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## Article

# The Accountable Executive

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### INTRODUCTION

Two hallmarks of the Bush administration have been its reliance on constitutional theories of strong presidential power and its penchant for secrecy. The connection between the two is clear in the case of executive privilege, which justifies presidential secrecy by invoking the President's constitutional powers.<sup>1</sup> In the case of another influential theory—that of the “unitary executive,” the connection is less obvious. Yet there is a profound bond between unitary executive theory and executive-branch secrecy. Unitary executive theorists argue that “all federal officers exercising executive power must be subject to the direct control of the President.”<sup>2</sup> Presidential control of all who hold executive power entails control not only over final decisions, but over the mustering of “facts” used to justify the same.<sup>3</sup> Moreover, formal presidential control of decision making necessarily devolves into de facto control by any number of White House offices and persons.<sup>4</sup> The result is obfuscated re-

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1. “[E]xecutive privilege claims are based on the notion that some information requests effectively infringe on the President's Article II powers, threatening his ability to receive candid advice or to protect national security.” Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L. REV. 489, 492 (2007).

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

3. See, e.g., Felicity Barringer, *White House Refused to Open Pollutants E-mail*, N.Y. TIMES, June 25, 2008, at A15; Juliet Eilperin, *White House Tried to Silence EPA Proposal on Car Emissions*, WASH. POST, June 26, 2008, at A2; Ron Suskind, *Without a Doubt*, N.Y. TIMES, Oct. 17, 2004, (Magazine), at 51.

4. See Lisa Schultz Bressman & Michael P. Vandenberg, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*,

sponsibility—whether due to a presidential design to avoid responsibility, the reality of divided power, or both. Furthermore, the presidency and surrounding White House offices are structurally well-equipped for secrecy and information control and have strong political incentives to use these capacities.<sup>5</sup> The practice of unitary executive theory thus lends itself to relative opacity and information manipulation within the vast resources of the administrative state.

The impact of unitary executive theory on presidential information control is important in its own right, but it also sheds light on the constitutional validity—or more precisely, invalidity—of the theory. A crucial aspect of the theory's justification is that it supports political accountability.<sup>6</sup> Unitary executive theorists argue that it is most consistent with political accountability for the President—rather than unelected administrators—to have the final say on discretionary executive branch decisions.<sup>7</sup> Voters can react to the President's decisions at the ballot box, something that they cannot do with respect to bureaucrats' actions.<sup>8</sup> Others have identified important problems with the accountability justification for unitary executive theory. Yet little sustained attention has been paid to the theory's connection to increased presidential control over information flow.<sup>9</sup> From this connection it follows not only that a

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105 MICH. L. REV. 47, 49–50 (2006) (“Presidential control is a ‘they,’ not an ‘it.’”).

5. See Kitrosser, *supra* note 1, at 491–92.

6. See, e.g., Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 35–37, 45, 59, 65–66 (1995); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 97–99 (1994); Saikrishna Bangalore Prakash, Note, *Hail to the Chief Administrator: The Framers and the President's Administrative Powers*, 102 YALE L.J. 991, 998–99, 1012–15 (1993).

7. See sources cited *supra* note 6.

8. See sources cited *supra* note 6.

9. I do not mean to suggest that others have failed to note the phenomenon of secret White House involvement in administrative affairs. A number of commentators, particularly in the administrative law literature, have discussed secrecy in White House oversight of rule makings. See, e.g., Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1266–67, 1281–82, 1309–10 (2006); Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 878, 882, 884–85 (2003); Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1085–86 (1986); Alan B. Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059, 1064–65, 1067–69 (1986); Erik D. Olson, *The Quiet Shift of Power: Office of Management & Budget Supervision of Environmental Protection Agency Rulemak-*

unitary executive does not enhance accountability, but that it undermines accountability. It does so, first, by increasing the President's ability to shield or manipulate the very information on which the public might judge his actions. Second, it replaces multiple identifiable avenues for public input and information access with a single, intrinsically opaque and relatively inaccessible formal decision maker. Third, the formal decision maker retains substantial ability to distance himself from unpopular decisions by pointing to actual or purported actions by inferiors within an opaque executive branch.

A unitary executive theorist (or "unitarian")<sup>10</sup> would respond that the functional accountability argument is accompanied by formalist arguments from text, structure, and history that themselves are sufficient to demand a unitary executive.<sup>11</sup> I address these arguments in my Article *Accountability and Administrative Structure*, which is part of a larger project on presidential power and information control.<sup>12</sup> The instant Article focuses on the functional side of things, emphasizing the practical impact of unity on information control and accountability.

It also is important to understand that one need not agree that unity plainly undermines accountability to share this Article's conclusion that the accountability argument for unity is flawed. Rather, the point need only be reasonably arguable to support this Article's conclusion. So long as it is reasonably arguable that unity undermines, rather than bolsters, accounta-

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*ing Under Executive Order 12,291*, 4 VA. J. NAT. RESOURCES L. 1, 4–5, 14, 55–64 (1984); Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 188–89 (1986). My point is that sustained analyses of the connection between secrecy, accountability, and unitary executive theory have been relatively rare. They are not, however, unprecedented. For examples of such analysis, see Peter M. Shane, *Presidents, Pardons, and Prosecutors: Legal Accountability and the Separation of Powers*, 11 YALE L. & POL'Y REV. 361, 400–01 (1993), and Michele Estrin Gilman, *The President as Scientist-in-Chief*, 45 WILLAMETTE L. REV. (forthcoming Apr. 2009).

10. I use the term "unitarian"—despite its usual religious implications—as shorthand, given the unwieldy nature of the phrase "unitary executive theorist." Others have used the term to describe unitary executive theorists as well, presumably for the same reason. See, e.g., Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1740–44 (1996).

11. See M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1138 (2000).

12. Heidi Kitrosser, *Accountability & Administrative Structure*, 45 WILLAMETTE L. REV. (forthcoming Apr. 2009).

bility, then unity fails to so plainly further accountability as to support an unyielding, categorical unity directive.

The Bush administration offers a powerful case study in the impact of unitary executive theory on information control and in the negative relationship between a unitary executive and accountability. It also demonstrates independent risks that stem from the fact that the theory is poorly understood by the public and politicians, and that the parameters of the theory's practical applications are not fully evident even in scholarly work on the topic. Thus, three major lessons can be gleaned from Bush administration action and argument relating to unitary executive theory. First, insofar as some administration actions clearly manifest unitary executive theory—that is, insofar as they substitute White House control for discretionary decision making statutorily or traditionally reserved for administrative professionals—they demonstrate the negative correlation between the unitary executive and accountability. Second, some assertions of White House control negatively impact information flow and accountability, but do so in a context where it is not fully clear whether or to what extent unitary executive theory demands such control. Such instances both demonstrate the negative link between unitary executive theory and accountability—at least by comparison and extrapolation—as well as the lack of clarity as to the theory's practical implications. Third, some assertions of White House control clearly stretch unitary executive theory beyond its bounds, thus compounding any harm to information flow and accountability caused by “correct” interpretations of the theory.

The first lesson is exemplified by the pressure placed on the Environmental Protection Agency (EPA) by the Bush White House to suppress a planned rule making. The rule making reportedly contained scientific analysis explaining that greenhouse gases are pollutants that can and should be regulated.<sup>13</sup> Presidential control over rule makings—whether direct or through influence over a political appointee who the President can fire at will—is well within the bounds of unitary executive theory.<sup>14</sup> Yet the secrecy surrounding the EPA decision and its suppressive effect on information exemplifies the risks to accountability intrinsic in such control. The second lesson is exemplified by White House efforts to block and manipulate re-

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13. See *infra* Part III.A.

14. See Calabresi & Rhodes, *supra* note 2, at 1166.

search and analysis on climate change in federal agencies.<sup>15</sup> There is little question that, under unitary executive theory, the President has full power to dismiss personnel who make discretionary decisions, even if their job also entails research and analysis.<sup>16</sup> It also is clear under the theory that those who exercise discretionary decision making and who oversee researchers and analysts are under full presidential control, as are inspectors general or others who might be empowered to investigate claims of improper interference with research.<sup>17</sup> In all of these respects, then, this example reflects the heightened presidential control over research and analysis that unitary executive theory requires. On the other hand, it is not clear that the theory demands direct presidential control over those whose jobs entail only research and analysis. The example thus simultaneously demonstrates the negative impact of unitary executive theory on information flow and accountability, and the need to clarify the theory's parameters. The third lesson is exemplified by the Bush administration's conflating of unitary executive theory with a more general expansion of presidential power.<sup>18</sup> This too, demonstrates the need to clarify the theory's practical boundaries and the harms of not so doing.

Part I of this Article summarizes unitary executive theory, its major functionalist justification from accountability and criticisms that others have made of that justification. Part II introduces the negative correlation between a unitary executive and free information flow, and thus between a unitary executive and accountability. Part III elaborates on the examples described above, explaining that they exemplify both the negative correlation between unitary executive theory and accountability, as well as the importance of clarifying the theory's boundaries. The Article's conclusion summarizes why the accountability-based justifications for unitary executive theory are unsound. It also seeks to offer some common ground for supporters and opponents of the theory. At minimum, these two groups should be able to agree on the importance of clarifying the theory's parameters. To the extent that unitary executive theory remains influential, such clarification might deter abuses of the theory and thus positively impact information flow and accountability.

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15. See *infra* Part III.B.

