# ACCOUNTABILITY AND ADMINISTRATIVE STRUCTURE

HEIDI KITROSSER*

## INTRODUCTION

The federal Clean Air Act requires the administrator of the Environmental Protection Agency (EPA) to "prescribe . . . standards applicable to the emission of any air pollutant from . . . motor vehicles . . . which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."[1] In 1999, a group petitioned the EPA to initiate a rule-making proceeding under the Act to "regulate greenhouse gas emissions from new motor vehicles."[2] The EPA denied the petition in 2003. It concluded that greenhouse gas emissions were not "air pollutants" under the Act and that it lacked jurisdiction to regulate them. Alternatively, the EPA concluded that it had statutory discretion to choose whether or not to regulate them, and that abstention was the wisest course.[3] The Supreme Court rejected the EPA's reasoning in 2007. It concluded that the EPA had the statutory authority to regulate greenhouse gas emissions.[4] It further explained that while the EPA has discretion as to initiate a rule-making proceeding to determine if it should regulate, such discretion must be exercised within statutory parameters. According to the Court, the EPA "can avoid [initiating a rule-making proceeding under the Clean Air Act] only if it determines that greenhouse gases do not contribute to

* Associate Professor, University of Minnesota. I thank the editors of the Willamette Law Review for their skillful editing and a great symposium. I doubly thank them for enabling me to participate in my panel via speaker-phone while I was home in Minnesota with the flu! I am also grateful to participants in a faculty workshop at the Washington University School of Law in St. Louis for their helpful comments on this article.

1. *See*

climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do."[5]

The EPA's initial reaction to the ruling was quite vigorous.[6] EPA administrator Stephen L. Johnson "convened at least 60 EPA officials to respond to the [C]ourt's instructions."[7] The effort resulted in a December 2007 "draft finding that greenhouse gases endanger the environment."[8] The EPA also "used Energy Department data from 2007 to conclude that it would be cost effective to require the nation's motor vehicle fleet to average 37.7 miles per gallon in 2018."[9] These findings were reflected in a nearly 300 page document prepared by EPA staffers. The document, which was approved by Johnson, included a proposed rule to effectuate the emissions requirement.[10]

Given the statutory and judicial directives to the EPA and the EPA's subsequent efforts, one might assume that the next steps were routine and predictable. Specifically, one might assume that the EPA publicly issued its draft document as a Notice of Proposed Rule-making (NPRM), that public comments followed, and that the comments were followed by a final, publicly explained and judicially reviewable decision to enact a rule or to refrain from so doing.[11] Yet none of this occurred.

Instead, the EPA's scientific analysis and regulatory proposals were literally willed away by the White House. As with the proverbial tree falling in a forest, the White House refused to see the EPA's plans and did their best to ensure that others could not see them.[12] This was effectuated very simply. When the EPA e-mailed

5. *Id.* at 533.

6. *See, e.g.*, Juliet Eilperin & R. Jeffrey Smith, *EPA Won't Act on Emissions This Year*, WASH. POST, July 11, 2008, at A1.

7. Juliet Eilperin, *No Action on Fuel Economy Despite EPA's Urging*, WASH. POST, March 13, 2008, at A8. *See also, e.g.*, *Rep. Markey Comments on Bush Global Warming Announcement, Environmental Protection Agency Subpoena Deadline*, U.S. FED. NEWS, April 16, 2008, *available at* 2008 WLNR 7122835 [hereinafter *Markey Comments*].

8. Felicity Barringer, *White House Refused to Open Pollutants E-Mail*, N.Y. TIMES, June 25, 2008.

9. *Id.*

10. *See Markey Comments*, *supra* note 7;

the document to the White House Office of Management and Budget (OMB) for pre-rule-making review, the White House declined to open it and ordered its retraction.[13] The White House since has claimed executive privilege against congressional attempts to discover the e-mail and related communications.[14] Although much remains unknown, the facts detailed here have come to light as a result of disclosures from EPA staffers to journalists and to members of Congress.[15] It also is now known that EPA shelved the scientific endangerment finding and proposed rule it had sent to the White House. Instead, it issued an Advance Notice of Proposed Rule-making (ANPRM)—a step preliminary to an NPRM—in June of 2008 merely seeking public comment on "potential use of [the Clean Air Act] to address climate change."[16]

For all of the secrecy that this episode entails, it sheds a bright light on the actual and potential consequences of the practice of White House control of rule-making through the OMB. More fundamentally, it helps to illuminate the practical impact of unitary executive theory. This is the constitutional theory that all discretionary executive branch activity—including rule-making proceedings such as those at issue in the events described above—must be subject to presidential control. Such practical insights help us better to grapple with the theory's justifications. If, for example, a

In *The Accountable Executive*,[17] I made the case that a unitary executive undermines, rather than bolsters, government accountability. I also explained that one need not agree with that proposition to conclude that the accountability justification for the theory is flawed. Rather, one need only deem the point reasonably arguable—and hence within Congress's discretion to judge, subject to functional boundaries—to determine that accountability principles do not demand a unitary executive.[18] The argument that unity reasonably can be deemed to undermine accountability rests on two prongs. First, it turns on the meaning of constitutional accountability. The Constitution reflects different forms of accountability that correspond to different constitutional actors who check and balance one another. Underlying all forms of accountability is the need for transparency and procedural regularity sufficient to enable public and inter-branch assessment of—and responses to—government actions.[19] Second, unity helps the White House both to secretly intervene in administrative state decisions and to manipulate the very "facts" upon which such decisions purport to rest. If, as in the example that begins this Article, the President not only can manipulate agency decisions on global warming, but can secretly manipulate the very data on which such decisions purport to rest, then Congress and the public cannot trust the very "reality" against which they are to judge such decisions.[20] The problem is compounded by the capacity of the White House politically to distance itself—and thus to create public confusion over who to blame—regarding decisions over which it legally has full authority (and in which conditions of unity thus exist).[21]

This Article expands on the project of *The Accountable Executive* in three respects. First, it situates the concern over unity's impact on information control and accountability within a broader discussion of accountability and administrative structure. If agencies are to be faithful servants of their legislative mandates, their actions generally will reflect three components: law, expertise, and politics.

