244.

144 *Id.* at 2245. A year after the Supreme Court decided *Seila Law*, it held that the structure of the Federal Housing Finance Authority (FHFA) was unconstitutional for having a single director who could be removed only "for cause" by the President. Collins v. Yellen, 141 S. Ct. 1761, 1770 (2021); *see also* David L. Noll, *Administrative Sabotage*, 120 MICH. L. REV. 753, 781 (2022) ("At the level of constitutional doctrine, the Roberts Court has broadly embraced the 'unitary executive' theory, restricting Congress's authority to protect agency heads from being removed by the president and suggesting in dicta that any substantial limitation on the president's authority to direct how the law is executed is incompatible with Article II.").

145 West Virginia v. EPA, 142 S. Ct. 2587, 2599, 2614 (2022).

146 *Id.* at 2616 (Gorsuch, J., concurring). Gorsuch cites to Hamilton at 2617 (The Federalist No. 11) and 2618 (The Federalist No. 73). *Id.* at 2617–18. He cites to Madison at 2617 (The Federalist Nos. 37 and 52) and 2618 (The Federalist Nos. 48, 10, 51, 47, 62). *Id.*

need for and analysis required by the major questions doctrine.[147] It is not surprising that Madison would be a primary authority in a judicial opinion supporting a doctrine that shifts power away from executive branch agencies to the legislature.[148] By contrast, the citations to Hamilton play, at most, a supporting role in Justice Gorsuch's concurrence. This is not surprising, given Hamilton's writings on the executive branch in the Federalist Papers and his energetic tenure as Secretary of the Treasury. As the Court continues to develop the major questions doctrine, it remains to be seen whether, and to what extent, it will rely on the writings and experience of the nation's most influential administrator at the Founding.

147 *See, e.g.*, Lupu, *supra* note 49, at 404–06.

148 *Accord* CHERNOW, *supra* note 3, at 252 (stating that in The Federalist Papers, "Madison showed more interest in constitutional curbs against tyrannical encroachments, whereas Hamilton lauded spurs to action").