

## ACCOUNTABILITY AND ADMINISTRATIVE STRUCTURE

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### INTRODUCTION

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

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1. *See* Massachusetts v. Environmental Protection Agency, 549 U.S. 497, 506 (2007) (citing 42 U.S.C. § 7521(a)(1) (2000)).

2. *Id.* at 510.

3. *Id.* at 511.

4. *Id.* at 532.

climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do.”<sup>5</sup>

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

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

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

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5. *Id.* at 533.

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

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

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

9. *Id.*

10. *See Markey Comments, supra* note 7; *Rep. Markey, Select Committee to Issue Subpoena to EPA for Global Warming Docs*, U.S. FEDERAL NEWS, Apr. 2, 2008, available at 2008 WLNR 6242885.

11. *See* 42 U.S.C. § 7607(d) (2000) (describing rule-making procedures under the Clean Air Act).

12. *See, e.g.*, Ian Talley & Siobhan Hughes, *EPA, White House in Climate Report Clash*, GLOBE & MAIL, June 30, 2008, at B5; Juliet Eilperin, *White House Tried to Silence EPA*

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

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

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*Proposal on Car Emissions*, WASH. POST, June 26, 2008; Barringer, *White House Refused to Open Pollutants E-mail*, *supra* note 8; 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*, WASH. POST, June 20, 2008; Felicity Barringer, *Group Seeks E.P.A. Rules on Emissions from Vehicles*, N.Y. TIMES, April 3, 2008; Richard Simon, *Waxman Accuses EPA of Shirking Its Duty*, L.A. TIMES, Mar. 13, 2008, at 9.

13. Eilperin, *supra* note 12; Barringer, *Group Seeks E.P.A. Rules*, *supra* note 12.

14. Talley & Hughes, *supra* note 12; Hsu & Johnson, *supra* note 12; Werner, *supra* note 12; Barringer, *Group Seeks E.P.A. Rules*, *supra* note 12; Simon, *supra* note 12.

15. *See, e.g.*, sources cited *supra* note 12.

16. Advance Notice of Proposed Rule-making by the EPA, 73 Fed. Reg. 44354, 44396 (July 30, 2008) (to be codified at 40 C.F.R. ch. I). *See also* Eilperin & Smith, *supra* note 6; Eilperin, *supra* note 12.

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

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

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

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

Law is present in agencies' statutory directives and any regulatory mandates to which they are bound. Expertise is required to implement those statutory directives—to give content, for instance, to congressional directives to identify air pollutants through scientific analysis. Politics is a necessary component as well. Politics comes into play on the many occasions when agencies select from more than one approach that would meet statutory requirements. To be legitimate, agency exercises of legal authority, of expertise, and of politics must be subject to accountability mechanisms. There must be means to determine, for example, if the agency's statutory directives are being followed, if the agency's discretionary judgments are wise, and if any presidential or congressional influence exercised deserves to be rewarded politically. Accountability will tend to require some compartmentalization of tasks and of personnel. If, for example, agency scientists were subject to substantial political pressures, their ability to produce scientific judgments rather than political conclusions cloaked as science could be compromised. Similarly, the ability of the public or of Congress to assess policy judgments that purport to be based on such science would be compromised. Some separation of functions and zones of independence from politics thus are called for so that the relevant actors (be they courts, Congress, the people, the press, or others) may ascertain what is law, what is expertise, what is politics, and may judge each component or combination thereof accordingly. The relationship between accountability and administrative structure also sheds light on the close relationship between accountability and other values—including checking and avoiding arbitrary decisions—that sometimes are framed as separate from or in tension with accountability.

Second, this Article supplements the functional constitutional analysis of *The Accountable Executive*—which concluded that unity undermines accountability and thus is not constitutionally required as a functional matter<sup>22</sup>—with formal constitutional analysis. “Unitarians”<sup>23</sup> deem unity demanded by both functional and formalist analyses. Their formalist argument is that the President, as chief executive, must control all discretionary executive activity in the

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22. *Id.*

23. I use the term “unitarian” to refer to those who support unitary executive theory. While the term is a bit out of context here given its usual religious implications, its use is less clumsy than repeatedly referring to “unitary executive theorists.” Others have used the term “unitarians” in this context as well. See, e.g., Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1740–44 (1996).

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

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

## I. ACCOUNTABILITY, FUNCTIONALISM, AND ADMINISTRATIVE STRUCTURE

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

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

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

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

executive power only in the subordinate.”<sup>26</sup> Second, he may “nullify or veto [subordinates’] exercises of discretionary executive power.”<sup>27</sup> Third, he may “remove at will any principal officers (and perhaps certain inferior officers) who exercise executive power.”<sup>28</sup>

Unitarians argue, among other things, that the constitutional principle of accountability functionally is advanced by and thus demands unity. They note that the President is electorally accountable, whereas unelected bureaucrats in the administrative state are not.<sup>29</sup> They also deem the President more accountable than other elected officials as he alone is elected by the nation as a whole.<sup>30</sup>

Some non-unitarians concede the accountability argument but deem it outweighed by other factors.<sup>31</sup> A few, however, have challenged both the unitarian definition of accountability and the conclusion that unity furthers accountability.<sup>32</sup> I built on these challenges in *The Accountable Executive*.<sup>33</sup> I explained first, that unitarians assume a very simple version of accountability based on whether decisions technically belong to elected officials. Simple accountability appears also to place a premium on centralizing decisions in one or a few highly visible figures to simplify and focus voter determinations. Yet this simple accountability bears little resemblance to the far more complex and multi-faceted accountability principles reflected in the Constitution. For relatively simple law-implementation tasks—the type of tasks that the founders originally anticipated for the President in an era well before the rise of the

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26. Calabresi & Rhodes, *supra* note 24, at 1166.

27. *Id.*

28. *Id.*

29. See, e.g., Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 97–99 (1994); Calabresi, *supra* note 25, at 35–37, 59, 65–66. 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 the accountability argument).

30. See, e.g., Calabresi, *supra* note 25, at 65–66.

31. See, e.g., Abner Greene, *Discounting Accountability*, 65 FORDHAM L. REV. 1489, 1502 (1997); Abner Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 142 U. CHI. L. REV. 123, 177–78 (1994). Cf. Lessig & Sunstein, *supra* note 29, at 2–4, 85–86, 94–95, 98 (disputing unitarians’ formalist arguments, but embracing unity on the ground that it furthers accountability).

32. *The Accountable Executive*, *supra* note 17 (citing sources and discussing their arguments).

33. *Id.* The remainder of this paragraph is drawn generally from *The Accountable Executive*. The one direct quote therein is cited precisely.

administrative state and executive branch policy-making—constitutional accountability principles require that rival branches and the people have access to information to determine—and to react accordingly—if such tasks are handled corruptly or incompetently. With respect to policy-making, constitutional accountability principles favor indirect, attenuated majoritarianism. While the people have final say over legislators through elections, the founders famously resisted more direct majoritarian control for fear of sacrificing reasoned debate and decision-making in the legislative process. The constitutional emphasis on dialogue, reason, and long-term public control is reflected in the legislative process—the hallmarks of which are transparency and deliberation—outlined in the Constitution. The accountability required of the administrative state—or that necessary to make legislative delegations to the administrative state “proper” under Congress’s “necessary and proper” powers—is derivative of that required of legislators and the President.

First, the administrative state must not frustrate the accountability that the Constitution demands of the national legislature and the national executive. Second, the administrative state itself must be accountable 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.<sup>34</sup>

Constitutional accountability, then, does not rest on enhancing majoritarianism for its own sake by tying every discretionary decision to an elected official. Nor does it rest on simplifying majoritarianism by centralizing decisions in a single or small set of national actors. What it does require are means of transparency and procedural regularity sufficient to ensure that executive corruption or incompetence can be detected and remedied and to protect the people’s capacity to assess policies and policy-makers.

The second problem in the unitarian accountability argument is that unity appears to undermine transparency and procedural regularity and thus to hinder rather than bolster constitutional accountability. As I explained in *The Accountable Executive* with respect to presidential control over policy-making:

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34. *Id.*

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

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

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

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

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

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

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

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

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36. U.S. CONST., art. II, § 3.