17. Heidi Kitrosser, *The Accountable Executive*, 93 MINN. L. REV. (forthcoming 2009) [hereinafter *The Accountable Executive*]. *The Accountable Executive* will be published roughly contemporaneously with this Article. The two are intended as complementary pieces of a project on the separation of powers, transparency, and accountability.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

Law is present in agencies' statutory directives and any regulatory

United States, regardless of the functional consequences. While others have persuasively responded to these formalist arguments, this Article supplements those points and links them to functional accountability arguments and to related facets of administrative structure. It explains that unitarians' core formalist point—that the Constitution's founders clearly understood the vesting of executive power in the President to entail exclusive power to implement legislative directives and to control others who engage in such tasks—not only is wrong, but is wrong partly because the founders were wary of the accountability risks posed by centralized presidential control. The Constitution is grounded partly in fears that a President with full control over other officers will use them as personal loyalists to help him hide wrongdoing or incompetence and to blur the line between self-interested behavior and faithful execution of the law.

Third, this Article focuses on two recent examples to demonstrate how unity can undermine accountability and can blur the lines between politics, law, and expertise. One is the example with which this Article begins—the recent EPA rule-making controversy involving greenhouse gas emissions. This Article also focuses on the broader administrative structure—particularly OMB review of planned rule-makings—that facilitates such events. The second example is the Bush White House's attempt—still coming to light as of the fall of 2008—to alter Department of Justice personnel practices to extend political control throughout the Department.

## I. ACCOUNTABILITY, FUNCTIONALISM, AND ADMINISTRATIVE STRUCTURE

### *A. The Unitary Executive, Functionalism, and Accountability*

"Unitary executive theorists claim that all federal officers exercising executive power must be subject to the direct control of the President."[24] The President can exercise this power in one of three ways.[25] First, he can directly "supplant any discretionary executive action taken by a subordinate with which he disagrees, notwithstanding any statute that attempts to vest discretionary

24. Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1158 (1992).

25. *See* Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 58 (1994) ("Sai Prakash and I are now persuaded that all three presidential mechanisms of control are constitutionally mandated.").

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> (1) unitariness increases the ability of the President or his proxies to control rule-making outcomes, either by decreeing the outcomes or by influencing administrators' decisions; (2) by enhancing the President's formal capacity to influence administrators, unitariness also increases the ability of the President or his proxies to shape the record or other administrative actions on which a rule-making—or the decision to forego one—is based; (3) given the structural and historical tools at the President's disposal to keep secrets, he and his proxies are well equipped to misrepresent his influence on the administrative process; and (4) apart from his capacity to hide specific interactions with the administrative state, the President is well positioned to distance himself rhetorically from actions he influenced.[35]

Furthermore, even if we assume that simple accountability—rather than the more complex accountability described here—is the goal, there remains a strong argument that unity undermines it. To the extent that unity enhances the President's capacity secretly to intervene in agency decision-making and to manipulate the very facts on which such decision-making is based, it diminishes the capacity of the public and other branches to assess the agency decisions or the President's role in the same. Hence, while the decision might technically belong to an elected official, that technicality is fairly empty from the perspective of meaningful accountability, simple or otherwise.

Finally, one need not agree that unity undermines accountability to conclude that unity is not constitutionally mandated. So long as there is room for reasonable disagreement on the matter, accountability principles are not so clearly furthered by unity as to categorically require the same. Rather, Congress has substantial leeway to structure the administrative state subject to functional limitations.

### *B. Constitutional Values and Administrative Structure*

Functional concerns about unity's impact on information control and accountability stem from more foundational insights about the relationship between administrative structure and constitutional values. To understand this, it is useful to consider what the alternative to unity looks like and how this alternative compares to

35. *Id.* The remainder of this section is drawn generally from *The Accountable Executive*.

unity in terms of its relationship to administrative structure, accountability, and related constitutional values. Congress does not enjoy free reign, from an anti-unitarian perspective, to isolate the administrative state from presidential control. Rather, Congress is subject to functional limitations based on constitutional values. Hence, while Congress is not categorically required to provide for unity, it cannot remove the President so deeply from law implementation as to functionally defeat his ability to "take Care that the Laws be faithfully executed"[36] and to be held accountable for the same. As Peter L. Strauss phrases it, what functionalism demands is that the President remain the "overseer" of the administrative state.[37] But this is distinct from a unitarian directive that the President be the "decider."[38] For example, one might conclude from a functionalist perspective that the President must at least be able to remove for cause all or most of those who exercise executive discretion in the administrative state.[39] This prerogative gives the President significant oversight power, enabling him to wield much influence over administrators. At the same time, because the exercise of this power comes with costs—removal itself often being a high profile affair with political implications, combined with the possibility that "for cause" removal will engender political or judicial scrutiny as to the existence of "cause"—it limits the potential pervasiveness of influence by the President or his political proxies in the White House.

