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SYMPOSIUM

**PRESIDENTIAL INFLUENCE OVER
ADMINISTRATIVE ACTION**

**SCIENTIFIC INTEGRITY: THE PERILS AND
PROMISE OF WHITE HOUSE ADMINISTRATION**

*Heidi Kitrosser**

In March 2009, President Barack Obama issued a memorandum instructing the Director of the White House Office of Science and Technology Policy (OSTP) to develop recommendations within 120 days “for Presidential action designed to guarantee scientific integrity throughout the executive branch.”¹ The President contrasted his approach with that of the previous administration. Speaking to the National Academy of Sciences in April 2009, he lamented that “we have watched as scientific integrity has been undermined and scientific research politicized in an effort to advance predetermined ideological agendas.”² His charge to OSTP, he said, is meant “to ensure that federal policies are based on the best and most unbiased scientific information . . . [and] that facts are driving scientific decisions—and not the other way around.”³ Yet the OSTP recommendations, which were due in July 2009, were not issued until December 2010. They amounted to a four-page document that commentators deemed vague and insufficiently directive to agencies.⁴ The Obama Administration was also sued under the Freedom of Information Act (FOIA) for failing to disclose documents pertaining to the reasons for delay.⁵ The Obama White House also claims, like its predecessors, a

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1. Memorandum on Scientific Integrity from the Administration of Barack H. Obama for the Heads of Executive Departments and Agencies (Mar. 9, 2009), <http://www.gpo.gov/fdsys/pkg/DCPD-200900137/pdf/DCPD-200900137.pdf> [hereinafter *Scientific Integrity Memo*].

2. President Barack Obama, Remarks at the National Academy of Sciences (Apr. 27, 2009).

3. *Id.*; see also President Barack Obama, Remarks on Signing an Executive Order Removing Barriers to Responsible Scientific Research Involving Human Stem Cells and a Memorandum on Scientific Integrity (Mar. 9, 2009), <http://www.gpo.gov/fdsys/pkg/DCPD-200900294/pdf/DCPD-200900294.pdf>.

4. See *infra* notes 85–87 and accompanying text.

5. See *infra* notes 88–92 and accompanying text.

constitutional right to review agency scientific testimony and reports before they are publicly disseminated.⁶ And scientists and open government advocates accuse the administration of failing to protect government employees who report problems in science-related agencies or programs.⁷

Citing the apparent discrepancies between the rhetoric and reality of scientific integrity in the Obama Administration, Jeff Ruch, the Executive Director of the group Public Employees for Environmental Responsibility (PEER), observed: "One of the central tensions in the Obama Administration is a rhetorical commitment to transparency and a fanatical devotion to message control. And the two don't go together."⁸ To varying degrees, this tension can be found in all modern presidencies. Like the character on *The Simpsons* who routinely surfaces in political debates to implore, "Think of the children!,"⁹ modern Presidents understand both the ease and the political benefit of applauding transparency as an abstract proposition. At the same time, they know that the public will hold them and their party responsible, for better or worse, for major national developments. And in this age of the "rhetorical presidency,"¹⁰ Presidents are expected not only to resolve, but to say all the right things about national problems. It thus is not surprising that modern Presidents champion transparency in the abstract while trying to shape public perceptions about national events by cloaking and manipulating information.

Conflicts over executive information control cut across substantive policy realms. Such disputes can arise in scenarios ranging from a White House claim of executive privilege for its social secretary,¹¹ to Justice Department motions to dismiss lawsuits against government contractors on the basis that litigation could reveal state secrets,¹² to presidential claims of a constitutional right to preclude agency officials from delivering information to Congress or the public before clearing it with the White House.¹³

This Article focuses on the Obama Administration's relationship to scientific information in the administration's first half (through early January 2011, when this Article was completed). Activities that mix politics and science—such as where a policy decision is justified partly by scientific conclusions or where scientists assess and report on the efficacy

6. See *infra* notes 95–96 and accompanying text.

7. See *infra* notes 105–11 and accompanying text.

8. Dan Froomkin, *Despite Obama's Lofty Words, Scientific Integrity Rules Are Lagging*, HUFFINGTON POST (July 9, 2010), http://www.huffingtonpost.com/2010/07/09/despite-obamas-lofty-word_n_641082.html (quoting Jeff Ruch).

9. See *Helen Lovejoy*, SIMPSON'S WIKI, http://simpsons.wikia.com/wiki/Helen_Lovejoy (identifying the character Helen Lovejoy as the regular speaker of this catchphrase).

10. See generally JEFFREY K. TULIS, *THE RHETORICAL PRESIDENCY* (1987).

11. See Michael D. Shear, *Government Openness is Tested by Salahi Case*, WASH. POST, Dec. 4, 2009, at C7.

12. See, e.g., Laura K. Donohue, *The Shadow of State Secrets*, 159 U. PA. L. REV. 77, 97–99, 150–55 (2010).

13. See *infra* notes 95–96 and accompanying text.

of government actions already taken—offer both opportunity and temptation for policymakers to shape scientific “facts” to support their desired outcomes. Such information control may entail keeping certain facts secret. It may also involve attempts to manipulate information that does get released.¹⁴ I use the term “information control” throughout this Article to denote both government secrecy and government efforts to manipulate information that the public sees or that select groups (for example, congressional committees) receive. I use the term “information integrity” as shorthand for the opposite of information control—that is, for a relatively transparent system that seeks to present factual information as truthfully as possible. Scientific integrity is a subset of information integrity. Processes embodying scientific integrity are designed to enable expert scientific findings to be presented without extra-scientific interference or distortion.

The first half of the Obama Administration casts the tension between abstract support for information integrity and the desire to control information in particularly sharp relief. Campaigning toward the end of the Bush Administration, which was frequently called “the most secretive administration in our history,”¹⁵ candidate Obama vowed to “run the most transparent administration in American history.”¹⁶ This promise remained a major theme of President Obama’s earliest days in office. On his first full day as President, he issued an executive order broadening public access to presidential records,¹⁷ a memorandum directing his Attorney General to oversee broader compliance with FOIA,¹⁸ and a memorandum “direct[ing] agencies to harness new technologies to make information available to the public and . . . top officials to draft a blueprint Open Government Directive.”¹⁹ On March 9, 2009, he issued his scientific integrity directive. These early actions and rhetoric appeared to reflect a sense that, at least for a moment in time, transparency and information integrity had some real political resonance—at minimum, that they excited and mobilized segments of the Democratic base.

14. For a detailed and insightful study of the many techniques through which scientific information can be distorted by the government and by private actors alike, see generally THOMAS O. MCGARITY & WENDY E. WAGNER, *BENDING SCIENCE: HOW SPECIAL INTERESTS CORRUPT PUBLIC HEALTH RESEARCH* (2008).

15. Ted Widmer, *Making War*, N.Y. TIMES BOOK REV., May 9, 2004, at 7 (reviewing BOB WOODWARD, *PLAN OF ATTACK* (2004)); see also, e.g., JOHN W. DEAN, *WORSE THAN WATERGATE: THE SECRET PRESIDENCY OF GEORGE W. BUSH* xi (2004); William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 POL. SCI. Q. 85, 108 (2005); Dorothy Samuels, Editorial, *Psst. President Bush Is Hard at Work Expanding Government Secrecy*, N.Y. TIMES, Nov. 1, 2004, at A24.

16. Justin Rood & Megan Chuchmach, *Money, Secrets Top DC Watchdog Worries in '09* (Jan. 2, 2009), <http://abcnews.go.com/Blotter/story?id=6519441> (internal quotation marks omitted); see also, e.g., *Obama at 100 Days – 21st Century Right-to-Know Agenda*, OMB WATCH (Apr. 2009), at 2–3, <http://www.ombwatch.org/files/obamaat100daysrtk.pdf>.

17. *Obama at 100 days*, *supra* note 16, at 7.

18. *Id.*

19. *Id.* at 3.

Analyzing a subset of these events in the Obama Administration's first half—specifically, those involving scientific integrity—sheds light on the politics of information integrity, including factors that create windows of opportunity for concrete action and change. Such analysis also illuminates the potential of White House administrative directives to enhance information integrity and government accountability. Scientific integrity in the Obama Administration also provides a study in the other side of the tension between information integrity and information control—that is, the gravitational pull of the latter. As suggested above, the Obama Administration has yet to live up to the promise of its March 9, 2009 directive and related statements. Considering how and why the administration has fallen short in this respect sheds light on a number of matters, including the pitfalls of White House administration, the use of constitutional theories of preclusive presidential powers to justify White House information control, and the tenuousness of transparency's political resonance.

Part I situates this Article within the broader history and literature of White House control of the administrative state and the impact of such control on accountability and transparency. Part II discusses ways in which the Obama Administration has fallen short, thus far, in protecting scientific integrity. Part III assesses some positive developments in the Obama Administration with respect to scientific integrity. Part IV considers lessons that might be drawn about the relationship between presidential administration and scientific integrity from the Obama Administration's first two years. It concludes that while presidential administration alone is insufficient and often counter-productive for fostering information integrity, statutory schemes can harness the positive potential of presidential administration while imposing checks necessary to curtail its dangers. Part IV also considers related constitutional and political lessons.

I. PRESIDENTIAL ADMINISTRATION AND ACCOUNTABILITY: SOME BACKGROUND

A. Developing the Modern Infrastructure of Presidential Administration

Forrest McDonald has observed that, “[f]rom the point of view of administration, the history of the presidency in the twentieth century has been the history of presidents’ attempts to gain control of the sprawling federal bureaucracy.”²⁰ Early twentieth century Presidents sought to wrest control of the administrative state from Congress, which had come to dominate administration by the latter half of the nineteenth century. A major focus of these presidential efforts was the budget.²¹ Prior to the passage of the Budget and Accounting Act of 1921,²² there was no such

20. FORREST McDONALD, *THE AMERICAN PRESIDENCY: AN INTELLECTUAL HISTORY* 329 (1994).

21. *Id.* at 329–31; see also PERI E. ARNOLD, *MAKING THE MANAGERIAL PRESIDENCY: COMPREHENSIVE REORGANIZATION PLANNING 1905–1996*, at 11, 19–21, 27–51 (2d ed. 1998).