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

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

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

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

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

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

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

41. See *id.*

42. See *id.*

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

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

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

## II. ACCOUNTABILITY, FORMALISM AND ADMINISTRATIVE STRUCTURE

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

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

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

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

*Id.*

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

48. See *id.*

49. See *id.*

for each exclusive. They deem the implementation of statutory directives—including through administrative policy-making<sup>50</sup>—executive activity. Because the Constitution says that “[t]he executive Power shall be vested in a President of the United States of America,”<sup>51</sup> and that the President “shall take Care that the Laws be faithfully executed,”<sup>52</sup> unitarians deem presidential control (through at least one of the three mechanisms for control cited above)<sup>53</sup> the exclusive constitutional means to implement statutory directives.<sup>54</sup>

Others have forcefully refuted the formalist position. Among other things, they point to the Necessary and Proper Clause of Article I, which grants Congress the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”<sup>55</sup> They deem this clause to reflect a constitutional design that grants Congress substantial leeway to structure the means and offices through which laws are implemented.<sup>56</sup> They juxtapose this conclusion with their view that unitarians substantially overstate the clarity and meaning of the Vesting and Take Care Clauses.<sup>57</sup>

As Martin Flaherty writes, unitarians “assume[] that there was a generally understood bundle of authority known as executive power . . . [and] that it necessarily included such specific prerogatives as the ability to appoint and remove executive officers as well as to superintend the enforcement of all laws. . . . If the history of the period indicates anything, however, it is that no such generally understood bundle existed.”<sup>58</sup> Flaherty continues: “If the Constitution’s origins undercut the notion that executive power possessed some precise meaning, they also negate any contention that such power was exclusive. . . . [E]ven the later

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50. See, e.g., Calabresi, *supra* note 25 at 34–37 (arguing that the rise of congressional law-making delegations to the administrative state militate in favor of, not against, unity); Calabresi & Rhodes, *supra* note 24, at 1166 (citing President’s “total power,” from a unitarian perspective, to “remove . . . officers who make policy decisions with which he disagrees”).

51. U.S. CONST., art. II, § 1.

52. U.S. CONST., art. II, § 3.

53. See *supra* notes 24–28.

54. See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 579–82 (1994); Calabresi & Rhodes, *supra* note 24, at 1164–65.

55. U.S. Const., art. I, § 8, cl. 18.

56. See sources cited *infra* note 60.

57. *Id.*

58. Flaherty, *supra* note 23, at 1790.

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

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

While formalism and functionalism generally are treated as separate lines of analysis, there are important points of overlap between them. For example, unitarians claim that the founders clearly understood the Constitution to create a unitary executive—and that the Vesting and Take Care Clauses reflect this understanding—in part because the founders wanted to capture the functional value of presidential accountability.<sup>61</sup>

This section builds on existing criticisms of unitarian formalism by examining the relationship between problems in formalist and functionalist justifications for unity. Specifically, this section explains that the scope and exclusivity of presidential power throughout the executive branch not only was unsettled among the founders, but that this was due partly to founding fears that the President would hide behind political loyalists. It is also striking that these fears arose against expectations of a relatively tiny executive

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59. Flaherty, *supra* note 23, at 1791. The block quote in the accompanying text and the quote's internal citations (including that immediately preceding this sentence) are from *The Accountable Executive*, *supra* note 17. See also, e.g., Peter Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 596, 611 (1989) ("A naive reader might entertain the possibility that the words 'executive power' in article II conventionally denote illimitable control over any administrative discretion that is exercised by the government of the United States. The fact is, however, that such a reading is not conventional, either now or in 1789"); Strauss, *The Place of Agencies in Government*, *supra* note 38, at 597–98 (1984) ("The text and structure of the Constitution impose few limits on Congress's ability to structure administrative government. . . . [The President] is vested generally with 'the executive Power,' but what that is in the domestic context does not readily appear."). Cf. Greene, *Checks and Balances*, *supra* note 31, at 123 (Constitution's drafters "focused only on how many people should hold the top spot in the executive branch, and . . . would have thought it perfectly consisting to allow, in the future, the establishment of other officials not removable by the President at his discretion.").

60. See, e.g., Flaherty, *supra* note 23, at 1798–1801; Shane, *supra* note 59, at 611; Strauss, *supra* note 38, at 598–99.

61. See, e.g., Saikrishna B. Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 731–32, 751–52, 783–85 (2003).

branch and a President who would rarely make policy apart from his participation in the legislative process. That fears of unity's abuses were manifest even in this setting, and that the founders separately provided for a transparent, dialogic, and check-filled policy-making (legislative) process, militate against reading a categorical unity directive into the Vesting and Take Care Clauses.

A. *The Council-Less President*

Unitarians rely heavily on the founding decision to establish a single President without a constitutionally annexed advisory council.<sup>62</sup> They deem this decision to reflect a founding embrace of the unitary executive.<sup>63</sup> This interpretation is incorrect. No clear founding consensus equated a unitary President with a unitary executive as modern scholars use the latter term. The conclusion that there was no such consensus is supported, first, by direct statements from influential founders asserting publicly—and defending the Constitution partly through assertions—that the President would not have unfettered control over executive officials. Second, it is supported by the nature of the founding debate over whether to annex an advisory council to the President. While those opposed to the council spoke of the greater accountability of a council-less President, this was for reasons unique to the nature of the envisioned council. Founders cited the likely small number of council members, the lack of clear roles for each, and the likely secrecy of a council. These functional concerns do not translate to objections over agency independence in the administrative state. To the contrary, they offer support for such independence.

1. *The Lack of a Founding Consensus on the Implications of the Single, Council-Less President*

Perhaps the most prominent and detailed founding refutation of the unitary executive was made by Alexander Hamilton, writing as Publius in the New York ratification debates. Hamilton opened Federalist No. 77 by writing in its first paragraph:

The consent of [the Senate] would be necessary to displace as well as to appoint. A change of the Chief Magistrate, therefore, would

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62. See, e.g., Prakash, *The Essential Meaning of Executive Power*, *supra* note 61, at 731–32, 783–85; Calabresi, *supra* note 50, at 4245; Calabresi & Prakash, *supra* note 54, at 610–11, 628.

63. See *supra* note 62.

not occasion so violent or general a revolution in the officers of the government as might be expected if he were the sole disposer of offices. Where a man in any station had given satisfactory evidence of his fitness for it, a new President would be restrained from attempting a change in favor of a person more agreeable to him by the apprehension that a discountenance of the Senate might frustrate the attempt, and bring some degree of discredit upon himself. Those who can best estimate the value of a steady administration will be most disposed to prize a provision which connects the official existence of public men with the approbation or disapprobation of [the Senate] which, from the greater permanency of its own composition, will in all probability be less subject to inconstancy than any other member of the government.<sup>64</sup>

Hamilton apparently had a change of view by 1789, when a major debate arose in the First Congress on the President's constitutional removal powers.<sup>65</sup> Perhaps for this reason—and perhaps due to the possibility that Hamilton was posturing in Federalist No. 77 to ensure constitutional ratification<sup>66</sup>—surprisingly little attention has been paid in the unitary executive literature (on either side of the debate) to Federalist No. 77. But Federalist No. 77 is quite significant, regardless of Hamilton's motivations for writing it or his post-ratification positions. The prominent public taking of this position by Hamilton—a staunch defender of a strong President—in lobbying for constitutional ratification suggests at minimum that there was no clear founding consensus on the constitutional extent of presidential control over the executive branch.

The lack of a founding consensus on the extent of presidential control over the executive branch is also demonstrated by the statements of participants in the First Congress's 1789 debate over presidential removal power.<sup>67</sup> The debate is discussed in more detail below. Suffice it for now to note that a number of participants

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64. THE FEDERALIST NO. 77, at 458 (Alexander Hamilton) (Clinton Rossiter ed., Signet Classic 1st prtg. 2003).

65. See Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1038 n.121 (2006). Steven Calabresi and Christopher Yoo also cite a change of heart by Hamilton, although they peg the change as having occurred "by the time Hamilton wrote his Pacificus letters." Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451, 1488 (1997).

66. See David McGowan, *Ethos in Law and History: Alexander Hamilton, the Federalist, and the Supreme Court*, 85 U. MINN. L. REV. 755, 852 (2001).