The difference between President as functional "overseer" and President as unitarian "decider" is very important from the perspectives of administrative structure and constitutional values. Full presidential control over all discretionary activity formally unifies the massive and unwieldy administrative state, fitting all of its various parts under a single point of control. This can make it difficult or impossible to distinguish those various parts. This is a particular problem when one considers that the administrative state is not a purely political entity. Indeed, its very legitimacy—particularly from the perspective of non-delegation principles—rests on the ability of courts, the people, and Congress to trace administrative actions to

36. U.S. CONST., art. II, § 3.

37. Peter L. Strauss, *Overseer, or "The Decider?" The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 704–05 (2007).

38. *Id.* *See also* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 648–50 (1984).

39. A possible exception that comes to mind is for those exercising discretion in quasi-adjudicative contexts.

statutory directives.[40] As early non-delegation case law reflects, such traceability depends not only on the substantive scope of a delegation, but on degrees of transparency and procedural regularity sufficient to enable observers to judge whether and how statutory directives are followed.[41] On the administrative assembly line that generates a rule, one should be able to pick out those components that reflect law, those that reflect expertise generated to apply law, and those that reflect political judgments. To conflate the various parts into a giant engine of presidential control can defeat this task. This difficulty is furthered by the fact that the President quite easily can—and often does—obscure questions of responsibility in response to inquiries by the public, by Congress, or by the courts.[42] At times this is intentional. At other times, it likely is due to the reality that the President cannot possibly master and make personal decisions on all facets of the gargantuan administrative state. Hence, formal presidential control can very quickly devolve—whether in appearance or in reality—into impenetrable struggles for control by competing interests within the White House.[43]

Unity thus can have a very negative impact on accountability, particularly when accountability is understood to entail something—such as an ability meaningfully to judge and to take recourse—more substantive than the ability to vote for one formally in charge of decisions. This conclusion is bolstered by criticisms that others have made of the unitarian accountability argument, including the points that the public never has more than two opportunities to hold a President electorally accountable and that one's vote for President cannot remotely capture one's views on every administrative decision attributed to the President.[44]

This account of unity, accountability, and administrative structure also tells us something about the close relationship between accountability and other important constitutional values including checking and avoiding arbitrary decisions. The latter values sometimes are presented as distinct from, even in tension with,

40. *See The Accountable Executive*, *supra* note 17.

41. *See id.*

42. *See id.*

43. *See infra* text accompanying notes 123–125; *see also The Accountable Executive*, *supra* note 17.

44. *See, e.g.*, Peter Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161, 197–206 (1994).

accountability.[45] Yet there is a strong relationship and even overlap between the values. Avoiding arbitrary decisions arguably is both a product and a subset of accountability.[46] Among the complex accountability goals reflected in the Constitution and its history is accountability to the rule of law (to be assessed by competing branches and the people).[47] And attenuated, long-term political accountability by legislators for policy-making (as opposed to more direct popular control) famously is designed to balance the benefits of democracy with the risks that it poses of arbitrariness and majoritarian tyranny.[48] As for checking, the division of responsibility between different and sometimes competing actors is meant, in part, to keep the various government actors honest by giving each incentive to outdo or to expose wrongdoing by others. Closely related to these virtues of checking is its ability to make distinct and relatively discernable the roles played by various actors in governing processes.[49]

## II. ACCOUNTABILITY, FORMALISM AND ADMINISTRATIVE STRUCTURE

Unitarians also deem unity required independent of functional analysis. Unity is demanded, they argue, under a formalist reading of the Constitution—that is, under a reading that deems most government activity classifiable as legislative, executive, or judicial, and that considers the procedures outlined in the Constitution's text

45. *See, e.g.*, Lisa Schultz Bressman, *Beyond Accountability*: *Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 461–69, 495–96 (2003) (arguing that theorists have focused on accountability in the administrative state to the exclusion of the value of avoiding arbitrary decisions); Greene, *Checks and Balances*, *supra* note 31, at 131, 177–79 (arguing that the Constitution is designed to sacrifice accountability for checks and balances).

46. *See The Accountable Executive*, *supra* note 17. *See also, e.g.*, Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531, 535–36 (1998) (accountability is a means to protect the rule of law); Bressman, *supra* note 45, at 499. Although Bressman generally distinguishes the value of accountability from that of avoiding arbitrary decisions, she notes:

> Perhaps the best understanding of accountability is not that it requires elected officials to make policy decisions simply because they are responsive to the people. Rather, it requires elected officials to make policy decisions because they are subject to the check of the people if they do not discharge their duties in a sufficiently public-regarding and otherwise rational, predictable, and fair manner.

*Id.*

47. *See The Accountable Executive*, *supra* note 17.