22. Pub. L. No. 67-13, 42 Stat. 20 (1921).

thing as a centralized federal budget. Rather, a hodgepodge of statutory directives and informal practices dictated the terms through which the Treasury Department and individual agencies reported budgetary information to Congress, which in turn legislated expenditures through similarly disjointed processes. As President William Taft's Commission on Economy and Efficiency reported to Congress, no one in the administration, in Congress, or among the public or press could speak to the overall condition of the United States budget or to how different pieces of it complemented, duplicated, were inconsistent with, or otherwise related to one another.²³

In 1912, President Taft presented the Commission's findings to Congress, along with the Commission's recommendations for a centralized federal budgetary process in which the President would play a prominent role.²⁴ Under the proposed system, bureaucrats would report budgetary information and requests up the chain of command in the executive branch, ultimately reaching individual agency heads, the Treasury Secretary, and the President. Drawing from these reports, the Treasury Secretary would, under the President's oversight and direction, draw up a clear and detailed budget for congressional consideration. The Commission also urged the creation of a high-level office to assist the President in this process.²⁵ While Congress initially rejected these proposals as presidential overreaching, it largely adopted them several years later in response to wartime deficits. "The Budget and Accounting Act of 1921 provided that the President, assisted by a new Bureau of the Budget (placed in the Treasury Department but understood to have a direct connection to the President), would oversee and coordinate all agencies' budget requests."²⁶

The next major victory for White House administration occurred during Franklin Delano Roosevelt's Presidency. With the New Deal having expanded an already broad administrative state, FDR sought to redirect concerns over a "headless 'fourth branch'" toward support for greater consolidation of federal agencies under presidential control.²⁷ The Brownlow Commission, which FDR spearheaded, issued a report championing enhanced White House control and responsibility over the administrative state.²⁸ The report proposed, among other things, "six new assistants to be assigned at presidential discretion. It also recommended

23. *The Need for a National Budget*, 62d Cong. 1-8, 140 (1912) [hereinafter TAFT COMMISSION REPORT] (Message from President William Howard Taft transmitting the Report of Commission on Economy & Efficiency on the subject of the need for a national budget); ARNOLD, *supra* note 21, at 26-51.

24. TAFT COMMISSION REPORT, *supra* note 23, at 1-8.

25. *Id.* at 7-8, 141-48, 204-06, 217-23.

26. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2275 (2001); see also ARNOLD, *supra* note 21, at 53-54; THE PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT, *ADMINISTRATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES* 15-16 (1937) [hereinafter BROWNLOW COMMISSION REPORT].

27. McDONALD, *supra* note 20, at 332-33; see also BROWNLOW COMMISSION REPORT, *supra* note 26, at 2, 43, 47.

28. See BROWNLOW COMMISSION REPORT, *supra* note 26, at 1-3; ARNOLD, *supra* note 21, at 103-07, 116-17; McDONALD, *supra* note 20, at 332-34.

discretionary funds that would enable the president to acquire more help when needed.” The report also “proposed a major organizational addition to the presidency, the Executive Office, with the Bureau of the Budget as its centerpiece.”²⁹ The Brownlow Commission and FDR sought new legislation to implement these proposals. Their efforts, however, became caught in a political firestorm over fears of a dictatorial presidency. Such fears were compounded by FDR’s simultaneous push to pack the Supreme Court.³⁰ Nonetheless, Congress partly relented in 1939, passing a Reorganization Act that gave the President some of the new authority that he sought.³¹ The Act gave Roosevelt reorganization powers and authority to hire new staff. Roosevelt used the new authority to “create[] the Executive Office of the President” (EOP). He moved the Bureau of the Budget, along with other central planning offices, into the EOP. He followed these changes with an executive order “designat[ing] the formal relationships in the Executive Office, the White House Office with its new assistants, the Bureau of the Budget, and the remaining components of the new presidential establishment.”³²

With the beginnings of a White House administrative infrastructure in place, and with the public increasingly accepting—even demanding—of presidential control over federal programs, the seeds of the modern administrative presidency were planted.³³ The modern era, generally traced back to the Richard M. Nixon Administration, has been characterized by a large expansion of the EOP and increasingly aggressive efforts by Presidents to shape, curtail, or spur specific agency actions.³⁴ Symbolizing the modern approach, the Bureau of the Budget was renamed the Office of Management and Budget (OMB) during the Nixon Administration. The name change signaled the agency’s new role as a clearinghouse not only for budgetary decisions but for broader policy matters. Under President Nixon, the OMB was tasked with reviewing certain proposed agency rulemakings.³⁵ The practice was continued and built upon under Presidents Gerald Ford and Jimmy Carter. Executive Orders issued by Presidents Ronald Reagan, Bill Clinton, and George W. Bush substantially expanded the OMB’s review powers over agency rulemakings.³⁶

29. ARNOLD, *supra* note 21, at 104 (citing BROWNLOW COMMISSION REPORT, *supra* note 26, at 6–7).

30. ARNOLD, *supra* note 21, at 107–09; McDONALD, *supra* note 20, at 333.

31. Reorganization Act of 1939, Pub. L. No. 76-19, 53 Stat. 565 (1939).

32. ARNOLD, *supra* note 21, at 114.

33. See, e.g., ARNOLD, *supra* note 21, at 85–87; McDONALD, *supra* note 20, at 332–34; Kagan, *supra* note 26, at 2275.

34. See, e.g., Kagan, *supra* note 26, at 2275–82; Peter L. Strauss, *Overseer, or “The Decider”?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 701–02, 719–20 (2007).

35. See, e.g., McDONALD, *supra* note 20, at 338–39; Kagan, *supra* note 26, at 2275–76.

36. See, e.g., Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 824–30 (2003); Kagan, *supra* note 26, at 2275–82; Alan B. Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059, 1061–63 (1986); Strauss, *supra* note 34, at 701–02, 719–20.

B. Some Early Discussions of Presidential Administration, Accountability, and Transparency

As far back as the founding, concerns over transparency and accountability have been raised by all sides in debates over presidential control of administration.³⁷ For example, proponents of ratifying the Constitution boasted of its provision for a single President with no constitutionally annexed advisory council. Any wrongful actions by the President, they predicted, would be readily tracked and punished, as he would have no council behind which to hide.³⁸ Anti-federalists lamented, on the other hand, that a council-less President would choose other, less visible “minions and favourites” to direct him, making it more difficult to track his or their actions.³⁹ Anti-federalists also warned that the council-less President would himself suffer for want of “proper information and advice.”⁴⁰

Moving ahead to the 20th century, issues of transparency and accountability were central foci in two seminal works justifying presidential administration—the Taft and Brownlow Commission Reports.⁴¹ While both commissions were strongly presidentialist in orientation, their reports evince some appreciation for the complex relationship between presidential administration, transparency, and accountability. At minimum, each reflects an understanding of the political value in invoking transparency and checks and balances. Each report portrays the relationship between presidential administration and accountability as a positive one, explaining that the more control that the President wields over the administrative state, the more that Congress and the people will know who to blame or to credit for administrative actions. Yet neither report assumes that presidential control alone is sufficient to create real accountability. Rather, each champions internal and external checking mechanisms to support and supplement presidential control. Both reports deem such mechanisms necessary to ensure a flow of accurate information to, within, and from the executive branch. Without this information flow, neither the President, nor Congress, nor the people could make well supported judgments or hold each other meaningfully to account.

The Taft Commission Report championed a presidentially prepared federal budget as a means to enhance accountability. President Taft echoed the Report’s reasoning in his message transmitting it to Congress. He explained:

37. See, Heidi Kitrosser, *Accountability and Administrative Structure*, 45 WILLAMETTE L. REV. 607, 623–29, 632–34 (2009).

38. *Id.* at 623–26.

39. *Id.* at 624–26 (quoting 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 44 (John P. Kaminski & Gaspare J. Saladino eds., 1990)).

40. *Id.* at 625 (quoting 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 39, at 44).

41. For references to the reports’ seminal natures, see, e.g., ARNOLD, *supra* note 21, at 49–51 (describing significance of TAFT COMMISSION REPORT, *supra* note 23); *id.* at 115–17 (describing significance of BROWNLOW COMMISSION REPORT, *supra* note 26); McDONALD, *supra* note 20, at 331–34 (citing historical roles of both reports).

there is at present no provision for reporting revenues, expenditures, and estimates for appropriations in such manner that the Executive, before submitting estimates, and each Member of Congress, and the people, after estimates have been submitted, may know what has been done by the Government or what the Government proposes to do.⁴²

While the Taft Commission Report prescribed greater presidential control over appointments and administrative communications with Congress,⁴³ it also stressed the need to harness bureaucratic expertise to provide an accurate factual picture against which the President, Congress, and the public could make and judge decisions.⁴⁴ What is more, the Report emphasized that the budgetary decision-making chain—from bureaucratic analyses and recommendations to Presidential budget formation to legislative votes—should be transparent.⁴⁵ The Commission explained that “[o]ne of the most important features of [its] recommendation is that which requires that every plan to be executed be made an open book, to be read by the Congress, by officers of the administration, and by the public.”⁴⁶

The Brownlow Commission Report echoed and expanded on these themes. The Commission famously observed that “[t]he President needs help.”⁴⁷ It envisioned some of this help taking the form of measures to “facilitate the flow upward to the President of information upon which he is to base his decisions and the flow downward from the President of the decisions once taken for execution by the department or departments affected.”⁴⁸

The Commission also deemed the flow of information outside of the executive branch crucial. It urged:

Nothing should be done that would diminish the importance of the work of the congressional committees in conducting hearings and pursuing investigations. Time and time again in our history investigations conducted by congressional committees have illumined [sic] dark places in the Government and in the affairs of the Nation and have resulted in the correction of abuses that otherwise might have been undetected for years and years. It is with full realization of the necessity of continuing and preserving this important function of the Congress and its committees that we suggest the necessity for improving the machinery of holding the Executive Branch more effectively accountable to the Congress.⁴⁹

42. TAFT COMMISSION REPORT, *supra* note 23, at 1 (message from President Taft).

43. *Id.* at 19–22, 143–44, 147–48, 203–05.

44. *Id.* at 139–42, 219–20.

45. *Id.* at 214–23.

46. *Id.* at 221.

47. BROWNLOW COMMISSION REPORT, *supra* note 26, at 5.

48. *Id.* at 5.

49. *Id.* at 43.