67. See *infra* Section II.C.

expressed a belief similar to that expressed by Hamilton in Federalist No. 77—that the Senate had to consent to removals of executive officers. While others evinced the view that the President alone had constitutional discretion to so remove, still others evinced confusion and uncertainty on the matter. As with Hamilton’s prominent pre-ratification statement, the Debate of 1789 reflects an utter lack of founding clarity or consensus on the scope of presidential power throughout the executive branch.

## 2. *The Nature of the Council Debate*

The founders’ rejection of a presidential advisory council cannot be equated with an embrace of a unitary executive. The concerns expressed by the founders over the council—particularly those involving accountability—were very specific to the characteristics of the envisioned council. Indeed, the features of the council that they lamented were strikingly similar to features reflected in modern presidential relations with executive agencies. The founders’ reasons for rejecting a council thus are not conclusive, from a formalist perspective, of the textual or historical scope of presidential power in the administrative state. To the contrary, the founders’ concerns are consistent with functional, accountability-based objections to unity.

The work of Alexander Hamilton as Publius again provides an excellent starting point. In extolling the virtues of a council-less President, Hamilton stressed several factors: the council would be small in number and thus susceptible to presidential persuasion to act against the public interest;<sup>68</sup> a nefarious council-President combination could act in relative secrecy;<sup>69</sup> and council-members and the President would lack distinct roles, making it difficult or impossible for the public and the other branches to know who to blame for bad behavior.<sup>70</sup> Hamilton also isolated a fourth disadvantage of a council regarding their role in appointments. Appointments made by the President and his council—unlike appointments made by the President and the Senate—would be prone to reward sycophantic candidates who would place loyalty to the President above the public interest.<sup>71</sup> Or, as Hamilton so artfully put it, Presidents might be tempted to select candidates “possessing the

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68. THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 64, at 428–29.

69. *Id.* at 426–27.

70. *Id.*

71. THE FEDERALIST NO. 76 (Alexander Hamilton), *supra* note 64, at 456.

necessary insignificance and pliancy to render them the obsequious instruments of his pleasure.”<sup>72</sup>

All four of these concerns are encapsulated in a passage in Federalist No. 77 in which Hamilton—to emphasize his opposition to a council—speaks disparagingly of the executive council system of appointment utilized in New York:

The council of appointment consists of from three to five persons, of whom the governor is always one. This small body, shut up in a private apartment, impenetrable to the public eye, proceed to the execution of the trust committed to them. It is known that the governor claims the right of nomination upon the strength of some ambiguous expressions in the Constitution, but it is not known to what extent, or in what manner he exercises it; nor upon what occasions he is contradicted or opposed. . . . Whether a governor of this State avails himself of the ascendant, he must necessarily have in this delicate and important part of his administration to prefer to offices men who are best qualified for them, or whether he prostitutes that advantage to the advancement of persons whose chief merit is their implicit devotion to his will and to the support of a despicable and dangerous system of personal influence are questions which, unfortunately for the community, can only be the subjects of speculation and conjecture.<sup>73</sup>

Other ratification debate statements from supporters and opponents of a presidential council alike demonstrate that the question addressed by those engaged in this debate was not whether the executive branch must in all respects be unified, but whether the council in particular would facilitate accountability.<sup>74</sup> Participants on both sides of the debate appeared to agree with the functional goal of establishing an executive branch whose actions could be tracked, and rewarded or punished, by the people and the other branches. They simply disagreed on whether the council in its envisioned particulars was the right way to achieve this goal. One council proponent argued, for example, that “the supreme executive powers ought to have been placed in the president, with a small independent council made personally responsible for every appointment to office or other

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72. *Id.*

73. THE FEDERALIST NO. 77 (Alexander Hamilton), *supra* note 64, at 460.

74. *See infra* text accompanying notes 75–81.

act, by having their opinions recorded.”<sup>75</sup> Similarly, George Mason objected that:

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

Opponents of the council countered that it would undermine accountability, while a council-less President would be accountable. One opponent of the council explained that, “The executive power is better to be trusted when it has no *screen*. Sir, we have a responsibility in the person of our President; he cannot act improperly, and hide either his negligence, or inattention; he cannot roll upon any other person the weight of his criminality.”<sup>77</sup> Another council opponent similarly argued:

It has also been objected, that a Council of State ought to have been assigned the President. The want of it, is, in my apprehension, a perfection rather than a blemish. What purpose would such a Council answer, but that of diminishing, or annihilating the responsibility annexed to the character of the President. From the superiority of his talents, or the superior dignity of his place, he would probably acquire an undue influence over, and might induce a majority of them to advise measures injurious to the welfare of the States, at the same time that he would have the means of sheltering himself from impeachment, under that majority.<sup>78</sup>

Finally, like Hamilton, others engaged in the ratification debate assumed that the executive branch would not and should not be staffed by members whose primary loyalty is to the President. Indeed, in the quote by George Mason cited above he lamented that, without a constitutionally imposed council, the President would create a *de facto* council of department heads, and that such presidential influence would be “the worst and most dangerous of all ingredients

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75. 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 635 (Merrill Jensen ed., 1990).

76. 8 *id.* at 44 (John P. Kaminski & Gaspare J. Saladino eds., 1990).

77. 2 *id.* at 495.

78. 9 *id.* at 679–80 (John P. Kaminski & Gaspare J. Saladino eds., 1990).

for such a Council, in a free country.”<sup>79</sup> A constitutional proponent evinced the same assumption—that independence in the departments was desirable—assuring that, because the President could not appoint officers without Senate consent, there will be no problems of “*patronage and influence*, and of personal obligation and dependence.”<sup>80</sup> Another constitutional proponent cited the same constitutional provision as “prevent[ing] the officers from looking up to the President alone as their master and benefactor.”<sup>81</sup>

The founding decision to create a single President with no constitutional council thus cannot be equated with a decision to create an executive branch under unitary presidential control in all respects. To the contrary, the decision reflects two conclusions. First, founders on both sides of the debate deemed it crucial that the people and other branches be able to track executive activity to ensure political and legal accountability. Second, the prevailing side of the debate deemed the envisioned council—with its likely secrecy, small size, and lack of clearly delineated functions—antithetical to accountability. At minimum, the founding decision reflects no formal unity directive. Beyond that, the decision supports the conclusion that Congress functionally must have discretion to create pockets of independence in the executive branch. Indeed, the resemblance of modern assertions of administrative unity—such as the apparent White House directives to the EPA (whose Administrator serves at the President’s pleasure) described at the start of this Article—to the clannish and evasive council that the founders feared is striking. Modern congressional efforts to disrupt unity to prevent such conditions thus are quite faithful to founding aspirations.

### *B. The Opinions Clause*

That the founders did not embrace a unitary executive is also reflected by the inclusion of the Opinions Clause—the one aspect of the proposed council provision to survive—in the Constitution. Pursuant to the clause the President “may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices.”<sup>82</sup>

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79. *See* 8 *id.*

80. 2 *id.* at 141.

81. 3 *id.* at 241 (Merrill Jensen ed., 1990).

82. U.S. CONST. art. II, § 2, cl. 1.

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

The Opinions Clause is the lone surviving part of a plan put forward by Gouverneur Morris and Charles Pinckney on August 20 to create a Council of the State. The original proposal called for the Council to consist of the Chief Justice of the Supreme Court and Secretaries for Domestic Affairs, Commerce and Finance, Foreign Affairs, War, Marine, and State. Each of the Secretaries was to be appointed by the President alone and to hold his office “during pleasure.” The plan further provided that the President “may require the written opinions of any one or more of the members: But he shall in all cases exercise his own judgment.”

