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# The Future of the Administrative Presidency: Turning Administrative Law Inside-Out

SIDNEY A. SHAPIRO\* & RONALD F. WRIGHT\*\*

All realistic study of government has to start with an understanding of bureaucracy . . . because no government can function without it. The popular antithesis between bureaucracy and democracy is an oratorical slogan, which endangers the future of democracy. For a constitutional system which cannot function effectively, which cannot act with dispatch and strength, cannot live.

—Carl Friedrich<sup>1</sup>

The central question [concerning bureaucracy is] how adaptation is to occur so that the public is served in a more efficacious way and that would-be reformers are not permitted to destroy an institution that remains central to the functioning of democracy.

—Ezra Suleiman<sup>2</sup>

Despite endless rantings to the contrary, American bureaucracy *does* work—in fact, it works quite well.

—Charles T. Goodsell<sup>3</sup>

President Obama has adopted the same approach to controlling the federal bureaucracy that his predecessors employed, dating back to the Reagan administration: the administrative presidency. The administrative presidency seeks to rein in bureaucratic discretion by centralizing decision-making in the White House and by sending vast numbers of political appointees into the agencies to monitor and control the bureaucrats. Beset by two wars and the Great Recession, it is not surprising that the President has chosen, at least so far, not to change this approach to agency oversight. But the choice is unfortunate. The capacity of the regulatory agencies has deteriorated over the years to the point that they are

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1. CARL FRIEDRICH, *CONSTITUTIONAL GOVERNMENT AND DEMOCRACY: THEORY AND PRACTICE IN EUROPE AND AMERICA* 57 (rev. ed. 1950).

2. EZRA SULEIMAN, *DISMANTLING DEMOCRATIC STATES* 305 (2003).

3. CHARLES T. GOODSSELL, *THE CASE FOR BUREAUCRACY: A PUBLIC ADMINISTRATION POLEMIC* 4 (4th ed. 2004).

largely dysfunctional.<sup>4</sup> The administrative presidency has played a role in this demise.<sup>5</sup>

The administrative presidency, along with congressional oversight and judicial review, are efforts to control bureaucratic discretion from outside of the agencies, an approach we call “outside-in” accountability. Administrative law scholarship focuses almost exclusively on these external controls.<sup>6</sup> Meanwhile, public administration scholars discuss the potential of promoting accountable and effective government from inside the bureaucracy, using managerial controls, and building up expertise and professionalism.<sup>7</sup> This approach we describe as “inside-out” accountability.

The outside-in strategy builds on the presumption that civil servants consistently act in self-interested ways, a presumption that is not borne out empirically. There is plenty of evidence that other-regarding motives oftentimes guide the actions of public employees, reducing the likelihood that they will misuse administrative discretion. Based on this insight, we contend that democracies can, under the right conditions, depend on inside-out controls to complement outside-in controls and promote accountability.

There are two challenges involved in making this strategy a reality. First, we need to identify the conditions that make inside-out control most likely to succeed and identify the agencies that best fulfill those conditions. Second, we must redesign those governmental institutions to take advantage of the expertise and other-regarding motives of civil servants. Unfortunately, the administrative presidency crowds out the better instincts of civil servants, leaving us with less effective and less responsive government. An over-reliance on external controls does real harm: it reduces the capacity of the civil service to provide expert advice, which is unfortunate because bureaucratic expertise serves as a check on short-term thinking and the politicization of public policy by the White House.

Our argument for a more balanced approach to the problem of bureaucratic discretion proceeds in four steps. Section I briefly describes the two outside-in approaches and the two inside-out approaches that might address the problem of administrative discretion. Each of the four approaches promotes democratic accountability (and thus addresses the

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4. See RENA STEINZOR & SIDNEY SHAPIRO, *THE PEOPLE’S AGENTS AND THE BATTLE TO PROTECT THE AMERICAN PUBLIC: SPECIAL INTERESTS, GOVERNMENT, AND THREATS TO HEALTH, SAFETY AND THE ENVIRONMENT* 4–5 (2010) (describing the dysfunctional state of five major regulatory agencies).

5. See *infra* Section IV.B.

6. See *infra* Section III.A.

7. See *infra* Section III.B.

legitimacy questions that surround the work of unelected bureaucrats), yet each approach also carries major limitations.

Section II proposes a model of bureaucratic behavior that lays out ideal conditions for the use of inside-out controls. Once we see that inside-out controls are promising for some agencies but not for others, the question becomes what is the best mix of inside-out and outside-in approaches. We argue that agency employees are more likely to perform in a public-interested manner when they have less discretion in how they perform their jobs (because they are subject to detailed instructions) and when they are easily monitored. We also suggest that professional training and traditions among bureaucrats, other things being equal, will make inside-out controls more effective.

Section III surveys the theoretical and empirical accounts of bureaucratic behavior, and evaluates our model in light of that evidence. While the legal and political science literatures view bureaucrats as primarily self-interested, the public administration literature views them as primarily other-regarding. Although we find that there is considerable evidence to support this second view, our model avoids the need to choose between these two views, by recognizing that employees hold both self-interested and other-regarding motives. By treating self-interested and other-regarding motives as distinct, something that the competing public choice model does not do, our approach allows government reform and redesign to respond to empirical learning.

Section IV reviews the origins of the administrative presidency. Then we describe the features of the administrative presidency that blunt the effects of expertise and professionalism, even in agencies where those features could produce an effective inside-out control. We contend that the tools of the administrative presidency are used too frequently and argue that the mix should be readjusted to give greater emphasis in some agencies to inside-out approaches, particularly professionalism.

Our aim is to kick-start a discussion of governmental accountability and effectiveness that recognizes the rich reality of bureaucratic behavior. Civil servants are not the threat to democracy or government effectiveness that politicians and economic theorists portray them to be. Instead, when properly trained and supervised, government employees have significant potential to promote democratically responsive government. This does not mean that external controls should be ignored, or should not be strengthened, but it does mean we should design bureaucratic controls that do not squelch this potential inside the agency.

## I. RESPONSES TO ADMINISTRATIVE DISCRETION

When Congress passes regulatory legislation, it normally delegates

policy-making discretion to agencies through the use of vague and ambiguous language.<sup>8</sup> This is the political cement that creates legislative majorities when disagreements about the details loom as a potential roadblock.<sup>9</sup> Congress also recognizes that agencies usually bring to the table greater expertise, experience, and organizational capabilities, such as fact-finding, than Congress can muster.<sup>10</sup> Whatever the motivation, this delegation presents a serious legitimacy problem: How can we ensure the democratic responsiveness of the unelected administrative bureaucracy?

In 1903, Bruce Wyman drew a distinction between external and internal administrative practice, a distinction that has defined the boundary line between administrative law and public administration scholarship ever since.<sup>11</sup> Thus, with only a few exceptions, most prominently Jerry Mashaw,<sup>12</sup> administrative law scholars treat agencies as a black box to be controlled from the outside, using political oversight and judicial review. The possibility that something is going on inside the agency that contributes to democratic accountability is never seriously considered.<sup>13</sup> Public administration scholars, by comparison, have been discussing the potential of promoting accountable and effective government from inside the bureaucracy since the earliest works in that discipline.<sup>14</sup> These scholars have focused on two strategies: managerial controls from the top of the agency and building up expertise and professionalism throughout the agency.<sup>15</sup>

Accounting for both of these literatures, as Figure 1 indicates, we sort the methods of promoting democratic accountability in administrative agencies into four categories.<sup>16</sup> Political oversight and judicial review constitute “outside-in” approaches, while bureaucratic controls and professionalism constitute “inside-out” approaches.

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8. RICHARD J. PIERCE, JR., SIDNEY A. SHAPIRO & PAUL R. VERKUIL, *ADMINISTRATIVE LAW AND PROCESS* § 3.1 (5th ed. 2009).

9. *Id.*

10. *Id.*

11. BRUCE WYMAN, *THE PRINCIPLES OF THE ADMINISTRATIVE LAW GOVERNING THE RELATIONS OF PUBLIC OFFICERS* 1–23 (1903).

12. See JERRY L. MASHAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS* (1983).

13. See Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 *CORNELL L. REV.* 486, 486–87 (2002) (stating that administrative law treats inside the agency as a black box).

14. See *infra* notes 98–100 and accompanying text.

15. See *infra* Section III.B.2.

16. See Barbara S. Romzek & Melvin J. Dubnick, *Accountability in the Public Sector: Lessons from the Challenger Tragedy*, 47 *PUB. ADMIN. REV.* 227, 227–30 (1987) (identifying the four accountability systems).

**Figure 1:** Institutional Controls of Discretion

Outside-In	Inside-Out
Political (Overhead Democracy)	Bureaucratic (Hierarchical Authority)
Judicial Review (Transmission Belt)	Professionalism (Impartial Competence)

This section describes how each approach works in theory to promote democratic accountability. We also consider the major weaknesses of each approach, although we will have more to say about some of these limitations in later sections.

*A. Political Oversight*

Political oversight establishes what Emmette Redford described in 1969 as “overhead democracy.”<sup>17</sup> The public chooses its leaders in competitive elections. They assume office with the power and responsibility to enact and execute policy, including overseeing the bureaucracy. Successful leaders are rewarded with reelection, thereby ratifying their actions, including the oversight of agencies. Unsuccessful leaders, by comparison, will be replaced.<sup>18</sup>

Both Congress and the president engage in political oversight, but the administrative presidency has become the focal point of political oversight, in part due to perceived weaknesses in congressional oversight.

1. CONGRESSIONAL OVERSIGHT OF ADMINISTRATIVE AGENCIES

Ideally, Congress would oversee the administrative agencies routinely and systematically, but there are few political incentives for members to spend their time in this manner.<sup>19</sup> Even without routine oversight hearings, Congress can still influence agency decision-making because interest groups inform members of Congress about potential problems.<sup>20</sup> The political science literature suggests that together, these forms of

17. See EMMETTE S. REDFORD, *DEMOCRACY IN THE ADMINISTRATIVE STATE* 70 (Roscoe C. Martin ed., 1969) (arguing that overhead democracy legitimates agency government).

18. See KENNETH J. MEIER & LAURENCE J. O’TOOLE, JR., *BUREAUCRACY IN A DEMOCRATIC STATE: A GOVERNANCE PERSPECTIVE* 6 (2006) (describing the operation of overhead democracy).

19. See JOEL ABERBACH, *KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT* 102 (1990); Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 *TEX. L. REV.* 469, 482–83 (1985); Richard J. Pierce & Sidney A. Shapiro, *Political and Judicial Review of Agency Action*, 59 *TEX. L. REV.* 1175, 1201 (1981).

20. Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 *VA. L. REV.* 431, 444 (1989).

oversight—the routine “police patrol” efforts along with the “fire alarm” responses to particular crises—give Congress sufficient information to bring agencies to heel if they stray too far outside of legislative policy preferences.<sup>21</sup>

Nevertheless, there are obvious limitations to the reach of these legislative controls. Congressional radar does not pick up many administrative decisions.<sup>22</sup> Even when informed, Congress may ignore the protests of interest groups that legislators do not favor. The Republican majority in Congress failed to investigate agency failure during the Bush administration, for example, despite considerable evidence that agencies were failing to carry out their statutory missions.<sup>23</sup>

There is also a question of whether the oversight itself is democratic. Committees conduct the oversight hearings, and individual legislators sometimes dominate those hearings. The individuals most interested in the oversight questions may not represent the policy preferences of a majority of members. Legislators often seek committee assignments to benefit special interests in their district or state, and other members may have no control over the signals that the legislature sends to the agency.<sup>24</sup> Consider, for example, the use of appropriations riders buried in large appropriations bills, a tactic that effectively hides the policy decision from the rest of the Congress except the sponsor and

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21. See, e.g., David S. Rubenstein, “Relative Checks”: Towards Optimal Control of Administrative Power, 51 WM. & MARY L. REV. 2169, 2205–08 (2010) (describing how “scholars have returned their focus to Congress as a legitimizing force”); Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 121 (2006) (describing the “potent” formal tools Congress often uses to conduct extensive oversight of the executive branch, as well as “pervasive and persistent” informal methods through which Congress keeps a watchful eye); Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrol Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166–76 (1984) (detailing the misconception that congressional oversight through a combination of limited police-patrol and thorough fire-alarm oversight is insufficient).