16. See Calabresi & Rhodes, *supra* note 2, at 1166.

17. See *id.* at 1165–66.

18. See *infra* Conclusion.

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I. UNITARY EXECUTIVE THEORY: MAJOR ARGUMENTS  
AND MAJOR CRITICISMS

A. THE THEORY AND ITS MAJOR JUSTIFICATIONS

As Steven Calabresi and Kevin Rhodes explained in a 1992 article, “[u]nitary executive theorists claim that all federal officers exercising executive power must be subject to the direct control of the President.”<sup>19</sup> The strongest version of the theory would accord the President “direct power to supplant any discretionary executive action taken by a subordinate with which he disagrees, notwithstanding any statute that attempts to vest discretionary executive power only in the subordinate.”<sup>20</sup> Under this approach, for example, the President may at any time substitute his judgment for that of the Federal Aviation Administration (FAA) when the latter acts pursuant to its statutory charge to promulgate regulations and minimum safety standards.<sup>21</sup> A milder version of the theory “recognizes that, although the President lacks the authority to act in the place of his subordinates, he has the power to nullify or veto their exercises of discretionary executive power.”<sup>22</sup> Under this version, the President may not supplant FAA safety standards with his own standards. He may, however, nullify any FAA standards with which he disagrees. “The third and weakest model of the unitary executive contends that the President has unlimited power to remove at will any principal officers (and perhaps certain inferior officers) who exercise executive power.”<sup>23</sup> Under this approach, the President may not himself perform the duties statutorily charged to the FAA. He may, however, fire any FAA administrator who does not perform as the President wishes.

Unitarians argue that the Constitution demands unity both as a formal matter<sup>24</sup> of text and history and as a function-

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19. Calabresi & Rhodes, *supra* note 2, at 1158.

20. *Id.* at 1166.

21. 49 U.S.C. § 44701(a) (2006).

22. Calabresi & Rhodes, *supra* note 2, at 1166.

23. *Id.*

24. For better or worse, separation-of-powers arguments fall into two main categories: formalist and functionalist. See Magill, *supra* note 11, at 1138. Formalists tend to focus on whether a given activity is legislative, executive, or judicial, and to suggest that relatively clear and unalterable constitutional rules apply to each (e.g., if an activity is executive in nature, the President must control it; if an activity is legislative in nature, it must go through the legislative procedures outlined in Article I, Section 7 of the Constitution).

al matter of effectuating constitutional principles. This Article focuses on unitarians' second, functional set of arguments.

Functionally, unitarians emphasize accountability as an important constitutional principle,<sup>25</sup> noting that it was one of the reasons why the Founders created a single President as opposed to a plural executive.<sup>26</sup> They deem it clear that a unitary executive furthers accountability. Indeed, as Martin Flaherty notes, accountability tends to be treated as a "trump card" by "proponents, and even many opponents, of the unitary executive."<sup>27</sup> The gist of the accountability argument is that the President is the only nationally elected figure in American politics. If he controls all law execution in the United States, then the national electorate has a clear object of blame or reward for such activity.<sup>28</sup> In contrast, giving the final word in law execution to unelected bureaucrats leaves no avenue for political accountability.<sup>29</sup> Even if power were deemed to rest not in unelected bureaucrats but in congresspersons—say, through their setting of the terms of bureaucratic employment or worse, through the influence of select congressional committee mem-

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*See id.* at 1138–40. Functionalists tend to be less convinced that all government actions can be neatly divided into three categories or that the Constitution outlines categorical rules as to how such actions must proceed. *See id.* at 1142–44. In situations where they see no clear rules, they tend to emphasize constitutional principles—arguing that the relevant constitutional question is whether a particular action functionally impedes applicable constitutional principles. *See id.* Of course, commentators can and often do address both types of arguments (e.g., formalism demands a unitary executive, but even if formalism does not so demand, functional principles lead to the same conclusion). For a similar summary of formalism and functionalism, see for example, Magill, *supra* note 11, at 1138–44.

25. *See* Flaherty, *supra* note 10, at 1740 (explaining that while unitarians cite other principles as well, "[m]ost often these goals collapse into what is easily the dominant constitutional value that [unitarians] identify—the requirement that government remain accountable to the people").

26. *See, e.g.,* Calabresi, *supra* note 6, at 42–45 (explaining that Alexander Hamilton considered a unitary executive a necessity for ensuring accountability); Prakash, *supra* note 6, at 998–99 (noting that among the reasons the Framers rejected a plural executive was their belief that a "single, responsible executive could be accountable for his personal selections and administrative decisions").

27. *See* Flaherty, *supra* note 10, at 1824.

28. *See, e.g.,* Calabresi, *supra* note 6, at 35–37, 59, 65–66 (arguing that the essential ingredient in combating the congressional collective action problem is the President's national voice); *see also* Morton Rosenberg, *Congress's Prerogative over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive*, 57 GEO. WASH. L. REV. 627, 690–91 (1989) (describing and criticizing this argument).

29. *See, e.g.,* Lessig & Sunstein, *supra* note 6, at 97–99.

bers<sup>30</sup>—the undivided, national accountability of a President would be lacking.<sup>31</sup> Even if power simply were deemed divided—for example, between Congress, the President, unelected bureaucrats, and the private interests that impact law execution—accountability again would suffer through the absence of a single, nationally responsive figure to blame or to reward.<sup>32</sup>

#### B. MAJOR CRITICISMS OF THE FUNCTIONALISTIC ARGUMENT FROM ACCOUNTABILITY

Some prominent critics of unitary executive theory concede unitarians' point on accountability, even as they criticize other aspects of the theory.<sup>33</sup> Yet not all take it as a given that the unitary executive enhances accountability. Criticisms of the accountability argument tend to contain two parts. First, critics seek to clarify what accountability means as a matter of constitutional principle. Second, they argue that accountability, properly defined, is not furthered by a unitary executive.

Martin Flaherty argues that the Constitution adopts a framework of joint, rather than single or simple accountabili-

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30. In their paper for this panel, Steven Calabresi and Nicholas Terrell express concern about the secrecy of communications in the oversight process between congressional committees and the federal bureaucracy. Steven G. Calabresi & Nicholas Terrell, *The Fatally Flawed Theory of the Unbundled Executive*, 93 MINN. L. REV. 1696, 1704 n.45 (2009). Congress has similar legislative flexibility to address oversight abuses and secrecy by congressional committees as it does to address those in the executive branch. This example bolsters the point that undue political control of the bureaucracy, and secrecy in the same, is a complex and multifaceted problem that is best addressed through legislative flexibility rather than by constitutionalizing the blunt and problematic instrument of the unitary executive.

31. See, e.g., Calabresi, *supra* note 6, at 65 (“The minute some portion of the executive is cut free from the President and the national electoral constituency which he and he alone represents, it tends to become swallowed up by the state and local pressures that drive the congressional committees and subcommittees.”).

32. See *id.* at 58–70; Prakash, *supra* note 6, at 993, 1012–15 (discussing the Framers' rejection of a plural executive because of its tendency to destroy responsibility and conceal faults).

33. See, e.g., Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 177 (1994) (acknowledging that it is difficult for citizens to know whom to blame when something goes wrong in a system of divided powers and complex checks and balances); cf. Lessig & Sunstein, *supra* note 6, at 2–4, 85–86, 94, 98–99 (rejecting formalist arguments for unity but embracing the accountability argument and thus largely supporting unity).



ty.<sup>34</sup> By giving executive, legislature, and judiciary alike a link to popular accountability, the Constitution is designed to keep a single branch from “rush[ing] through ill-considered [measures] on the strength of a self-serving and distorted reliance on popular will.”<sup>35</sup> Others similarly criticize the simplistic vision of accountability on which unitary executive theory relies.<sup>36</sup>

Peter Shane also cites problems with simple accountability.<sup>37</sup> First, Shane notes that the Founders, not anticipating the administrative state and the rise of executive policymaking, did not envision presidential accountability “for the policy content of administrative decisions.”<sup>38</sup> Rather, the Founders saw presidential accountability as “*managerial accountability*”; the focus was on competence and integrity, not policy, as the criterion for judging administration.<sup>39</sup> Second, if constitutional principles do mandate political accountability for policymaking in the modern administrative state, this goal may not be furthered by centralizing all discretionary decision making in the President.<sup>40</sup> If political accountability means accountability to the national majority, then presidential elections are too blunt an instrument to achieve it.<sup>41</sup> The President faces the national electorate at most twice, and because each voter casts but a single vote for President based on any one of thousands of issues and concerns, presidential elections cannot foster meaningful accountability for policymaking.<sup>42</sup> If political accountability means accountability to some objective conception of the public interest,

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34. See Flaherty, *supra* note 10, at 1785. For a general discussion of simple versus joint accountability, see *id.* at 1767–68, 1785–86, 1804–05, 1821–22, 1824–25.

35. See *id.* at 1785 (explaining that colonial legislatures had acted in such a fashion under systems of simple accountability).

36. See, e.g., Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 992–1007, 1017–20 (1997) (arguing that the characteristics of American democratic governance make a unitary executive unsuitable); Jerry L. Mashaw, *Structuring a “Dense Complexity”: Accountability and the Project of Administrative Law*, ISSUES IN LEGAL SCHOLARSHIP, Mar. 2005, art. 4, at 12–15, 35–38 (2005), <http://www.bepress.com/ils/iss6/art4>.

37. Peter M. Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 596, 613–14 (1989).

38. *Id.*

39. *Id.*

40. Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161, 197–202 (1995).