Indeed, while the Commission supported the executive branch practice of centrally clearing agencies' legislative proposals,⁵⁰ it made plain its view that Congress must have access to truthful information from throughout the executive branch.⁵¹

The Brownlow Commission Report also criticized the structure of the Comptroller General's office because the office performed both accounting and auditing functions but was not clearly accountable to either the President or Congress. While the Commission deemed accounting an executive function that demands accountability to the President, it was equally emphatic in its view that auditors must be free from executive political controls to ensure the integrity of their work.⁵² The current system, said the Commission:

deprives the President of essential power needed to discharge his major executive responsibility. Equally important, it deprives the Congress of a really independent audit and review of the fiscal affairs of the Government by an official who has no voice in administrative determinations, which audit is necessary to hold the Administration accountable.⁵³

Relatedly, the Brownlow Commission stressed the importance of neutral competence throughout the executive branch. It argued, for example, that "[t]he merit system should be extended upward, outward, and downward to include all positions in the Executive Branch of the Government except those which are policy-determining in character."⁵⁴

*C. Presidential Administration, Accountability, and Transparency:
Modern Problems and Debates*

In recent years, the most prolific proponents of presidential administration have been unitary executive theorists, or "unitarians."⁵⁵ Unitarians argue that, as a matter of constitutional law, the President must control all discretionary executive activity in the United States.⁵⁶ Under the theory's strongest version, the President must be able not only to fire executive personnel at will but to directly supplant their decisions (with or without firing them) with his own decisions.⁵⁷ From this perspective, for

50. *Id.* at 19–20.

51. *Id.* at 19, 43–44.

52. *Id.* at 15, 20–21.

53. *Id.* at 21.

54. *Id.* at 7.

55. "Presidential administration" does not necessarily require the application of unitary executive theory. Indeed, now-Justice Elena Kagan championed "presidential administration" in an article of the same name without embracing unitarianism. *See* Kagan, *supra* note 26, at 2251, 2320, 2326. She explained that presidential administration often can be supported through statutory interpretation. *Id.* at 2326–31.

56. *See, e.g.,* Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1158, 1166 (1992).

57. *Id.* at 1166.

example, the President could “at any time substitute his judgment for that of the Federal Aviation Administration when the latter acts pursuant to its statutory charge to promulgate regulations and minimum safety standards.”⁵⁸

Unitarians typically rely in part on arguments from constitutional text, structure, and history.⁵⁹ Elsewhere, I have challenged the textual, structural, and historical arguments, and others have done so as well.⁶⁰ For present purposes, however, a second (though not unrelated)⁶¹ set of unitarian justifications are most directly relevant. That is, unitarians routinely argue that presidential control enhances government accountability.⁶² “The gist of the accountability argument is that the President is the only nationally elected figure in American politics. If he controls all law execution in the United States, then the national electorate has a clear object of blame or reward for such activity.”⁶³ Relative to unelected bureaucrats or the more parochial interests of congressional committee members, the President is both uniquely equipped to represent the wishes of the national electorate⁶⁴ and uniquely visible.⁶⁵

A number of scholars have criticized unitarian claims to accountability. For one thing, they deem the unitarian vision of accountability unduly simplistic. Unitarians equate accountability with the placing of thousands of administrative decisions—ranging from the high profile to the deeply technical and obscure—in the hands of a single person who is subject to reelection once. As critics point out, this vision of accountability is inconsistent with the far more complex accountability envisioned by the Constitution. The Constitution, say these critics, creates a web of

58. Heidi Kitrosser, *The Accountable Executive*, 93 MINN. L. REV. 1741, 1746 (2009) (using this example to illustrate unitary executive theory).

59. 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 56, at 1164–65.

60. Kitrosser, *supra* note 37, at 607, 618–34 (2009) (challenging unitarian textual, structural and historical arguments and citing challenges by other scholars).

61. Indeed, I have discussed at length elsewhere connections between the shortcomings of “formal” unitarian arguments and those of “functional” unitarian arguments. *Id.* at 611–12, 620–21.

62. See, e.g., Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 35–37, 45, 59, 65–66 (1995); Saikrishna Bangalore Prakash, Note, *Hail to the Chief Administrator, The Framers and the President's Administrative Powers*, 102 YALE L.J. 991, 998–99, 1012–15 (1993). Additionally, at least two scholars support unitary executive theory solely on accountability grounds, while disagreeing with unitarian arguments from text, structure, and history. Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 2–4, 85–86, 94, 98–99 (1994). And Elena Kagan, while not embracing unitary executive theory, touts the relative accountability of presidential administration to support her argument for a presumption favoring presidential administration in statutory interpretation. See Kagan, *supra* note 26, at 2331–39; see also *supra* note 55.

63. Kitrosser, *supra* note 58, at 1747 (and sources cited therein).

64. *Id.* at 1747–48 (and sources cited therein).

65. See Kagan, *supra* note 26, at 2337 (making this argument as a policy matter and to support her statutory interpretation argument, although Kagan does not embrace unitary executive theory as a constitutional matter); see also *supra* note 55.

accountability shared by multiple legislators representing multiple constituencies and by the President alike.⁶⁶ Furthermore, constitutional accountability mechanisms are not directed solely toward vindicating majority policy preferences (and certainly not toward doing so through the instrument of the presidency) but also toward guarding against abuse, incompetence, and majoritarian tyranny.⁶⁷ In the context of the administrative state, critics argue, constitutional accountability values demand not only multiple avenues for political accountability, but also intra-bureaucratic accountability mechanisms characterized by “complex chains of authority and expertise.”⁶⁸

In previous work, I built on these criticisms, explaining that presidential administration can often defeat accountability by facilitating information control. Presidential administration can foster information control in several ways. First, it can deepen the reach of politics into bureaucracy and hence into scientific research and other forms of fact-finding by subjecting those who do research to the risk of politically motivated dismissal or reprisal and by subjecting findings themselves to political interference.⁶⁹ In these ways, Presidents and political appointees can manipulate “the very factual picture against which the public, Congress, and the courts can judge [executive branch] decisions.”⁷⁰ Second, government researchers may be required to clear any public appearances or reports—such as radio or television discussions, press releases, or publicly issued studies—with agency public affairs officers who themselves are politically appointed or subject to politically motivated dismissals, and who are in place partly to ensure that any information conveyed is politically “on message.”⁷¹ Third, government scientists and other agency personnel routinely are required to clear congressional testimony, including testimony on scientific research, as well as certain other reports with the OMB.⁷² Fourth, the more deeply and

66. See Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1785 (1996) (cited in Kitrosser, *supra* note 58, at 1748–49); Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161, 197–209 (1995) (cited in Kitrosser, *supra* note 58, at 1749–50); see also Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 992–1007, 1017–20 (1997) (cited in Kitrosser, *supra* note 58, at 1749 n.36); Jerry L. Mashaw, *Structuring a “Dense Complexity”*: *Accountability and the Project of Administrative Law*, ISSUES IN LEGAL SCHOLARSHIP (Mar. 2005), at 12–15, 35–38, (cited in Kitrosser, *supra* note 58, at 1749 n.36).

67. See Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531, 552–59, 564–65 (1998) (cited in Kitrosser, *supra* note 58, at 1750); Peter M. Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 596, 613–14 (1989) (cited in Kitrosser, *supra* note 58, at 1750).

68. Kitrosser, *supra* note 58, at 1750 (citing Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2076–83, 2119–22, 2134–35 (2005)).

69. See, e.g., Kitrosser, *supra* note 37, at 607–10, 640, 643–44, 646–47; see also Kitrosser, *supra* note 58, at 1765–74.

70. Kitrosser, *supra* note 58, at 1769.

71. See Kitrosser, *supra* note 37, at 640 & n.127; Kitrosser, *supra* note 58, at 1773–74.

72. See Kitrosser, *supra* note 58, at 1772; see also Memorandum from Peter R. Orszag, Director, Office of Management and Budget (OMB), to the Heads of Departments and

ubiquitously that the OMB's influence and that of high-level political appointees reach into the day-to-day work of agencies—including scientific research—the more difficult it can be for Congress, courts, or the public to discern the nature of that influence. This blurring of the lines of responsibility is due partly to the practical availability of executive privilege claims to high-level political officials.⁷³ Such blurring also stems from the fact that multiple political actors—including those from the OMB and from other high-level political offices—can be involved in any given effort to influence agency activity.⁷⁴ Indeed, it often is unclear whether the President himself has any knowledge of alleged high-level political interference in agency activities. Also frequently contested is whether any presidential ignorance is incidental or is scrupulously maintained to ensure plausible deniability.⁷⁵

II. SCIENTIFIC INTEGRITY IN THE BUSH ADMINISTRATION AND IN THE FIRST HALF OF THE OBAMA ADMINISTRATION: HOW PRESIDENTIAL ADMINISTRATION CAN FOSTER INFORMATION CONTROL

Given the degree and blatancy of its attempts to control scientific information, the Bush Administration offered some textbook examples of political interference in science. For instance:

[In] a now infamous period in the middle of the Bush administration. . . . climate change reports and press releases routinely were edited—generally by nonscientists, and in one case by a twenty-four-year-old political appointee who lacked a college degree—to downplay scientists' conclusions on human-made global warming. Also in this period, scientists for the first time since NASA's founding in 1958 were required to pre-clear media appearances with NASA's public affairs office.⁷⁶

As these and other incidents became publicly known, scientists, open government advocates, and other commentators expressed great concern over integrity in government science.⁷⁷ Promises to restore information

Agencies, M-09-09 (Jan. 27, 2009), http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_fy2009/m09-09.pdf (informing department and agency heads of the "Executive branch's formal legislative coordination and clearance process" detailed in OMB Circular No. A-19; OMB Circular No. A-19 (1979), available at http://www.whitehouse.gov/omb/circulars_a019/) (detailing process by which agencies must submit testimony and reports to the OMB for "coordination and clearance").

73. See Kitrosser, *supra* note 37, at 609, 654–55; Kitrosser, *supra* note 58, at 1763–64, 1766–69.

74. See Kitrosser, *supra* note 37, at 638–40, 655; Kitrosser, *supra* note 58, at 1765.

75. See Kitrosser, *supra* note 37, at 638, 654–56; Kitrosser, *supra* note 58, at 1763–69.

76. Kitrosser, *supra* note 58, at 1773 (citing MARK BOWEN, CENSORING SCIENCE: INSIDE THE POLITICAL ATTACK ON DR. JAMES HANSEN AND THE TRUTH OF GLOBAL WARMING 15–17, 34, 36, 49–50, 56, 67–68, 81, 93–94, 116–17, 119, 123–28, 136, 140–41 (2009)).