22. See Mark Seidenfeld, *A Big Picture Approach to Presidential Influence on Agency Policy-Making*, 80 IOWA L. REV. 1, 11 (1994) (asserting effective monitoring of agency action involves day-to-day awareness and collection of “voluminous quantities” of technical information); Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 834 (2003) (stating that the “informational capture” thesis assumes Congress does not have the ability to monitor agencies and cannot “discipline” them for failing to favor congressional will).

23. See Press Release, U.S. H.R. Comm. on Educ. & Labor, Bush Labor Department Failed to Properly Investigate Wage Theft, GAO Tells House Panel (Mar. 25, 2009), <http://edlabor.house.gov/newsroom/2009/03/bush-labor-department-failed-t.shtml>; see also Susan Milligan, *Congress Reduces Its Oversight Role: Since Clinton, a Change in Focus*, THE BOSTON GLOBE (Nov. 20, 2005), [http://www.boston.com/news/nation/washington/articles/2005/11/20/congress\\_reduces\\_its\\_oversight\\_role/](http://www.boston.com/news/nation/washington/articles/2005/11/20/congress_reduces_its_oversight_role/).

24. Rubenstein, *supra* note 21, at 2212; see also Mark Seidenfeld, *The Psychology of Accountability and Political Review of Agency Rules*, 51 DUKE L.J. 1059, 1077 (2001); Sidney A. Shapiro, *Political Oversight and the Deterioration of Regulatory Policy*, 46 ADMIN. L. REV. 1, 15 (1994).

perhaps a few other legislators.<sup>25</sup>

## 2. THE PRESIDENT

The administrative presidency relies on three interrelated strategies to assert control over the bureaucracy. Presidents have tried to centralize decision-making power in the White House by increasing the size of the White House staff responsible for overseeing the agencies.<sup>26</sup> They have also extended their influence over agency work by increasing the number of presidential appointees located in departments and agencies.<sup>27</sup> Finally, the White House has imposed reporting requirements, such as regulatory impact statements, to enhance its monitoring and control efforts.<sup>28</sup>

Supporters of the administrative presidency believe it compensates for defects in congressional oversight.<sup>29</sup> They contend that, unlike members of Congress, the President has a national constituency, making White House oversight less parochial.<sup>30</sup> Presidential oversight is also considered to be more systematic, since agencies are required to submit all significant regulations and all administrative guidance for review to the Office of Information and Regulatory Affairs (OIRA), located in the Office of Management and Budget (OMB).<sup>31</sup> And the White House, like Congress, hears from interest groups that call potential problems to its attention.<sup>32</sup> Finally, although Congress can punish agencies that ignore its wishes through devices such as appropriations riders, it is thought that the White House can directly assert control through an extensive network of presidential appointees who are chosen for their political loyalty to the President.<sup>33</sup>

Despite these advantages, there are also limitations to White House oversight. It is not broad enough to review the thousands of regulatory decisions that occur each year.<sup>34</sup> And, despite systematic reporting requirements, the White House acts non-systematically,<sup>35</sup> choosing its

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25. Beermann, *supra* note 21, at 88–89; Shapiro, *supra* note 24, at 14.

26. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2275–77 (2001) (describing the increasing power and size of the White House after the Brownlow Committee).

27. See *infra* notes 136, 139 and accompanying text.

28. Kagan, *supra* note 26, at 2277–79.

29. *Id.* at 2347–48.

30. *Id.* at 2334, 2349.

31. Exec. Order No. 12,291, 3 C.F.R. 127 (1981).

32. See Seidenfeld, *supra* note 22, at 46; see also Croley, *supra* note 22, at 882 (both articles discuss the potential for interest groups to raise objections to the OIRA).

33. See *infra* Section IV.

34. STEINZOR & SHAPIRO, *supra* note 4, at 129–32; Cynthia Farina, *False Comfort and Impossible Promises: Uncertainty, Information Overload, and the Unitary Executive*, 12 U. PA. J. CONST. L. 357, 397–98 (2010).

35. See *infra* notes 212–17 and accompanying text.



targets on the basis of whether some office in the White House has a particular interest in the matter or whether an interest group important to the White House or some competing government agency opposes a proposed policy.<sup>36</sup> Finally, it is the White House staff that seeks to align agency decisions with presidential preferences, not the President himself.<sup>37</sup>

Finally, and more broadly, it is unlikely that most voters are aware of the White House's efforts to superintend the administrative state, and it is therefore unlikely that this affects their voting.<sup>38</sup> Even if aware, voters must make a wholesale choice when they vote for president, factoring in how they evaluate the president on a wide variety of issues. Thus, even if voters are unhappy with some aspects of presidential supervision of the administrative state, this will only sway their votes in exceptional circumstances.<sup>39</sup>

### B. *Judicial Review*

Richard Stewart memorably portrayed the legal system as a "transmission belt" for legislative directives.<sup>40</sup> An agency decision that is both authorized by and rationally connected to the agency's statutory mandate is democratic in the sense that the Congress passes a law, the President signs it, and the agency implements the law.<sup>41</sup> The function of judicial review is to monitor the connections in this process. Judges determine whether or not an agency has chosen a policy that is within its legal and policy discretion, and whether an agency has followed applicable administrative procedures.

Judicial review, however, is an imperfect means of democratic accountability. Placing unelected judges with lifetime tenure in charge of ensuring the democratic responsiveness of the administrative state opens the door for an unaccountable use of power.<sup>42</sup> Recognizing this

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36. Farina, *supra* note 34, at 416.

37. *Id.* at 408.

38. STEINZOR & SHAPIRO, *supra* note 4, at 130; Seidenfeld, *supra* note 22, at 19–20; Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1160–61 (2010) (calling for greater public disclosure of presidential influence on particular agency decisions).

39. This last condition does occur, however. Many supporters of President Obama were reacting to what they regarded as excessive politicization of regulatory policy in the Bush administration. See Stuart Shapiro, *The Fate of Bush's Regulatory Reforms*, REG., Spring 2009, at 22, 27 (stating that "[m]any of Bush's changes have been widely derided by the interest groups that supported Obama's election," and further noting the small cost of eliminating these changes).

40. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1675 (1975).

41. *Id.* at 1675–76.

42. STEINZOR & SHAPIRO, *supra* note 4, at 146–69 (discussing the potential for judicial bias, motivating incentives, and ideological judging).

potential, administrative law doctrines, such as *Chevron*<sup>43</sup> or rationality review,<sup>44</sup> ask judges to ensure the legal and policy rationality of administrative action without displacing agencies as the primary decision-makers concerning factual and policy decisions. This aspiration to judicial modesty sometimes fails, however, because imprecise judicial review doctrines permit judges to influence the outcome of administrative action on the basis of their ideological and policy preferences.<sup>45</sup> Recent empirical work confirms the real-world impact of this theoretical threat.<sup>46</sup>

We do not disagree with Steven Croley that judicial review and the administrative law system provide a substantial check on the administrative state.<sup>47</sup> Our point is that, like the other methods of promoting democratic accountability, judicial review is flawed.

### C. Bureaucratic Control

Bureaucratic control uses managerial supervision of standard operating procedures or clearly stated internal rules. Managers issue detailed instructions to employees about how to resolve issues or problems they will face, and then monitor the behavior of their employees to ensure that they follow these procedures.<sup>48</sup> Using this system, agency managers can ensure that employees do not implement policies outside of the agency's legal discretion to act. More to the point, this system aligns the behavior of agency employees with the policy preferences of the political appointees who run the agency. It therefore relies on hierarchical authority to produce democratic responsiveness.<sup>49</sup>

Jerry Mashaw's examination of Social Security disability adjudica-

43. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). In *Chevron*, the Court established a method of interpreting statutes that defers to the agency's interpretation in instances in which Congress's intent is not clear. *Id.* at 863. Since judges are to accept the agency's interpretation if it is a plausible one, the judge's role is to ensure the reasonableness of the agency's interpretation, but not to substitute the judge's preferred outcome for it. *Id.* at 844.

44. See 5 U.S.C. § 706(2)(A) (2006) (authorizing courts to reverse agency decisions that are "arbitrary and capricious"). Since courts are not authorized to reverse non-arbitrary agency decisions, the judge's role is limited to determining whether or not the agency has met this minimum standard of rationality.

45. Sidney A. Shapiro & Richard Murphy, *Depoliticizing Judicial Review in Administrative Law: Three Improbable Ways Forward* (Sept. 5, 2010) (unpublished manuscript) (on file with the University of Miami Law Review).

46. See *id.* at 9–12 (describing the empirical scholarship).

47. See STEVEN P. CROLEY, *REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT* 99–101 (2008).

48. Romzek & Dubnick, *supra* note 16, at 228.

49. *Id.* at 229; Edward L. Rubin, *Discretion and Its Discontents*, 72 CHI.-KENT L. REV. 1299, 1304 (1997).

tion illustrates these benefits at work.<sup>50</sup> The Social Security Administration (SSA) employs a decision-making grid that indicates how to treat disability benefit applications once the agency's employees determine some basic facts.<sup>51</sup> Mashaw finds that this grid, along with additional managerial controls, promotes decision-making accuracy and consistency far better than judicial review could accomplish.<sup>52</sup> His work therefore suggests that *bureaucratic* controls are an important way to deliver *democratic* accountability.<sup>53</sup>

Hierarchical controls only work if agency managers are effective at using the tools available to them. If managers fail to issue standard operating instructions, fail to monitor compliance with them, or both, hierarchical controls will fail. Unfortunately, the Mineral Mining Service, whose utter failure to regulate offshore drilling in the Gulf of Mexico contributed to the Deepwater Horizon oil spill, illustrates what can happen when agency employees are badly managed in this manner.<sup>54</sup>

Even if managers are not negligent, hierarchical controls may not be entirely effective. Some agency activities lend themselves to specific and standard operating procedures, while others do not.<sup>55</sup> Think of the differences, for example, between enforcement inspections and rulemaking. Agencies develop elaborate inspection manuals to guide the safety inspector in the field who faces certain types of violations,<sup>56</sup> and agency managers review the citations that each inspector issues to ensure that the inspectors have followed their instructions.<sup>57</sup>

It is not possible, by comparison, to pre-program the development of a proposed regulation in the same manner. While agency managers may give general instructions to the team, there is no equivalent of an inspection manual or similarly detailed instructions for rule drafters. Instead, administrators manage rulemaking through reporting requirements and meetings with the team of employees as they develop a regulation.<sup>58</sup>

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50. JERRY L. MASHAW ET AL., *SOCIAL SECURITY HEARINGS AND APPEALS: A STUDY OF THE SOCIAL SECURITY ADMINISTRATION HEARING SYSTEM* 49–120 (1978).

51. *Id.* at 19–33.

52. *Id.* at 146–50.

53. *See id.*

54. *See, e.g.,* Siobhan Hughes & Stephen Power, *Salazar Says Regulatory Oversight of Industry Is Lax*, WALL ST. J., May 18, 2010, <http://online.wsj.com/article/SB10001424052748703957904575252130658458208.html?KEYWORDS=siobhan+hughes+stephen+power>.

55. *See infra* Section II.

56. *See, e.g.,* OCCUPATIONAL SAFETY & HEALTH ADMIN., *OSHA'S FIELD OPERATIONS MANUAL* (2009).

57. *See, e.g.,* Joel A. Mintz, *Agencies, Congress and Regulatory Enforcement: A Review of EPA's Hazardous Waste Enforcement Effort, 1970–1987*, 18 ENVTL. L. 683, 695–96 (1988) (discussing the EPA's enforcement methods).

58. Thomas O. McGarity, *The Internal Structure of EPA Rulemaking*, LAW & CONTEMP.

The same type of problem exists in a criminal prosecutor's office, such as the office of a District Attorney or the Attorney General. Managers normally do not issue detailed, step-by-step instructions about how attorneys should try a case or argue an appeal. Trial judgment and tactics depend on an intimate knowledge of a particular case, and it is not possible to write more than general guidelines concerning these decisions. Instead, as in rulemaking, managers in prosecutors' offices use a system of reporting requirements and meetings to enforce the general policies that line attorneys must implement in particular cases.<sup>59</sup>

In both the rulemaking and the criminal prosecution contexts, there is an information asymmetry. Managers must depend on their employees to furnish them with the information that they will use to engage in such management. Because of this information asymmetry, institutional analysts distrust hierarchical controls (such as reporting and meetings) in these contexts.<sup>60</sup> These limits on the reach of bureaucratic controls become a rationale for creating multiple levels of political appointees in an agency. By putting such employees in a closer relationship with agency staff and their work, this tactic is supposed to reduce the typical information asymmetries.<sup>61</sup>

As we take up in the next section, the potential for staff capture of managers through the control of information is overstated because it fails to account for professionalism. Nevertheless, the fact remains that managerial controls do not work as well where managers must cede discretion to the career staff and where it is difficult to monitor how that discretion is used.<sup>62</sup>

#### D. Professionalism

Managers can also influence employee behavior by creating and maintaining an organizational culture that promotes a mission orientation, a sense of public service, and professionalism.<sup>63</sup> Public administration scholars have recognized the significance of organizational culture as a management tool since the publication of Herbert Kaufman's book, *The Forest Ranger*, in 1960.<sup>64</sup>

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PROBS., Autumn 1991, at 57, 74–76 (describing how EPA managers use reporting and meetings to direct rulemaking).