41. *Id.*

42. *Id.* at 199–200.

or to those parties most directly affected by decisions, there similarly is little reason to deem the blunt instrument of presidential elections well equipped to achieve that goal.<sup>43</sup> Hierarchical presidential control also does not necessarily foster key elements of accountability—including dialogue and transparency—and may deter them through politically motivated secrecy and intimidation.<sup>44</sup>

Rebecca Brown challenges the notion that electoral accountability for policy choices is a core constitutional value, citing the many ways in which the Constitution reflects a fear of excessive popular control and embraces an indirect relationship between the people, their representatives, and policymaking.<sup>45</sup> The accountability envisioned by the Constitution, says Brown, is not simple accountability defined by responsiveness to majority wants, but oversight accountability designed to protect against government abuse and corruption.<sup>46</sup>

Edward Rubin too believes that unitarians err by conflating accountability with simple accountability or responsiveness to majority preferences.<sup>47</sup> Rubin notes that, “[a]s used in ordinary language, accountability refers to the ability of one actor to demand an explanation or justification of another actor for its actions and to reward or punish that second actor on the basis of its performance or its explanation.”<sup>48</sup> Such accountability is best furthered not by occasional, winner-take-all elections, but by the complex chains of authority and expertise that characterize bureaucracies.<sup>49</sup>

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43. *See id.* at 203–06 (arguing that a President’s “abandonment of particular interests in a particular episode is not likely to be so important to his reelection prospects—if he has any—to deter a President determined to go his own way”).

44. *Id.* at 204–09; *see also* Shane, *supra* note 9, at 400 (“There is an obvious tension between theoretical support for plenary presidential authority regarding foreign affairs on the grounds of accountability and the efforts of Presidents who largely possess such authority to shield their exercise of power from public exposure.”).

45. Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531, 552–59, 564–65 (1998).

46. *Id.* at 564–65.

47. Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2076–83 (2005).

48. *Id.* at 2119.

49. *See id.* at 2078–80, 2121–22, 2134–35. Rubin further argues that elections themselves are predominantly geared not toward accountability, but toward succession and representativeness. *Id.* at 2078, 2134–35.

## II. ACCOUNTABILITY AND TRANSPARENCY

Existing challenges to the unitarian view of accountability share an important common observation: the simple accountability assumed by unitarians does not comport with the Constitution's complex approach to accountability. This section builds on this observation, demonstrating that transparency and mechanisms to respond to transparent information are crucial elements of constitutional accountability.

As an initial matter, the Constitution reflects not one, but several, visions of accountability. The vision or visions that apply in a given case vary depending on some combination of the function and actor involved. For instance, it is fairly intuitive that the type of accountability called for in the context of administrative adjudication is different than that called for in other administrative contexts. While administrative accountability often demands some degree of political responsiveness, administrative adjudicators are accountable for adhering to the rule of law and thus require relative independence from politics.<sup>50</sup>

The remainder of this section describes three major types of accountability relevant to the unitary executive debate.

### A. COMPETENCE/ANTICORRUPTION-BASED ACCOUNTABILITY (A.K.A ORIGINAL ANTICIPATED PRESIDENTIAL ACCOUNTABILITY)

Unitarians draw heavily on founding references to the virtues of a single president. Chief among these virtues is presidential accountability. However, as Peter Shane points out, the Founders operated under expectations of a small federal government, a limited set of federal legislative directives, and a President who typically would need only to "keep within lawful bounds, spend public funds carefully, and deal with problems evenhandedly."<sup>51</sup> This type of presidential accountability was not accountability about policymaking, but accountability about presidential competence, fairness, and lawfulness.<sup>52</sup>

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50. See, e.g., Cynthia R. Farina, *Undoing the New Deal Through the New Presidentialism*, 22 HARV. J.L. & PUB. POL'Y 227, 233–34 (1998) (arguing that presidential control is uniquely problematic in the context of administrative adjudications and "even the most ardent presidentialists have been careful to insist that the Chief Executive could not intervene to direct the outcome of particular cases").

51. Shane, *supra* note 37, at 613.

52. *Id.* at 613–14.

The founding conception of presidential accountability assumes and depends on the existence of multiple checking forces—including the people, the courts, and Congress—and mechanisms for those forces to expose and respond to presidential corruption or incompetence.<sup>53</sup> As I have explained elsewhere, constitutional text, structure, and history reflect a brilliant balance between secrecy’s advantages—embodied in the President’s capacity to keep secrets—and its dangers—embodied in Congress’s prerogatives to limit presidential secrecy and to provide for the revelation of secrets through legislation and oversight.<sup>54</sup>

This balance is reflected in Alexander Hamilton’s famous declaration as Publius about the advantages of a single President.<sup>55</sup> In one Federalist paper, Hamilton boasted both of the unitary President’s capacity for “secrecy”<sup>56</sup> and his relative transparency and responsibility. Regarding the latter, Hamilton explained that “multiplication of the executive adds to the difficulty of detection,”<sup>57</sup> whereas one person “will be more narrowly watched and most readily suspected.”<sup>58</sup> Hamilton elaborated that:

[T]he plurality of the executive tends to deprive the people of the two greatest securities they can have for the faithful exercise of any delegated power, *first*, the restraints of public opinion . . . ; and, *second*, the opportunity of discovering with facility and clearness the misconduct of the persons they trust, in order either to their removal from office or to their actual punishment in cases which admit of it.<sup>59</sup>

Similar points were made throughout the ratification debates. In the Pennsylvania debates, for example, one constitutional proponent remarked that the Constitution’s single President will be “better to be trusted” because he “has no screen . . . [N]ot a single privilege is annexed to his character; far from being above the laws, he is amenable to them in his private character as a citizen, and in his public character by

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53. *See id.*

54. Heidi Kitrosser, *Classified Information Leaks and Free Speech*, 2008 U. ILL. L. REV. 881, 917–18.

55. THE FEDERALIST NO. 70, at 428–29 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

56. *Id.* at 392, 395–98.

57. *Id.* at 395–96.

58. *Id.* at 398.

59. *Id.* at 428–29.

impeachment.”<sup>60</sup> Similarly, James Monroe asserted in Virginia that “[t]here should be no constitutional restraint, no equivocation of office, to shield a traitor from the justice of an injured people. No circumstance to blunt or turn aside the keen edge of their resentment. . . . For these reasons the executive power should be vested altogether in one person . . . .”<sup>61</sup> *The Virginia Independent Chronicle* also boasted of the Constitution that:

The president stands alone. The United States are the scrutinising spectators of his conduct, and he will, always, be the distinguished object of political jealousy. Destitute of a council and of the means, by which he might extend his influence and secure his safety, he and he alone is responsible for any perversion of power.<sup>62</sup>

#### B. POLICY-BASED ACCOUNTABILITY (A.K.A ORIGINAL ANTICIPATED LEGISLATIVE ACCOUNTABILITY)

The Framers of the Constitution embraced a distinct type of accountability with respect to *policymaking*: indirect, attenuated review by the people.<sup>63</sup> The Framers

[a]t every turn . . . buffered majority will, insulated representatives from direct influence of majority factions, and provided checks on majority decisionmaking. The framers of the Constitution were afraid of government, even if made up of officials elected by the people. Madison’s renowned invective against faction, defined to include a numerical majority of the people, suggests a real difference between the goal of representative government, on the one hand, and the translation of popular will into law, on the other.<sup>64</sup>

While the people would have final say, through elections, over the various players in the legislative process,<sup>65</sup> such accountability would be of a gestalt nature. This was a far cry from a popular right to demand particular policy outcomes on particular issues.

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60. 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, RATIFICATION BY THE STATES, PENNSYLVANIA 495 (Merrill Jensen ed., 1976) (emphasis omitted).

61. 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, RATIFICATION BY THE STATES, VIRGINIA 865 (John P. Kaminski & Gaspare J. Saladino eds., 1990).

62. 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, RATIFICATION BY THE STATES, VIRGINIA 245 (John P. Kaminski & Gaspare J. Saladino eds., 1988) (emphasis omitted).

63. See Brown, *supra* note 45, at 553–54.

64. *Id.* at 553.

65. The elections I refer to are the indirect election of President through the electoral college, U.S. CONST. art. II, § 1, cl. 3; the direct election of Representatives, *id.* art. I, § 2, cl. 1; the indirect election of Senators through elected state legislatures, *id.* art. I, § 3, cl. 1; and, since the passage of the Seventeenth Amendment, the direct election of Senators, *id.* amend. XVII.

As with the competence/anticorruption-based accountability anticipated for the President, policy-based accountability demands and assumes a fair amount of transparency. If the people are to make electoral choices based on an overall sense of particular politicians—how those politicians vote and conduct themselves in the legislative process—then the people need access to information about voting, the legislative and oversight processes, and some factual context to make sense of the issues on which votes are cast. Transparency and deliberation are hallmarks of the legislative process that the Constitution outlines (if not always of the process in practice).<sup>66</sup>

C. NECESSARY-AND-PROPER ACCOUNTABILITY  
(A.K.A. ADMINISTRATIVE STATE ACCOUNTABILITY)

In addition to its more precisely enumerated powers, Congress may make laws “necessary and proper” for effectuating those powers and the constitutional powers of the federal government generally.<sup>67</sup> With respect to unitary executive theory, this raises at least two questions. First, is a nonunitary administrative state formally unconstitutional and hence an improper means to effectuate laws? Second, if the administrative state is not formally unconstitutional, what if any demands do constitutional values functionally impose on it? I address the first, formalist question in *Accountability and Administrative Structure*;<sup>68</sup> the second, functional question is this Article’s core inquiry.