77. See, e.g., *infra* notes 118–21 and accompanying text. See generally TIMOTHY DONAGHY ET AL., ATMOSPHERE OF PRESSURE: POLITICAL INTERFERENCE IN FEDERAL CLIMATE SCIENCE (2007); THE SCIENTIFIC INTEGRITY PROGRAM OF THE UNION OF CONCERNED SCIENTISTS, INTERFERENCE AT THE EPA: SCIENCE AND POLITICS AT THE U.S.

integrity, including scientific integrity, were significant themes in the presidential campaign and early presidency of Barack Obama.⁷⁸

The backlash against scientific information control in the Bush Administration is a politically important phenomenon. In Part III, I provide more detail on manifestations of that backlash in the Obama campaign and administration, and in Part IV I elaborate on what we may learn from the backlash and its manifestations. It is equally important, however, to assess and to learn from respects in which the Obama Administration's actions thus far have fallen short of its rhetoric and have even helped to further entrench information control. The remainder of Part II provides examples of such shortcomings in the Obama Administration's first half, and Part IV draws lessons from the same.

A. Scientific Integrity Directive

As noted in the Introduction, President Obama gave a much ballyhooed directive to the OSTP in March 2009 to develop recommendations by July 9, 2009 "for Presidential action designed to guarantee scientific integrity throughout the executive branch."⁷⁹ Yet the recommendations were not issued until December 17, 2010, more than quintupling the time-frame outlined by the President. While a long delay of any initiative invites criticism, several features of this delay and of the December 17 recommendations suggest problems specific to information integrity, and scientific integrity in particular, in the executive branch.

First, the few vague explanations for the enormous delay that have been offered as of early January 2011 suggest that much of the hold-up occurred in the OMB. While OSTP Director John Holdren has provided little explanation for the delay, he did note in a June 2010 blog post that OSTP and OMB had received draft recommendations from "an interagency panel with representatives from all of the major science offices and agencies," and that the two offices had "over the intervening months . . . been honing a final set of recommendations."⁸⁰ Similarly, the bits of information available as of January 2011 from a heavily redacted set of inter-agency correspondence disclosed pursuant to a FOIA request suggest that OMB was a major bottleneck.⁸¹ While virtually nothing has been disclosed as of

ENVIRONMENTAL PROTECTION AGENCY (2008), available at http://www.ucsusa.org/assets/documents/scientific_integrity/interference-at-the-epa.pdf.

78. See *infra* notes 118–21 and accompanying text.

79. Scientific Integrity Memo, *supra* note 1; see also Complaint at 1–2, *PEER v. OSTP*, (D.D.C. Oct. 19, 2010) (No. 110-cv-01762) available at http://peer.org/docs/dc/10_19_10_OSTP_FOIA_Complaint_Final.pdf.

80. John Holdren, *Ask Dr. H: "Where Are We on Scientific Integrity?"*, OSTP BLOG (June 18, 2010, 8:21 PM), <http://www.whitehouse.gov/blog/2010/06/18/ask-dr-h-where-are-we-scientific-integrity>.

81. White House Office of Sci. and Tech., *Talking Points*, 2010 doc set at PEERvOSTP000146-47, available at http://www.peer.org/docs/doc/12_22_10_2010_OSTP_docs.pdf (document dated July 9, 2010, reporting agreement between OSTP and OMB "on penultimate language"); *id.* at PEERvOSTP000151, 156 (documents dated July 19, 2010, referencing upcoming meeting between Holdren and OMB Director Peter Orszag); White House Office of Sci. and Tech., *Talking Points*, 2009 doc set at

yet regarding the substance of OMB's concerns, it seems intuitive that OMB would have been concerned over the prospect of losing some of its longstanding power to clear agencies' scientific testimony and certain scientific reports for dissemination.⁸² Indeed, the December 2010 recommendations do "not challenge the long-standing practice of OMB review of testimony, nor [do they] question OMB's role in reviewing agency scientific findings, regulations, and information collections—activities that allow OMB to inject political considerations into scientific and technical matters."⁸³ What is more, the recommendations state that they are not intended to affect the OMB when the latter performs functions "relating to budgetary, administrative, or legislative proposals."⁸⁴

Second, while the December recommendations have some merit, as discussed in Part III, for the most part they are short and relatively vague statements of principle on which individual agencies are to base their own, presumably more detailed guidelines.⁸⁵ This fact, too, lends credence to the theory that the four page document was delayed due not to wrangling over nuances of language or other fine points, but to reluctance by political appointees to relinquish control over information. Indeed, the fact that the

PEERvOSTP000065, 67, available at http://www.peer.org/docs/doc/12_22_10_2009_OSTP_docs.pdf (document dated June 29, 2009, stating that "OSTP staff are working closely with OMB to revise the proposed recommendations to the President"); *id.* at PEERvOSTP000018-20 (document dated June 29, 2009, explaining that "OSTP and OMB continue to negotiate a handful of remaining fine points"); *id.* at PEERvOSTP000031 (document dated July 10, 2009, stating "Latest draft of Holdren response to the memorandum was sent to OMB for review on July 9th"). See also News Release, PEER, Science Transparency Policy Swathed in Secrecy (Dec. 22, 2010), available at http://www.peer.org/news/news_id.php?row_id=1438 (describing thin document disclosure from OSTP and apparent hold-ups in discussions between OSTP and OMB); Dan Froomkin, *New Obama Scientific Integrity Memo is Late and Vague*, HUFFINGTON POST, Jan. 3, 2011, http://www.huffingtonpost.com/2010/12/17/new-obama-scientific-inte_n_798483.html (updating a posting first dated December 17, 2010, Froomkin writes of the disclosed documents, "[t]he vast majority of the 155 pages were blacked out, but they indicated that the guidance had been derailed by the [OMB]").

82. See *supra* note 72 and accompanying text (referencing that power and some of its sources).

83. Press Release, OMB Watch, OMB Watch Sees White House Science Memo as a Step Forward, (Dec. 17, 2010), available at <http://www.ombwatch.org/node/11423>; see also Memorandum on Scientific Integrity from John P. Holdren for the Heads of Executive Departments and Agencies (Dec. 17, 2010), at pt. V [hereinafter John Holdren Scientific Integrity Memo] available at <http://www.whitehouse.gov/sites/default/files/microsites/ostp/scientific-integrity-memo-12172010.pdf>.

84. John Holdren Scientific Integrity Memo, *supra* note 83, at pt. V(ii).

85. See, e.g., Kenneth Chang, *White House Issues Long-Delayed Science Guidelines*, N.Y. TIMES, Dec. 18, 2010, at A13 (quoting environmental studies Professor Roger A. Pielke, Jr. to the effect that "[t]he guidelines are substantively quite thin" and that because they are merely "a starting line for agencies to consider these issues, what is surprising is how long it took to get [them] out"); News Release, Public Employees for Environmental Responsibility, New Obama Scientific Integrity Guidance: Timid, Torn, and Tardy (Dec. 20, 2010), available at http://www.peer.org/news/news_id.php?row_id=1437 (calling document "vague and contradictory" and quoting PEER executive director Jeff Ruch as saying, "[t]his guidance was almost two years in the making but it reads like it was finalized at the last minute").

memorandum leaves “enormous discretion” to all affected agencies⁸⁶ suggests that the OMB was not alone in fearing loss of information control. PEER offers some examples of the discretion with which OSTP leaves agencies. It observes:

Despite its lengthy gestation, the memo sidesteps several critical topics, including:

Whether alterations of scientific and technical papers and the reasons for those changes will be part of a public record or whether these rewrites will remain secret;

Whether non-scientist senior managers may alter scientific documents for non-technical reasons. The memo only forbids alterations by “political officials” and “public affairs officers.” Thus, for example, alterations of Arctic offshore drilling reviews by non-scientist managers as documented in an April 2010 Government Accountability Office report may not be prohibited; and

The memo once mentions adoption of “appropriate whistleblower protections” but does not say what is “appropriate” or even what specialists will be allowed to blow the whistle. It concludes by stipulating that nothing in the memo created any “substantive or procedural” right against a federal agency or officer, suggesting any new protections may only be rhetorical.⁸⁷

Finally, as of January 2011, the administration has hardly been forthcoming about the reasoning and dialogue behind the recommendations or their delay. PEER filed a FOIA request with OSTP on August 11, 2010, seeking “all comments, communications and recommendations developed between OSTP and executive departments and agencies, related to the proposed policies and any explanations of OSTP’s delay in publishing these policies in accordance with the President’s timeline.”⁸⁸ On October 19, 2010, PEER filed suit under FOIA in federal district court for the same information.⁸⁹ On December 22, 2010, OSTP disclosed 155 pages of documents, most of which are blacked out.⁹⁰ According to PEER, “all of the meeting notes, progress reports and even congressional testimony were

86. Press Release, Union of Concerned Scientists, Scientific Integrity Directive “Articulates a Broad Vision for Defending Science from Political Interference,” (Dec. 17, 2010), available at http://www.ucsusa.org/news/press_release/scientific-integrity-directive-0484.html (quoting UCS’ Dr. Francesco Grifo as deeming the recommendations a “promising blueprint” but noting that “[a]t the same time, I’m worried that the directive leaves an enormous amount of discretion to the agencies”); see also, e.g., Froomkin, *supra* note 81 (noting concerns of scientists and advocates over discretion left to agencies).

87. Press Release, PEER, *supra* note 85.

88. Complaint, *supra* note 79 at 1–2. see also *id.* at 5.

89. *Id.* at 1–3, 5–6, 16–23; see also Press Release, PEER, Lawsuit to Expose Cause of Scientific Integrity Rules Holdup, (Oct. 19, 2010), available at http://www.peer.org/news/news_id.php?row_id=1414.