59. See Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 134 (2008) (discussing recording and monitoring procedures for the prosecutor's office in New Orleans).

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

61. See *supra* note 49 and accompanying text.

62. Mark Seidenfeld, *Why Agencies Act: A Reassessment of the Ossification Critique of Judicial Review*, 70 OHIO ST. L.J. 251, 270 (2009).

63. Romzek & Dubnik, *supra* note 16, at 229.

64. HERBERT KAUFMAN, *THE FOREST RANGER: A STUDY IN ADMINISTRATIVE BEHAVIOR* (RFF

Professionalism creates “neutral competence” because civil servants are constrained by their training, socialization, and peer relationships to think beyond the political values of the current White House.<sup>65</sup> Professionals act on a body of data and information external to the agency. As they do so, they employ a methodology that they have been taught to value.<sup>66</sup> Peers reinforce this socialization when they expect that a person within the agency will engage in appropriate professional behavior.<sup>67</sup> A professional staff promotes democratic responsiveness by identifying for the agency’s political leaders the scientific, policy, and legal options that are the most consistent with its legal mandate.

Analysts have made too much out of the accountability problem posed by information asymmetries because they have failed to take into account the role that professionalism plays in these contexts.<sup>68</sup> When agency employees act based on professional skills and loyalties, they do not try to hide information from their managers, or skew it in some manner, because to do so would be unprofessional. Lawyers who act professionally, for example, will impartially present to their client—the agency manager—the information that she or he needs to decide on a course of action.<sup>69</sup> Other agency professionals perform in a similar manner. Scientists, for example, present an impartial reading of the evidence available to them, because this is what their professional training and self-identity dictate. Peer expectations within the scientific community reinforce these traits.

Like the other forms of accountability, professionalism has its limitations. Analysis can be colored by the analyst’s policy preferences, a result made more likely by the uncertainty that is ever present in law and science.<sup>70</sup> Professionalism sometimes gives way to other motivations, as John Yoo’s “torture memo” illustrates. Yoo produced the memo for Jay Bybee, the head of the Office of Legal Council (OLC) in the Justice Department.<sup>71</sup> The Office held a reputation for the independence and

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Press 2006) (1960); see also, Eric Biber, *Too Many Things To Do: How To Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENVTL. L. REV. 1, 24–25 (2009).

65. See Herbert Kaufman, *Emerging Conflicts in the Doctrines of Public Administration*, 50 AM. POL. SCI. REV. 1057, 1060 (1956) (The “core value” in the search for “neutral competence” is the “ability to do the work of government expertly, and to do it according to explicit, objective standards rather than to personal or party or other obligations and loyalties.”).

66. JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* 59–65 (1989).

67. *Id.*; Seidenfeld, *supra* note 62, at 277.

68. See *infra* Section II.B.

69. Seidenfeld, *supra* note 62, at 277–78.

70. WILSON, *supra* note 66, at 61 (noting how policy preferences influence the behavior of lawyers and economists).

71. JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 142 (2007).

professionalism of its work.<sup>72</sup> This long tradition, however, failed to prevent Bybee and Yoo from looking primarily to the immediate political and legal needs of their client, the White House.<sup>73</sup>

## II. A MODEL TO IDENTIFY PROMISING INSIDE-OUT AGENCIES

Each of the four methods of agency control operates to some extent in the real world of federal administrative agencies. Some of those methods presume that bureaucrats act on the basis of self-interest, while others assume that other-regarding reasons motivate the bureaucrats. We believe that both accounts hold some truth, each within its proper sphere. What we need, therefore, is a model of public employee behavior that identifies when self-interested and other-regarding behavior is most likely to appear.

It is possible to avoid the effort to sort out the agencies into different categories by using only the outside-in controls and assuming that self-interest dominates the work of all bureaucrats. When other-regarding motives of civil servants appear, one might treat them as a specialized form of self-interest.<sup>74</sup> If an employee acts in a public-interested manner, according to this approach, it is because the employee gains more utility from this behavior than by acting in a self-interested manner. The difficulty is that this prediction about employee behavior cannot be falsified. Employees will act in their self-interest to gain material advantages except when they act in their self-interest to gain non-material advantages.

We believe it is more fruitful to recognize that employees hold both self-interested and other-regarding motives, to treat these motivations as distinct, and to identify what factors may influence them to act in one manner or the other. By treating self-interested and other-regarding motivates as distinct, this approach allows testing for what factors influence public employees to act in one manner or the other. This section proposes a model to accomplish this end. In our model, employee behavior is influenced by the extent to which hierarchical controls and

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72. Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2336–37 (2006).

73. *Id.* at 2336 (describing the authors of the memo as “a pep squad masquerading as a quasi-judge”); David A. Harris, Review Essay, *How the Commander in Chief Power Swallowed the Rest of the Constitution*, CRIM. JUST. ETHICS, Summer/Fall 2007, at 44, 45 (asserting that Yoo acted “with a willingness to say anything necessary for the administration to have its way.”).

74. See, e.g., William F. Shughart II & Robert D. Tollison, *Interest Groups and the Courts*, 6 GEO. MASON L. REV. 953, 963 (1998) (explaining that utility, or non-material well-being, can be characterized as self-interested or public-oriented motivation such as the desire to do a good job or to benefit society).

professionalism are present in the agency to encourage employees to act in the public interest.

### A. *Hierarchical Controls*

Standard operating procedures or clearly stated internal rules can limit the choices of agency employees and define the job in detail; these internal controls set more narrow boundaries than the relevant statutes require. Hierarchical controls therefore align the behavior of agency employees with the policy preferences of the political appointees who run the agency.<sup>75</sup>

Managerial controls are not viable for every function in every agency. The availability of such controls depends on two factors. First, is an agency able to formulate detailed instructions for employees on how to perform their jobs? Some jobs lend themselves to such instructions more easily than others.<sup>76</sup> All other things being equal, the more detailed the instructions, the more likely it is that agency managers can align employees' behavior with the goals of the agency.

Second, is an agency able to monitor employees' performance to determine how well the employees adhere to the instructions they were given?<sup>77</sup> All other things being equal, the extent to which an agency can monitor employee performance, the more likely it is that agency managers can align employees' behavior with the goals of the agency.

Our model predicts that employees are more likely to perform in a public-interested manner to the extent employees have less discretion in how they perform their jobs (because they are subject to detailed instructions) and to the extent that they are easily monitored (to determine whether they act according to those instructions). Figure 2 below illustrates these relationships. At the top left-hand corner of the figure, the potential for public-interested behavior is at its maximum because employees have no discretion and are completely monitored. The Social Security Administration's disability program, discussed earlier,<sup>78</sup> would be located near the upper left corner of the diagram.

At locations lower and farther to the right side of the figure, as employees gain more discretion and as monitoring becomes less effective, the potential for self-interested behavior increases. The vertical axis of the diagram depicts the amount of monitoring that an agency performs. Programs located in the lower regions of the figure perform less monitoring of agency employees, either because the legal, physical, or

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75. See *supra* note 49 and accompanying text.

76. See *supra* notes 56–59 and accompanying text.

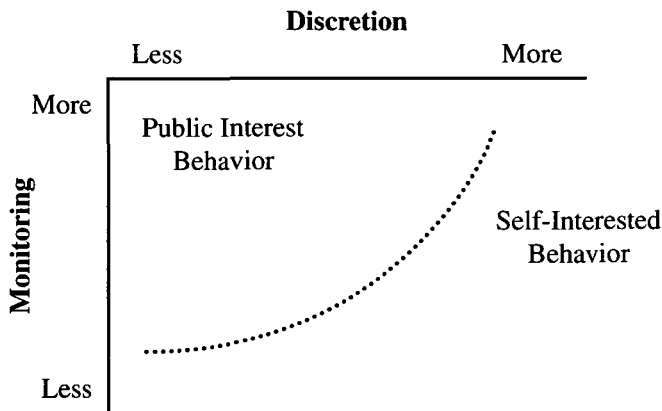
77. See Seidenfeld, *supra* note 62 and accompanying text.

78. See MASHAW ET AL., *supra* note 50, at 49–120.

organizational environments make the monitoring difficult, or because the agency simply foregoes monitoring that is possible.

The horizontal axis of Figure 2 deals with the amount of discretion that is available to agency employees, apart from any efforts by the agency to monitor and control employee choices. The agency's organic statute might leave relatively broad questions for agency employees to answer as they implement the law. The nature of the work assigned to some employees might also be complex or otherwise difficult to standardize, necessarily leaving some discretion in how to accomplish the tasks. Agency functions that meet these descriptions would be located further to the right on the diagram.

**Figure 2: Impact of Monitoring and Discretion**



The vertical and horizontal dimensions of the figure interact. Some agency functions might involve low levels of monitoring, while the level of complexity and discretion inherent in the agency's delegated task is also relatively low. Such functions would appear nearer to the lower left-hand quadrant of the diagram. Certain determinations of immigration status might match this description;<sup>79</sup> the same might be said of workplace safety inspections.<sup>80</sup>

By the same token, some agency activities could involve large amounts of complexity and discretion, while the agency subjects its employees to high levels of monitoring. These functions would be depicted nearer the upper right-hand quadrant of the diagram. In the

79. For a discussion of the prospects for heavier monitoring of immigration adjudications, see Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007); Margaret H. Taylor, *Refugee Roulette in an Administrative Law Context: The Déjà Vu of Decisional Disparities in Agency Adjudication*, 60 STAN. L. REV. 475 (2007).

80. See *supra* notes 56–57 and accompanying text.



offices of criminal prosecutors, certain high-priority categories of crimes, such as domestic violence or homicide, meet this description, because the work of line prosecutors receives more than the typical amount of review by the office leadership, despite the complex judgments involved in preparing a major criminal case for a jury trial.<sup>81</sup>

One of the key functions of federal administrative agencies is the development of rules to implement the statutory mandate of the agency. This notice-and-comment rulemaking poses special challenges for accountability. Because this is non-routine work involving considerable creativity and discretion on the part of employees, agency managers find it difficult to issue detailed instructions in advance concerning how to write a proposed rule.<sup>82</sup> While agency managers routinely monitor such behavior, the lack of standard operating procedures or clearly stated internal rules makes monitoring more challenging.<sup>83</sup> As an initial matter, we would therefore place rulemaking outside of the dotted lines, in the lower right-hand corner of the diagram, indicating that the potential for self-interested behavior is relatively strong. Because the most expensive and salient rules receive the heaviest review within an agency, those rulemaking efforts might be located somewhat higher on the diagram. At the same time, such high-impact rules also tend to involve technically complex questions, thus pushing them further to the right on the diagram.

The difficulty of monitoring the rulemaking functions of an agency might indicate, as a preliminary matter, that outside-in controls are the only way to make rulemaking agencies accountable. But this conclusion ignores the potential of professionalism, the other inside-out approach. As we develop next, some agencies have the capacity to create a strong culture of professionalism, which provides meaningful protection against self-interested behavior, and reduces the need for outside-in actions.