48. *See id.*

49. *See id.*

for each exclusive. They deem the implementation of statutory directives—including through administrative policy-making[50]—executive activity. Because the Constitution says that "[t]he

> generation of 'reform' state constitutions not only permitted, but actually mandated legislative involvement in both personnel and superintendence. Nothing in the records of the Convention demonstrates that exclusivity suddenly became the norm in 1787."[59]

In short, anti-unitarians argue that there is no formal, categorical directive of full presidential control over the administrative state. Rather, Congress has substantial leeway, subject to functional limits, under its enumerated powers—particularly under the Necessary and Proper Clause—to structure the administrative state.[60]

While formalism and functionalism generally are treated as separate lines of analysis, there are important points of overlap

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> not occasion so violent or general a revolution in the officers of the government as might be expected if he were the sole disposer of offices. Where a man in any station had given satisfactory evidence of his fitness for it, a new President would be restrained from attempting a change in favor of a person more agreeable to him by the apprehension that a discountenance of the Senate might

act, by having their opinions recorded."[75] Similarly, George Mason objected that:

> The President of the United States has no Constitutional Council (a thing unknown in any safe and regular government) he will therefore be unsupported by proper information and advice; and will generally be directed by minions and favourites . . . . or a Council of State will grow out of the principal officers of the great departments; the worst and most dangerous of all ingredients for such a Council, in a free country; for they may be induced to join in any dangerous or oppressive measures, to shelter themselves, and prevent an inquiry into their own misconduct in office . . . .[76]

Opponents of the council countered that it would undermine

for such a Council, in a free country."[79] A constitutional proponent evinced the same assumption—that independence in the departments was desirable—assuring that, because the President could not appoint officers without Senate consent, there will be no problems of "*patronage and influence*, and of personal obligation and dependence.

Martin Flaherty recounts the evolution, at the Philadelphia framing convention, from the council provision to the Opinions Clause:

> The Opinions Clause is the lone surviving part of a plan put forward by Gouverneur Morris and Charles Pinckney on August 20 to create a Council of the State. The original proposal called for the Council to consist of the Chief Justice of the Supreme Court and Secretaries for Domestic Affairs, Commerce and Finance, Foreign Affairs, War, Marine, and State. Each of the Secretaries was to be appointed by the President alone and to hold his office "during pleasure." The plan further provided that the President "may require the written opinions of any one or more of the members: But he shall in all cases exercise his own judgment."
>
> Two days later the Committee of Detail returned the proposal with several changes. First, it expanded the roster of what it now called the President's "Privy Council" to include the President of the Senate and the Speaker of the House. In addition, it dropped the provisions specifying the President's appointment and removal authority of the Secretaries and instead provided that the Council would simply consist of "the principal Officer in the respective departments of foreign affairs, domestic affairs, War, Marine, and Finance, as such departments of office shall from time to time be established . . . ." Finally, the new version retained a slightly modified provision regarding opinions, stating that it would be the members' duty "to advise [the President] in matters respecting the execution of his Office, which he shall think proper to lay before them: But their advice shall not conclude him, nor affect his responsibility for the measures which he shall adopt." Despite this promising start, the Privy Council did not survive the Committee of Eleven, which scrapped the idea for the sole stated (but not necessarily only) reason that "it was judged that the Presidt. by persuading his Council—to concur in his wrong measures, would acquire their protection for them." All that remained was the Opinions Clause.[83]

Of course, the matter did not end there. As we saw above, the absence of a council remained an issue throughout the ratification debates.

The obvious question presented by this evolution from council to Opinions Clause is, what's the difference between the two? The draft council provisions made clear that the council's advice was to be just that, advice, and that it would not bind the President. And the proposed council was to be comprised largely of department heads.

83. Flaherty, *supra* note 23, at 1796–97 (internal citations omitted).

Had the inclusion of members of other branches been deemed a problem, it could have been remedied by simply subtracting those members from the council, rather than abandoning the council all together. It thus is not entirely plain, at first glance, what materially differs as between a council comprised largely of department heads

understandings. It also bolsters the notion that the founders sought whatever structures would further accountability, and that they understood that clear and transparent divisions of executive responsibility could serve this purpose by helping the public and other branches trace a decision's origins.

### *C. The Debate of 1789*

The "Debate of 1789" further illuminates the two historical lessons discussed throughout this section. First, that there was no clear founding consensus favoring a unitary executive. Second, that founding discussions centered on finding structures to facilitate accountability. These discussions regularly included expressions of concern that unity will defeat, rather than further, accountability.

#### *1. No Consensus on Unity as a Constitutional Mandate*

The Debate of 1789, which took place in the House of Representatives during the first Congress, centered on whether the bill creating a Department of Foreign Affairs should explicitly grant the

branch officers at his pleasure[89]—acknowledge that the first vote, standing alone, could be interpreted either as a declaration of such a presidential prerogative or as reflecting Congress's belief in its own constitutional discretion to grant or withhold such power from the President.[90] They argue that the subsequent two votes, however, reflect the majority's desire to clarify—by implying rather than explicitly granting a presidential removal power—that the power is constitutional in nature.[91] Opponents of the unity-based interpretation deem the votes inconclusive of any constitutional theory of presidential power on the part of a majority of the Representatives.[92] The votes and the legislative history, they argue, reflect disagreement and confusion among those who voted for the provisions as to whether they merely recognized a pre-existing constitutional removal power on the part of the President or whether they exercised their own constitutional prerogative to grant such power by legislation.[93]

The anti-unity position is the stronger one for three reasons. First, let us assume for the sake of argument that a majority of the voting representatives clearly believed that the President has a constitutional right to dismiss officers at his pleasure. Even if this were the case, it tells us nothing more than that the issue was a highly contested one and that some in the founding era—including those Representatives in the 1789 majority—supported unity whereas

would hide his bad acts. While this position did not prevail in 1789, the rationales offered are instructive for functional analyses. Their instructiveness is further bolstered by their similarity to the accountability-based arguments that prevailed in the pre-ratification council debate.