The major functional question regarding the administrative state is whether it permits end-runs around the accountability protections that would apply were Congress or the other named branches performing the activities delegated to it.<sup>69</sup> The Constitution’s accountability directive for the administrative state can be broken into two parts. First, the administrative state must not frustrate the accountability that the Constitution demands of the national legislature and the national executive.<sup>70</sup> Second, the administrative state itself must be ac-

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66. Elsewhere, I have discussed the relative transparency and deliberativeness of the legislative process as a matter of constitutional text, structure, and history. See, e.g., Kitrosser, *supra* note 1, at 518–20.

67. U.S. CONST. art. I, § 8, cl. 18.

68. See Kitrosser, *supra* note 12, Part II.

69. See Flaherty, *supra* note 10, at 1740 (noting that other values aside from accountability are relevant but that accountability is the major value touted by unitarians and at issue in the unitary-executive debate generally).

70. Cf. Peter L. Strauss, *The Place of Agencies in Government: Separation*

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countable for the various actions—executive, quasi-legislative, and quasi-adjudicative—that it takes. This ensures that it does not impact individuals in the manner of a legislature, an executive, or a court without the accountability protections that accompany actions of those branches.

### 1. Legislative and Presidential Accountability in the Administrative State

A danger of the administrative state is that it can be used to obscure the nature of the policy decisions made by the legislature, the implementation of those decisions by the executive, or the very facts on which such decisions are based. The national legislature might, for instance, eschew tough, precise policy choices in favor of very broad delegations to administrative actors whose implementation of those choices will be less visible to the populace and unanswerable at the ballot box. The President, for his part, might avoid accountability for administrative state decision making by leaving to unelected bureaucrats all decisions not statutorily delegated to him. Or he might avoid accountability by acting without transparency. He could, for instance, hide the bases for decisions. Or he might secretly steer decisions while publicly distancing himself from them.

That the President might leave decision making to unelected bureaucrats is, of course, the core concern of unitarians.<sup>71</sup> Yet if we assume—as I argue in *Accountability and Administrative Structure*—that disunity does not violate formal constitutional limits,<sup>72</sup> then the question is a functional one: do restrictions on presidential control intolerably frustrate accountability? Unitarians deem the answer a categorical “yes” with respect to any restrictions that breach conditions of unity.<sup>73</sup> Yet this answer is correct only if one can not reasonably

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*of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 579 (1984) (“Each agency is subject to control relationships with some or all of the three constitutionally named branches, and those relationships give an assurance—functionally similar to that provided by the separation-of-powers notion for the constitutionally named bodies—that they will not pass out of control.”).

71. See, e.g., Lessig & Sunstein, *supra* note 6, at 102–03.

72. See Kitrosser, *supra* note 12, at 5.

73. See Lessig & Sunstein, *supra* note 6, at 2. Unlike other unitarians, Lawrence Lessig and Cass Sunstein stop short of a categorical demand. Rather, they argue that there ought to be, at minimum, a presumption favoring unity. *Id.* at 103. This is a step in the right direction insofar as it assumes that unity is not formally demanded and that there may be some cases in which unity undermines accountability. Nonetheless, because the notion that unity presumptively enhances accountability is at least reasonably arguable, Con-

contest the notion that unity inevitably intrudes on—and does not undermine—accountability. If the point is reasonably arguable, then the question is one of degree: did Congress go too far in restricting presidential control and hence accountability? From this perspective, the constitutional calculus looks much like the loose balancing test that the Supreme Court employed in *Morrison v. Olson*.<sup>74</sup> There, the Court upheld the independent counsel provisions of the Ethics in Government Act against a separation of powers challenge.<sup>75</sup> The provisions empowered the Attorney General—an officer who serves by statute at the President’s pleasure—to terminate the counsel only for “good cause.”<sup>76</sup> Echoing earlier case law, the Court explained that Congress may not grant itself “a role in the removal of executive officials other than through its established powers of impeachment and conviction.”<sup>77</sup> Congress may, however, limit the President’s power to remove officers if the removal restrictions functionally do not “impede the President’s ability to perform his constitutional duty . . . .”<sup>78</sup>

The Supreme Court’s approach to a separate functional concern—that the national legislature will shirk accountability through overly broad delegations to the executive branch—sheds additional light on the unitary executive debate. Through the body of caselaw comprising the nondelegation doctrine, the Court has come to accept broad policymaking delegations from Congress to the administrative state.<sup>79</sup> This reflects the Court’s recognition of the limits of bright-line, formalist distinctions between legislating and executing. To say that only Congress may legislate is to suggest a sharp constitutional and practical boundary between creating law and implementing law that does not exist. The Court instead has settled on a loose and deferential standard—Congress need only provide an “intelligible principle” to guide administrative policymaking.<sup>80</sup> At the same

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gress must retain more leeway to depart from unity than the opportunity to rebut a presumption favoring it.

74. 487 U.S. 654, 686–93 (1988).

75. *Id.* at 693.

76. More precisely, the statute permitted termination only for “good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel’s duties.” *Id.* at 663 (quoting 28 U.S.C. § 596(a)(1) (Supp. V 1982)).

77. *Id.* at 686.

78. *Id.* at 691.

79. See *Mistretta v. United States*, 488 U.S. 361, 372 (1989).

80. See, e.g., *id.*



time, there are hints in the Court's two 1935 cases striking down laws on nondelegation grounds—the only two Supreme Court cases to do so—of a functional concern with the processes by which delegated power is exercised.<sup>81</sup> In these early cases, decided before the regularization of administrative procedure through the Administrative Procedure Act<sup>82</sup> (APA), the Court expressed concern not only with the delegations' broad subject matters, but with the absence of transparency and procedural regularity.<sup>83</sup> In *A.L.A. Schechter Poultry Corp. v. United States*, the Court objected that the President's statutory authority to approve or reject a code of fair competition was relatively unchecked.<sup>84</sup> In contrast, the Court referred approvingly to other statutes delegating rule-making power under regular and transparent procedures.<sup>85</sup> The Court voiced similar concerns in *Panama Refining Co. v. Panama Refining Co.*, objecting among other things that executive orders promulgated under the statute were not required to state their grounds.<sup>86</sup>

Notably, the Court in both *Schechter Poultry* and *Panama Refining Co.* focused on the fact that the respective statutes delegated excessive power to the President.<sup>87</sup> Each contrasted the excessive delegation to the President with procedurally and substantively constrained, and hence proper, delegations made to administrative agencies.<sup>88</sup>

The Court's nondelegation analysis bears on unitarian arguments in two closely related ways. First, as a general matter, the Court recognizes that excessive presidential discretion can undermine accountability.<sup>89</sup> Second, the Court's analysis reflects the final constitutional accountability concern cited

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81. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 521–22, 539–40 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 406, 432–33 (1935).

82. 5 U.S.C. §§ 551–569 (2006).

83. See *Schechter Poultry*, 295 U.S. at 521–22, 539–40; *Panama Refining Co.*, 293 U.S. at 406, 432–33.

84. See *Schechter Poultry*, 295 U.S. at 521–22, 539.

85. See *id.* at 539–41.

86. See *Panama Refining Co.*, 293 U.S. at 431.

87. See *Schechter Poultry*, 295 U.S. at 539–40; *Panama Refining Co.*, 293 U.S. at 432–33.

88. *Schechter Poultry*, 295 U.S. at 539–40; *Panama Refining Co.*, 293 U.S. at 432–33.

89. See, e.g., *Schechter Poultry*, 295 U.S. at 539–40; *Panama Refining Co.*, 293 U.S. at 432–33 (comparing the President's “unfettered discretion” with legislatively created administrative agencies that are required to support their orders with findings of fact that are sustained by evidence).

above—that the President might use the administrative state as a means either to hide the bases for decision making or to publicly distance himself from final decisions over which he had influence.<sup>90</sup>

The President, armed in the administrative state with both policymaking and policy-implementing powers, might act corruptly or incompetently. As the Supreme Court correctly recognized in its early nondelegation cases, regular and transparent procedures are necessary to protect against such abuses.<sup>91</sup> In short, some floor of protective procedures is required when broad powers are delegated to the President. *Morrison v. Olson*, in turn, correctly directs that the ceiling on Congress's leeway to limit presidential control in the administrative state be determined through functional analysis deferential to Congress's policy choices.<sup>92</sup>

## 2. Bureaucratic Accountability

If Congress indeed has discretion, within functional limits, to delegate quasi-legislative, executive, and quasi-judicial powers to unelected administrators, then functional accountability constraints apply to these administrators as well. *Political-branch accountability* alone is not enough. The administrative state, after all, is a powerful set of entities and capacities in its own right. It directly impacts people's lives and liberty in much the way that the actions of the named branches do. Where Congress thus empowers administrative agencies to implement its legislative programs, Congress must ensure not only that political-branch accountability remains, but that the administrative state itself cannot impact people's lives absent mechanisms for its own accountability.

The accountability demanded of the administrative state, or "bureaucratic accountability," is that sufficient to ensure that Congress, the President, and the judiciary can determine, and respond, if legislative directives are not faithfully or competently followed. This complements political-branch accountability, enabling congressional control over its administrative creations, and also enabling presidential and judicial control

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90. See, e.g., *Panama Refining Co.*, 293 U.S. at 432 (describing how the President must show the "determinations of fact" authorizing his authority to give a legislative order).

91. See, e.g., *Schechter Poultry*, 295 U.S. at 538–40; *Panama Refining Co.*, 293 U.S. at 432.

92. See *Morrison v. Olson*, 487 U.S. 654, 703–07 (1988).

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over those aspects of the administrative state delegated to them. Congress has substantial leeway, pursuant to its enumerated powers and the Necessary and Proper Clause, to structure bureaucratic accountability mechanisms.<sup>93</sup>

Bureaucratic accountability, like political-branch accountability, demands transparency and procedural regularity. Such procedural protections, combined with substantive legislative directives, enable the named branches and the public to assess legislation's implementation. The named branches and the public should be able to determine, for instance, if agencies are considering the substantive factors outlined by statute, if they rely impermissibly on other substantive factors, and if they are influenced impermissibly by political pressure. This requires access to the facts and research on which actions purportedly rely.