### B. *Professionalism*

Professionalism creates impartial competence. The civil servant's training, socialization, and peer relationships all combine to constrain the person's actions on the job. Professionals act on a body of data and standards of evaluation that are external to the agency. As they do so, they employ a methodology that they have been trained and socialized to

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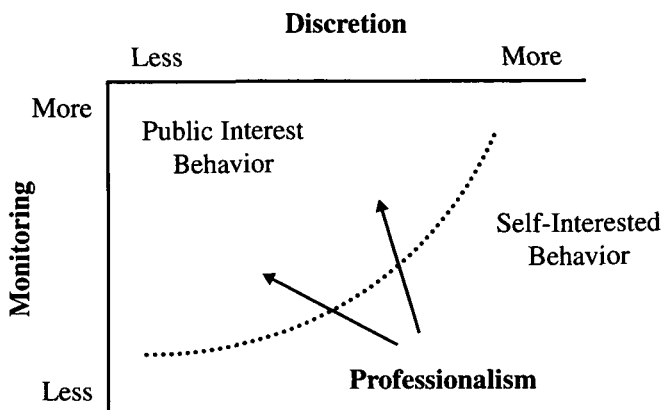
81. For a discussion of the effects of more centralized control of criminal prosecution by the leadership in larger prosecutor's offices, see Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29 (2002).

82. See *supra* note 58 and accompanying text.

83. *Id.*

use. Peers reinforce this socialization when they expect that a person will engage in appropriate professional behavior and punish those who depart from accepted standards.<sup>84</sup>

**Figure 3: Impact of Professionalism**



Professionalization can make up for weaknesses in managerial controls, as Figure 3 illustrates. If employees have substantial discretion and are not easily monitored, their behavior will tend to fall in the zone of self-interest. But, when those same employees are highly professionalized, this approach shifts the workplace into the zone of public-interested behavior, as the arrows indicate.

Professionalism shifts the location of an agency function higher and farther left on the diagram than the nature of the work initially indicates. The shift to the left (reducing the range of discretion and complexity built into the work) occurs because the training and expectations of a profession make the nature of the work more predictable and less subject to the choices of the individual employee. Tasks assigned to a lawyer will be accomplished in a lawyerly manner, and tasks assigned to an economist or an engineer will be completed in ways that comport with the standards of basic competence for those professions.

Professionalism also shifts the location of agency work toward the top of the diagram (increasing the effects of monitoring) because it makes viable a wider range of monitoring for two reasons. First, professionalism reduces the problem of asymmetrical information. Professionals have been trained to deliver information according to the standards of their profession, rather than to slant the information in some manner in order to attempt to capture the policy process.<sup>85</sup> Second, even

84. See *supra* note 66 and accompanying text.

85. See HAL G. RAINEY, UNDERSTANDING & MANAGING PUBLIC ORGANIZATIONS 304–05

when no standardized data output is available for a manager to review an employee's results, monitoring is still possible. Briefings by professional staff about ongoing and completed projects will be easier for a manager to understand and evaluate if professional norms guide those briefings.

Herbert Kaufman's classic work on the Forest Service illustrates how professionalism makes up for weaknesses in hierarchical controls.<sup>86</sup> The management of federal lands is a multi-dimensional task, and the far-flung physical locations of Forest Service offices made it difficult to monitor the work of the rangers before modern advances in communication. These characteristics of the work delegated to the agency would place it far to the right and the bottom of Figure 2. Concerned that these job characteristics would produce inconsistent policies and possible corruption, Gilbert Pinchot, the first director of the Forest Service, made two changes to the typical design of a governmental agency. First, he required exceptionally detailed reporting from the rangers in the field offices. Second, he set out to build an organization composed of professional foresters by developing an educational program, using uniforms and other visible symbols of loyalty to external standards, and emphasizing peer reinforcement of professional obligations.<sup>87</sup> These efforts produced what Kaufman called "voluntary conformity" to the goals and public purposes of the Forest Service.<sup>88</sup> Kaufman found "almost no charges of administrative sabotage by frustrated leaders, for example; comparative few accusations of local favoritism and discrimination by the clientele of the national forests; [and] no discoveries by Congressional investigators of scandalous field collusion with special interests . . . ."<sup>89</sup>

The completed model accounts for an interaction between the agency's work and the agency's workers. While the vertical and horizontal axes of Figure 3 capture aspects of the *work* delegated to the agency and the efforts of the organization to monitor the execution of those tasks, the diagonal force portrayed in the diagram—professionalism—focuses on qualities of the *workers* themselves. When workers are

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(Jossey-Bass, 4th ed. 2009) (hallmarks of professionalism include a "code of conduct and emphasis on adherence to it" and a "feeling of ethical obligation to render service to clients without self-interest and with emotional neutrality"); *see also id.* at 305–06 (professionals in the Reagan administration disagreed with many of its policies but regarded it as their professional obligation to discharge those policies effectively).

86. *See* KAUFMAN, *supra* note 64 and accompanying text.

87. *Id.* at 85.

88. *Id.* at 198.

89. *Id.* at 204.

highly professionalized, we can expect them to act more often to protect the public interest, rather than their self-interest.

Not all agencies will have the necessary degree of professionalism to promote public-interested behavior. Just as managers can build a culture of professionalism, as Pinchot did, they can subvert it as well, as our earlier example involving the Yoo memorandum on torture illustrates.<sup>90</sup> We do not contend that professionalism is the silver bullet of democratic accountability. But taking professionalism into consideration, civil servants are not the threat to democratic accountability that public choice theory predicts, even in circumstances where they have considerable discretion and are difficult to monitor.

### III. THE MOTIVATIONS OF PUBLIC EMPLOYEES

As we discussed in Section I, two methods of promoting democratic responsiveness in administrative agencies work from the inside-out, while two others work from the outside-in. All four methods have important limitations, suggesting a strategy of using each method in the most promising contexts. The model presented in Part II embraces the idea of sorting the strategies into their most compatible agency environments. Yet the doctrine and practice of administrative law in the United States has emphasized the outside-in methods embodied in administrative presidency—to the detriment of the inside-out approaches.

This inattention to inside-out strategies can be attributed to the economic perspective that dominates the legal and political science literatures. In this model, the bureaucracy cannot be trusted because government employees are rational utility-maximizing actors who seek, first and foremost, to further their own self-interests.

Many public administration scholars argue for an alternative view of the motives of civil servants. They understand public employees to have both self-interested and other-regarding motives, and they argue that these other-regarding motives provide a source of protection against the misuse of administrative discretion.

This section compares these two perspectives on the behavior of public employees. We explore here the theoretical underpinnings of the different accounts of bureaucratic behavior, along with the empirical evidence that tends to support each group of theories. We then conclude that there is substantial evidence to support the public administrative perspective that public employees can be trusted, at least in some contexts, to act in the public interest. The theory and the available evidence suggest that it is worthwhile for us to identify agencies that can create

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90. See *supra* notes 71–73 and accompanying text.

strong conditions for public-interested behavior. The use of inside-out controls in those settings can produce major benefits for the public.

### A. *Economic and Political Science Analysis*

Economic analysis of public institutions provides two perspectives that dispute the reliability of government employees to serve in the public interest. Public choice economics starts with an assumption that bureaucrats are self-interested, which leads to a prediction that government employees will make decisions that advance their own careers and interests.<sup>91</sup> These interests include prospects for employment outside the government, promotion within the government, the accretion of power, and other self-interested goals, such as avoiding hard work (i.e., to shirk rather than work).<sup>92</sup>

Institutional economics posits that government managers do not have the same array of tools that private sector principals can use to align the interests of a principal and agents. Public managers cannot readily induce productive behavior through financial incentives and they cannot easily deter unproductive behavior by disciplining or firing employees.<sup>93</sup> As a result, the public manager can neither easily encourage work nor deter shirking and sabotage.

The problem of sabotage arises when government employees fail to carry out an administration's marching orders, either because the employees prefer leisure (a form of shirking) or because they oppose the administration's preferences on policy or ideological grounds.<sup>94</sup> At the start of the Reagan administration, for example, the White House was concerned that employees at agencies such as the EPA would sabotage the administration's deregulatory goals because they were perceived to be Democrats and persons who were committed to the agency's mission of protecting the environment.<sup>95</sup>

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91. Steven J. Eagle, *Economic Salvation in a Restive Age: The Demand for Secular Salvation Has Not Abated*, 56 CASE W. RES. L. REV. 569, 574 (2006) ("Public choice theory posits that legislators, executive branch officials, and agency administrators are in business for themselves; that is, they are motivated by the same types of incentives that motivate their counterparts in the private sector.").

92. SULEIMAN, *supra* note 2, at 30 (describing the view of bureaucracy based on the economic model in which government employees are self-interested).

93. JOHN BREHM & SCOTT GATES, *WORKING, SHIRKING, AND SABOTAGE: BUREAUCRATIC RESPONSE IN A DEMOCRATIC REPUBLIC* 42 (1999) (there is substantial evidence that coercive supervision, particularly in the form of punishment, is limited); RONALD N. JOHNSON & GARY D. LIBECAP, *THE FEDERAL CIVIL SERVICE SYSTEM AND THE PROBLEM OF BUREAUCRACY: THE ECONOMICS AND POLITICS OF INSTITUTIONAL CHANGE* 164–65 (1994) (demonstrating that government managers are constrained by the civil service laws, which not only limit their capacity to sanction poor workers, but impede their ability to reward good ones).

94. BREHM & GATES, *supra* note 93, at 21; Seidenfeld, *supra* note 62, at 280.

95. See MARISSA MARTINO GOLDEN, *WHAT MOTIVATES BUREAUCRATS?: POLITICS AND*

Institutional economics also focuses on the difficulty that public managers, like their private counterparts, have in monitoring employees when the employees control the information that the managers need to assess performance.<sup>96</sup> Employees may filter information to protect themselves from being fired for poor performance, but they may also do so to prevent an administrator from adopting policies that they oppose.<sup>97</sup>

The political science literature is varied, but the theoretical center of gravity in that discipline also stresses the possibilities for self-interested behavior by government employees.<sup>98</sup> Political scientists stress the effects of interactions among different organizations. The historical concerns of the discipline emphasize the need for external controls of public actors.

Thus, economic and political science theories of government agencies support the necessity of outside-in controls. Outside-in approaches are necessary because civil servants will pursue their self-interest, which may not coincide with the aims of the White House (or Congress), while agency managers are constrained from deterring such behavior or even recognizing when it happens.

### B. *Public Administration Analysis*

The public administration literature emphasizes how bureaucratic controls, organizational culture, and professionalism ensure the democratic accountability of agencies. This potential was first recognized in the Progressive Era and it continues to be recognized today, although public administration theorists have modified their account of how inside-out controls work.

#### 1. A "SCIENCE OF ADMINISTRATION"

The original Progressives believed that government through administrative agencies would be effective because employees would be hired on the basis of their expertise, rather than political patronage, and the application of expertise would point the way to solutions for social problems. Agencies would be efficient because, as bureaucracies, they could be organized by the rational distribution of specialized functions combined with a scientific plan for the flow of work.<sup>99</sup> Agencies would be neutral because, as Woodrow Wilson famously explained, the

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ADMINISTRATION DURING THE REAGAN YEARS 109–26 (2000) (detailing the efforts of the Reagan administration to control the bureaucracy at the EPA).

96. BREHM & GATES, *supra* note 93, at 13.

97. GERALD GARVEY, *FACING THE BUREAUCRACY: LIVING AND DYING IN A PUBLIC AGENCY* 29–30 (1993).

98. *See, e.g.*, GORDON TULLUCK, *THE POLITICS OF BUREAUCRACY* (1965).

99. GARVEY, *supra* note 97, at 2–3.

Progressives would establish a “science of administration” that operated “outside the proper sphere of *politics*.”<sup>100</sup>

The Progressives’ concept of neutral administration was based on three interrelated ideas. First, the government would hire employees because of their demonstrated mastery of a technical skill or intellectual discipline.<sup>101</sup> Second, the administration of the laws only involved a choice of the best way to *implement* a policy, making it possible to leave the choice of policies to the political system. Once the political system made a policy choice, employees would neutrally and impartially find the best methods to implement that choice.<sup>102</sup> Finally, imbued with a professional’s standard of performance, these civil servants would not engage in political behavior because to do so would contradict their training, their personal preferences, and their professional ethics.<sup>103</sup>

Today, we know that the idea of a “science of administration” is not feasible. The political system delegates to agencies many of the policy choices that the Progressives expected legislators to make.<sup>104</sup> Moreover, the Progressives were simply wrong that there would be an objective solution concerning how best to implement a policy once it is determined.<sup>105</sup> But public administrators have not given up on the potential of neutral competence and professionalism to promote democratic accountability.