Exemplifying the 1789 majority's accountability arguments, James Madison deemed "no principle . . . more clearly laid down in the Constitution than that of responsibility."[106] "[S]o far . . . as we do not make the officers who are to aid [the President] . . . responsible to him," Madison concluded, "he is not responsible to his country."[107]

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> come at the evidence of the President's guilt, in order to obtain his conviction on impeachment."[108]

Representative Jackson made the point more dramatically, warning: "Behold the baleful influence of the royal prerogative when officers hold their commission during the pleasure of the Crown!"[109]

## III. A MODERN DAY COUNCIL?: HOW UNITY CAN UNDERMINE ACCOUNTABILITY IN PRACTICE

### *A. OMB Review of Rule-makings*

The previous section argued that unity is not embedded in the Constitution as a formalist directive, and that this is so due partly to founding ambivalence about the impact of centralized presidential control on executive accountability. Founding fears that unity sometimes will hinder rather than further accountability have been vindicated on a number of occasions. One such occasion is the EPA rule-making controversy discussed in this Article's introduction. The general lesson of the controversy is that White House control of executive activity can reach so deep into the activity's roots as to subvert accountability by shielding the existence or extent of White House influence. More insidiously, it can shape perceptions of the scientific or other "facts" upon which a decision is based. In the case of the EPA rule-making, the White House sought secretly not only to alter the EPA's proposed rule-making activity, but to prevent the EPA's proposal and its underlying scientific analysis from ever seeing the light of day.[110]

The episode also exemplifies consequences that can follow from one increasingly pervasive means through which the White House institutionalizes control over administrative policy-making. That is

108. 1 ANNALS OF CONG., *supra* note 85, at 519. *See also, e.g.*, *id.* at 458, 472, 508–09 (Smith); 473, 502, 575 (Gerry); 487–89; 530–31 (Jackson); 568–69 (Stone).

109. *Id.* at 488 (Jackson). Representative Page, too, warned that "this clause of the bill contains in it the seeds of royal prerogative." *Id.* at 490. Members of the minority also harnessed these points to respond to the textual argument that removal power is implicit in executive power. They explained that the scope of executive power is context-dependent. Its meaning is informed by the type of government in which it exists. They emphasized that the United States is not a monarchy and that it accords Congress, not the President, the power to create and shape executive offices. In this context, they argued, the executive power cannot include an implicit, unalterable right on the President's part to remove executive officers at his pleasure. *See, e.g.*, *id.* at 466, 513–15 (White); 477 (Livermore); 486–89 (Jackson); 494 (Stone); 504 (Gerry); 510, 545 (Smith); 548 (Page).

110. *See supra* Introduction.

the involvement of the OMB's Office of Information and Regulatory Affairs ("OIRA") in agency rule-makings.[111] Observers trace White House efforts to create formal, institutional means of coordinating and influencing agency rule-makings to the Nixon Administration.[112] There is wide agreement that every President since Nixon has sought to utilize or extend such means.[113] Commentators observe that the practice got particular boosts from the executive orders and practices of the Reagan and Clinton Administrations.[114] There is at least one respect in which commentators differ in their description of White House influence over agency rule-makings through the Clinton Administration. That is whether—to put it in Straussian terms—presidential efforts generally remained in the "overseer" category, or whether they crossed into "decider" territory. In other words, whether Presidents from Nixon through Clinton focused, as a general practice, only on demanding information from agencies and seeking aggressively to persuade them, or whether any of these Presidents adopted a practice of claiming final decision-making authority over matters delegated by statute to agencies.[115]

111. *See* Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 55 (2006).(citing history of OIRA involvement in rule-making).

112. *See, e.g.*, Alan B. Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059, 1061 (1986).

113. *See, e.g.*, Strauss, *Overseer, or "The Decider?"*, *supra* note 37, at 701–02, 719 n.105; Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 821–22 (2003); Morrison, *supra* note 112, at 1061–63.

114. *See, e.g.*, Strauss, *Overseer, or "The Decider?"*, *supra* note 37, at 719 n.105; Croley, *supra* note 113, at 824–29.

115. For example, in 1986, 96 0 oy, 112A 0.0043 Tw [(. 8)6162Tm 0084]TJ /TT6 0 0 7.0

> Congress from getting to the bottom of the "who did what and when" mystery. While high profile uses of executive privilege are not without political cost, they often prove quite effective at enabling an administration to wait out a political scandal with little long-term cost and little in the way of factual revelations for public, congressional, or legal review.[122]

Of course, the President's practical inability to remain on top of most administrative activities means that he not only can intentionally distance himself from unpopular actions over which he has formal control, but that he can unwittingly be out of the loop as well. In either case, formal presidential control can readily translate into actual control by competing White House staffers. As with actual presidential control, control by others within the vast White House infrastructure can fly under the radar of the public, Congress, and even many within the White House given the absence of procedural protocol for White House interventions and the availability of executive privilege and other means to avoid disclosures. The ideal of formal presidential control thus can readily devolve into an opaque and chaotic fog of formal and informal powers held by many who surround the President. Under such conditions, the practice of formal unity looks much like the dreaded presidential council envisioned by the framers.

The OMB embodies the potential for just such an accountability-obscuring fog. This is not to say that OMB review is intrinsically illegitimate. To the extent that it assists the President in his role as Straussian "overseer," enabling him to render transparent political judgments in response to agencies' transparent technical and policy analyses and to effectuate his judgments through open pressure via the presidential "bully pulpit," through termination (with or without cause as legislation provides), through open legislative proposals, or otherwise, it can be a constructive part of the White House infrastructure. Yet to the extent that it formally embraces a President-as-"decider" model while facilitating the practical obfuscation of presidential responsibility and the facts underlying agency decisions, it looks less like an accountability-enhancing aide and more like the founders' accountability-draining council.