The concept of bureaucratic accountability demands that Congress have leeway to insulate certain decisions from political pressure, paradoxically to ensure both bureaucratic and political accountability. Suppose, for example, that Congress passes legislation requiring airplanes to meet certain technical benchmarks to ensure flight safety. Were the President free to step in and substitute his judgment for that of the bureaucrats charged with the decision, or if the President had unfettered removal power over those bureaucrats, political considerations might trump the required statutory factors. It is also not hard to imagine that the President might not be forthcoming about those political considerations, but might instead pressure administrators behind the scenes to claim the President's favored position as their own or to cherry-pick data to justify that position. This scenario could defeat political accountability by enabling the President to hide or misrepresent his involvement in the decision and by obscuring the implementation and efficacy of Congress's legislation. It could also defeat bureaucratic accountability by encouraging bureaucratic obfuscation as to the motives or factual bases for decision. While constitutional accountability directives may not demand that Congress insulate such decision making from direct political pressures, they do give Congress leeway to choose such measures in the name of accountability.<sup>94</sup>

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93. See U.S. CONST. art. I, § 8.

94. Notably, Peter Strauss interprets case law regarding presidential removal power to support the view that Congress may restrict such power only when it declines to grant such power to itself. Strauss, *supra* note 70, at 614–

As with (and complementary to) political accountability, then, bureaucratic accountability demands a floor—recognized in the early nondelegation cases—of transparency and procedural regularity.<sup>95</sup> At the same time, it lends itself to deferential functionalism—as in *Morrison*—for assessments as to when limits on presidential control exceed a constitutional ceiling.<sup>96</sup>

### III. THE ACCOUNTABLE EXECUTIVE VERSUS THE UNITARY EXECUTIVE

While there are important distinctions between presidential accountability, legislative accountability, and bureaucratic accountability, two common directives stem from each. First, a floor of procedural regularity and transparency is required when Congress delegates substantial policymaking power to the President or to others in the executive branch. Second, Congress enjoys substantial discretion, subject to functional balancing, to take accountability-enhancing measures beyond the requisite constitutional floor. These measures include degrees of insulation from presidential control.

The core concern of unitarians is the latter—that is, the constitutional ceiling on Congress's ability to insulate policymaking and other discretionary activity in the executive branch from presidential control.<sup>97</sup> This Section discusses how congressional failure to insulate activity from presidential control can diminish presidential, legislative, and bureaucratic accountability. It demonstrates that, at the very least, one can reasonably disagree with the notion that unitary presidential control bolsters accountability. Indeed, one can reasonably conclude that unitary presidential control undermines accountability by compromising transparency and procedural regularity. Given that there are, at minimum, reasonable bases to disagree with

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15. An example is the independent-counsel provision at issue in *Morrison*, under which the Attorney General was restricted to removal for good cause but Congress had no removal power. See *Morrison*, 487 U.S. at 701–03. Strauss deems this approach warranted under an antipolitics principle. See Strauss, *supra* note 70, at 614–15. Under this principle, Congress may limit presidential control of agencies to help ensure agency “free[dom] from political domination or control.” *Id.* at 615 (quoting *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 625 (1935) (internal citation omitted)). Congress may, in short, determine that “certain types of decisions are preferably made in the absence of any political intervention,” whether congressional or presidential. *Id.* at 623.

95. See *Schechter Poultry*, 295 U.S. at 538–40; *Panama Refining Co.*, 293 U.S. at 431–33.

96. *Morrison*, 487 U.S. at 703–07.

97. See, e.g., Lessig & Sunstein, *supra* note 6, at 102–03.

the unitarian accountability argument, Congress's discretion to curtail unity, assuming that there is no formalist constitutional unity directive, is subject only to flexible, functional limitations.

#### A. ACCOUNTABILITY AND POLICYMAKING

Unitarians deem administrative rule making a core example of discretionary executive branch activity that the President must control.<sup>98</sup> Agencies engage in rule making when they promulgate regulatory policies pursuant to their relatively broad statutory directives.<sup>99</sup> Under the constraints of the APA and related requirements, even so-called "informal" rule-making processes entail protections of transparency and procedural regularity.<sup>100</sup> Under the APA, an agency must publish a notice of proposed rule making, give interested members of the public an opportunity to comment on the proposal in writing, and publish a "concise general statement of [the rule's] basis and purpose" with the final rule.<sup>101</sup> While the APA does not require an agency to rely exclusively on a designated legal record, it subjects the agency's informal rulemaking to judicial review.<sup>102</sup> Among other things, courts may review rule makings for determinations that are "arbitrary, capricious"<sup>103</sup> or "in excess of statutory jurisdiction, authority, or limitations."<sup>104</sup> While still a relatively lenient standard of review, it effectively requires agencies to rationally explain decisions and their evidentiary bases.<sup>105</sup> It also puts them at risk of having their rules invalidated should they give insufficient attention to major objections made in the public comment process.<sup>106</sup> They are at similar risk where it is evident that they relied on extra-statutory factors.<sup>107</sup> Some statutes go further and explicitly

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98. *See infra* note 146.

99. *Cf. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844–45 (1984) ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.")

100. *See* 5 U.S.C. § 553(b)–(d) (2006).

101. *Id.* § 553(c).

102. *See id.* § 706.

103. *Id.* § 706(2)(A).

104. *Id.* § 706(2)(C).

105. *See, e.g., Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

106. *See id.*

107. *See id.*

prohibit agencies from basing rules on information not in the public rule-making record.<sup>108</sup>

Unitarians believe the President must have full discretion to fire rule makers for any reason.<sup>109</sup> They also state that he has a constitutional prerogative to substitute his preferred rules for those made by administrators, or simply to act in administrators' stead in the first place.<sup>110</sup> The impact of the latter prerogatives on procedural floors established in the APA or elsewhere is less clear. On the one hand, many unitarians, including Cass Sunstein, have, to their great credit, explained that unitary executive theory "is not a general claim about the President's power to act on his own or to contradict the will of Congress."<sup>111</sup> As Justice Alito put it at his confirmation hearing, "[t]he question of the unitary executive . . . does not concern the scope of executive powers, it concerns who controls whatever power the executive has."<sup>112</sup> One might argue, then, that while unitary executive theory demands that the President have prerogative to choose final rules, the President must make such decisions within statutory parameters. Under the APA, for example, such presidential decisions would be subject to judicial review for being "arbitrary" or "capricious" or beyond substantive statutory limits.<sup>113</sup> On the other hand, one could reasonably envisage a unitarian argument against such limitations on the basis that presidential discretion to implement statutes is full and final and may not be made subject to judicial second-guessing or procedural constraints. From this perspective, the only check on presidential implementation would be simple political accountability. This area of uncertainty is one

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108. See *Sierra Club v. Costle*, 657 F.2d 298, 401–02 (D.C. Cir. 1981) (explaining that the Clean Air Act must be based on the record compiled and made public by the EPA).

109. See Posting of Cass Sunstein to The University of Chicago Law School Faculty Blog, *What the Unitary Executive Debate Is and Is Not About*, <http://uchicagolaw.typepad.com/faculty/2007/08/what-the-unitar.html> (Aug. 6, 2007, 17:34).

110. Cf. *id.* ("[A]s a matter of constitutional law, the president has considerable control over policymaking by executive agencies . . .").

111. *Id.*; see also Charlie Savage, *Reaganites Reconsider*, THE NATION, Sept. 24, 2007, at 5, 5 (quoting Steven Calabresi); Posting of Johnathan Adler to The Volokh Conspiracy, *Defining the Unitary Executive*, [http://volokh.com/archives/archive\\_2007\\_08\\_12-2007\\_08\\_18.shtml](http://volokh.com/archives/archive_2007_08_12-2007_08_18.shtml) (Aug. 12, 2007, 19:53).

112. Posting of Ilya Somin to The Volokh Conspiracy, *Distinguishing the Scope of Executive Power From Its Distribution*, [http://volokh.com/archives/archive\\_2007\\_08\\_12-2007\\_08\\_18.shtm#1187118574](http://volokh.com/archives/archive_2007_08_12-2007_08_18.shtm#1187118574) (Aug. 14, 2007, 15:09).

113. 5 U.S.C. § 706(2)(A) (2006).

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that unitarians and nonunitarians might agree should be clarified.

For purposes of this Section, it suffices to assume the milder interpretation of unitary executive theory's application to rulemaking. Under this interpretation, the President must have final say over rules and unfettered power to dismiss rule-makers, but all statutory requirements of the rule-making process must otherwise be followed. There remains a strong argument, however, that a unitary executive diminishes transparency and procedural regularity and hence accountability even under these conditions. Indeed, a unitary executive lends itself to the worst of both worlds with respect to presidential, congressional, and bureaucratic accountabilities alike. It lends itself to a President who can publicly distance himself from unpopular actions of the administrative state, but who has substantial power secretly to influence the same. Furthermore, for the same reason that the President can plausibly distance himself from administrative actions—the obvious impossibility of his personally making and being well-informed about all agency decisions—the President often will be genuinely out of the loop. Yet his proxies—any number of competing White House personnel—will remain well positioned to influence policy out of the public eye.