## 2. MODERN PUBLIC ADMINISTRATION

The public administration account of employee behavior sees civil servants as having both other-regarding and self-interested motivations.<sup>106</sup> Employees reject self-interested action because of their dedication to public service, commitment to the agency’s mission, and, as the Progressives suggested, because of their professional training and orientation.<sup>107</sup> The propensity of employees to engage in other-regarding behavior is reinforced by the similar behavior of fellow employees and by the mutual commitment of employees to the mission of the agency.<sup>108</sup> If an agency therefore maintains an organizational culture of professionalism and public service, public administration scholars predict employ-

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100. Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197–98, 210 (1887).

101. GARVEY, *supra* note 97, at 20–21.

102. *Id.* at 22

103. *Id.* at 20–21.

104. *Id.* at 24–25.

105. Sidney A. Shapiro, “Political” Science: Regulatory Science After the Bush Administration, 4 DUKE J. CONST. L. & PUB. POL’Y. 31, 34–35 (2009).

106. See, e.g., WILLIAM T. GORMLEY, JR. & STEVEN J. BALLA, BUREAUCRACY AND DEMOCRACY: ACCOUNTABILITY AND PERFORMANCE 41–42 (2d ed. 2008).

107. See GOLDEN, *supra* note 95, at 21, 29.

108. *Id.* at 25.

ees will engage in work rather than in shirking and sabotage.<sup>109</sup>

Thus, by comparison to the economic perspective, many public administration scholars see the civil service as a generally dependable workforce rather than a significant threat to agency effectiveness and democratic government. The same holds true for the sociological perspective on government agencies, embodied in organization theory. Organizational sociologists emphasize the ways that the leadership and internal structure of an organization shapes the behavior of individual employees.<sup>110</sup> Together, the public administration and organizational sociology scholars regard organizational culture and professionalism as one method of promoting democratically responsive government along with managerial and external controls.

### C. *The Evidence*

The public administration literature offers substantial evidence for its more nuanced view of the behavior of public employees. First, government quite often works as it was intended, an unexpected development in light of economic theory. Second, despite public opinion polling that indicates distrust of government, most Americans have had positive encounters with government. Finally, survey evidence indicates that most public employees have strong other-regarding motives.

#### 1. GOVERNMENT PERFORMANCE

The economic perspective paints a grim picture of government. Employees act in their self-interest and managers have few options to deter such behavior when it does not contribute to the mission of the government.<sup>111</sup> If this description were accurate, we would expect government to fail at most of what it does.

Yet, every day, government does what it is supposed to do, whether it is predicting the weather, running an insurance program such as Medicaid, or ensuring that the money supply is not counterfeit. As for the regulatory agencies, they produce regulations, run inspection programs, and enforce the statutes and regulations, suggesting that their employees are doing the work of government, or at least that enough of them are doing so such that government functions.

When we say government succeeds, we are not denying that its performance falls short of what is expected or needed. In particular, the performance of regulatory agencies has deteriorated over the last dec-

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109. GORMLEY & BALLA, *supra* note 106, at 47–48.

110. See *THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS* (Walter W. Powell & Paul J. DiMaggio eds., 1991) (treating organizations as complex sub-cultures of norms).

111. See *supra* note 92 and accompanying text.



ade.<sup>112</sup> But government is not the train wreck that the economic perspective expects, and, based on a new book by one of the authors, we do not see how government underperformance vindicates the economic perspective. Shapiro and his coauthor Rena Steinzor detail how regulatory underperformance results from political oversight and judicial review, rather than the shirking or sabotage of civil servants.<sup>113</sup> They argue that the civil service should be credited with making the government work despite the significant handicaps thrown in the path of agencies by the White House, Congress, and the courts.<sup>114</sup>

There are many potential reasons for agency underperformance, and employee self-interest might also number among them. Moreover, Steven Croley contends that when the grim predictions of the economic model do not come true, it is primarily because outside-in controls manage to block self-interested bureaucratic behavior.<sup>115</sup> Classic administrative law controls undoubtedly lead to such happy endings in some instances. Nevertheless, it would be unwise to draw broad lessons from confirmed examples of self-interested bureaucracy. The reasons for governmental failure are just as varied as the reasons for market failure, and the best responses to these failures must remain flexible and responsive to the situation.<sup>116</sup>

## 2. THE PUBLIC'S EXPERIENCE

Many of us have had positive interactions with public employees. As one public administration scholar notes, "[w]hether tax officials, police officers, Customs employees, or agricultural inspectors, it is possible to encounter bureaucrats who work hard, show concern for our interests, do not flaunt their authority, exhibit courtesy and good humor, and go the extra mile to help out."<sup>117</sup> According to polling data, one is more likely to encounter these types of employees than not. When citizens are surveyed about their satisfaction with government services, the government generally gets good marks at all levels.<sup>118</sup>

Consider, for example, a study by Thomas and Michelle Miller that analyzed the results of 261 surveys conducted by local governments to measure public satisfaction with their services.<sup>119</sup> They calculated the

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112. See *supra* note 4 and accompanying text.

113. STEINZOR & SHAPIRO, *supra* note 4, at 49, 97-146, 191.

114. *Id.* at 49, 191.

115. CROLEY, *supra* note 47, at 305-06.

116. Cf. STEPHEN BREYER, *REGULATION AND ITS REFORM* (1982).

117. GOODSSELL, *supra* note 3, at 2.

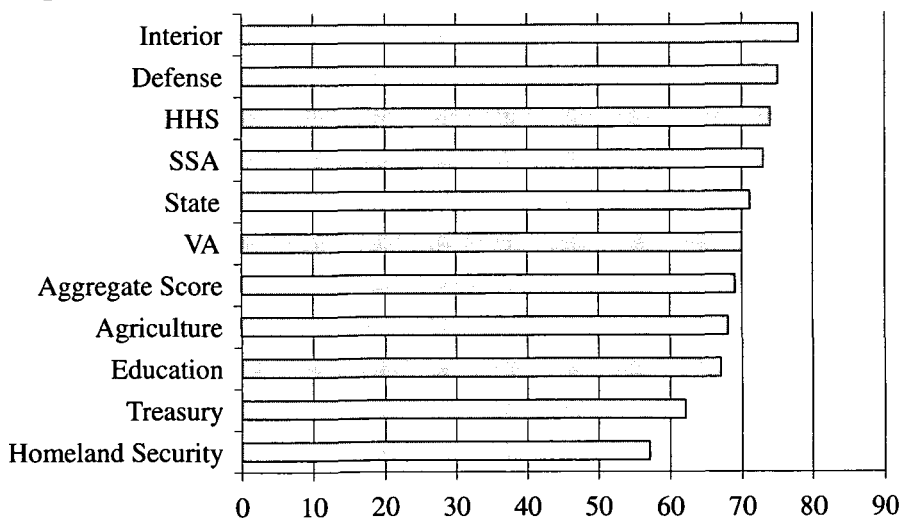
118. See *id.* at 24-31 (describing the survey evidence and concluding that "[t]his does not mean . . . that these experiences are never bad—only that *most* are good.").

119. Thomas I. Miller & Michelle A. Miller, *Standards of Excellence: U.S. Residents' Evaluations of Local Government Services*, 51 PUB. ADMIN. REV. 503 (1991).

average “percent to max (PTM)” score on the surveys at 67.2.<sup>120</sup> A PTM score measures the extent to which the responses collectively attained the highest possible point on whatever rating scale was used. A score of 67.2 means that the average citizen indicated a rating of satisfaction with local governmental services that was more than two-thirds of the way to a perfect rating.

As the following chart indicates, the American Consumer Satisfaction Index reports the same generally high regard for the services provided by federal government. This survey is based on thirty-nine user groups at twenty-four agencies.<sup>121</sup> The scores are consistent with prior years.<sup>122</sup> The government’s aggregate satisfaction score of 68.9 (out of 100) lags behind a national average score of 75.0 for the private sector,<sup>123</sup> but it is a respectable showing nonetheless. It is notable that those polled express high levels of trust in specific agencies (an average score of 70 out of 100), but low overall trust in the government (a score of 37).<sup>124</sup>

**Figure 4** Consumer Satisfaction Scores, Federal Government 2008<sup>125</sup>



These results might be questioned on the ground that citizens do not have enough in-depth knowledge about the quality of the services

120. *Id.* at 507.

121. See GOODSELL, *supra* note 3, at 29–30 (describing the ACSI methodology).

122. ACSI Commentary, Federal Government Scores, (Dec.16, 2008), [http://www.theacsi.org/index.php?option=com\\_content&task=view&id=204&Itemid=62](http://www.theacsi.org/index.php?option=com_content&task=view&id=204&Itemid=62).

123. *Id.*

124. *Id.*

125. *Id.*

that they are receiving, and the results may vary depending on the nature of the question asked. But taking these qualifications into account, it is notable that about two-thirds of citizens report a good experience dealing with federal bureaucrats.

### 3. OBSERVED EMPLOYEE BEHAVIOR

Scholars regularly study public employees at work, paying particular attention to settings where self-interested behavior ought to thrive. These studies of employee behavior offer additional evidence that many civil servants do not behave as economic theory predicts. Even when the studies find evidence of self-interest, it turns out that this does not result in the shirking and sabotage that is supposed to occur.

John Brehm and Scott Gates studied employee behavior by comparing surveys of government and local employees that indicate how employees view their own behavior and how it is viewed by their fellow workers, supervisors, and outside persons.<sup>126</sup> The data consistently demonstrated that “bureaucrats devote the majority of their time to working, rather than to shirking or to sabotage,”<sup>127</sup> and there was “no evidence at all to support leisure-maximization as an explanation for variance in [employee] effort” in different agencies and in different surveys.<sup>128</sup> The surveys also revealed that federal employees are motivated by pecuniary and non-pecuniary incentives, but that pecuniary incentives are not strong enough to account for the lack of shirking and sabotage.<sup>129</sup> Since supervisors were highly constrained in punishing and rewarding employees, the lack of shirking and sabotage is explained by such non-pecuniary rewards as “recognition from others, accomplishing worthwhile things, [and] serving the public interest . . . .”<sup>130</sup>

Marissa Golden studied employee behavior by considering how upper-level civil servants in four agencies responded to the election of Ronald Reagan.<sup>131</sup> “Even under the most extreme circumstances, with a president attempting to turn agency policy 180 degrees from its past,” Golden found, “career civil servants were, for the most part, responsive

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126. BREHM & GATES, *supra* note 93, at 198. The surveys were conducted by the Office of Personnel Management and covered dozens of agencies, ranging from the military through human services. *Id.* at 76. The authors also conducted surveys of a county Department of Social Services and in three police departments. *Id.* at 112, 132.

127. *Id.* at 198.

128. *Id.*

129. *Id.* at 82–83.

130. *Id.* at 83; *see also id.* at 80–81, 195.

131. GOLDEN, *supra* note 95, at 33. The four agencies were the National Highway Traffic Safety Administration (NHTSA), the Food and Nutrition Service (FNS) in the Department of Agriculture, the Civil Rights Division (CRD) of the Department of Justice, and the Environmental Protection Agency (EPA). *Id.*

to this change in elected leadership.”<sup>132</sup> Although there were instances of exit, voice, and sabotage, Golden concludes that “presidents can expect a fairly high degree of responsiveness from the career bureaucrats in the executive branch.”<sup>133</sup> She attributes this behavior to both self-interest and role perception.<sup>134</sup> Although careerists were compliant to avoid demotion or other punishments,<sup>135</sup> they also understood that their role was to present information to their political appointees and to allow them to determine whether and how to carry out the president’s policy preferences.<sup>136</sup>

Golden’s study gives more credit to supervisors’ ability to punish employees and to influence their behavior than do Brehm and Gates.<sup>137</sup> But both studies agree that a combination of pecuniary and non-pecuniary motives explain the behavior of civil servants.<sup>138</sup>

In sum, the evidence of bureaucratic behavior suggests that self-interested behavior and public-interested behavior exist side by side in administrative agencies. The self-interested behavior does not crowd out other employee conduct. Public-regarding behavior exists in the bureaucracies, and even persists in administrations hostile to an agency’s mission. Thus, the effort to identify agencies that are most friendly to public-regarding motives appears to be worthwhile.

#### IV. THE ADMINISTRATIVE PRESIDENCY

The administrative presidency has dominated efforts to control the bureaucracy for the last two decades. While there is a strong normative case to be made for presidential efforts to oversee the bureaucracy, the administrative presidency comes with a downside that has been largely ignored: in some settings, it makes the agency less effective.