122. *Id.* (internal citations omitted).

These concerns are bolstered by empirical research by Lisa Schultz Bressman and Michael P. Vandenbergh.[123] Their research focuses exclusively on interactions between the EPA and the OMB during the first Bush Administration and the Clinton Administration, 1989–2001.[124] It thus does not reflect the use of the OMB in the second Bush Administration. Yet in some respects the findings are more valuable for this temporal limitation. They can give us a sense of factors that tend to inhere in OMB interactions with agencies under conditions less aggressively unitarian than those in the second Bush Administration. To the extent that these factors pose accountabilitythaot tsomcly alertve un

In addition to the "who's the boss?"[126] problem that pervades OMB rule-making oversight, Bressman and Vandenberg found that such oversight can blur politics and expertise. Foreshadowing the EPA rule-making controversy—as well as other recent controversies in which political appointees altered agency scientists' reports to downplay environmental threats[127]—under the more aggressive tactics of the second Bush Administration, some of the EPA officials interviewed by Bressman and Vanderberg noted:

> OIRA on occasion questioned whether the science really supported the results that the EPA had claimed. Whether or not OIRA actually had the authority to challenge agency scientific judgments, these respondents believed that it lacked the competence. One EPA respondent recalled asking an OIRA staffer, "[W]hen did [you] get a PhD in epidemiology? I must've missed that." These respondents suggested that OIRA challenged the science as a means to avoid regulation and reduce costs.[128]

They also noted a substantial lack

illegitimate. Yet they do suggest the wisdom of congressional leeway to override given schemes of White House review and to experiment with different forms of administrative control, unitarian and otherwise. Such leeway—within functional boundaries—is necessary to protect against the risk that White House rule-making review will prove the modern day equivalent of the founders' feared, accountability-sapping council.

### *B. Remaking the Justice Department from the Ground Up*

#### *1. Background: Accountability and Career Employees*

This Article thus far has argued that accountability is bolstered by mechanisms that foster some separation between politics, law, and expertise in the administrative state. Such separation can help those charged with oversight—be it the people, other branches, or a combination thereof depending on the activities at issue—to identify, understand, and judge relevant decision-making factors. This point also sheds light on the very close constitutional relationships between the values of checking, accountability, and avoiding arbitrary decisions.

As exemplified by the references above to agency scientists, the civil service and other career appointees (hereinafter "non-politicals" or "career" employees) in the administrative state are important parts of this scheme. As Neal Katyal puts it, they are means to "check[] [the executive branch] from within."[130] Such checking is crucial to accountability. Non-politicals tend to have relative advantages in length of service, institutional knowledge, and technical subject matter expertise (for example, in their fields of science or law). And the very fact that they are, by definition, supposed to be hired and retained without regard to political affiliation suggests that they have some freedom to form judgments and take actions without heeding the political agendas of current elected officials. While this scheme is by no means fool-proof, it should create intra-agency mechanisms to push back against political decisions that might subvert the demands of agencies' governing statutes or of scientific or other technical realities. As Katyal emphasizes, such interventions can right an agency's course from within, even where a dispute never becomes

130. *See generally* Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006).

known outside of the agency.[131] Such mechanisms also are crucial to ensure meaningful accountability to outsiders—i.e., to other branches and the people. Structurally, non-politicals are situated as the persons most likely within an agency to blow the whistle by alerting the media or the other branches to corruption or incompetence. Furthermore, in simply providing routine legal or technical analysis, non-politicals are structurally well situated to offer relatively apolitical judgments against which the final decisions approved by politicals can be measured.

In a recent report (hereinafter Voting Rights Report), three former, long-time career employees in the Justice Department's Civil Rights Division[132]—each of whom served across multiple administrations of both parties—offer a striking example of the checking and accountability functions served by an agency's mix of politicals and non-politicals. The example involves the Voting Section's longstanding role, under Section 5 of the Voting Rights Act of 1965, to review "preclearance" requests by jurisdictions subject to Section 5. Covered jurisdictions must obtain preclearance to implement new voting procedures. Preclearance may not be granted if the new procedures will have the "purpose or the effect of denying or abridging the right to vote on account of race or membership in a language minority group."[133]

> Historically, the Justice Department has avoided partisan application of the preclearance re

> staff to make appropriate Section 5 decisions based upon the law and the facts, and not based upon partisan interests.
>
> . . . . In both Democratic and Republican administrations the political staff almost always has agreed with staff recommendations to interpose an objection . . . . In the few instances when staff recommendations to deny preclearance have been rejected by political appointees during past administrations,

presidential power to ignore statutory or intra-agency hiring practices or minimum qualification requirements for those deemed to exercise discretionary executive power.[136] Third, to the extent that it broadens and deepens the role of presidential appointees who serve at the President's pleasure throughout the administrative state—even if only in the relatively higher reaches of agencies—it can have a trickle down effect throughout the career ranks. Should politicals exercise increasing power over career personnel decisions, litigation, or other decisions typically made by career staff, this can have a pervasive impact on agency activities and staffing.

Before turning to recent examples from the Department of Justice, two additional points bear noting. First, in addition to lessons drawn from examples of the practical impact of unity, one can also draw lessons about the risk that the theory will be misinterpreted and misapplied. Given uncertainties as to some of unity's practical manifestations—and given a general over-reading of the theory by the Bush Administration and the media, as unitarians themselves have observed—it is plausible that unity might demand some, but not all, of the actions recently taken in the Justice Department.[137] For example, unity may not demand White House control over personnel decisions that reaches as deep into the Department's career ranks as such control reached in the Bush Administration. The point is not to conclusively resolve all of the practical manifestations of unitary executive theory in this Article. The point simply is to note that a second lesson can be drawn from the events in the Justice Department beyond the lesson of unity's practical impact. That second lesson—one on which unitarians and non-unitarians alike might agree—is that further exploration and clarification of unity's meaning and practical reach is called for, regardless of whether one supports or opposes the theory.