First, a President in a unitary regime remains at least as able as a President in a nonunitary setting to distance himself from unpopular actions of the administrative state.<sup>114</sup> Even if the President were frequently to exercise his constitutional prerogatives to make final rule-making decisions, the President is not likely to do the grunt work of writing proposed rules, analyzing public comments, engaging in scientific or other technical analysis, or writing final rules. That being the case, the President remains well poised to distance himself publicly even from his own decisions should they prove unpopular. He can argue that the administrators below him failed him with flawed advice, flawed data, or the like. He can also distance himself from actions taken by administrators without firing them by explaining to the public that he maintains respect for an administrator but that they disagree on the issues at hand. The President can also claim that an administrator herself is

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114. See Shane, *supra* note 40, at 207 (“[T]o a great extent, even the vesting of ultimate decisional authority in the President will not undo the ubiquitous possibilities that a complex bureaucracy affords to disavow responsibility for unpopular choices and to claim the chief credit for successes.”).

not at fault for unpopular actions, that those below the administrator failed her with poor advice or incorrect data. Even where the President receives substantial political push-back in an unusually high-profile case, he can invoke executive privilege to keep Congress from getting to the bottom of the “who did what and when” mystery.<sup>115</sup> 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.<sup>116</sup>

Examples abound of situations in which the President legally had final say over a matter but managed to obscure responsibility and avoid substantial public revelation. Consider the recent U.S. Attorney controversy in the Bush administration.<sup>117</sup> Though U.S. Attorneys by statute serve at the President’s pleasure,<sup>118</sup> the removal and replacement of several of them in the middle of President Bush’s second term caused no end of mystery as to who made what decisions and why.<sup>119</sup> White House officials simultaneously insisted that the President had no involvement in the removals and claimed executive privilege against testifying, despite the fact that executive pri-

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115. See *id.* (“[F]or those who embrace categorical separationism as a constitutional reading, this problem [of the President’s ability to deny responsibility] is exacerbated by their faith in executive privilege.”).

116. In their paper for this panel, Professor Steven Calabresi and Nicholas Terrell indicate their shared concern with the overuse of executive privilege. See Calabresi & Terrell, *supra* note 30, at 1716 n.97. This is an important and potentially quite constructive point of agreement. Assuming that we agree on this point, however, there remain multiple ways discussed throughout this Article in which White House control over bureaucracy facilitates secrecy. See discussion *infra* Part II.A. Indeed, the very ease with which the President can invoke executive privilege—even should his claim fail in the unlikely case that it reaches a court—adds to such capacity for secrecy. See discussion *infra* Part II.A. Hence, while curtailing the scope of executive privilege would be a very important step and one for which those of us concerned about its abuse should strive, it is not sufficient to remove the dangers to transparency and accountability that inhere in a unitary executive.

117. See Michael Abramowitz & Amy Goldstein, *Bush Claims Executive Privilege on Subpoenas*, WASH. POST, June 29, 2007, at A1, A12 (“Democrats have charged that the administration’s decision last year to fire nine U.S. attorney [sic] was tainted by politics and they have called for Attorney General Alberto S. Gonzales to resign . . .”).

118. 28 U.S.C. § 541(a) (2006).

119. See Dahila Lithwick, *Alberto Gonzales, Zen Master*, SLATE, May 10, 2007, <http://www.slate.com/id/2165987>.



vilege claims pertain to discussions in which the President is involved.<sup>120</sup> When officials did testify, they revealed little.<sup>121</sup>

Second, the President can be out of the loop not only in appearance but in reality. Empirical research from the Bush I and Clinton administrations confirm this intuition. Based on interviews with EPA officials from both administrations, Lisa Schultz Bressman and Michael P. Vandenberg conclude that White House intervention in EPA rule making often comes from multiple, even competing, channels within the White House infrastructure.<sup>122</sup> As Bressman and Vandenberg put it, “Presidential control is a ‘they,’ not an ‘it.’”<sup>123</sup>

Third, a unitarian system enhances the ability of the President or his proxies to influence agency actions away from the public eye.<sup>124</sup> This is “the [very] opposite of accountability.”<sup>125</sup> It is intuitive that a President’s capacity (or that of his proxies) for political influence over administrators will be greater where the President can terminate their employment for any reason. The President or his White House proxies can apply behind-the-scenes pressure not only as to final rule-making determinations but as to the type of factual “findings” that should underscore such determinations. Knowing that the President has the power to step in and substitute his preferred rule for that formulated by administrators can have a similarly coercive effect on administrators, even if the President rarely exercises this power. Indeed, that Congress itself makes this common-sense assumption is supported by research demonstrating a greater congressional reluctance to delegate power to executive agencies during periods of divided government.<sup>126</sup>

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120. See, e.g., Sheryl Gay Stolberg, *Bush Moves Toward Showdown with Congress on Executive Privilege*, N.Y. TIMES, June 29, 2007, at A23; Lithwick, *supra* note 119.

121. See, e.g., Lithwick, *supra* note 119. Another striking example harkens back to the Reagan administration. As with the later U.S. Attorney controversy, much of the Iran-Contra controversy involved Congress’s trying to determine who did what when and on what authority, and whether the President knew what was going on. THEODORE DRAPER, A VERY THIN LINE: THE IRAN-CONTRA AFFAIRS 275–76 (1991). John Poindexter, National Security Advisor to President Reagan, explained that he limited what he told the President so as to give him “future deniability.” *Id.*

122. See Bressman & Vandenberg, *supra* note 4, at 99.

123. *Id.* at 49.

124. See Shane, *supra* note 40, at 173.

125. *Id.*

126. See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2341 (2006). Additionally, there is some em-

The ability of the President or his proxies not only to influence administrators, but to do so without public or congressional knowledge, is a natural consequence of the presidency's structural capacity for secrecy.<sup>127</sup> This capacity has expanded substantially over time due to factors that include the vast resources of the administrative state.<sup>128</sup> The President's capacity to operate in secret is aided also by the practical availability of executive privilege claims, as well as more informal means to refuse or to stall in response to information requests.

Of course, the more successful that secretive influence is, the less likely we are to learn of it. Still, there are abundant examples of secret influence attempts about which we now know enough to understand the phenomenon. Writing in the mid-1990s, Peter Shane offered a stark example of White House oversight during the first Bush administration that combined formal presidential control with evasion of public scrutiny. Referring to the President's Council on Competitiveness that operated out of the White House without formal legislative sanction, Shane writes:

First, it was the conclusion of the most extensive journalistic study of the Council that it intervened in "dozens of unpublicized controversies over important federal regulations, leaving what vice presidential aides call 'no fingerprints' on the results of its interventions." The White House's efforts to avoid public disclosure of its oversight activity took multiple forms: resisting FOIA disclosure of documents belonging to President Reagan's Task Force on Regulatory Relief on the ground that the Task Force (and, by implication, the Council) was not a covered "agency"; resisting Congressional access to information about the Council beyond published fact sheets and the testimony of individuals who did not participate in Council deliberations; keeping decisions at staff level to shield them from the greater publicity that would likely follow cabinet level involvement. Intriguingly, only one Council decision—pressuring EPA on pollution permit modifications—ever escalated to actual presidential involvement; the usual, albeit tacit, rule was to avoid appeals to the President wherever possible. It would not seem unrealistic that behind this approach lay a desire to buffer the President from criticism for Council policies, especially given a campaign promise to be the "environmental president."<sup>129</sup>

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pirical evidence to suggest that independent agencies are less likely to be influenced by the policy preferences of a President than are executive agencies. See Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 942–43 (2008).

127. See *supra* notes 54–56 and accompanying text.

128. See Kitrosser, *supra* note 54, at 887–89.

129. Shane, *supra* note 40, at 172–73.

The findings of Schultz and Bressman lend additional support to the notion that White House control is often secretive. They write:

According to 63% of EPA respondents, only rarely or sometimes were changes arising from White House involvement apparent in the record. This number actually understates the issue because a full 30% indicated that they had no knowledge of the contents of the record. Of the respondents who had awareness of the contents of the record, 90% stated that the record either rarely or sometimes did not contain evidence of White House involvement; the remaining 10% said it never did.<sup>130</sup>

The problem is also exemplified by recent efforts by the second Bush White House to secretly influence EPA decision making. The controversy involves the EPA's reaction to a 2007 Supreme Court decision, *Massachusetts v. EPA*.<sup>131</sup> The Court rejected the EPA's position that it lacked statutory power to regulate greenhouse gas emissions from automobiles.<sup>132</sup> It also deemed the EPA's reasons for refusing to exercise such power inconsistent with statutory authority. The Court ordered the EPA either to regulate such emissions or to offer a sound statutory basis for not doing so. Such a basis would entail either a determination "that greenhouse gases do not contribute to climate change," or "a good explanation why [the EPA] cannot or will not find out whether they do."<sup>133</sup>

Revelations by EPA staffers indicate that by December 2007, EPA administrator Johnson had signed off on a 300-page report compiled by the agency responsive to the Supreme Court's directive. The report proposed regulating greenhouse gas emissions.<sup>134</sup> The White House refused to open the report and ordered the e-mail through which the EPA had sent it recalled.<sup>135</sup> The official who e-mailed the report to the White House—and who refused the White House's request to recall it and later quit his post out of frustration with White House inaction on climate change—explained, "[i]n early December [2007], I sent an e-mail with the formal finding that action must be taken to address the risk of climate change' . . . . 'The

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130. Bressman & Vandenberg, *supra* note 4, at 81.

131. 127 S. Ct. 1438 (2007).

132. *Id.* at 1460.