This section examines the relationship between the administrative presidency and governmental effectiveness. We begin with a short history of the evolution of the administrative presidency, which reveals that the White House devotes considerable time and resources attempting to ensure its policy priorities are implemented. We then describe a conflict between the administrative presidency and the effectiveness of government.

132. *Id.* at 151–52.

133. *Id.* at 152.

134. *Id.* at 155, 158.

135. *See id.* at 158–59 (civil servants “feared for their jobs, wanted to avoid the wrath of their appointed bosses, did not want to be demoted or banished, and sought to advance their careers.”).

136. *Id.* at 155.

137. Compare GOLDEN, *supra* note 95, at 158–59, with BREHM & GATES, *supra* note 93, at 42.

138. *See* BREHM & GATES, *supra* note 93 at 82–83; GOLDEN, *supra* note 95, at 154–60 and accompanying text.

### A. *The Evolution*

Every president since Richard Nixon has embraced the administrative presidency. Some presidents have been more enthusiastic practitioners of this effort than others, but no one, including President Obama, has reversed the trend in a significant way. The growth in the administrative presidency, therefore, has been entirely in the direction of more centralization, more political appointees, and more reporting requirements.

#### 1. RICHARD NIXON

Richard Nixon kicked off the administrative presidency by creating the Domestic Council and the Office of Management and Budget (OMB),<sup>139</sup> both of which started the White House on the road to centralized decisions. Worried that the staff of an agency would capture the administrator, a result that a Nixon advisor (John Ehrlichman) described as “marrying the natives,”<sup>140</sup> Nixon also began the increased use of political appointees.<sup>141</sup> The idea was that additional political appointees would be in a better position to defend the administration’s policy preferences because they would be less distant from the staff than the administrator.<sup>142</sup>

#### 2. JIMMY CARTER

President Carter spearheaded the creation of the Senior Executive Service (SES), which created a cadre of civil service employees who work just below politically appointed managers.<sup>143</sup> Although this legislation was intended to improve the quality of top-level civil service managers,<sup>144</sup> there are two aspects of the SES that empower the administrative presidency. First, although most SES managers rise up from the civil service, the president is able to appoint up to 10 percent of all SES managers and up to one quarter of SES managers in a single agency.<sup>145</sup> Second, administrators have the legal authority to move top-level career civil service managers with whom they do not wish to

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139. PATRICIA WALLACE INGRAHAM, *THE FOUNDATION OF MERIT: PUBLIC SERVICE IN AMERICAN DEMOCRACY* 97 (1995).

140. *Id.*

141. *Id.*

142. *Id.*; see also DAVID E. LEWIS, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE* 52 (2008) (stating that Nixon, upset with appointees and career officials from his first term, replaced them with layers of “loyalists,” and “inserted additional political appointees deep into the departments and bureaus, and tried to accomplish informally what Congress would not allow formally in reorganization.”).

143. INGRAHAM, *supra* note 139, at 98.

144. *Id.* at 98–99.

145. Anne Joseph O’Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 925–26 (2009).

work.<sup>146</sup>

The Carter administration also increased the number of Schedule C appointees,<sup>147</sup> a strategy that every president subsequently has used to increase the number of employees responsive to him.<sup>148</sup> Schedule C appointments are Civil Service jobs that are not based on the results of an examination process.<sup>149</sup> These jobs are exempt because the work is confidential or involves the determination of government policy.<sup>150</sup> Between 1976 and 1990, the presidents doubled the number of Schedule C appointments.<sup>151</sup>

### 3. RONALD REAGAN

President Reagan adopted the first regulatory reporting requirements, including regulatory impact statements.<sup>152</sup> The administration also sought greater control by choosing presidential appointees on the basis of their ideological affinity, rather than their expertise or experience, and by screening managers appointed by cabinet officers and administrators on the same basis, rather than permitting the top appointees to make these choices themselves.<sup>153</sup> The administration also increased the number of Schedule C political appointees in departments, such as the Department of Labor, that were perceived as hostile to the President's policy priorities.<sup>154</sup> In addition, the Reagan administration used internal agency reorganizations, program reductions, and employment cuts.<sup>155</sup> These cuts were known as "reductions-in-force," and according to David Lewis, "had much the same effect as more overt politicization or reorganization in some circumstances since it altered the career-appointee balance in many agencies."<sup>156</sup>

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146. INGRAHAM, *supra* note 139, at 98–99.

147. *Id.* at 99.

148. See LEWIS, *supra* note 142, at 11.

149. See O'Connell, *supra* note 145, at 925–26 (explaining the categories of civil service employees exempted from the examination process).

150. *Id.*

151. INGRAHAM, *supra* note 139, at 9.

152. Exec. Order No. 12,291, 3 C.F.R. 127 (1981), required agencies to assess the costs and benefits of proposed rules, and it prohibited agencies from proposing or finalizing rules until their cost-benefit analyses were approved by the Office of Information and Regulatory Affairs (OIRA), located in the OMB. The administration also required agencies to submit an annual regulatory agenda, Exec. Order No. 12,498, 3 C.F.R. 323 (1985), and to assess family, federalism, property rights, and trade impacts. See Exec. Order No. 12,261, 3 C.F.R. 83 (1981); Exec. Order No. 12,606, 3 C.F.R. 241 (1987); Exec. Order No. 12,612, 3 C.F.R. 252 (1987); Exec. Order No. 12,630, 3 C.F.R. 554 (1988).

153. Shapiro, *supra* note 24, at 5.

154. INGRAHAM, *supra* note 139, at 101.

155. LEWIS, *supra* note 142, at 52.

156. *Id.*

#### 4. GEORGE H.W. BUSH

The first President Bush engaged in less intensive efforts to manage the bureaucracy, perhaps because “he had a much less clear policy agenda and less need for a tightly controlled political management machine,”<sup>157</sup> but he made his own additions to the administrative presidency. These included additional reporting requirements, more political appointees in departments of special concern to him (through additional Schedule C appointments),<sup>158</sup> and the imposition of a 180-day regulatory moratorium toward the end of his term.<sup>159</sup>

#### 5. BILL CLINTON

President Clinton continued the use of regulatory impact analysis and other reporting requirements,<sup>160</sup> which gave these tools a bipartisan pedigree. Large numbers of political appointees also remained a component of the Clinton management strategy.<sup>161</sup> The significant difference from the prior administration was the president’s personal involvement in rulemaking. He intervened at the front end of the process by issuing a formal directive to an agent head that indicated the type of regulation that the president wanted.<sup>162</sup> At the back end, President Clinton took credit for the regulation by announcing its promulgation, a strategy intended to affect the prior stages of the rulemaking and to ensure compliance with the president’s preferences.<sup>163</sup>

Other members of his staff were also actively involved in steering regulatory policy, as Professors Lisa Bressman and Michael Vandenberg have demonstrated.<sup>164</sup> Based on a survey of EPA officials appointed during the first Bush (1989–1993) and Clinton (1993–2001) Administrations, they found that as many as nineteen White House offices were involved in reviewing EPA rules,<sup>165</sup> with as many as

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157. INGRAHAM, *supra* note 139, at 102.

158. *Id.* at 102–03.

159. Shapiro, *supra* note 24, at 8.

160. President Clinton replaced Executive Orders 12,291 and 12,498, issued by President Reagan, with Executive Order 12,866; but the new order, while providing for greater transparency and less delay, adopted the prior systems of review. See 3 C.F.R. 638, 640, 645 (1993), reprinted in 5 U.S.C. § 601 (1994). President Clinton also imposed additional impact assessment requirements for federalism, environmental justice, and impacts on state, local and Native American governments. Exec. Order No. 13,132, 3 C.F.R. 206 (1999) (federalism); Exec. Order No. 12,988, 3 CFR 157 (1996) (civil justice); Exec. Order No. 12,875, 3 C.F.R. 669 (1993) (intergovernmental entities).

161. INGRAHAM, *supra* note 139, at 103.

162. Kagan, *supra* note 26, at 2249.

163. *Id.*

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

165. *Id.* at 68.

ninety-three percent of the respondents explaining that they became involved in debates with institutional entities other than the OMB.<sup>166</sup>

## 6. GEORGE W. BUSH

George W. Bush adopted the Clinton executive order on regulatory review and, later in the administration, made two changes to it. The administration included non-legislative rules within the scope of the order and required that the policy officer who served as the gatekeeper for agency rulemaking be a presidential appointee.<sup>167</sup> There was also a return to using a political compatibility test for agency appointees.<sup>168</sup> As well, Vice President Cheney was notorious for intervening in bureaucratic decisions without, as the *Washington Post* put it, “leaving any tracks.”<sup>169</sup>

The administration’s unique contribution was its claim that the administrative presidency was constitutionally compelled by the “unitary executive” interpretation of the Constitution. In President Bush’s understanding, “Congress evidently cannot delegate authority to a subordinate executive branch official without formally allowing the president to substitute his own views for those of the officer.”<sup>170</sup> The Clinton administration made a similar claim about the president’s authority to order changes, but claimed only that Congress had in effect delegated this power to the president, without grounding the claim in the Constitution.<sup>171</sup>

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166. *Id.* at 66.

167. Exec. Order No. 13,422, 3 C.F.R. 191 (2007).

168. *See, e.g.*, Daniel Richman, *Political Control of Federal Prosecutions: Looking Back and Looking Forward*, 58 DUKE L.J. 2087, 2102 (2009) (describing the practice of the George W. Bush administration of choosing Justice Department appointees using a political compatibility test).

169. *See* Jo Becker and Barton Gellman, *Leaving No Tracks*, WASH. POST (June 27, 2007), [http://voices.washingtonpost.com/cheney/chapters/leaving\\_no\\_tracks/](http://voices.washingtonpost.com/cheney/chapters/leaving_no_tracks/); *see, e.g.*, STEINZOR & SHAPIRO, *supra* note 4, at 128, 144 (explaining how the Vice-President and the White House ended up writing EPA regulations controlling emissions from electrical generation plants under the Clean Air Act).

170. Harold J. Krent, *The Sometimes Unitary Executive: Presidential Practice Throughout History*, 25 CONST. COMMENT. 489, 504 (2009) (reviewing STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008)). Because the president is authorized by the Constitution to “take Care” that federal laws are “faithfully executed,” the most aggressive view of the unitary executive concludes that the President has the “duty” and therefore the power to direct agency heads, and if necessary, to correct their decisions. *See* Farina, *supra* note 34, at 358 (describing the aggressive viewpoint). A less aggressive version maintains that the President has the power to fire any administrator who does not make a decision the president prefers, although the president lacks the authority to overrule that decision. *See also* Richard J. Pierce, Jr., *Saving the Unitary Executive from Those Who Would Distort and Abuse It: A Review of The Unitary Executive by Steven G. Calabresi & Christopher S. Yoo*, 12 U. PA. J. CONST. L. 593, 597–98 (2010).

171. *See* Kagan, *supra* note 26, at 2320 (contending that President Clinton’s practices were



## 7. BARACK OBAMA

President Obama inherited and continued the administrative presidency. There are now about 1800 people in the Executive Office of the President (EOP) who help him manage the federal bureaucracy.<sup>172</sup> The EOP, which has a budget of \$439 million, consists of thirteen major offices, board, and councils, and their sub-units, the most significant of which is probably the OMB, which employs about 500 people and is composed of career employees and political appointees.<sup>173</sup> President Obama has selected about the same number of policy czars (34) as the prior administration employed (36),<sup>174</sup> and, as far as we can tell, he has kept at least the same number of political appointees. There has been no reduction in the reporting requirements created by his predecessors.<sup>175</sup>

As in the Clinton administration, presidential oversight has been friendlier to agency preferences,<sup>176</sup> but this does not signal a cutback in the administrative presidency. If a president is less hostile to regulation, there is less need for the White House to dampen agency enthusiasm. Nevertheless, the Obama White House has not hesitated to head off strong regulation when it sees a political benefit in doing so.<sup>177</sup>

### B. *The Consequences*

The White House deploys a large internal bureaucracy, thousands of political appointees, and an extensive regulatory reporting system to promote the bureaucracy's responsiveness to the president's policy preferences. More attention has been paid to how these tools can promote overhead democracy than to its internal effects on the bureaucracy. Unfortunately, the effects are not necessarily positive. While the bureaucracy may become more responsive to the president's policy prefer-

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based on a statutory interpretation argument that where statutes grant discretion to executive branch, ultimate decision-making authority has been left by Congress in the hands of the President).