Two days later the Committee of Detail returned the proposal with several changes. First, it expanded the roster of what it now called the President’s “Privy Council” to include the President of the Senate and the Speaker of the House. In addition, it dropped the provisions specifying the President’s appointment and removal authority of the Secretaries and instead provided that the Council would simply consist of “the principal Officer in the respective departments of foreign affairs, domestic affairs, War, Marine, and Finance, as such departments of office shall from time to time be established . . . .” Finally, the new version retained a slightly modified provision regarding opinions, stating that it would be the members’ duty “to advise [the President] in matters respecting the execution of his Office, which he shall think proper to lay before them: But their advice shall not conclude him, nor affect his responsibility for the measures which he shall adopt.” Despite this promising start, the Privy Council did not survive the Committee of Eleven, which scrapped the idea for the sole stated (but not necessarily only) reason that “it was judged that the Presidt. by persuading his Council—to concur in his wrong measures, would acquire their protection for them.” All that remained was the Opinions Clause.<sup>83</sup>

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

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

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

Had the inclusion of members of other branches been deemed a problem, it could have been remedied by simply subtracting those members from the council, rather than abandoning the council all together. It thus is not entirely plain, at first glance, what materially differs as between a council comprised largely of department heads whose role is to give non-binding opinions to the President, versus a constitutional provision entitling the President to demand opinions from Department Heads.

The change begins to make sense, however, when viewed in light of the accountability concerns cryptically noted by the framing Committee of Eleven, and hashed out at length in the ratification debates. The perceived problem with the council was its grouping of members into a secretive cabal that the President could use as a shield, persuading them to offer “opinions” that he pre-ordained. The founders feared this result despite the fact that the council’s advice formally would not bind the President. Under the Opinions Clause, in contrast, Department Heads would not combine into a secretive entity with the President. Instead, they would issue opinions in their capacities as Department Heads, separate and apart from the office of the President. As Akhil Amar observes, this structure was geared to ensure accountability by the Department Heads and the President, respectively. Department Heads would be accountable for their advice, the President for what he chose to do (or not to do) with the same. That the Department Heads’ opinions were to be written (as they would also have been in the first draft of the Council plan) would further protect accountability, making the “opinion process . . . plain and open” to the public and other branches.<sup>84</sup>

The founders thus rejected a unitary entity (unitary insofar as the proposed council members would not have been able to bind the President with their advice) that they feared would undermine accountability through secrecy and the blurring of council-member roles. In its place, they embraced a provision that retained relatively clear lines between bureaucratic expertise and presidential decision-making. This suggests again that the founders did not celebrate unity for its own sake, and that there is no clear, formalist unity directive that can be derived from the constitutional text via the founders’

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84. Akhil Reed Amar, *Some Opinions on the Opinions Clause*, 82 VA. L. REV. 647, 671 (1996) (citing 4 DEBATES IN THE SEVERAL STATES CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 108–10 (Jonathan Elliot ed., 2 ed., 1968) (statement of James Iredell)).

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

### *C. The Debate of 1789*

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

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

The Debate of 1789, which took place in the House of Representatives during the first Congress, centered on whether the bill creating a Department of Foreign Affairs should explicitly grant the President the power to remove the Secretary of Foreign Affairs.<sup>85</sup> This question took the form of three proposed amendments to the bill. First, after four days of debate, the Representatives voted 34 to 20 to retain a clause deeming the Secretary "removable from office by the President of the United States."<sup>86</sup> Second, after a short discussion on the day after the first vote, the Representatives voted 30 to 18 to add language further implying a presidential removal power. The new clause stated that the Department's chief clerk would have custody of all Department books and records "whenever the [Secretary] shall be removed from office by the President of the United States, or in any other case of vacancy."<sup>87</sup> Third, the Representatives voted later that same day, 31 to 19, to strike the words approved in their first vote by which they had explicitly granted a presidential removal power.<sup>88</sup>

There are two schools of thought as to whether the majority votes reflect a belief in a unitary executive. Supporters of the pro-unity interpretation—that the majority votes reflect the belief that the President has the constitutional prerogative to dismiss executive

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85. Prakash, *New Light on the Decision of 1789*, *supra* note 65, at 1023. See also 1 ANNALS OF CONG. 455–585, 590–591 (1789).

86. 1 ANNALS OF CONG. at 455.

87. *Id.* at 578–80.

88. *Id.* at 580, 585.

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

The anti-unity position is the stronger one for three reasons. First, let us assume for the sake of argument that a majority of the voting representatives clearly believed that the President has a constitutional right to dismiss officers at his pleasure. Even if this were the case, it tells us nothing more than that the issue was a highly contested one and that some in the founding era—including those Representatives in the 1789 majority—supported unity whereas others—including those Representatives in the 1789 minority—believed otherwise. The very fact of this division—again, assuming the best possible meaning of the votes for unitarians—demonstrates that the concept of unity was not unambiguously embedded in the Vesting and Take Care Clauses of the Constitution. That unity was a position argued by some founders is a very different thing from its being so plainly reflected in the text (via the text’s historical meaning) as to constitute a categorical mandate.

Second, the conditions surrounding the vote were not “best case” for unitarians. The Representatives who spoke in favor of a removal

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89. See, e.g., *Myers v. United States*, 272 U.S. 52, 114, 119 (1926); Prakash, *New Light on the Decision of 1789*, *supra* note 65, at 1026.

90. *Myers*, 272 U.S. at 112; Prakash, *New Light on the Decision of 1789*, *supra* note 65, at 1031–33, 1042.

91. *Myers*, 272 U.S. at 112–14; Prakash, *New Light on the Decision of 1789*, *supra* note 65, at 1031–33, 1042.

92. See Prakash, *New Light on the Decision of 1789*, *supra* note 65, at 1024–26, 1042–43 (summarizing arguments to this effect).

93. See *id.* (summarizing arguments to this effect).

power did not express a monolithic unitarian position. Rather, some Representatives deemed the removal power a constitutional prerogative of the President,<sup>94</sup> while others deemed it within Congress's discretion to bestow pursuant to the Necessary and Proper Clause.<sup>95</sup> Still others took no clear position on the removal power's constitutional basis.<sup>96</sup>

Third, as with the constitutional council debate, the 1789 Debate was too fact-specific to stand for a sweeping principle of unity throughout the executive branch. Most important in this regard was the alternative that the members of the majority rejected. The counter-proposal to dismissal with pleasure was not dismissal for cause or some other relatively moderate restriction on the President. Rather, Representatives in the minority predominantly argued that removal by the President should be permitted only with the consent of the Senate.<sup>97</sup> They argued both that this was good policy and that it could be inferred as a constitutional command from the Senate's "advise and consent" role in appointing executive officers.<sup>98</sup> The latter position, of course, was the same one taken by Alexander Hamilton in *Federalist No. 77*.<sup>99</sup> A small minority took a position even more extreme, insisting that executive officers could be removed only by impeachment.<sup>100</sup> That the majority in the 1789 Debate were focused on countering two very extreme restrictions on Presidential power—restrictions that even today are widely considered excessive and have been deemed so by the Supreme Court<sup>101</sup>—counsels against reading a broad unitarian principle into the majority's objections to the same. Indeed, several in the majority who spoke emphasized the functional intrusion on presidential power that a senatorial consent

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94. 1 ANNALS OF CONG., *supra* note 85, at 495–97, 578–79 (Madison); 464–65, 585 (Vining); 469, 527–28, 583 (Boudinot); 538–40 (Ames); 489 (Clymer); 505–06 (Benson).

95. *Id.* at 520–21, 583–84 (Sedgwick); 484–86, 583 (Lawrence); 524–25 (Lee); 584 (Tucker).

96. *Id.* at 479–81, 585 (Hartley); 532–33 (Scott); 534 (Goodhue); 560 (Baldwin); 562–63 (Sylvester).

97. See Prakash, *New Light on the Decision of 1789*, *supra* note 65, at 1036–38.

98. 1 ANNALS OF CONG., *supra* note 85, at 455–56, 513–515 (White); 473, 502–04, 535–36, 574–75 (Gerry); 477–79, 543 (Livermore); 486–89, 530–32, 554–55 (Jackson); 490–91, 519–20, 548–51 (Page); 491–92, 538 (Sherman); 493–94, 564–65, 568–69 (Stone).

99. See *supra* note 64 and accompanying text.

100. See Prakash, *New Light on the Decision of 1789*, *supra* note 65, at 1035–36.

101. *Morrison v. Olson*, 487 U.S. 654, 685–86 (1988) (distinguishing the good cause limitation that the Court upheld in *Morrison* from earlier provisions that the Court had struck down because Congress had impermissibly "reserve[d] for itself the power of removal of an [executive] officer.").

requirement would mark.<sup>102</sup> The Debate and its result thus could be deemed to reflect a functional, non-categorical analysis rather than an absolute, unitarian approach.