133. Linda Greenhouse, *Justices Say E.P.A. Has Power to Act on Harmful Gases*, N.Y. TIMES, Apr. 3, 2007, at A1.

134. See Janet Wilson, *EPA Bides Time on Emissions Order*, L.A. TIMES, Mar. 28, 2008, at A10.

135. Juliet Eilperin, *White House Tried to Silence EPA Proposal on Car Emissions*, WASH. POST, June 26, 2008, at A2; see also Barringer, *supra* note 3.

White House made it clear they did not want to address the ramifications of that finding . . . .”<sup>136</sup>

As of fall 2008, the EPA’s December 2007 report had not been released, nor had much of the information sought by Congress on the nature and extent of White House interference with the EPA’s work. EPA administrator Johnson and the White House refused to turn over much of the requested information, and the White House claimed executive privilege in response to congressional disclosure requests.<sup>137</sup> As one observer explains, “[t]here’s really no downside risk [for the White House in claiming executive privilege] because, by the time it goes into court, the next administration will be in, and they’ll simply waive the privilege.”<sup>138</sup> Despite claiming executive privilege—which assumes that conversations with the President are at issue—the White House has publicly distanced itself from the EPA’s actions.<sup>139</sup> White House spokesman Tony Fratto insisted that [not seeking near-term emissions regulation] “was a decision [Johnson] made on his own.”<sup>140</sup> Similarly, as to charges of White House interference with EPA research and analysis, Fratto asserted that “[i]t’s the E.P.A. that determines what analysis it wants to make available.”<sup>141</sup>

As these examples reflect, a unitary executive may well diminish, rather than enhance, accountability in the context of rule making. This effect is mainly a function of four factors: (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 Presi-

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136. Eilperin, *supra* note 135 (internal quotations omitted).

137. Spencer S. Hsu & Carrie Johnson, *White House Refuses to Release Documents on Air-Quality Policy*, WASH. POST, June 21, 2008, at A4; Erica Werner, *White House Asserts Executive Privilege in EPA Dispute*, USA TODAY, June 20, 2008, [http://www.usatoday.com/news/washington/2008-06-20-1499902489\\_x.htm?](http://www.usatoday.com/news/washington/2008-06-20-1499902489_x.htm?).

138. INSIDE WASH. PUBLISHERS, CLEAN AIR REPORT, BUSH PRIVILEGE CLAIM ON EPA RULES PROMPTS CONGRESSIONAL TEST (2008), *available at* 2008 WLNR 11928457.

139. See Barringer, *supra* note 3; Eilperin, *supra* note 135.

140. Eilperin, *supra* note 135.

141. Barringer, *supra* note 3.

dent'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.

#### B. ACCOUNTABILITY AND GOVERNMENT RESEARCH

The link between unitariness, information control, and diminished accountability is particularly pronounced in the realm of agency research and analysis. Whether pursuant to statutory command or political necessity, agency decisions typically purport to stem from research and analysis. Similarly, when the President weighs in on decisions in his capacity as "rhetorical President," or when he clearly makes decisions himself, he publicly frames his conclusions as responsive to underlying facts.<sup>142</sup> Thus, President Bush cited intelligence on weapons of mass destruction to justify invading Iraq in 2003.<sup>143</sup>

A risk of unity is that, in controlling the vast resources of a unitary administrative state, the President will control not only final decisions but the very factual picture against which the public, Congress, and the courts can judge those decisions.<sup>144</sup> Political or legal accountability in such a scenario is profoundly tainted.

As with the impact of unity on policymaking, there is some uncertainty as to its impact upon government research and analysis. Unitarians take the position that all discretionary decision making in the executive branch must be subject to presidential control.<sup>145</sup> Policymaking and prosecutorial discretion

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142. See generally JEFFREY K. TULIS, *THE RHETORICAL PRESIDENCY* (1987) (describing the rhetorical President as one who acts for the popular will).

143. See, e.g., Paul R. Pillar, *Intelligence, Policy, and the War in Iraq*, 85 *FOREIGN AFF.* 15, 16 (2006).

144. A 2002 conversation between an unnamed senior White House advisor in the Bush Administration and journalist Ron Suskind is telling in this respect. Suskind reports:

The aide said that guys like me were "in what we call the reality-based community," which he defined as people who "believe that solutions emerge from your judicious study of discernible reality." I nodded and murmured something about enlightenment principles and empiricism. He cut me off. "That's not the way the world really works anymore," he continued. "We're an empire now, and when we act, we create our own reality."

Suskind, *supra* note 3, at 51.

145. See *supra* notes 19–23 and accompanying text.

are among the powers that they deem clearly covered by this description.<sup>146</sup> It is less clear that the description includes an administrator whose entire job involves research and analysis—for example, a government scientist whose only tasks are to perform research and to report on its results.<sup>147</sup> Arguably, unitary executive theory does not demand presidential control over such an employee because one who purely conducts and reports on research is not making discretionary decisions as to how to execute the law. On the other hand, one could argue that research inevitably entails determining which research projects to pursue and which to discontinue, to place on hold, or to eschew from the outset. Such determinations might be deemed decisions as to how to execute the legislative directives under which the research is performed.

This ambiguity, too, is one that unitarians and nonunitarians alike might agree should be addressed. For purposes of this Section, however, it suffices to assume the milder application of unitary executive theory. That is, it suffices to assume that persons whose jobs consist solely of conducting and reporting on research are not within the category of those who must, under unitary executive theory, be subject to full presidential control. Under this interpretation, however, unitary executive theory still facilitates substantial presidential control over information and thus compromises accountability.

Assuming that unitary executive theory does not demand presidential control over those who solely perform and report on research, it does demand such control over those whose jobs include both discretionary decision making and conducting, analyzing, or reporting on research. Indeed, it is hard to im-

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146. See, e.g., *Morrison v. Olson*, 487 U.S. 654, 706 (1988) (Scalia, J., dissenting); Shane, *supra* note 40, at 162 (discussing that under unitary executive theory, as espoused in the Reagan and first Bush administrations, “the President enjoys plenary authority over all policy making involved in the execution of the laws”); Christopher S. Yoo et al., *The Unitary Executive in the Modern Era, 1945–2004*, 90 IOWA L. REV. 601, 607 (2005) (referring to the unitarian mandate of presidential control over “policy-making” officials and activities).

147. In *Bowsher v. Synar*, a decision generally praised by unitarians, the Supreme Court appears to suggest that jobs consisting solely of research and analysis might not be executive in nature. 478 U.S. 714, 733 (1986) (deeming the Comptroller General an executive officer based not on the fact that he compiles a report on necessary budget cuts but on the fact that the conclusions in his report bind the President); see also Lessig & Sunstein, *supra* note 6, at 114 (suggesting that providing information alone might not be an executive task); Prakash, *supra* note 6, at 793 n.530 (same).

agine a scenario in which an administrative policy decision would not purport to be justified by research and thus entail interpreting and reporting, if not conducting research. Unitary executive theory also demands control over anyone whose job includes both discretionary decision making and the supervision of government researchers and analysts. It further demands control over inspectors general and others who are empowered to investigate and punish improper interference with research or analysis. In all of these respects, unitary executive theory impacts the independence of research and analysis.

The EPA rule-making controversy cited above exemplifies the presidential control over research that follows from research's entwinement with discretionary decision making. As noted, the White House succeeded not only in stopping the EPA's planned emissions regulation proposal but in stopping the release of a detailed report justifying the same. Most of what presently is known about the report stems from disclosures by aggrieved staff members. One press account draws on such disclosures to report:

[A] few senior White House officials were unwilling to allow the EPA to state officially that global warming harms human welfare . . . .

Career EPA officials argued that the global benefits of reducing carbon are worth at least \$40 per ton, but Bush appointees changed the final document to say the figure is just an example, not an official estimate . . . .

"The administration didn't want to show a high-dollar value for reducing carbon," said one EPA official, adding that the administration cut dozens of pages from a draft that outlined cost-effective ways to reduce greenhouse gases.

. . . .

The proposal that the EPA will unveil [in lieu of the now shelved proposal of December 2007], known as an advance notice of proposed rulemaking, stands in stark contrast to the agency's original Dec. 5 finding—backed up by a lengthy scientific analysis—that global warming is unequivocal, that there is "compelling and robust" evidence that the emissions endanger public welfare and that the EPA administrator is "required by law" to act to protect Americans from future harm. . . .<sup>148</sup>

Other examples illustrate the connection between presidential control over administrators—either directly through his ability to terminate them or to alter their work (such as through the review processes of the White House Office of Management and Budget (OMB)), or indirectly through his

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

ability to terminate or direct their supervisors—and that over research and reporting outside of the rule-making context.<sup>149</sup> For example, White House review of congressional testimony by executive agency officials is commonplace,<sup>150</sup> as are White House efforts to distance itself from such review. During the Reagan administration, for instance, the OMB altered testimony that James Hansen—who served at NASA at the time, who remains there today, and who is widely considered “the preeminent climate scientist of our time,”—was to present to the Senate.<sup>151</sup> The OMB “change[d] . . . the text, and the main point in particular, that the greenhouse effect was changing climate. The approved version stated that the cause was unknown.”<sup>152</sup> Less routine than such OMB review was Hansen’s response. Angered by the OMB’s action and by similar reviews that he had endured in the past, he “disavow[ed] his own written testimony in person before the [Senate] committee,” “clarify[ing] the differences between his actual opinions and the text he had been forced to submit.”<sup>153</sup> Hansen’s response was so unusual that it generated intense media interest, forcing the White House to distance itself from what had occurred by blaming “a nameless OMB bureaucrat ‘five levels down from the top.’”<sup>154</sup>

Yet while White House interference in research and its reporting cuts across administrations and parties,<sup>155</sup> we again see particularly stark examples in the most recent Bush administration. What is important about these examples is not what they tell us about a single administration. Rather, it is what they remind us about the ever-present danger to information flow in a system of pervasive presidential control of the administrative state. Such risks are not limited to congressional testimony, but impact all outlets for reporting research, including official reports and media appearances. As James Hansen observes: “[In the Bush administration,] they’re picking and

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149. See, e.g., Croley, *supra* note 9, at 824–25 (describing OMB review of rule making); Peter Strauss, Foreword, *Overseer or “The Decider”? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 732–33 (2007) (citing recent changes to OMB review of rule making).