90. See *supra* note 81 (citing to PEER and Dan Froomkin’s descriptions of the disclosed documents and to some of the documents themselves).

heavily redacted.”⁹¹ PEER wrote on December 22, 2010 that it continued to seek information, including: “What were the thorny issues that dragged out and diluted the OSTP process; Which agencies voiced what specific objections and concerns; and How did OMB affect the drafting of guidance and what role will it continue to play”?⁹²

B. Administration Practices and Legal Claims

Perhaps more telling than the saga of the scientific integrity guidelines are the practices in which the administration has engaged and the legal claims that it has made over the past two years. Examples demonstrate that the Obama Administration, like past administrations, is not immune to the pull to control scientific information, or to leave open avenues and legal justifications for so doing. To be clear, these examples are not comprehensive, and they are not meant to paint a complete picture of the Obama Administration’s relationship to scientific integrity. They are meant simply to illustrate that presidential administration can undermine scientific integrity and some key means by which it can do so. Additionally, they demonstrate that threats to scientific integrity—while varying in manifestation and degree—cut across administrations and parties. Such continuities call to mind James Madison’s admonition that humans are neither angels nor governed by angels.⁹³ Or, more to the point, as Dr. Francesca Grifo of the Union of Concerned Scientists cautioned shortly after President Obama’s inauguration, in the face of high expectations from scientists around the country: “Just because we have well-meaning smart people in there now doesn’t mean [that events like those in the Bush Administration] can’t happen again.”⁹⁴

With respect to its legal arguments, the Obama Administration has echoed previous administrations in taking the view that the President has an exclusive constitutional prerogative to control communications between executive branch employees and Congress. In a signing statement, President Obama flagged the narrow construction that he would accord a statutory provision that “prohibit[s] the use of appropriations to pay the salary of any Federal officer or employee who interferes with or prohibits certain communications between Federal employees and Members of Congress.”⁹⁵ The President indicated that he would “not interpret this provision to detract from [his] authority to direct the heads of executive departments to supervise, control, and correct employees’ communications with the Congress in cases where such communications would be unlawful or would reveal information that is properly privileged or otherwise

91. Press Release, PEER, *supra* note 81.

92. *Id.*

93. THE FEDERALIST NO. 51, at 239 (James Madison) (Hallowell et al. eds., 1857).

94. Gardiner Harris & William J. Broad, *Scientists Welcome Administration’s Words but Must Wait for Action*, N.Y. TIMES, Jan. 22, 2009, at A23.

95. Presidential Statement on Signing the Omnibus Appropriations Act (Mar. 11, 2009), available at <http://www.gpo.gov/fdsys/pkg/DCPD-200900145/pdf/DCPD-200900145.pdf>.

confidential.”⁹⁶ As it relates to scientific integrity, this view would protect the President’s ability to continue to direct the OMB in its longstanding role vetting agency testimony, including that of a scientific nature. This position similarly would protect the President’s ability to have the vetting function performed by individual agency heads.

In practice, the Obama Administration has indeed followed the lead of past administrations in requiring testimony and certain other reports to be cleared by OMB.⁹⁷ In one recent, high profile case involving the BP oil spill, OMB’s vetting process might have compromised scientific integrity. In an October 2010 working paper on the spill, the staff of the National Commission investigating the incident (the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling) addressed the government’s early estimates of the oil flow rate, which were later found to have been inaccurately low.⁹⁸ The Commission staff was informed that, shortly after the spill, “NOAA [the National Oceanic and Atmospheric Administration] wanted to make public some of its long-term, worst-case discharge models for the . . . spill,” but OMB denied its request to do so.⁹⁹ The White House, OMB, and NOAA have denied any improper interference by OMB.¹⁰⁰ Furthermore, the final Commission Report, released on January 11, 2011, neither repeats nor retracts the claim about OMB interference. The final report simply does not mention it. The final report does elaborate on the unrealistically low nature of the government’s original public estimates. The report recounts a statement at a press conference by Admiral Mary Landry on April 28 that “NOAA experts believe that the output could be *as much as* 5000 barrels [per day].”¹⁰¹ The report notes that “5,000 barrels per day was a back-of-the-envelope estimate,” but that it “remained the official government estimate of the spill size” for the next four weeks.¹⁰² By the time that the final report was issued, the government’s estimate had climbed to “about 60,000 barrels per day.”¹⁰³

Regardless of what transpired at OMB in late April regarding flow-rate estimates, the controversy reminds us of the risk that scientific estimates or other analysis can become compromised in the process of political pre-clearance. Furthermore, the lack of clarity as to what happened between

96. *Id.*

97. *See supra* note 72 (citing to current clearance directives).

98. *The Amount and Fate of the Oil* 1–8, 14–16 (Nat’l Comm’n on the BP Deepwater Horizon Oil Spill and Offshore Drilling, Working Paper No. 3, 2010).

99. *Id.* at 10.

100. *See, e.g., Ben Gemen, OMB Denies Report It May Have Suppressed Data During BP Spill*, E² WIRE, THE HILL’S ENERGY & ENVIRONMENTAL BLOG (Oct. 6, 2010, 3:46 PM), <http://thehill.com/blogs/e2-wire/677-e2-wire/123041-white-house-denies-it-suppressed-oil-flow-data>.

101. FINAL COMM’N REPORT, NAT’L COMM’N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, DEEPWATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE OIL DRILLING 135 (2010), *available at* https://s3.amazonaws.com/pdf_final/DEEPWATER_ReporttothePresident_FINAL.pdf.

102. *Id.*

103. *Id.* at 146; *see also id.* at 167 (breaking down the numbers a bit further).

OMB and NOAA reflects the broader difficulty of determining who did what and when in interactions between the OMB and other agencies.¹⁰⁴

Political clearance requirements and constitutional arguments defending them also have serious implications for the protection of scientific and other whistleblowers. These implications are illuminated by the testimony of Rajesh De, Deputy Assistant Attorney General in the Justice Department's Office of Legal Policy, speaking on behalf of the Obama Administration regarding proposed new whistleblower protections. While expressing strong general support for protecting whistleblowers, De objected to provisions that would enable whistleblowers to share classified or privileged information with Congress without executive branch approval. Such provisions, De said, "would unconstitutionally restrict the ability of the President to protect from disclosure information that would harm national security" or undermine executive privilege.¹⁰⁵ De also expressed concern over provisions that would enable federal juries to order the reinstatement of individuals who had lost their government jobs after their security clearances were stripped for retaliatory reasons. "Providing a judicial remedy" in such cases, said De, "even one that does not mandate restoration of the [security] clearance, is inconsistent with the traditional deference afforded Executive Branch decision-making in this area."¹⁰⁶

104. Another post-oil spill incident also reflects the risks to scientific accuracy when statements get filtered through White House offices. On August 4, 2010, Carol Browner, director of the White House Office of Energy and Climate Change Policy (OECCP), told major news outlets that "'the vast majority' . . . of the oil 'is gone' or 'appears to be gone.'" *Id.* Previously, however, NOAA had privately expressed disagreement with this assessment in an e-mail to Browner's deputy. *Id.* at 168. Later on August 4th, Browner, speaking at a press briefing, said that the report that she had cited on the oil's fate had been "subjected to a scientific protocol, which means you peer review, peer review, and peer review." *Id.* at 168. Earlier in the same briefing, NOAA's administrator had also deemed the report peer reviewed. *Id.* Outside scientists quickly criticized the report as premature, "especially because of the uncertain rate of [the oil's] biodegradation." *Id.* It also soon came to light, and NOAA acknowledged, that the report had not yet been peer reviewed at the time of Browner's announcements. Indeed, a final, peer reviewed report was not available until November 23, 2010. *Id.* at 168–69. Browner's mistake, of course, was remedied quickly through the responses of outside scientists. Yet in less high profile cases, White House mistakes in presenting scientific information may not be caught nearly so readily. Furthermore, Browner's error highlights the political motivations that can push White House officials to place the most positive (or otherwise politically desirable) public spin on a scientific matter. Such error may be entirely unintentional. Regardless, such a mistake highlights the importance of transparency so that external forces may catch errors, as happened here, as well as internal procedures facilitating review and push-back by government scientists. Indeed, at the same August 4 afternoon press briefing in which Browner appeared, NOAA Director Jane Lubchenco, a marine scientist and environmental ecologist, also appeared and expressed reservations about Browner's optimistic numbers. *The Amount and Fate of the Oil*, *supra* note 98, at 21. A system of rigid, top-down clearance for press appearances might well have prevented Lubchenco's statement.

105. *The Whistleblower Protection Enhancement Act of 2009: Hearing on H.R. 1507 Before the H. Comm. on Oversight and Gov. Reform*, 111th Cong. 66 (2009) (statement of Rajesh De, Deputy Assistant Attorney Gen., Office of Legal Policy, Dep't of Justice); *The Whistleblower Protection Enhancement Act of 2009, Hearing on S.372 Before the Oversight Subcomm. of the Comm. on Homeland Security*, 111th Cong. 41, (2009) (Statement of Rajesh De, Deputy Assistant Attorney Gen., Office of Legal Policy, Dep't of Justice).

106. Hearing on S. 372 at 39; Hearing on H.R. 1507 at 68.

Additionally, whistleblower rights groups have expressed alarm over the Obama Administration's aggressive approach to whistleblower cases, including those involving science agencies or scientific information. For example, Justice Department lawyers have continued to defend the Bush Administration's firing of former U.S. Park Police Chief Teresa Chambers. The U.S. Park Police is situated within the Interior Department and Chambers is represented in her legal defense by PEER.¹⁰⁷ Chambers was fired at least partly for conveying safety and budgetary concerns to the Washington Post without authorization.¹⁰⁸ Justice Department lawyers argued in their 2009 brief to the U.S. Court of Appeals for the Federal Circuit that the Bush Administration properly charged Chambers for, among other things, "disclos[ing] budget information in violation of a directive of the [OMB]" and "disclos[ing] security information relating to the deployment of Park Police."¹⁰⁹

Science agency employees and scientific information are also impacted by the Obama Administration's unprecedented push to criminally prosecute government employees who leak classified information.¹¹⁰ Much classified information, after all, involves scientific matters ranging from weapons engineering to the efficacy of electronic surveillance methods to chemical production hazards. One prosecution initiated by the Obama Administration, for example, targets computer software expert Thomas Drake, who reportedly conveyed to his bosses at the National Security Agency (NSA), the NSA Inspector General, the Defense Department's Inspector General, the congressional intelligence committees, and the *Baltimore Sun*, his concerns that the NSA was investing large amounts of money in inefficient and unwieldy intelligence management systems while overlooking more effective and more privacy-protective programs.¹¹¹

107. See Press Release, PEER, Chambers Wins Appeal Over Removal as U.S. Park Police Chief (Apr. 21, 2010), available at http://www.peer.org/news/news_id.php?row_id=1336.