One additional fact-specific aspect of the Debate is worth noting. Specifically, that the Representatives might have been motivated partly by their views on the control that the President should have over the Secretary of Foreign Affairs in particular, as opposed to all executive officers. Indeed, James Madison—who voted with the majority regarding removal of the Foreign Affairs Secretary—proposed, very shortly after the Foreign Affairs matter was resolved, imposing some restrictions on the President’s ability to retain the Comptroller General.<sup>103</sup> Madison argued that the Comptroller General was differently situated than the Foreign Affairs Secretary, as the former’s role was not “purely . . . [e]xecutive.”<sup>104</sup> Madison eventually withdrew his proposal for reasons not reflected in the record.<sup>105</sup> This episode further highlights the difficulty of drawing broad unitarian conclusions from the Debate of 1789.

## 2. *The Role of Accountability in the Debate*

If the 1789 Debate supports a case-specific, functional analysis, it also offers guidance on how that analysis might go, and on why functional accountability concerns will often prove consistent with non-unitarian provisions. First, as with the presidential council debate, there was broad agreement on both sides of the Debate that the executive must be accountable to the public and the other branches. Second, the two sides differed on whether unity helps or hinders accountability. Much like the majority arguments in the council debate, members of the 1789 minority warned that unity would enable the President to surround himself with loyalists who

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102. See, e.g., 1 ANNALS OF CONG., *supra* note 85, at 461–62, 499 (Madison); 569 (Vining); 481 (Hartley); 485–86 (Lawrence); 506–07 (Benson); 533 (Scott); 557–58 (Baldwin). See also sources cited *infra* note 107 (to the effect that many in the 1789 Debate voiced concerns that the Senate—whose members were not, at the time, elected directly by the people—would be less politically responsive than the nationally elected President).

103. Madison proposed that each Comptroller General be limited by a term of years and that Senate consent be required before the Comptroller General could stay in office beyond that term. Madison’s proposal, however, would have accorded the President discretion to remove the Comptroller General before the end of the specific term. 1 ANNALS OF CONG., *supra* note 85, at 611.

104. *Id.*

105. *Id.* at 615. See also Prakash, *New Light on the Decision of 1789*, *supra* note 65, at 1071.

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

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

Those in the minority countered that unchecked removal power would enable the President to surround himself with loyal minions who could hide damaging information or otherwise enhance his power and shield him from accountability. For example, Representative Page argued:

[T]he more power you give [the President], the more his responsibility is lessened. By making the heads of all the departments dependent upon the President, you enable him to swallow up all the powers of Government; you increase his influence, and every one will be studious to please him alone.

. . . .

"By this grant of [unilateral removal] power you secure the President against impeachment; you fence him round with a set of dependent officers, through whom alone it is probable you could

106. 1 ANNALS OF CONG., *supra* note 85, at 462.

107. *Id.* at 462. *See also, e.g., id.* at 499 (Madison); 465 (Vining); 474, 477, 539–40 (Ames); 489 (Clymer); 522–23 (Sedgwick); 525 (Lee). Members of the majority also deemed the President intrinsically more responsible to the people than the Senate because of the respective modes by which each is elected. Given the national scope of the Electoral College through which the President is elected and re-elected, some echoed Representative Lawrence's statement that "The President is the representative of the people in a near and equal manner; he is the guardian of his country." *Id.* at 483. *See also, e.g., id.* at 581 (Hartley); 499 (Madison), 533 (Scott); 572 (Vining). In contrast, they emphasized that Senators at the time (prior to the 17<sup>th</sup> Amendment's passage in 1913) were elected not by the people, but by state legislatures, and that each state has two Senators regardless of population. *See, e.g., id.* at 483 (Lawrence), 533 (Scott), 572 (Vining). As James Madison asked rhetorically, "Shall we trust the Senate, responsible to individual Legislatures, rather than the person who is responsible to the whole community?" *Id.* at 499. The argument that Senators are not elected by the people of course is no longer applicable in light of the 17<sup>th</sup> Amendment. The argument that only the President is responsive to the nation as a whole is mirrored in modern unitarian accountability arguments. Those arguments, and refutations thereof, are discussed in some detail in *The Accountable Executive*, *supra* note 17.

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

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

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

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

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

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

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

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

110. *See supra* Introduction.

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

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

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

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

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

115. For example, in 1986, Alan Morrison criticized the level of control exercised by the Reagan Administration over agency rule-making decisions. Among other things, he explained that executive agencies could not issue proposed rule-makings or even perform underlying research without OIRA approval. Morrison, *supra* note 112, at 1064–69. On the other hand, Peter Strauss and Cass Sunstein, also writing in 1986, stressed that final decision-making power under the terms of Reagan's executive orders remained with the agency head. Peter L. Strauss & Cass R. Sunstein, *The Role of the President and the OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 185–86 (1986). They cautioned, however, that “the exercise of supervisory power raises the danger . . . perhaps realized in practice, of displacement of authority vested in the relevant agency head.” *Id.* at 186. On a similar note, Peter Strauss, writing in 2007, rejects suggestions that President Clinton championed a level of presidential control over agency rule-makings similar to that practiced by the second President Bush. Strauss, *Overseer, or “The Decider?”*, *supra* note 37, at 720–32. By way of example, Strauss cites President Clinton's signing statement for the Fiscal Year 2001 Appropriations Legislation. In the statement, Clinton expressed disappointment that the legislation restricted certain environmental projects and directed agencies to consider ways to implement the statute “that will have the least harmful effect on the environment.” *Id.* at 730 (internal citation omitted). Strauss explains that Clinton's statement remains on the “overseer,” rather than

While there may be some disagreement on the reach of presidential control claims from the Nixon through Clinton Administrations, the scope of such claims in the second Bush Administration are comparatively clear. Two prominent examples stem from President Bush's 2007 Executive Order on OIRA and agency rule-making.<sup>116</sup> First, EO 13422 requires that each agency's Regulatory Policy Officer (RPO)—a position established by President Clinton's EO 12866—be “a ‘presidential appointee’—that is, a person both appointed and removable by the President—whose identity would be regularly coordinated with the OMB.”<sup>117</sup> EO 13422 also removes earlier requirements that the RPO be appointed by, and report to, the Department Head.<sup>118</sup> Second, EO 13422 provides that, “[u]nless specifically authorized by the head of the agency, no rule-making shall commence . . . without the approval of the agency's Regulatory Policy Office.”<sup>119</sup> It thus makes approval by the agency's White House point person the default prerequisite to initiate rule-makings.

These aspects of EO 13422 manifest unitarian theory in two respects. First, because both the RPO and the Department Head (the latter in the context of executive agencies)<sup>120</sup> are removable by the President at will, they manifest one of the forms of control—service at the President's pleasure—demanded by unitarians for all executive officers. Second, given that the newly configured RPO essentially is a product of the OMB rather than the Department for appointment and reporting purposes, its default right to preclude rule-makings

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“decider” side of the line: “The presidential direction neither denies the law Congress has enacted, nor tells responsible officials precisely what they are to do; it gives them an impulse to administer within the possibilities that the enacted text permits, and accepts that these specific judgments are theirs to make.” *Id.*

116. This order, Executive Order 13,422 amended Executive Order 13,258 (2002). Executive Order 13,258 was itself an amended version of President Clinton's Executive Order 12,866 (1993).

117. Strauss, *Overseer, or “The Decider?”*, *supra* note 37, at 732–33.

118. *Id.*

119. Exec. Order No. 13,422, at § 4(b), 72 Fed. Reg. 2,703 (Jan. 18, 2007).

120. The term “executive agency” generally refers to an agency whose head serves at the President's pleasure. The heads of “independent agencies” typically can only be terminated for good cause. *See, e.g.*, Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 898–99, 984 (2008). Traditionally, executive orders regarding OMB oversight of rule-making have applied predominantly to executive agencies. *See, e.g., id.* at 918. Some uncertainty has been expressed, however, as to whether Executive Order 13,422 goes further in its reach. Strauss, *Overseer, or “The Decider?”*, *supra* note 37, at 736–37.

approaches the unitarian ideal that Presidents themselves be able to override agencies' policy determinations.