172. Farina, *supra* note 34, at 405.

173. *Id.* at 405-06.

174. See Michael A. Fletcher & Brady Dennis, *Obama's Many Policy "Czars" Draw Ire From Conservatives*, WASH. POST, Sept. 16, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/09/15/AR2009091501424.html?sid=ST2009091501436> (noting that President Bush had 36 policy czars and President Obama has 34).

175. President Obama did revoke President Bush's executive order extending regulatory review to non-legislative rules, Exec. Order No. 13,497, 74 Fed. Reg. 6113 (Jan. 30, 2009), but the administration has apparently continued such review nevertheless. See Letter to Robert Bauer, White House Council, from CPR Board Members (Mar. 17, 2010), [http://www.progressive.reform.org/articles/WH\\_Counsel\\_re\\_OIRA\\_March2010.pdf](http://www.progressive.reform.org/articles/WH_Counsel_re_OIRA_March2010.pdf)

176. STEINZOR & SHAPIRO, *supra* note 4, at 145.

177. See, e.g., Sidney A. Shapiro, *Cost-Benefit Analysis: An Organizational Perspective*, 18 N.Y.U. ENVTL. L.J. (forthcoming 2011) (describing White House efforts to change EPA's proposed rule concerning coal ash to please the electrical generation industry).

ences, government is also less effective in carrying out its statutory mandates.

This tension between responsiveness and effectiveness arises for several reasons. The need to fill thousands of positions with political appointees results in a high level of vacancies, denying agencies consistent on-going management. Administrations also face a challenge in appointing competent managers in all of these positions, particularly if they use political ideology as a qualification. Another problem is that multiple layers of review delay and distort decision-making. By dragging down the effectiveness of agencies, the administrative presidency contributes to the deterioration of the civil service. Experienced civil servants leave because their agencies become dysfunctional, and it is difficult to recruit talented replacements for the same reason. Finally, the administrative presidency deflects attention from the fundamental problems that inhibit effective government. The White House spends too much time focusing on the minutia of individual policy initiatives and too little time on the big picture of whether agencies can implement their statutory missions.

### 1. VACANCIES

A new administration has to fill many positions. One estimate is that a change in the party controlling the White House can result in 1400 new political appointments,<sup>178</sup> but this may be too low. Senate-confirmed appointees, non-civil service SES employees, and politically-selected Schedule C employees hold about 3000 or more jobs in the federal bureaucracy.<sup>179</sup> Even if an administration chooses not to fill all of the SES and Schedule C jobs with political appointees, it will still have a substantial task.

With so many jobs to fill, it takes a new administration considerable time to get the first appointees into place.<sup>180</sup> When Anne Joseph O'Connell studied vacancies that occurred in the past five completed administrations, she found that the average time it took to fill a Senate-confirmed agency position in the executive branch ranged from 163 days (first Bush administration) to 267 days (Clinton administration).<sup>181</sup> While presidents tend to fill the highest positions fairly quickly, lower positions take far longer.<sup>182</sup> The delay for one category of such posi-

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178. James W. Fesler, *The Higher Civil Service in Europe and the United States*, in *THE HIGHER CIVIL SERVICE IN EUROPE AND CANADA* 87, 88 (Bruce L.R. Smith ed., 1984).

179. LEWIS, *supra* note 142, at 56; INGRAHAM, *supra* note 139, at 104; Farina, *supra* note 34, at 410.

180. O'Connell, *supra* note 145, at 918–19.

181. *Id.* at 956, Table 1.

182. *Id.* at 957, Table 2.

tions, for example, ranged from 283 days (first Bush administration) to 420 days (Reagan administration).<sup>183</sup>

The situation has not improved in the Obama administration. At the start of its second year, the administration lagged behind all four previous administrations in percentage of Senate-confirmed executive appointments and key positions remaining open.<sup>184</sup> It has filled 64.4% of these positions as compared to 86.4% for the Reagan administration, 80.1% for the George H.W. Bush administration, 73.8% for the George W. Bush administration, and 69.8% for the Clinton administration.<sup>185</sup>

Moreover, because of turnover among political appointees, an administration must fill these jobs again in a year or two.<sup>186</sup> Many political appointees leave near the end of an administration, leaving the jobs vacant again.<sup>187</sup> The National Commission on the Public Service found that the average amount of time that political appointees stayed in office declined from 2.8 years in the Johnson administration to two years in 1984 in the Reagan administration, and that forty percent of government executives stayed in their positions less than one year.<sup>188</sup> The tenure for Schedule C appointments was the shortest.<sup>189</sup> Moreover, the reappointment process can take months once a position becomes open. As a result of turnover and delays in filling positions, Professor O'Connell found that Senate-confirmed positions in executive agencies were vacant an average of twenty-five percent of the time during the past five administrations.<sup>190</sup>

The problem of turnover and vacancies produces two significant performance problems. The first is inaction. Agencies that lack key managers are less likely to address pressing important problems or to provide the guidance necessary for lower level employees to begin the work.<sup>191</sup> The National Highway Traffic Administration, for example, faced the problem of runaway Toyota cars for a year without an administrator, a vacancy that a former head of NHTSA believes hindered the

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183. *Id.*

184. ANNE JOSEPH O'CONNELL, CENTER FOR AMERICAN PROGRESS, WAITING FOR LEADERSHIP: PRESIDENT OBAMA'S RECORD IN STAFFING KEY AGENCY POSITIONS AND HOW TO IMPROVE THE APPOINTMENTS PROCESS 2 (2010), [http://www.americanprogress.org/issues/2010/04/pdf/dww\\_apointments.pdf](http://www.americanprogress.org/issues/2010/04/pdf/dww_apointments.pdf).

185. *Id.*

186. O'Connell, *supra* note 145, at 919.

187. *Id.*

188. NAT'L COMM'N ON THE PUB. SERV., *Politics and Performance: Strengthening the Executive Leadership System*, in LEADERSHIP FOR AMERICA: REBUILDING THE PUBLIC SERVICE 219, 220 (1990).

189. INGRAHAM, *supra* note 139, at 105.

190. O'Connell, *supra* note 145, at 962.

191. *Id.* at 938.

agency's response.<sup>192</sup> Moreover, without stability in management, civil servants are reluctant to invest the time to develop new policies and programs.<sup>193</sup> If the manager who approved the initiative leaves the agency, employees anticipate that the next manager may not favor the proposed policy.

Confusion is another result. When managerial positions remain vacant, the career staff lacks direction about what they should do. While the staff has expertise, such as law or science, these skills are meaningless without directions on which of the agency's priorities to emphasize.<sup>194</sup> Consider, for example, FEMA's disastrous performance in the aftermath of Hurricane Katrina. When Hurricane Katrina hit the Gulf Coast, more than one-third of FEMA's key management positions were vacant.<sup>195</sup> Likewise, it is difficult to develop new policies, such as a regulation, unless managers are present to ensure that the policy reflects options that the agency leadership can support.<sup>196</sup>

## 2. COMPETENCE

As the administrative presidency has evolved, the number of politically appointed officials has increased. This not only results in positions being frequently vacant, it presents a challenge in terms of appointing competent managers.

Because of frequent turnover, political appointees often do not have time to learn enough about their agencies to become effective managers. Consider David Lewis's study of agency performance in the George W. Bush administration. Lewis focused on the Program Assessment Rating Tool (PART), a numerical grade devised by the OMB to assess agency performance. Lewis found that programs managed by political appointees consistently received lower PART scores than programs headed by career employees.<sup>197</sup> So did programs that employed a higher percentage of political appointees.<sup>198</sup> According to Lewis's statistical evaluation, previous experience in a program and longer tenure in a manager's job were the systematic factors that explained the differences in the PART scores.<sup>199</sup>

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192. O'CONNELL, *supra* note 184, at 3.

193. O'Connell, *supra* note 145, at 962.

194. *Id.* at 941.

195. *Id.* at 939–40; *see also* LEWIS, *supra* note 142, at 150 (stating that FEMA has consistently had a problem with vacancies, and noting that “[t]here was rarely a time when at least one of the important appointed posts was not vacant.”).

196. O'CONNELL, *supra* note 184, at 11.

197. LEWIS, *supra* note 142, at 172–84.

198. *Id.* at 183.

199. *Id.* at 189.

Lewis also found that programs managed by political appointees also scored lower on another measure of program performance employed by the Bush administration, the Federal Human Capital Survey, which asks government employees whether the characteristics of successful organizations were present in their agency.<sup>200</sup> Programs run by political appointees received consistently lower ratings concerning management, leadership, and work environment than programs run by career staff managers.<sup>201</sup>

A White House that appoints on the basis of ideological loyalty can make the problem of competence worse. Appointees who have little experience in management and scant respect for professional bureaucrats are more likely to demean and ignore the advice of the career staff. They are therefore more likely to repeat historical mistakes and make serious errors in judgment in both framing and choosing policy options.<sup>202</sup> The results can be disastrous, as Michael Brown's performance as head of FEMA during Katrina demonstrated.<sup>203</sup>

The emphasis on appointing managers on the basis of ideological loyalty can also lead managers to ignore or demean legitimate scientific evidence, as the Bush administration's treatment of agency science revealed. Agency administrators routinely ignored the scientific evidence presented to them, changed scientific reports to conform to their policy preferences, and barred agency scientists from participating in scientific meetings or publishing relevant research.<sup>204</sup>

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200. *Id.* at 189–94.

201. *Id.*

202. STEINZOR & SHAPIRO, *supra* note 4, at 198.

203. *Id.*; *see also* LEWIS, *supra* note 142, at 165–69. Lewis states that evaluations of FEMA's performance during Katrina:

look strikingly like those that followed Hurricane Andrew in 1992. Critiques focused on unclear responsibilities and lines of authority during catastrophic events; confusion about when the federal government can and should supersede state authority; insufficient planning, training programs, and predisaster exercises; inadequate response and recovery capabilities; and a failure in executive leadership.

*Id.* at 166. Brown was also roundly criticized for waiting five hours after Katrina's landfall to call in disaster-response teams, and only pre-positioning one FEMA official in New Orleans before landfall. *Id.* at 167–69. Lewis asserts Brown's unresponsive, unprepared nature likely resulted from his lack of disaster experience. *Id.*

204. *See, e.g.*, DAVID MICHAELS, DOUBT IS THEIR PRODUCT: HOW INDUSTRY'S ASSAULT ON SCIENCE THREATENS YOUR HEALTH 192–211 (2008); THOMAS O. MCGARITY & WENDY E. WAGNER, BENDING SCIENCE, HOW SPECIAL INTERESTS CORRUPT PUBLIC HEALTH RESEARCH 125–26, 184–88 (2008); SETH SHULMAN, UNDERMINING SCIENCE: SUPPRESSION AND DISTORTION IN THE BUSH ADMINISTRATION (2006); RESCUING SCIENCE FROM POLITICS: REGULATION AND THE DISTORTION OF SCIENTIFIC RESEARCH (Wendy Wagner & Rena Steinzor eds., 2006); CHRIS MOONEY, THE REPUBLICAN WAR ON SCIENCE 221–47 (2005); Linda Greer & Rena Steinzor, *Bad Science*, 19 ENVTL. F. 28 (2002).

### 3. DELAY

The centralization of decision-making in the White House and the deployment of political appointees deep into the bureaucracy create multiple layers of review for policy proposals. The result, which Paul Light describes as the “thickening” of government,<sup>205</sup> slows agency decision-making. An issue stops at many levels of review, however briefly.<sup>206</sup>

In the Reagan administration, OIRA was a significant source of delay.<sup>207</sup> Although OIRA review has been less time-consuming since the Clinton administration introduced time deadlines,<sup>208</sup> most analysts still point to reporting requirements as a source of rulemaking ossification. As two observers note:

It is difficult to measure the costs of delay caused by ossification and impossible to prove that these costs are outweighed by improvements in the regulations that are adopted. We can say with some assurance, however, that even when Congress instructs the EPA to complete a regulation within a certain time frame, those deadlines are rarely met.<sup>209</sup>

There are other causes of delay, of course, but there is little doubt that the administrative presidency contributes to the problem.