Second, the Justice Department activities described below exemplify the fact that formal placement of hiring, removal, or other powers in the President by no means ensures practical knowledge by the public, by other branches, or even within the executive branch, as

to Grover Cleveland's refusal to issue an executive order requiring statements of reasons for removing civil servants).

136. *See, e.g.*, Strauss, *supra* note 37, at 721-24 (citing signing statements by President Clinton and President George W. Bush objecting to minimum qualification requirements for Presidential appointees).

137. *See The Accountable Executive*, *supra* note 17 (discussing misuses of unitary executive theory and areas of uncertainty about the theory's practical reach).

to who made what decisions. To the contrary, reports on the recent controversies depict a virtual Keystone Kops[138] of the administrative state. By eschewing the procedural requirements and bureaucratic hierarchies traditionally followed within the Department in favor of top-down control, politicals within the Justice Department confused the people, the other branches, and—at least in appearance—themselves as to who did what, when. Perhaps most damning for the accountability story that unitary executive theory invokes, the activities undertaken by politicals generated—and continue to generate—a host of unanswered questions as to what the President and his Attorney Generals[139] knew and when they knew it.

*3. Recent Events in the Justice Department*

*a. The Example of the Civil Rights Division, Voting Rights Section*

Many allegations have come to light in the past year or so—in most cases years after the events began or occurred, and long after much damage was inflicted—about improprieties in hiring, removal, and other decisions throughout the Department of Justice in the second Bush Administration. Among those allegations are several concerning the Department's Civil Rights Division.

A detailed report on personnel practices in the Civil Rights Division (hereinafter CRD Report) was released by the Department's Office of the Inspector General and Office of Professional Responsibility (OIG and OPR) shortly before this Article went to press.[140] The CRD Report concludes that Bradley Schlozman, a senior official in the Civil Rights Division during the Bush Administration, violated federal law by "consider[ing] political and ideological affiliations in hiring career attorneys and in other personnel actions affecting career attorneys in the Civil Rights

138. *See generally* JEANINE BASINGER, SILENT STARS 65–98 (2000) (discussing the Keystone Kops troop of comedic actors).

139. As the next sections reflect, the bulk of the politicization controversies arose during the tenure of Attorney General Alberto Gonzales. Some arose, however, during the tenure of his predecessor, John Ashcroft. *See infra* Part III.B.3.

140. OFFICE OF THE INSPECTOR GEN. & OFFICE OF PROF'L RESPONSIBILITY, U.S. DEP'T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING AND OTHER IMPROPER PERSONNEL ACTIONS IN THE CIVIL RIGHTS DIVISION (2009), *available at* http://www.usdoj.gov/opr/oig-opr-iaph-crd.pdf [hereinafter CRD REPORT].

While the composition of the Screening Committee changed from

The Report confirms that the suspicions were warranted. Statistically,

searches of candidate names—to determine political or ideological affiliations, and that she recommended many deselections on the basis of such affiliations.[165] Fridman appears to have resisted McDonald's suggestions and more generally to have resisted taking politics and ideology into account, even complaining on several occasions that such considerations factored into the process.[166] Elston, on the other hand, went along with many of McDonald's suggestions, often providing the necessary second vote to deselect.[167] In some instances Elston initiated or actively supported political and ideological discrimination.[168]

*c. Politicized Career Hiring Decisions Made by Members of the Office of the Attorney General*

Shortly after releasing their report on the Honors Program and SLIP, the OIG and OPR released a report entitled "An Investigation into Allegations of Politicized Hiring by Monica Goodling and the Other Staff in the Office of the Attorney General" (hereinafter Goodling Report).[169] The Goodling Report revealed that several politicals in the Office of the Attorney General (OAG) illegally inserted political and ideological considerations into career hiring decisions throughout the Department.[170] These practices extended to hiring decisions for, among other positions, career attorneys in various Divisions, Assistant U.S. Attorneys, and Immigration Judges.

The Goodling Report focused predominantly on the activities of Monica Goodling. Goodling served in the OAG from October 2005 until her resignation in April 2007.[171] While Goodling most often assisted in hiring for political positions, she also "assessed candidates for various types of career positions, including candidates for (Assistant U.S. Attorney) positions, . . . career attorneys applying for details to Department offices, . . . candidates for [Immigration Judge] and [Board of Immigration Appeals] positions . . . [and] many

165. *Id.* at 73, 76–79, 81–83, 92–93.

166. *Id.* at 70–75, 92.

167. *Id.* at 84, 86, 93–94.

168. *Id.* at 93-96.

169. OFFICE OF THE INSPECTOR GEN. & OFFICE OF PROF'L RESPONSIBILITY, U.S. DEP'T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL (2008), *available at* http://www.usdoj.gov/oig/special/s0807/final.pdf [hereinafter GOODLING REPORT].

170. *See infra* notes 171–185.