108. *Chambers v. Dep't of Interior*, 602 F.3d 1370, 1373–74 (Fed. Cir. 2010).

109. Brief of Respondent at 14–15, *Chambers v. Dep't. of Interior*, 602 F.3d 1370 (Fed. Cir. 2010) (No. 2009–3120), 2009 WL 3044489.

110. See Heidi Kitrosser, *Supremely Opaque?: Accountability, Transparency, and Presidential Supremacy*, 5 ST. THOMAS J.L. & PUB. POL'Y (forthcoming 2011) (describing the large uptick in prosecutions and criminal investigations for leaking classified information in the Obama Administration); see also Charlie Savage, *Ex-C.I.A. Officer Named in Disclosure Indictment*, N.Y. TIMES, Jan. 7, 2011, at A15 (describing new leak indictment issued in early January 2011, and noting that the indictment "is the fifth case during the Obama administration in which a current or former government official has been charged in connection with a leak investigation").

111. See, e.g., Scott Shane, *Obama Steps up Prosecution of Leaks to the News Media*, N.Y. TIMES, June 12, 2010, at A1; Scott Shane, *Former N.S.A. Official is Charged in Leaks Case*, N.Y. TIMES, Apr. 15, 2010, at A18.

III. SCIENTIFIC INTEGRITY IN THE FIRST HALF OF THE OBAMA ADMINISTRATION: HOW PRESIDENTIAL ADMINISTRATION CAN HELP TO FACILITATE INFORMATION INTEGRITY

Presidential administration and scientific integrity are not always antithetical to each other. While the President and his advisers have substantial capacity to act in secret and incentives to manipulate facts, they also have unrivaled access to national and international stages and incentives to appear forthcoming. The tools of presidential administration thus can be used to bolster, as well as to compromise, information integrity. The Obama Administration's first half provides some evidence of presidential administration's potential to positively impact information integrity, while also demonstrating its ability to do just the opposite.

Indeed, disappointment over the lethargy of the White House's scientific integrity efforts should not obscure the lessons to be gleaned from the very fact that the scientific integrity initiative, and related pledges of transparency and information integrity, formed so prominent a part of the Obama campaign and the administration's early days. Candidate Obama repeatedly promised to run "the most transparent administration in American history,"¹¹² and on his first full day in office issued an executive order and two memoranda directed toward increasing government transparency.¹¹³ He and his advisers also emphasized their commitment to scientific integrity throughout the presidential campaign and from the earliest moments of the administration, including the inaugural address.¹¹⁴

As a matter of politics, these aspects of the Obama candidacy and administration reflect two larger phenomena. First, it is hard to go wrong, politically, praising concepts like transparency and scientific integrity in the abstract. While polling responses become more mixed as questions get more specific—as Americans are asked, for example, whether national security information should be protected—Americans express support for transparency and related concepts in the abstract.¹¹⁵

Second, there are moments in history in which the political momentum to strengthen protections for oft-cited values like the rule of law and

112. See Rood & Chuchmach, *supra* note 16.

113. See *supra* notes 17–19 and accompanying text.

114. See, e.g., Brian Beary, *Top Obama Official Reaffirms Commitment to Cap and Trade*, EUROPOLITIC ENV'T, Jan. 22, 2009; Katherine Boyle, *EPA: Obama Vowed To Increase Agency Funding, Protect Scientific Integrity*, GREENWIRE, Nov. 7, 2008; Harris & Broad, *supra* note 94, at A23; Alex Kaplun, *Senate Confirms Energy, Interior, USDA Secretaries, But Delays on EPA, CEQ Heads*, ENV'T & ENERGY DAILY, Jan. 21, 2009; Science Debate 2008 at question no. 12 and corresponding answers, SCIENCEDEBATE, <http://www.sciencedebate.org/debate08.html>.

115. See, e.g., 2009 Sunshine Week Survey About Public Attitudes Toward Government Secrecy, <http://www.opengovva.org/virginias-foia-resources/sunshine-week/1165?task=view>; *State of the First Amendment 2008*, FIRST AMENDMENT CENTER, at 5, available at <http://www.firstamendmentcenter.org/pdf/SOFA2008survey.pdf>; First Amendment Center and the American Society of Newspaper Editors, *Government Secrecy Poll*, Mar. 7, 2005, at 1–2; *The Bush Administration's Secrecy Policy: A Call to Action to Protect Democratic Values*, OMBWATCH Part III: Research: What the American Public Believes (Oct. 24, 2002), <http://www.ombwatch.org/node/639>.

transparency are enhanced. In the wake of Watergate and other abuse-of-power scandals, for example, landmark hearings were held and laws passed by Congress, including amendments to strengthen FOIA that were passed over President Ford's veto.¹¹⁶ Presidents are well-positioned to harness and to benefit from such moments politically, particularly if they replace administrations perceived as scandal-ridden or unduly opaque.¹¹⁷

Candidate and then President Obama's early words and deeds, and the reaction to the same by scientists and transparency advocates, suggest an initial sense among a subset of the President's political base and perhaps on the President's part that such a moment had arrived for scientific integrity and transparency. For example, a *New York Times* article referred to recent "wounds to scientific integrity that President Obama promised to heal in his Inaugural Address."¹¹⁸ The article added that "[t]he quickest-acting balm was the change of tone, delivered instantly in the speech."¹¹⁹ It also cited government scientists who "reported being teary-eyed with joy" at the change in administrations and what it could mean for scientific integrity.¹²⁰ Relatedly, the group openthegovernment.org wrote that "[t]he elections of 2008 were viewed by many as a referendum on the secrecy and unaccountability of the Bush Administration, and the country elected a President who has promised the most open, transparent and accountable federal Executive Branch in history."¹²¹

Furthermore, President Obama's early words and pledges, including the 2009 scientific integrity memorandum, appear to have had some influence within agencies. While the picture is not all bright—for example, some agencies still require scientists to pre-clear even unofficial public communications relevant to their work with public affairs officers¹²²—

116. See, e.g., Heidi Kitrosser, *National Security and the Article II Shell Game*, 26 CONST. COMMENT. 483, 496–97 (2010); *Veto Battle 30 Years Ago Set Freedom of Information Norms*, NAT'L SECURITY ARCHIVE, Electronic Briefing Book No. 142 (Nov. 23, 2004), <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB142/index.htm>.

117. This notion calls to mind political scientist Stephen Skowronek's concept of a "reconstruction" president. Such a "president heralds from the opposition to the previously established regime, and pre-established commitments of ideology and interest have, in the course of events, become vulnerable to direct repudiation as failed or irrelevant responses to the problems of the day." STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE* 36 (1997). Skowronek calls the "politics of reconstruction" the "most promising of all situations for the exercise of political leadership" by presidents. *Id.* at 37. Of course, Skowronek also observes that modern reconstruction presidents may have more trouble distinguishing themselves from their predecessors than they did in the past, due to the thickening of the institutional apparatus that surrounds the presidency. *Id.* at 55–57. Skowronek's analysis provides a helpful lens for considering both the reconstruction rhetoric of candidate and President Obama regarding scientific integrity, as well as the uneven and at times counter-productive nature of his administration's actions and claims with respect to scientific integrity.

118. Harris & Broad, *supra* note 94, at A23.

119. *Id.*

120. *Id.*

121. *Secrecy Report Card, 2010*, [OPEN THE GOVERNMENT.ORG, http://www.openthegovernment.org/otg/SecrecyRC_2010.pdf](http://www.openthegovernment.org/otg/SecrecyRC_2010.pdf), at 3.

122. See, e.g., Press Release, PEER, *Lift Gag Order Muzzling NOAA Scientists*, (July 12, 2010), http://www.peer.org/news/news_id.php?row_id=1372 (discussing Department of

some headway has been made since President Obama took office. For instance, scientific integrity groups lavished praise on Interior Secretary Ken Salazar for a September 2010 order directing his department to create a scientific integrity policy. The Union of Concerned Scientists, while cautioning that a policy with clear rules and time-frames must soon follow, approvingly describes the order as stating among other things that the Interior Department will “protect whistleblowers who expose the misuse of scientific information[] and clarify government scientists’ right to share their research and scientific analyses with the public and the press.”¹²³ The Interior order presumably was meant in part as a response to the Administration’s March 2009 memorandum.¹²⁴ Furthermore, the order was responsive to recent criticisms, both internal and external, of the Department. An earlier, considerably weaker draft was roundly panned by scientific integrity groups.¹²⁵ And an April 2010 Inspector General report was highly critical of the Department for its approach to scientific integrity and its lack of a policy.¹²⁶

Additionally, while aspects of the administration’s response to the BP oil spill have rightly been criticized, it also must be noted that some of what we now know about that response—including the possibility, noted in Part II, that OMB prevented NOAA from releasing worst case scenario flow rate estimates—we know due to the work of a commission created by President Obama through executive order.¹²⁷ Of course, one should not be naïve in assessing the truth-finding value of presidential commissions where government wrongdoing may be at issue. Such commissions can, after all, be handy means to stave off or deflect attention from more damaging

Commerce, Office of Management and Organization, Public Communications Policy, DAO 219-1, effective Apr. 30, 2008, at §§ 6–7, 11, http://www.osec.doc.gov/omo/dmp/daos/dao219_1.html); *see also*, e.g., Press Release, PEER, Forest Cops Chafe Under Tight Media Muzzle (Apr. 21, 2010), http://www.peer.org/news/news_id.php?row_id=1335 (describing similar directive within US Forest Service); Press Release, PEER, Obama Gag Order on Federal Workers Like Those Under Bush (Jan. 28, 2010), http://www.peer.org/news/news_id.php?row_id=1298 (same).

123. Press Release, Union of Concerned Scientists, Science Group Praises New Department of Interior Scientific Integrity Policy as a Great First Step; Calls for Department to Furnish Details and Deadlines (Sept. 29, 2010), http://www.ucsusa.org/news/press_release/science-group-praises-new-0457.html; *see also* Secretary of Interior, Order No. 3305, Ensuring Scientific Integrity Within the Department of the Interior (Sept. 29, 2010), http://elips.doi.gov/app_so/act_getfiles.cfm?order_number=3305 [hereinafter Order No. 3305]; Press Release, PEER, Interior Makes Big Stride on Scientific Integrity (Sept. 29, 2010), http://www.peer.org/news/news_id.php?row_id=1409.