150. Andrew C. Revkin, *Cheney’s Office Said to Edit Draft Testimony*, N.Y. TIMES, July 9, 2008, <http://www.nytimes.com/2008/07/09/washington/09enviro.html?>

151. MARK BOWEN, CENSORING SCIENCE 3, 227 (2008).

152. *Id.* at 227.

153. *Id.*

154. *Id.* at 228.

155. See Revkin, *supra* note 150.



choosing information according to the answer that they want to get, and they've appointed so many people who are just focused on this that they really are having an impact on the day-to-day flow of information."<sup>156</sup>

The Bush administration institutionalized control of scientific reporting in part by increasing the use of political appointees, as opposed to career civil servants, to oversee the final vetting of reports from science agencies.<sup>157</sup> Indeed, the top three public affairs people at the National Aeronautics and Space Administration (NASA) were White House appointees during a now infamous period in the middle of the Bush administration.<sup>158</sup> In this period climate change reports and press releases routinely were edited—generally by nonscientists, and in one case by a twenty-four-year-old political appointee who lacked a college degree—to downplay scientists' conclusions on human-made global warming.<sup>159</sup> Also in this period, scientists for the first time since NASA's founding in 1958 were required to pre-clear media appearances with NASA's public affairs office.<sup>160</sup> According to journalist Andrew Revkin, White House interference with NASA's science reporting was particularly "intense in the run-up to the 2004 election."<sup>161</sup>

The aggregate impact of such events on the morale of government scientists was documented in surveys conducted by the Union of Concerned Scientists (UCS) and the Government Accountability Project.<sup>162</sup> For example, of 1586 scientists responding to an online survey by UCS in 2007, "60 percent . . . or 889 scientists, reported personally experiencing what they

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156. Andrew C. Revkin, *Bush vs. the Laureates: How Science Became a Partisan Issue*, N.Y. TIMES, Oct. 19, 2004, <http://www.nytimes.com/2004/10/19/science/19poli.html?>

157. See, e.g., BOWEN, *supra* note 151, at 16–17, 66–68, 93–94, 116, 134; Revkin, *supra* note 156.

158. BOWEN, *supra* note 151, at 93–94; see also *id.* at 116 ("[I]t is unusual for the two highest positions in public affairs [at NASA] to be filled by 'politicals.'").

159. *Id.* at 16–17, 49–50, 67–68, 81, 116–17, 119, 123–28, 136, 140–41.

160. *Id.* at 15–16, 34, 36, 49–50, 56, 124.

161. *Id.* at 117.

162. See generally TIMOTHY DONAGHY ET AL., UNION OF CONCERNED SCIENTISTS, *ATMOSPHERE OF PRESSURE: POLITICAL INTERFERENCE IN FEDERAL CLIMATE SCIENCE* (2007); UNION OF CONCERNED SCIENTISTS, *INTERFERENCE AT THE EPA: SCIENCE AND POLITICS AT THE U.S. ENVIRONMENTAL PROTECTION AGENCY* (2008) [hereinafter *INTERFERENCE AT THE EPA*]; H. Josef Herbert, *EPA Scientists Allege Political Interference*, ST. LOUIS POST-DISPATCH, Apr. 24, 2008, at A3.

viewed as political interference in their work over the last five years.”<sup>163</sup>

### CONCLUSION

Presidential invocations of unitary executive theory are hardly exclusive to one administration or one party. This is unsurprising, as the human tendency to aggrandize power is well understood. Indeed, this view of human nature is among the core reasons why the Founders insisted on the accountability mechanisms discussed throughout this Article. As James Madison famously said, “[i]f angels were to govern men, neither external nor internal controls on government would be necessary.”<sup>164</sup>

Nonetheless, the past eight years have seen such copious applications of unitary executive theory that they offer particularly stark lessons in its problems. This Article has focused on problems in the theory’s functionalist, accountability-based justifications. Specifically, unitary executive theory can undermine, rather than bolster, government accountability. While the Constitution embodies several interlocking types of accountability, a degree of transparency and procedural regularity underscores each type. The centralization of executive power in the President enhances the capacity of the President and his proxies to make or implement policy behind closed doors. More insidiously, it enables them to shape the very “facts” upon which policies purport to be based.

It also is important to recognize that the conclusion that unitary executive theory undermines government accountability need only be reasonably arguable to undermine the theory. This is because unitarians argue that functional accountability concerns independently demand unity, apart from any formalist directives.<sup>165</sup> Yet if it is reasonably arguable that unity undermines accountability, then the argument from accountability simply is not so ironclad as to support a categorical unity directive.

In addition to illustrating unity’s accountability-based problems, events in the Bush administration illuminate respects in which unitary executive theory has plainly been mi-

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163. Herbert, *supra* note 162; see also INTERFERENCE AT THE EPA, *supra* note 162, at 2.

164. THE FEDERALIST No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

165. See *supra* notes 6, 25–32 and accompanying text.

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sinterpreted, and others in which its practical applications are unclear. Even if unitarians and nonunitarians cannot agree on the theory itself, they surely can agree on the benefits of clarifying the theory and its practical implications. At least four points bear mention in this respect.

First, it seems clear, as unitarians including Steven Calabresi have observed, that the Bush administration and commentators over the last eight years have failed at points to understand that the theory involves the allocation of executive power, not its content or scope. The theory, in short, dictates that the President must control all executive power. It does not dictate how much power must belong exclusively to the executive branch as opposed to Congress or the courts. Thus, for example, the President cannot resist complying with laws that specify how he may and may not conduct wiretapping on unitary executive grounds. Any such resistance would have to be based on some other ground—such as that wiretapping decisions belong exclusively to the executive branch and not to Congress.

The second point is a bit of a caveat to the first. While unitary executive theory is about who controls executive power rather than its content and scope, there are some points of overlap between those two areas. For example, insofar as unitarians claim that the President alone must control all executive activity, they necessarily claim that Congress cannot constitutionally demand that any final executive decisions be made by others, or that the President must have good cause to fire an executive official. Similarly, the implications of unitary executive theory for imposing APA-like procedural and judicial review requirements on the President are not entirely clear. On the one hand, one could argue that such requirements are entirely consistent with unitary executive theory as they simply define the law that the President must implement. On the other hand, one might insist that while Congress can give the President substantive statutory directives, it may not dictate how he executes those directives. Nor can it subject his performance to judicial review. Clarification on this point would be useful.

Third, consideration is called for as to whether government personnel whose jobs consist entirely of research and analysis are discretionary executive employees who constitutionally must serve at the President's pleasure. The intuitive answer seems to be no, and the Supreme Court, in a decision generally

praised by unitarians, appears to assume that a pure research position is not executive in nature.<sup>166</sup> Additionally, at least one unitarian scholar has indicated that pure research positions may not be executive in nature, although he does not reach a firm conclusion on that point.<sup>167</sup> Given recent experiences with political control of research and the importance of research integrity to accountability, this too is an area in which clarification is called for.

A fourth and final point about the practical implementation of unitary executive theory is made in a new paper by Saikrishna Prakash. Prakash objects to the White House practice of imposing OMB oversight on rule makings delegated by statute to agencies.<sup>168</sup> As a unitarian, Prakash argues that the President himself must be able to control activities delegated by statute to agencies. But to authorize another executive branch actor to engage in such control amounts to presidential lawmaking.<sup>169</sup> This point has significant implications for the practice of unitary executive theory. If the President has constitutional leeway only to personally control executive activity, rather than to delegate the same to others, there are substantial practical constraints on the exercise of his unitarian prerogatives.

Overall, then, this Article embraces two conclusions. First, it is at minimum reasonably arguable that unity undermines, rather than advances, government accountability. Given this fact, and given the absence of a formal constitutional unity directive as I discuss in a separate article,<sup>170</sup> Congress must have flexibility to create zones of relative independence from presidential control in the administrative state. Second, to the extent that unitary executive theory continues to have political or legal influence, it is important that the theory's reach be debated and clarified. At best, such clarification may protect accountability by limiting the reach of presidential control. Such limiting effect could follow, for example, from the conclusion that the theory does not demand presidential immunity from statutory procedural requirements or presidential discretion to

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166. See *Bowsher v. Synar*, 487 U.S. 714, 733 (1986).

167. See Prakash, *supra* note 6 at 1014–15. Lessig & Sunstein seem more definitively to embrace this conclusion. Lessig & Sunstein, *supra* note 6, at 114.

168. Saikrishna B. Prakash, *Fragmented Features of the Constitution's Unitary Executive*, 45 WILLAMETTE L. REV. (forthcoming Apr. 2009).

169. *Id.*

170. See generally Kitrosser, *supra* note 12.

dismiss employees whose jobs consist solely of research. Even if the consensus were that the theory is best interpreted broadly in such areas of ambiguity, this would at least clarify the grounds of the debate. Such clarification would make all the more evident the negative impact of unitary executive theory on government accountability.