As a logical matter, and as exemplified by the EPA rule-making debacle, EO 13422's actual and potential impact mirrors the respects, summarized earlier, in which unity can undermine accountability:

(1) unitariness increases the ability of the President or his proxies to control rule-making outcomes, either by decreeing the outcomes or by influencing administrators' decisions; (2) by enhancing the President's formal capacity to influence administrators, unitariness also increases the ability of the President or his proxies to shape the record or other administrative actions on which a rule-making—or the decision to forego one—is based; (3) given the structural and historical tools at the President's disposal to keep secrets, he and his proxies are well equipped to misrepresent his influence on the administrative process; and (4) apart from his capacity to hide specific interactions with the administrative state, the President is well positioned to distance himself rhetorically from actions he influenced.<sup>121</sup>

The first three factors follow logically from EO 13422 on its face. They also are reflected in the EPA rule-making controversy. The fourth factor merits some further attention. As I explain in *The Accountable Executive*:

[A] President in a unitary regime remains at least as able as a President in a non-unitary setting to distance himself from unpopular actions of the administrative state. 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 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

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121. *The Accountable Executive*, *supra* note 17.

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

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

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

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

These concerns are bolstered by empirical research by Lisa Schultz Bressman and Michael P. Vandenbergh.<sup>123</sup> Their research focuses exclusively on interactions between the EPA and the OMB during the first Bush Administration and the Clinton Administration, 1989–2001.<sup>124</sup> It thus does not reflect the use of the OMB in the second Bush Administration. Yet in some respects the findings are more valuable for this temporal limitation. They can give us a sense of factors that tend to inhere in OMB interactions with agencies under conditions less aggressively unitarian than those in the second Bush Administration. To the extent that these factors pose accountability challenges, knowing of them can alert us to the need for accountability-enhancing protections, and to the dangers posed by measures such as EO 13422.

Based on their extensive interviews with top EPA officials across the two administrations, Bressman and Vandenberg conclude that:

Presidential control is a “they,” not an “it.” . . . EPA respondents did not merely confirm that both OIRA and other White House offices are involved in EPA rule-making. Rather, they indicated that OIRA is not the primary source of influence on many major rule-makings, as scholars typically assume. OIRA often takes a back seat to other White House offices when both are involved. Although OIRA exerts influence on many day-to-day issues, other White House offices often wield more influence on high-profile or high-stakes matters. EPA respondents also highlighted an ill-appreciated dynamic: White House offices form coalitions for or against the EPA. These coalitions frequently enlist OIRA to batter or shield the EPA rather than to avail themselves of the independent value of its regulatory review.

. . . [S]cholars may [also] have overestimated the regularity of presidential control. According to EPA respondents, OIRA review and other White House involvement are unsystematic. Furthermore, both appear to be triggered in many cases not just by the need for centralized oversight of particular regulatory matters but also by the interest of the particular officials involved.<sup>125</sup>

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123. Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47 (2006).

124. *Id.* at 49.

125. *Id.* 49–50.

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

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

They also noted a substantial lack of transparency in the OMB review process. They report:

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>129</sup>

As a practical matter, then, formal White House control of rule-making poses dangers akin to those that led the founders to reject a presidential council. Such control risks obscuring who made what decisions, what decision-makers knew when they made given decisions, technical facts against which decisions should be judged, etc. These potentialities by themselves do not render such control

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126. Cf. *Who’s the Boss?*, ABC Television, 1984–1992 (evoking this term in a different, albeit delightful context).

127. See generally, e.g., Mark Bowen, *Censoring Science* 3 (2008); H. Josef Herbert, *EPA Scientists Allege Political Interference*, ST. LOUIS POST-DISPATCH, April 24, 2008, at A3; *Interference at the EPA: Science and Politics at the U.S. Environmental Protection Agency*, a Report of the Union of Concerned Scientists (2008); *Atmosphere of Pressure: Political Interference in Climate Science*, a Report of the Union of Concerned Scientists and the Government Accountability Project (2007).

128. Bressman & Vandenberg, *supra* note 123, at 97.

129. *Id.* at 81.

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

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

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

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

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

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

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

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

Historically, the Justice Department has avoided partisan application of the preclearance requirement in large part because of the well-established, bottom-up, process applied to Section 5 decision-making. Under this process, the nonpolitical career staff of the Civil Rights Division is solely responsible for investigating and making recommendations on all Section 5 submissions, and the staff's analyses frame each preclearance determination in terms of the law of Section 5 and the facts pertinent to the specific submitted change. This has had the effect of steering the political

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131. *Id.* at 2343, 2348.

132. Joseph D. Rich, Mark Posner, & Robert Kengle, *The Voting Section*, in *THE EROSION OF RIGHTS: DECLINING CIVIL RIGHTS ENFORCEMENT UNDER THE BUSH ADMINISTRATION* 32 (William L. Taylor, et al. eds., 2007), available at [http://www.americanprogress.org/issues/2007/03/pdf/civil\\_rights\\_report.pdf](http://www.americanprogress.org/issues/2007/03/pdf/civil_rights_report.pdf) (Joseph Rich served in the Civil Rights Division from 1968–2005 and was Voting Section Chief from 1999–2005; Mark Posner served in the Civil Rights Division from 1980–2003 and was in the Voting Section from 1980–1995; Robert Kengle served in the Civil Rights Division Voting Section from 1984–2005, was special counsel and acting deputy chief from 1996–1999 and was deputy chief from 1999–2005).

133. *Id.* at 32. See also *id.* at 33–34.

staff to make appropriate Section 5 decisions based upon the law and the facts, and not based upon partisan interests.

. . . . In both Democratic and Republican administrations the political staff almost always has agreed with staff recommendations to interpose an objection . . . . In the few instances when staff recommendations to deny preclearance have been rejected by political appointees during past administrations, memoranda or written explanations of the reasons for such rejections were prepared by political decision-makers for career staff to provide the legal rationale for the decision and to make a complete record of the decision-making process to guide future Section 5 decisions. This longstanding deliberative process also has played an important role in ensuring that inappropriate political factors do not influence Section 5 decision-making.<sup>134</sup>

As this example illustrates, maintaining a strong role for agency non-politicals and politicals alike balances two important goals. On the one hand, agency politicals maintain the ability to oversee agency activities and to steer them to some degree for political reasons. At the same time, non-politicals help to keep politics from overtaking law and expertise. Dialogue, procedural regularity, and record-building between the two groups also facilitate external and internal accountability.

## 2. *The Unitary Executive and Career Employees*

The practice of unitary executive theory can impact the delicate balance between politicals and non-politicals in several ways. First, it can manifest itself in a presidential power to remove career employees—at any time and for any reason—who meet the unitarian criterion of one who exercises discretionary executive power. Precisely who that description encompasses is subject to case-by-case debate. But the practice of unity likely would entail the removal of civil service and other career protections currently held by many throughout the executive branch.<sup>135</sup> Second, it can manifest itself in a

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134. *Id.* at 38.

135. See, e.g., Christopher S. Yoo, Steven G. Calabresi & Anthony J. Colangelo, *The Unitary Executive in the Modern Era*, 90 IOWA L. REV. 601, 660 (2005) (arguing that early civil service laws were consistent with unity as they did not hinder the President's removal power and lamenting that modern civil service laws limit this power and thus are inconsistent with unity); Christopher S. Yoo, Steven G. Calabresi, & Laurence D. Nee, *The Unitary Executive During the Third Half-Century, 1889-1945*, 80 NOTRE DAME L.R. 1, 11–12, 22–23, 36–37, 108–09 (2004) (arguing that early civil service laws were consistent with unity because they “left the President’s removal power largely unfettered”); *id.* at 23 (referring approvingly

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

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

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

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

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

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

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

### 3. *Recent Events in the Justice Department*

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

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

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

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

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

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

Division.”<sup>141</sup> The CRD Report also found that Schlozman’s superiors in the Division were aware of his conduct and failed to stop it.<sup>142</sup> This Article does not detail the CRD Report further given the report’s release late in this Article’s editing process. However, many of the illegal practices described in the report are similar to those that occurred elsewhere in the Department of Justice around the same time and that are described in this Article’s next two sections.<sup>143</sup>

In addition to the CRD Report, other disclosures shed light on the pervasive influence of politics on the Division’s day-to-day work during the Bush Administration. One very striking example involves the Voting Rights Section and comes from the Voting Rights Report cited earlier.<sup>144</sup> It involves the preclearance practice described in the Voting Rights Report, a practice which the authors praised as long balancing politics, law, and expertise and creating accountability-enhancing records.<sup>145</sup> This encouraging picture contrasts sharply with the politicized process that the authors witnessed during the second Bush Administration. The authors explain that political’s rejections of non-political’s pre-clearance recommendations for the first time became routine in this administration.<sup>146</sup> What is more, “political staff did not prepare any . . . explanation [again, in a sharp break from past practice,] for their rejection of the staff recommendations.”<sup>147</sup>

Perhaps most significant from an accountability-based perspective, Section political’s forbid non-political’s from memorializing their views on pre-clearance requests in writing.