171. GOODLING REPORT, *supra* note 169, at 6.

candidates who were interested in obtaining any position in the Department, whether career or political."[172] The Goodling Report concludes that Goodling violated the law by frequently using political and ideological criteria to screen career candidates.[173]

Goodling's screening techniques included politically directed "interview questions, Internet searches, employment forms, and reference checks."[174] Among Goodling's typical interview questions were:

> Tell us about your political philosophy. There are different groups of conservatives, by way of example: Social Conservative, Fiscal Conservative, Law & Order Republican.
>
> [W]hat is it about George W. Bush that makes you want to serve him?
>
> Aside from the President, give us an example of someone currently or recently in public service who you admire.[175]

Goodling also asked some candidates, "Why are you a Republican?"[176]

As for internet research, Goodling's techniques included a search string that she used to run searches on the Lexis Nexis database:

> [First name of a candidate]! and pre/2 [last name of a candidate] w/7 bush or gore or republican! or democrat! or charg! or accus! or criticiz! or blam! or defend! or iran contra or clinton or spotted owl or florida recount or sex! or controvers! or racis! or fraud! or investigat! or bankrupt! or layoff! or downsiz! or PNTR or NAFTA or outsourc! or indict! or enron or kerry or iraq or wmd! or arrest! or intox! or fired or sex! or racis! or intox! or slur! or arrest! or fired or controvers! or abortion! or gay! or homosexual! or gun! or firearm![177]

Goodling also "admitted in her congressional testimony that she accessed www.tray.com and other websites to get information about political contributions made by candidates for temporary details, immigration judges, and other positions."[178]

172. *Id.* at 17.
173. *Id.* at 135–38.
174. *Id.* at 18.
175. *Id.*
176. *Id.*
177. *Id.* at 21–22.
178. *Id.* at 22.

Goodling's use of political criteria had a substantial impact on the Department, affecting who was hired for many career positions[179] and causing hiring delays—particularly for Immigration Judges and Board of Immigration Appeals members—and consequent case backlogs.[180] To cite just one striking example of Goodling's impact,

> an experienced career terrorism prosecutor was rejected by Goodling for a detail to [the Executive Office of the U.S. Attorneys (EOUSA)] to work on counterterrorism issues because of his wife's political affiliations. Instead, EOUSA had to select a much more junior attorney who lacked any experience in counterterrorism issues and who EOUSA officials believed was not qualified for the position.[181]

While Goodling might have been the most prolific and visible of the offenders, she was not alone in conducting political and ideological candidate screening for non-political, career positions. The Goodling Report concludes that Kyle Sampson and Jan Williams also "violated federal law and Department policy . . . by considering political and ideological affiliations in soliciting and selecting [Immigration Judges]."[182] Sampson was Chief of Staff to the Attorney General from September 2005 until Sampson's resignation in March 2007.[183] Jan Williams served as White House Liaison in the OAG from March 2005 until she resigned in April 2006.[184] Kyle Sampson was direct supervisor to both Goodling and Williams during their respective tenures at the OAG.[185]

*d. Accountability Defeated: The Mystery of Who Knew What and When They Knew it*

Perhaps the best news in all of this is that much misconduct has now come to light and has been analyzed and deemed illegal by the Department of Justice. Yet this turn of events, while encouraging, hardly signifies that "the system worked." For one thing, even if we now knew everything of import about these events, it would remain problematic that it took as long as it did for the information to come to light and that so much damage was done in the interim. It's as

179. *Id.* at 37–40, 44–45, 47–60, 69, 101–06, 110–12.
180. *Id.* at 106–07.
181. *Id.* at 136.
182. *Id.* at 137. *See also id.* at 76–101.
183. *Id.* at 7.
184. *Id.*
185. *Id.* at 6–7.

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young political operatives, were responsible for politicizing the Justice Department.

## CONCLUSION

Supporters of unitary executive theory argue that unity serves accountability and that the Constitution demands unity partly for this reason. Yet if experience is any guide, conditions of unity are just as likely—if not more likely—to defeat accountability by facilitating secret influence on government decision-making, the distortion of data, and the President's capacity to distance himself from unpopular actions that he formally controls.

It is not surprising to learn that the founders predicted and feared such presidential misdeeds. What is perhaps surprising, and certainly ironic, is that the founders expressed such fears in contexts from which unitarians routinely draw. In rejecting a presidential council, for example, the founders rejected a body that was formally unitary (in the sense that its advice would not bind the President) because they recognized that formal presidential control would not stop the President from manufacturing self-serving council "advice" and otherwise hiding behind council members. In contrast, the founders embraced a constitutional directive that enabled the President to demand advice under conditions more conducive to transparency and to the public discernment of clear lines between the President and administrative actors.

These insights lend themselves to two related conclusions. First, unity does not so clearly further accountability as to justify a categorical constitutional mandate of the same. To the contrary, Congress needs substantial leeway, subject only to functional parameters, to determine how best to facilitate accountability throughout the complex pathways of the administrative state. Second, the founders grasped many of the risks that follow from unity while also recognizing unity's benefits, the dangers of moving too far from unity, and the case-specific factors that might impact the wisdom of specific proposals—be they for a presidential council or a removal provision. As a result, the founders were far less clear and categorical in embracing unity than the unitarian literature suggests. As a result, neither constitutional text alone nor the text as informed by history categorically demands unity.

can be abused in many ways. One such way, as recent events demonstrate, is through an excess of unity—that is, through excessive concentration of executive power in the President or in his political proxies at the top of the executive branch. Thankfully, the Constitution—with its many checks and balances and provisions for overlapping power—leave a fair amount of room for the legislature to curtail secretive and otherwise undue political influence within the administrative state and to experiment with measures designed to enhance political and bureaucratic accountability.