124. *See* Order No. 3305, *supra* note 123, at § 2.

125. *See*, e.g., Press Release, PEER, Interior Posts Only Half of a Scientific Integrity Policy (Aug. 31, 2010), http://www.peer.org/news/news_id.php?row_id=1396.

126. *See generally* Office of the Inspector Gen., U.S. Dep’t of the Interior, *Evaluation Report: Interior Lacks a Scientific Integrity Policy*, Report No. WR-EV-MOA-0014-2009 (Apr. 2010), available at <http://www.doiioig.gov/images/stories/reports/pdf/ScientificIntegrityPolicy.pdf>.

127. Press Release, White House, Weekly Address: President Obama Establishes Bipartisan National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling (May 22, 2010), <http://www.whitehouse.gov/the-press-office/weekly-address-president-obama-establishes-bipartisan-national-commission-bp-deepwa>.

inquiries.¹²⁸ Yet the commission staff's finding about the flow rate estimate illustrates that there are limits on the extent to which political actors can control investigative mechanisms once they are in place. Political incentives can, in short, lead Presidents to announce inquiries or otherwise to take pro-transparency actions that—despite presidential intentions to keep such activities within tight confines—take on lives of their own.

A. Reflections on the Past Two Years

The story of scientific integrity in the first two years of the Obama Administration supports several propositions relating to constitutional law, politics, and constitutional politics. I group those points into three big-picture lessons on which I elaborate below. The first lesson is that presidential administration is not an unequivocally good thing for accountability, given its capacity to foster information control. Certainly, presidential administration can conduce to accountability under certain conditions, but whether and when it does so is a very fact-dependent matter. Furthermore, some of the conditions that conduce to accountability may violate perfect unity, even if they are consistent with aspects of presidential administration. These points have negative implications for unitary executive theory's major functional justification, which is that unity enhances accountability. Second, if Congress indeed has the constitutional flexibility that I and others have argued it does to structure the bureaucracy and to protect information integrity, the question that remains is how Congress might use that leeway to foster scientific integrity in government. The events and patterns of the past two years and beyond suggest that Congress would be well advised to harness the positive potential of presidential administration while supplementing and checking it through statutory direction and constraint. For example, Congress might give the President a wide berth within which to create open government initiatives, while imposing protective statutory floors such as whistleblower rights to report directly to Congress, prohibitions on non-scientists pre-clearing scientific reports, and greater documentation regarding White House involvement in decisionmaking. The third lesson begins with the assessment that both the Obama Administration and Congress failed, over the past two years, to take full advantage of the political backlash against information control sparked during the Bush Administration. From there, I

128. See, e.g., KATHRYN S. OLMSTED, *CHALLENGING THE SECRET GOVERNMENT* 49 (1996) (describing President Ford's appointment of a commission headed by Vice President Rockefeller as a means to "preempt a congressional inquiry" into recent scandals). In an amusing example of the Rockefeller Commission's attempt to head off embarrassing disclosures, a book recounts the following:

After [CIA Director] Colby's second or third appearance before the commission investigators, Rockefeller drew Colby aside and said, 'Bill, do you really have to present all this material to us? We realize there are secrets that you fellows need to keep, and so nobody here is going to take it amiss if you feel there are some questions you can't answer quite as fully as you seem to feel you have to.'

ANGUS MACKENZIE, *SECRETS: THE CIA'S WAR AT HOME* 62 (1997).

offer some thoughts on how political momentum toward information integrity might be better seized, and even created, in the future.

B. Lesson #1: Accountability Is No Simple Thing (or Why Unity and Accountability Do Not Always Mix, and the Constitutional Implications Thereof)

As noted in Part II, I have elsewhere critiqued unitary executive theory. To briefly summarize those critiques: constitutional text, structure, and history do not demand a fully unitary executive.¹²⁹ Unity thus can only be supported, if at all, on functionalist grounds. Unitarians rely on the relative accountability of the unitary executive as their major functional justification.¹³⁰ However, information integrity, including transparency, is a necessary condition to achieving constitutional accountability values.¹³¹ Logic and history—including much recent history—demonstrate that unity can and often does undermine information integrity. As such, it undermines accountability by enabling executive branch personnel to hide or manipulate facts that would help the public or the other branches to judge their actions.¹³² Furthermore,

one need not agree that unity plainly undermines accountability to share [the] conclusion that the accountability argument for unity is flawed. . . . So long as it is reasonably arguable that unity undermines, rather than bolsters, accountability, then unity fails to so plainly further accountability as to support an unyielding, categorical unity directive.¹³³

From all of this it follows not that Congress may fracture unity as much as it likes, but rather that it has a fair amount of discretion to impose checks on the President, including by fracturing unity, subject to case-by-case balancing as to whether Congress has gone so far as to defeat accountability in any given case.¹³⁴

The Obama Administration's first two years provide additional support for the notion that unity does not necessarily advance accountability and that it can undermine it by compromising information integrity. We have seen, for example, that even in the context of an information integrity initiative spearheaded by the President personally and very publicly managed through a White House office (the OSTP), it can be difficult if not impossible to discover who did what and who knew what when.¹³⁵ We are also reminded that presidential control over executive subordinates and actions, either personally or through OMB or other offices, can translate

129. Kitrosser, *supra* note 37, at 618–34.

130. *Id.* at 613; Kitrosser, *supra* note 58, at 1746–47.

131. Kitrosser, *supra* note 58, at 1760.

132. *Id.* at 1768–69.

133. *Id.* at 1743–44.

134. *Id.* at 1755–56 (reaching this conclusion, and explaining that the U.S. Supreme Court embraced essentially the same approach in *Morrison v. Olson*, 487 U.S. 654 (1988)).

135. See *supra* notes 88–92 and accompanying text.

into information pre-clearance power.¹³⁶ Such power poses risks that scientific information will be cloaked or manipulated for political ends, thus compromising the ability of the public or the other branches to assess agency actions.¹³⁷ Such power also threatens the ability of whistleblowers to check the executive branch from within by exposing the manipulation of science or other forms of corruption or incompetence.¹³⁸

In short, the events of the last two years do nothing to dispel the notion, and provide further evidence, that the trappings of unity can undermine information integrity and accountability. This fact remains true even if unity can positively impact accountability under certain conditions, for example, through White House demands that subordinates act with greater transparency. Indeed, that unity in some cases can positively impact accountability and in other cases can undermine it is perfectly consistent with the notion that Congress must have discretion, within functional bounds, to leave the conditions of unity intact or to disrupt them in any given case. Such discretion enables Congress to consider whether unity will help or hinder accountability under the circumstances addressed in particular pieces of legislation.

C. Lesson #2: How Statutory Schemes Might Supplement and Constrain Presidential Administration To Enhance Information Integrity

That presidential administration is a mixed bag for scientific integrity not only is demonstrated by experience, but makes quite a bit of sense. On the one hand, the President has a built-in structural capacity to act in secret, and ample motivation to see the administrative state reach scientific conclusions that are politically convenient. Furthermore, “[p]residential control is a ‘they,’ not an ‘it.’”¹³⁹ So long as presidential control effectively means control by hundreds of political appointees,¹⁴⁰ the potential for intentional or incidental obfuscation as to who took or ordered given actions and why is substantial. The potential for obfuscation is further bolstered by the use and shadow effects of doctrines like executive privilege and state secrets privilege. On the other hand, the President has unique access to national

136. See *supra* notes 95–96 and accompanying text.

137. See *supra* notes 97–104 and accompanying text.

138. See *supra* note 105 and accompanying text.

139. Lisa Schultz Bressman & Michael B. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 49 (2006).

140. As this discussion reflects, unitarians often treat the President and the White House staff as interchangeable. On this view, power that belongs to the President as head of the unitary executive branch may be exercised by White House officers to whom the President delegates power. Yet the notion that the President may freely delegate his “unitary” power has not gone unchallenged. In his contribution to this Symposium issue, Professor Saiger argues that a unitarian reading of the Constitution does not encompass a presidential freedom to “deputize agents on his staff to wield executive power on his behalf just as he could wield it himself.” Aaron Saiger, *Obama’s “Czars” for Domestic Policy and the Law of the White House Staff*, 79 FORDHAM L. REV. 2577 (2011). Similarly, Saikrishna Prakash has argued that the Constitution is unitarian but that it does not license the President to “delegate his own power to others.” Saikrishna B. Prakash, *Fragmented Features of the Constitution’s Unitary Executive*, 45 WILLAMETTE L. REV. 701, 716 (2009).

and international bully pulpits and political incentives to associate himself with transparency, accountability, and the rule of law. And neither Congress nor the bureaucracy is immune to capture from financial or ideological interests or to the pull of “bent science.”¹⁴¹ Presidential leadership thus has the potential to serve as a real counter-force, both rhetorically and through directives, against the pull of information control within or outside of the executive branch.

Simply put, presidential administration has a potential to further information integrity that should be harnessed, but it also has a capacity for information control that calls for statutory checking. As an initial matter, some statutory checks might face (and in some cases have faced) objections on the grounds that they violate executive unity or the President’s constitutional power to keep secrets. With respect to unity, above I referenced other work in which I argue that the Constitution does not impose a categorical unity directive. With respect to presidential claims of a constitutional right to keep secrets, I have elsewhere detailed my view that such claims are constitutionally unsound, and that Congress in fact has a broad constitutional power to create statutes imposing disclosure requirements on the President or otherwise checking executive secrecy.¹⁴² Once we move past the constitutional arguments, we are returned to the realm of policy, and the question of what statutory measures are desirable, assuming that Congress has the constitutional power to create them. While a detailed set of proposals is beyond the scope of this Article, the remainder of this section offers some guiding principles and examples.

A key starting point is the notion that external checks and internal checks often depend on one another, a point on which scholars have increasingly focused.¹⁴³ For example, it has been noted, quite properly, that whistleblowers can serve as very important internal checks—or checks from within the executive branch—by exposing incompetence or corruption within agencies.¹⁴⁴ At the same time, externally imposed whistleblower protections are necessary if whistleblowers are not to be at the mercy of the very executive branch that they seek to criticize.¹⁴⁵ Thus, whistleblower rights to reveal information directly to congresspersons or to receive meaningful remedies from juries—despite opposition to both from the Obama Administration¹⁴⁶—are examples of important, externally imposed and externally administered protections.