As reported in *The Washington Post* in December 2005, Voting Section leadership instituted a new rule requiring that staff members who review Section 5 voting submissions limit their written analysis to the facts surrounding the matter and *prohibited the career staff from making recommendations as to whether or*

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141. *Id.* at 64. The Report also finds that Schlozman gave false testimony to Congress regarding his personnel practices while at the Division. *Id.*

142. *Id.* The Report also explains structural changes in Division hiring practices—whereby political’s were given a greater role in hiring—that preceded Scholzman and that facilitated his wielding of influence. *Id.* at 11–13. Such changes are similar to the structural hiring changes described below for the Department’s Honors Program and Summer Law Intern Program. *See infra* text accompanying notes 151–152.

143. *See infra* Part III.B.3.b, c; *see also supra* note 142.

144. *See supra* note 132.

145. *See supra* notes 132–134.

146. Rich, et al., *supra* note 132, at 36–38.

147. *Id.* at 38.

*not the Department should impose an objection to the voting change.*<sup>148</sup>

This rule plainly “increases the ability of political appointees to make politically-motivated preclearance decisions without appearing to repudiate career staff directly.”<sup>149</sup> It epitomizes the use of top-down political decision-making to manipulate the very record—in this case of non-political, expert legal judgments—against which final policy decisions are made.

*b. Honors Program and Summer Hiring Practices  
Throughout the Department*

As the CRD Report reflects, hiring practices for non-politicals were politicized in the second Bush Administration. In addition to the CRD Report, the Department of Justice’s OIG and OPR released a report in June 2008 chronicling such practices in two of the Department’s most prestigious hiring programs: the Honors Program (for attorneys directly out of law school or a post-law school judicial clerkship) and the Summer Law Intern Program (SLIP) (hereinafter Honors/SLIP Report). The Honors/SLIP Report concludes that many of the practices broke laws prohibiting the Department from using political considerations in hiring career (non-political) attorneys.<sup>150</sup>

Prior to 2002, hiring decisions for both programs were made predominantly by non-politicals within each Division. A candidate seeking an Honors Program or SLIP position in the Civil Rights Division, for example, would have their application reviewed, be interviewed if selected for that stage, and have their final hiring decision made predominantly by non-politicals within the Division. In 2002, the Department communicated to all Divisions that politicals should be brought more prominently into selection processes for the Honors and SLIP programs. They also developed a screening committee comprised largely of politicals to review applications after first cut choices had been made by initial groups.<sup>151</sup>

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148. *Id.* (emphasis added).

149. *Id.*

150. *See generally* OFFICE OF THE INSPECTOR GEN. & OFFICE OF PROF’L RESPONSIBILITY, U.S. DEP’T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING IN THE DEPARTMENT OF JUSTICE HONORS PROGRAM AND SUMMER LAW INTERN PROGRAM (2008), available at <http://www.usdoj.gov/oig/special/s0806/final.pdf> [hereinafter HONORS/SLIP REPORT].

151. *Id.* at 4–5, 11.

While the composition of the Screening Committee changed from year to year, in general the [individual Divisions] did not know who served on the Screening Committee or what criteria it applied in reviewing candidates. In addition, the Screening Committee gave no reasons or explanations for its decision to deselect a candidate from the list of those to be interviewed.<sup>152</sup>

Despite these changes, there were only a small handful of complaints of politicized hiring outside of the Civil Rights Division prior to 2006.<sup>153</sup> The 2008 Honors/SLIP Report concluded that Screening Committee decisions prior to 2006 remained largely in the hands of career employees and generally were based on “relevant criteria, including grades, quality of law school, judicial clerkships, law review experience, and work experience, particularly work experience that related to the components’ areas of expertise.”<sup>154</sup> While the Report found statistical and some anecdotal indications that the Screening Committee considered political factors in its 2002 decisions,<sup>155</sup> it found no statistical or anecdotal evidence to this effect for 2003 through 2005.<sup>156</sup>

The Report concludes, however, that the Screening Committee’s role became deeply politicized in 2006. During 2006, the Screening Committee deselected an unusually large number of candidates (186 out of the 602 Honors Program candidates (31%) that had been selected for interviews by 11 Department Divisions and 1 U.S. Attorney’s Office).<sup>157</sup>

Many [Division] employees involved in the selection process told [the Report’s authors] they were shocked and upset at the large number of candidates the Screening Committee had deselected. They said the impressive qualifications of many of the deselected candidates, together with no explanation for their deselection, led to widespread speculation that the Screening Committee considered political or ideological affiliations in deselecting candidates.<sup>158</sup>

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152. *Id.* at 5.

153. *Id.* at 15, 19. With respect to the Civil Rights Division, the newly released CRD Report finds that Honors Program and SLIP hiring within parts of the Division was deeply politicized from roughly 2003–2005. CRD REPORT, *supra* note 140, at 28–32.

154. HONORS/SLIP REPORT, *supra* note 150, at 15.

155. *Id.* at 15, 18, 19, 22–34.

156. *Id.* at 34–37. Again, with the exception of the Civil Rights Division. *See supra* note 153.

157. HONORS/SLIP REPORT, *supra* note 150, at 38.

158. *Id.* at 39.

The Report confirms that the suspicions were warranted. Statistically, the Report estimates<sup>159</sup> that “candidates whose applications indicated liberal affiliations” were deselected at a higher rate (83 out of 150, or 55%) than candidates who had conservative affiliations (5 out of 28 percent, or 18%) or neutral affiliations (98 out of 424, or 23%). Out of the subset of candidates who met relatively high “academic criteria but whose applications indicated liberal affiliations,” 35 of 87, or 40% were deselected whereas 1 out of 17, or 6% of conservative candidates meeting the criteria were deselected, while 35 out of 275, or 13% of “neutral” candidates meeting the criteria were deselected. The statistical disparities were even greater for SLIP candidates.<sup>160</sup> Indeed, the high number of SLIP deselections and the intensive internet research done by Screening Committee member Esther McDonald to determine candidate ideological and political affiliations led to extensive, costly delays in program hiring.<sup>161</sup>

The qualitative evidence confirms the political and ideological discrimination indicated by statistics. While there is “virtually no written record of the Screening Committee members’ votes and views,”<sup>162</sup> the Report’s authors concluded from interviews that such discrimination accounted for many of the Screening Committee votes to deselect. The Committee was comprised of three people: committee chair Michael Elston, the Chief of Staff for the Deputy Attorney General; Assistant U.S. Attorney Daniel Fridman (on detail to the Deputy Attorney General’s office); and Esther McDonald, Counsel to the Associate Attorney General. “Elston and McDonald were political appointees, and Fridman was a career prosecutor.”<sup>163</sup> In order to deselect a candidate, two out of the three committee members had to agree to do so.<sup>164</sup> The Report’s authors found that McDonald engaged in extensive research—including internet

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159. As the Honors Program and SLIP Report notes, such statistics “are not precise,” as they are based on categorizing groups listed on candidates’ applications as “liberal,” “conservative,” or “neutral.” Additionally, the evidence shows that one Screening Committee member—Esther McDonald—“determined whether candidates had liberal affiliations based in part upon information she found when conducting Internet searches that was not reflected on the candidates’ applications.” The authors of the Report had access only to the candidates’ applications, and hence could not account for information discovered in McDonald’s internet searches. *Id.* at 41 n.29.

160. *Id.* at 55, 58.