141. See MCGARITY & WAGNER, *supra* note 14, at 34–38.

142. See, e.g., Heidi Kitrosser, *Classified Information Leaks and Free Speech*, 2008 U. ILL. L. REV. 881, 916–18.

143. See, e.g., Kathleen Clark, *The Architecture of Accountability: A Case Study of the Warrantless Surveillance Program*, 2010 BYU L. REV. 357, 362–64, 376–89; Seth F. Kreimer, *The Freedom of Information Act and the Ecology of Transparency*, 10 U. PA. J. CONST. L. 1011, 1016–21, 1033, 1045–46, 1056–59 (2008); Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 425–26, 439–52 (2009).

144. See, e.g., Clark, *supra* note 143, at 385–86.

145. *Id.* at 385–87.

146. See *supra* notes 105–06 and accompanying text.

Another example of internal checks that can be fostered externally is the existence of agency scientists who candidly share their analysis with the public. As we have seen, internal political interference—through mechanisms such as OMB clearance or public affairs office clearance within science agencies—can deeply hinder these checks. While the Obama Administration has made some internal strides on this front, the strides have been uneven and there is still a long way to go. Furthermore, if protections are purely a function of internal policies, then they can be altered at any point by the current administration or by future ones when they prove inconvenient. External protections are thus necessary supplements to internal measures. Such protections might, for example, forbid pre-clearance requirements for scientific testimony or media contact by political offices.

A related internal check that Congress sometimes imposes via statute is expertise. That is, Congress at times has required—despite administration objections based on executive unity¹⁴⁷—minimum hiring qualifications for appointees who exercise discretionary executive authority. Scientific expertise as a hiring qualification has been emphasized by the Obama Administration.¹⁴⁸ The Administration has made some high-profile hires to demonstrate its commitment to the same—perhaps most notably, appointing the Nobel Prize-winning physicist Steven Chu to head the Department of Energy.¹⁴⁹ Nonetheless, this is an area in which statutory requirements can serve as external bulwarks, particularly for positions less high-profile than Chu's that get little public attention but deeply influence agencies and their practices.

External checks not directly linked to internal ones also have important roles to play. Transparency statutes such as FOIA and the Federal Advisory Committee Act can help the public and the press discern whether extra-scientific pressures were placed on agencies conducting scientific analyses. Statutes outlining agency procedural requirements, particularly the Administrative Procedure Act (APA) with its direct procedural mandates and the record-keeping norms to which it has given rise,¹⁵⁰ also help observers track the various inputs underlying agency decisions and scientific justifications. Currently, however, there are significant gaps in statutory coverage. The APA has been construed by the Supreme Court not to apply to the President.¹⁵¹ Furthermore, administrations have suggested—sometimes as a matter of statutory interpretation, sometimes as

147. See, e.g., Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 721–24 (2007) (citing signing statements by President Clinton and President George W. Bush objecting to minimum qualification requirements for Presidential appointees).

148. See Scientific Integrity Memo, *supra* note 1.

149. See Dr. Steven Chu, Secretary of Energy, DEP'T OF ENERGY, http://www.energy.gov/organization/dr_steven_chu.htm.

150. See, e.g., Jack M. Beermann & Gary Lawson, *Reprocessing Vermont Yankee*, 75 GEO. WASH. L. REV. 856, 881–900 (2007) (describing and criticizing some of the procedural requirements that courts have inferred from the APA).

151. *Franklin v. Massachusetts*, 505 U.S. 788, 796, 800–01 (1992).

a matter of constitutional interpretation, and often as both—that statutory openness and other procedural requirements do not apply to White House offices.¹⁵² The constitutional arguments must, of course, be addressed as they arise. On the statutory front, such gaps that do exist should be closed. Indeed, as some of the examples cited in this Article illustrate, it often is particularly difficult to trace influences that emanate from the OMB or other White House offices.

D. Lesson #3: Seizing Political Momentum Toward Information Integrity

As discussed in Part III, the start of the Obama Administration appeared to be a historical moment in which the issue of information integrity had real political resonance. With the new President and Congress both hailing from the Democratic party and riding a backlash against the outgoing Republican administration, the stage seemed set for information integrity reforms to take hold, paralleling the wave of transparency measures and other “good government” reforms that followed the scandals of Watergate.

The failure of developments thus far to live up to initial hopes can be attributed partly to political and institutional changes of the past several decades. For one thing, as political scientist Stephen Skowronek points out, the thickening of institutions that surround the presidency—such as the growth of the White House bureaucracy—makes it more difficult for presidents to make sharp breaks from the practices of their predecessors, even in “reconstruction” periods when new presidents take the reins from widely repudiated Presidents of a different party.¹⁵³ Furthermore, certain constitutional theories of presidential power, including executive privilege and related theories of a broad presidential right to keep secrets, have grown increasingly influential and ubiquitous.¹⁵⁴ Indeed, such arguments are sometimes used as bases to avoid passing legislation in the first place.¹⁵⁵ Additionally, the increasingly partisan nature of Congress makes it difficult in periods of divided government for Presidents and Congress to get on the same page politically to pass legislation.¹⁵⁶ And in periods of unified

152. For example, the Obama White House (echoing a similar incident in the Bush administration) claimed a constitutional right, as well a statutory exemption, to withhold information from a group that invoked FOIA to request “records of visits by coal executives in order to analyze whether these executives influenced the administration’s energy policy.” While the administration ultimately relented and agreed to disclose the records, the incident is a reminder of the practical significance of constitutional and statutory arguments as a means for administrations to avoid disclosing information, and the continuity of such arguments across administrations and parties. See Union of Concerned Scientists, *White House Visitor Logs and Lack of Transparency in the Obama Administration*, http://www.ucsusa.org/scientific_integrity/abuses_of_science/white-house-visitor-logs-and.html.

153. See *supra* note 117.

154. See, e.g., Kitrosser, *supra* note 110; Heidi Kitrosser, *It Came From Beneath the Twilight Zone: Wiretapping and Article II Imperialism*, 88 TEX. L. REV. 1401, 1405–06 (2010).

155. Kitrosser, *supra* note 110; Kitrosser, *supra* note 154, at 1430–33.

156. See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2316, 2332–34, 2339 (2006).

government, it is difficult to build political momentum for legislation that would meaningfully constrain the President.¹⁵⁷

The question, from the perspective of information integrity advocates, is how moments of political promise—like that which greeted the start of the Obama Administration—might be seized to lock in both meaningful internal changes and statutory protections. For one thing, advocates must engage constitutional debates over presidential power in all three branches of government and in the realm of public discourse. Beyond the constitutional questions, advocates should pay careful attention to calibrating the specificity of proposed statutory protections. As noted in Part III, opinion polls reflect that while Americans support information integrity in the abstract, they grow more equivocal as questions become more specific.¹⁵⁸ Legislation thus must be identified broadly with values of scientific integrity or transparency, while being specific enough to provide meaningful, enforceable rules. In periods of unified government, advocates might pitch such legislation in a manner both cooperative and challenging—urging Congress and the President to put force behind their words by encoding their shared ideals in statute. In periods of divided government, the pitch might be more partisan in nature—appealing to Congress’ desire to constrain an opposite-party President, while appealing to the President’s desire to cultivate an image as one who will cross the aisle to support values of transparency and the rule of law.

Presidential administration and congressional initiative can also play off of each other dynamically. In a period of divided government, this might amount to inter-branch one-upmanship. For example, congresspersons might call the President on transparency promises, urging him to sign legislation that constrains him in the interest of furthering his own pledges. In a period of unified government, Congress might wait and see as administrative experimentation takes place—for instance, as agencies draw up scientific integrity plans in response to a broad presidential directive—and then step in to legislatively codify or supplement some of the more appealing plans.

CONCLUSION

The Constitution leaves Congress much discretion to pass statutes—contingent, of course, on presidential approval or two-thirds support in each chamber—that protect scientific integrity in government. One of the most ubiquitous constitutional arguments against such protections is that they violate the President’s power to control administration through a unitary executive branch. Unity is demanded, say unitarians, by constitutional accountability values. As we have seen, events in past administrations and now in the Obama Administration demonstrate that unity does not always conduce to accountability. In this, experiences of the past two years echo

157. *Id.* at 2344.

158. *See supra* note 115 and accompanying text.

earlier events that undermine the accountability-based argument for a unitary executive.

At the same time, one ought not to write off as meaningless the several high-profile transparency and scientific integrity pledges of the Obama campaign and administration or the excitement that such pledges generated among segments of the President's political base. These phenomena offer lessons in their own right. They suggest that transparency and scientific integrity have some political resonance, that Presidents and presidential candidates are aware of this fact, and that the presidential bully pulpit and the tools of presidential administration can be harnessed to promote and foster these values.

For advocates of transparency and scientific integrity, the two-fold trick is in figuring out how to sustain political momentum toward such values and how to harness the advantages of presidential administration without facilitating White House information control. As this Article's tentative reflections on both points suggest, a partial response to both questions is for advocates to place sustained political pressure on Congress and on the President to create external and internal protections alike. Nor is politics detached from the constitutional arguments referenced throughout this Article—that is, unitary executive theory, theories favoring presidential secrecy privileges, and arguments against both theories. Such arguments play important roles in executive and congressional debates over whether to pass, and how to administer, legislation. Furthermore, the modern influence of presidentialist theories is due in no small part to concerted movements within and outside of the executive branch.¹⁵⁹ Like presidentialists, then, transparency and scientific integrity advocates must continue to engage the political branches as well as the judiciary. They must do so not only to champion the policy advantages of internal and external checking mechanisms, but to articulate the fallacies of the presidentialist constitutional theories that would block much external checking.

159. See, e.g., Stephen Skowronek, *The Conservative Insurgency and Presidential Power: A Developmental Perspective of the Unitary Executive*, 122 HARV. L. REV. 2070, 2073–77, 2092–2100 (2009); Julian E. Zelizer, *The Conservative Embrace of Presidential Power*, 88 B.U. L. REV. 499, 499–503 (2008).