161. *Id.* at 50–51, 83.

162. *Id.* at 68.

163. *Id.* at 37–38.

164. *Id.* at 72, 81.

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

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

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

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

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

166. *Id.* at 70–75, 92.

167. *Id.* at 84, 86, 93–94.

168. *Id.* at 93–96.

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

170. See *infra* notes 171–185.

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

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

Goodling’s screening techniques included politically directed “interview questions, Internet searches, employment forms, and reference checks.”<sup>174</sup> Among Goodling’s typical interview questions were:

Tell us about your political philosophy. There are different groups of conservatives, by way of example: Social Conservative, Fiscal Conservative, Law & Order Republican.

[W]hat is it about George W. Bush that makes you want to serve him?

Aside from the President, give us an example of someone currently or recently in public service who you admire.<sup>175</sup>

Goodling also asked some candidates, “Why are you a Republican?”<sup>176</sup>

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

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

Goodling also “admitted in her congressional testimony that she accessed www.tray.com and other websites to get information about political contributions made by candidates for temporary details, immigration judges, and other positions.”<sup>178</sup>

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172. *Id.* at 17.

173. *Id.* at 135–38.

174. *Id.* at 18.

175. *Id.*

176. *Id.*

177. *Id.* at 21–22.

178. *Id.* at 22.

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

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

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

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

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

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179. *Id.* at 37–40, 44–45, 47–60, 69, 101–06, 110–12.

180. *Id.* at 106–07.

181. *Id.* at 136.

182. *Id.* at 137. *See also id.* at 76–101.

183. *Id.* at 7.

184. *Id.*

185. *Id.* at 6–7.

though rescue and recovery efforts for the Titanic had been more successful than they were, enabling the boat to be salvaged and many more passengers to be saved. This relative success would hardly obviate the fact that something had gone seriously wrong that needed to be examined and corrected. Furthermore, there is still much of import that we do not know. Perhaps most importantly, major questions linger as to who within the White House and political positions within the Department knew what and when they knew it.

*i. How Could This Have Happened in the First Place?*

Regarding the length and pervasiveness of the now-condemned activities, among the striking details to emerge is that many within the Department were concerned about the activities and yet felt powerless to do much if anything about them. For example, EOUSA Director Michael Battle<sup>186</sup> recalls having been extremely upset that Goodling refused to approve the highly qualified counter-terrorism detailee discussed above.<sup>187</sup> Yet Battle did not appeal Goodling's decision because "he did not think it would be successful given that Goodling worked in the OAG."<sup>188</sup>

Others within the Department went along more actively with politicized hiring practices, claiming that it was the path of least resistance. For example, Bradley Scholzman—who himself was found to have violated federal law while in the Civil Rights Division<sup>189</sup>—requested permission of Monica Goodling to hire an Assistant U.S. Attorney while Scholzman was the interim U.S. Attorney for the Western District of Missouri. Scholzman suggested three candidates, describing each "in terms of their conservative political credentials."<sup>190</sup> Scholzman later explained this approach as follows:

I had heard rumors that Ms. Goodling considered political affiliation in approving hiring decisions for career positions. I also knew that, although the decision to authorize the hiring of AUSAs by interim U.S. Attorneys was technically vested in EOUSA, Ms. Goodling exercised great control in this area. Knowing this, and in order to maximize the chances of obtaining authority to hire an

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186. *Id.* at 6, 10.

187. *Id.* at 49.

188. *Id.*

189. *See supra* notes 141–142 and accompanying text.

190. GOODLING REPORT, *supra* note 169, at 31.

additional AUSA, I recall once noting the likely political leanings of several applicants in response to a query from EOUSA about the candidates being considered for the position.<sup>191</sup>

Additionally, some supervisors were deemed in the CRD Report, the Honors/SLIP Report, and the Goodling Report to have been insufficiently proactive in responding to problems and in some cases to have actively furthered them or covered them up.<sup>192</sup>

*ii. Who's the Boss?<sup>193</sup> Redux*

In terms of political accountability, the picture that continues to emerge from revelations about the Justice Department—much like that involving the EPA and the OMB—resembles the ominous portrait that some founders painted of a presidential council. Recall that council opponents warned that the council would shield the President from responsibility by creating uncertainty as to who did what. It would enable the President to “act improperly, [to] hide either his negligence, or inattention,” or to “roll upon [another] person the weight of his criminality.”<sup>194</sup> Similarly, in this case, it remains unclear whether the President or his Attorney General acted improperly by orchestrating or even tacitly encouraging the actions taken in the name of loyalty to their administration; whether either was merely negligent or inattentive and had little knowledge or control over these events; and whether either has sought to cover up White House involvement in the events, so as to “roll upon [another] . . . the weight” of their actions.

Consider what we do and do not know at this relatively late stage as to who did (and who knew) what and when. The Department has publicly concluded that several young political appointees, for the most part recent law school graduates and in one case a non-lawyer who graduated from college in 1997, committed improprieties. And yet then-Attorney General Alberto Gonzales—in whose office Kyle Sampson, Monica Goodling, and Jan Williams all worked in prominent positions—insists that he knew nothing of these events or

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191. *Id.* at 31–32. The recently released Civil Rights Division Report deems this piece of testimony by Schlozman misleading insofar as it implies that he did not consider career candidates' political leanings on other occasions. CRD REPORT, *supra* note 140, at 62–63.

192. CRD REPORT, *supra* note 140, at 45–52; GOODLING REPORT, *supra* note 1699, at 123–28, 132–33, 138; HONORS/SLIP REPORT, *supra* note 150, at 99.

193. *See supra* note 126 and accompanying text.

194. *See supra* note 78 and accompanying text.

related scandals such as the dismissal of several U.S. Attorneys.<sup>195</sup> President Bush too admits to no knowledge of or involvement in these events.<sup>196</sup> And the Bush White House claimed executive privilege and refused to let several high profile White House aides, including Karl Rove and Harriet Miers, testify on such matters.<sup>197</sup>

Much like the OMB, then, the many-tentacled White House and Department of Justice political offices can generate massive uncertainty and confusion as to who actually makes decisions or engages in actions legally attributable to the President. In some cases this may be intentional, in others inadvertent. In some cases it may reflect genuine lack of knowledge or involvement by the President, in others a mirage of presidential innocence. And, as with OMB involvement in rule-making, White House involvement can diminish—rather than enhance—political and legal accountability for agency hiring and other activities. Given the relative lack of procedural regularity and transparency in a system of White House control as opposed to a more bureaucratic and apolitical one, the President and his proxies are better equipped to interfere and to obscure such interference in the former system.

Finally, it is worth noting that the 2007 resignation of Attorney General Gonzales is not a sign that accountability ultimately prevailed. Both Gonzales and the President continue to deny knowledge of or involvement in the activities at issue. In accepting Gonzales' resignation, the President publicly lamented doing so and blamed "months of unfair treatment that has created a harmful distraction at the Justice Department."<sup>198</sup> Thus, while Gonzales' resignation is not without significance, it does not amount to, or substitute for, legal or political accountability. Indeed, as explained above, the Bush Administration continued, long after accepting Gonzales' resignation, to resist efforts by Congress to obtain information shedding light on who, beyond a handful of relatively

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195. See, e.g., Eric Lichtblau, *Report Faults Aides in Hiring at Justice Department*, N.Y. TIMES, July 29, 2008; Paul Gottschling & Dahlia Lithwick, *Who's Blaming Who*, SLATE, Mar. 27, 2007, <http://www.slate.com/id/2162775/>.

196. See, e.g., Sheryl Gay Stolberg, Neil A. Lewis, & Michael Luo, *Bush Criticizes How Dismissals of U.S. Attorneys Were Handled*, N.Y. TIMES, Mar. 15, 2007.

197. See, e.g., Lisa Mascaró, *House Renews Probe of U.S. Attorney Firings*, LAS VEGAS SUN, Jan. 7, 2009, available at <http://www.lasvegassun.com/news/2009/jan/07/house-renews-probe-us-attorney-firings/>.

198. President Bush, Press Conference, Aug. 27, 2007.

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

#### CONCLUSION

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

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

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

What text and history do reflect are pervasive fears of tyranny through the usurping of power by one person, body, or branch. Power

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

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