### 4. DISTORTION

Multiple layers of review distort decision-making. For one thing, the review process impedes the flow of information up and down the management chain. Information can become distorted as it passes from one level to another, and some important information may never make it all the way to top officials.<sup>210</sup> The same problem exists for guidance and oversight that must pass back down through layer after layer before it reaches front-line employees. Information is lost because it often passes by word of mouth, much like the children’s game of telephone.<sup>211</sup> Cynthia Farina sums up the consequences this way: “Even under the most optimistic assumptions of universal, disinterested competence and good judgment, the information flowing up to the President about implications and options will be imperfect—and the message flowing down

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205. PAUL C. LIGHT, THICKENING GOVERNMENT, FEDERAL HIERARCHY AND THE DIFFUSION OF ACCOUNTABILITY 85–86 (1995).

206. *Id.* at 79–85.

207. Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1280–81 (2006) (describing how delay was “OIRA’s tactic of choice for stifling costly new regulations” during the Reagan and first Bush administrations).

208. *Id.* at 1281.

209. STEINZOR & SHAPIRO, *supra* note 4, at 141–42.

210. LIGHT, *supra* note 205, at 65–66.

211. *Id.*; see also David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095, 1128 (2008).

to agency officials about 'what the President wants done' will at times be ambiguous, even contradictory."<sup>212</sup>

Layers of review also distort decision-making by making it less systematic. White House involvement in decision-making focuses on the subset of relevant issues that have the most political salience. Rather than systematically monitoring agencies, White House officials react to the views of interest groups, influential constituents, and the media.<sup>213</sup> In addition, White House officials seldom have the same awareness of the issue and its relationship to other issues as agency administrators who have overseen the development of a rule; they are not attuned to the advice of the career staff or to the rulemaking record.<sup>214</sup> While an agency is normally allowed to defend its preferred resolution of an issue, no agency will be granted enough time to make reviewers on the outside as fully informed as the agency insiders.

White House review is not systematic even within the context of OIRA review of regulatory impact statements. According to the respondents in the Bressman-Vanderbergh study, OIRA involvement was "sporadic;" it was "very involved in the things they got involved in [but] they let most of it go by," and OIRA had "heavy involvement in some rulemakings but hardly any or none in plenty of other rulemakings."<sup>215</sup> Those surveyed attributed the intensity or lack of intensity of review to the professional or political interests of particular OIRA staffers.<sup>216</sup>

Thus, White House oversight is "sporadic, at times cacophonous, and often imperfectly realized."<sup>217</sup> Even if White House oversight promotes accountability, it may not "promote rationality in a systematic way, as a model of agency decision-making should."<sup>218</sup>

## 5. DETERIORATION OF THE CIVIL SERVICE

The previous problems have an adverse impact on the civil service, making it more difficult to hire and retain effective employees. As we discussed earlier, a primary motivation for the career bureaucracy is the opportunity to promote the agency's mission. In particular, many senior officials report that the satisfaction that comes from promoting the public interest is more important to them than the financial rewards they

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212. Farina, *supra* note 34, at 413-14.

213. In political science terminology, the White House practices "fire-alarm" oversight instead of engaging in the more systematic "police-patrol" oversight. See Farina, *supra* note 34, at 412-13 (discussing the White House reliance on "fire-alarm" oversight).

214. STEINZOR & SHAPIRO, *supra* note 4, at 132.

215. BRESSMAN & VANDENBERGH, *supra* note 164, at 67.

216. *Id.* at 70.

217. Farina, *supra* note 34, at 412.

218. BRESSMAN & VANDENBERGH, *supra* note 164, at 70.

earn from their jobs. Civil service jobs therefore are less attractive when the previous problems make agencies less effective, as the National Commission on Public Service explains:

There are too many decision makers, too much central clearance, too many bases to touch, and too many overseers with conflicting agendas. Leadership responsibilities often fall into the awkward gap between inexperienced political appointees and unsupported career managers. . . . Policy change has become so difficult that federal employees themselves often come to share the cynicism about government that affects many of our citizens.<sup>219</sup>

As a result, the Commission notes, “[t]oo many of the most talented leave the public service too early; too many of the least talented stay too long.”<sup>220</sup>

The administrative presidency has another unfortunate impact on the civil service. In defense of their aggregation of power, presidents have routinely bashed the bureaucracy. Ronald Reagan and George W. Bush used this rhetoric most aggressively, but Democrats also follow this path.<sup>221</sup> Some of this criticism is no doubt deserved, although earlier we noted that the government generally performs far better than this rhetoric would indicate.<sup>222</sup> From the point of view of the civil service, the practitioners of bureaucracy bashing are not only over the top in their rhetoric, they blame the bureaucracy for government failures that result from complex causes, including poor presidential administration. Moreover, any job is less attractive when the boss regularly and publicly stigmatizes the employees, and seldom praises their good work.

To be sure, the disillusionment of the career civil service has many causes, including pay rates and working conditions.<sup>223</sup> The loss of talented civil servants, however, is a problem for the country no matter what the cause. As one of the authors has explained:

. . . the federal government will lose nearly 530,000 employees, largely because it has a workforce aging far faster than that of the private sector—58 percent of federal workers are over 45, compared with 41 percent in the private sector . . . . The attrition will cripple the government at the highest levels . . . 36 percent of the SES employees will retire by 2012. . . . Similarly, 27 percent of supervi-

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219. NAT’L COMM’N ON THE PUB. SERV., URGENT BUSINESS FOR AMERICA: REVITALIZING THE FEDERAL GOVERNMENT FOR THE 21ST CENTURY 1 (2003).

220. *Id.*

221. STEINZOR & SHAPIRO, *supra* note 4, at 126.

222. *See supra* Section III.C.1.

223. STEINZOR & SHAPIRO, *supra* note 4, at 216–18; *see also* LEWIS, *supra* note 142, at 141–42 (discussing the theory that competent workers will choose salary structures directly tied to performance, and thus “the best workers will choose the private sector over government work because the private sector is more likely to reward them for their performance.”).



sors who direct daily work throughout the government are expected to retire by 2012.<sup>224</sup>

The loss of talented federal employees not only limits the government's capacity to complete the missions that Congress assigns, it also adversely affects the capacity of the bureaucracy to check the administrative presidency. When agency professionals, operating within the parameters of their training and experience, present their understanding of the law, science, and technology to agency leadership, they speak truth to power. When this capacity is reduced, politics takes on a greater role in influencing the outcome. Agencies should not, and cannot as a practical matter, ignore the White House's policy demands. But, without an effective civil service, an agency loses its capacity to vet the validity of these policy demands.

## 6. MISPLACED ATTENTION

Since the goal of the administrative presidency is to strengthen the responsiveness of the bureaucracy to the White House's policy preferences, it does not take note of forces that weaken the agency's capacity more generally. White House officials have mostly sat on their hands as the capacity of agencies to protect the public has gradually eroded.

In a recent book, one of the authors details how the five agencies primarily responsible for protecting the health and safety of the public are in shambles.<sup>225</sup> These agencies—the Consumer Protection Safety Commission (CPSC), Food and Drug Administration (FDA), National Highway Traffic Safety Administration (NHTSA), Environmental Protection Agency (EPA), and the Occupational Safety Administration (OSHA)—have been unable to cope with both highly publicized threats or systematic failures that threaten the public safety and health. The book explains:

Two [agencies]—the CPSC and OSHA—would not make it past any reasonable triage of effective institutions, just managing to stay open for limited business. At the opposite end of the spectrum lies the EPA . . . [which] has managed to cut a wider and deeper swath through public affairs than the other agencies combined and [which] has been brought to its knees only with considerable effort. In between . . . are the NHTSA and the FDA, which have clocked substantial achievements at the same time that emerging, important problems slip from their grasp.<sup>226</sup>

While the regulatory authority, resources, and capacity of these

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224. STEINZOR & SHAPIRO, *supra* note 4, at 208.

225. *Id.* at 3–37.

226. *Id.* at 4–5.

agencies has diminished to an alarming point, the White House has been more concerned about the minutiae of individual regulatory initiatives. Rather than facilitating the work of government, the orientation of the administrative presidency is to second-guess individual policy initiatives. As the White House fiddles with micro-management of the regulatory state, administrative government burns out.

## V. THE PATH TO STRONGER INSIDE-OUT CONTROLS

The administrative presidency has dominated efforts to control the bureaucracy for the last two decades. The assumptions on which it is based—the normative justification for overhead democracy and the economic perspective on bureaucratic behavior—are widely accepted in the administrative law literature. But, as we have seen, the economic perspective is unduly suspicious of civil servants.<sup>227</sup> Administrative law fails to account for their other-regarding motivations, particularly professionalism, or the internal controls that address the self-interested behavior of the career staff. Likewise, although little attention has been paid to how the administrative presidency reduces government effectiveness, we know it hinders the capacity of the civil service to implement the statutes under which they operate.<sup>228</sup>

Many conclude that, despite the weaknesses of the administrative presidency in promoting overhead democracy, these techniques offer the best available way to achieve democratic accountability. While this conclusion may hold true in the context of outside-in controls, it is the wrong question to ask. Once it is recognized that inside-out controls also play a role in promoting democratic accountability, the question becomes this: What is the best mix of outside-in and inside-out controls? When inside-out controls work, there is less need for outside-in controls to promote democratic accountability, making it possible to reduce the toxic side effects of the administrative presidency.

In assessing the administrative presidency, we must remember that agency effectiveness itself is a form of democratic responsiveness. When Congress passes and the president signs legislation, the failure to achieve these commitments devalues the democratic processes that produced the legislation and the commitments made in those laws. Agencies must be responsive *both* to the values of the elected Congress that passed the statute *and* to the current policy preferences of the elected president.

Yet, half of the task of democratic responsiveness—the congres-

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227. See *supra* notes 91–92 and accompanying text.

228. See *supra* Section IV.B.

sional half—has largely been ignored because of the focus on the administrative presidency and its efforts to make the bureaucracy more responsive to the president's policy preferences. Support for the administrative presidency is based largely on its normative premises with little regard for its impact on governance in its totality.<sup>229</sup> As Hugh Hecl once noted, “[i]n practice the idea that the higher career service should be a resource for political leadership is still alien to Washington.”<sup>230</sup>

The price for this ignorance appears to us to be significant. While we cannot prove that the benefits of the administrative presidency (an increase in responsiveness) outweigh its costs (a loss of effectiveness), we are confident that the administrative presidency is a significant contributing cause of government ineffectiveness. Moreover, ineffectiveness begets more ineffectiveness. As the government becomes less effective, the morale of the career staff suffers, producing a brain drain that further threatens government effectiveness.

As the quality of the civil service falls, the country loses the most valuable asset of a high quality civil service—its capacity to speak truth to power. This was the Progressives' most useful insight: neutral competence is an antidote to the politicization of administration. Presidents are no doubt frustrated by the bureaucracy's attention to evidence and reasoned argument, particularly when they wish to implement what they perceive as their electoral mandate immediately and without opposition. Yet the country is well served by the professional disciplines of the civil service.

Hopefully, these considerations will at some point move Congress to investigate the links between government effectiveness and the administrative presidency. If, as the public administration literature suggests, the career civil service can at times be responsive and responsible without the spur of the administrative presidency, then Congress and the president may want to negotiate appropriate reductions in the administrative presidency.

The general assumption is that presidents are unlikely to cooperate with reforms that reduce their power.<sup>231</sup> While we are not pollyannas about reform, we do not believe that future presidents, or even the current one, would resist all reform efforts. The effectiveness of government is a concern for presidents. Both progressive and conservative presidents have some positive goals for government, if for no other rea-

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229. SULEIMAN, *supra* note 2, at 219.

230. HUGH HECL, *A GOVERNMENT OF STRANGERS: EXECUTIVE POLITICS IN WASHINGTON* 241 (1977).

231. *Cf.* O'Connell, *supra* note 145, at 987–88 (concluding that achieving a reduction in the number of political appointees is “politically impossible”).

son than to meet voter expectations about government protections and services.

We suggest that the focus of Congress's efforts should be to reduce the number of political appointees, a recommendation made by the National Commission on Public Service<sup>232</sup> and endorsed by academics who have studied the downsides of appointing over 3000 appointees.<sup>233</sup> This appears to be a sensible reform since our own analysis indicates that many of the problems with the administrative presidency are linked to the multiple layers of review that it creates.

We do not favor, however, an across-the-board reduction in the number of political appointees. Instead, we believe that the balance between outside-in and inside-out controls should be based on an assessment of how well inside-out controls work for a given agency. As we have suggested in Section II, the efficacy of hierarchical controls in an agency is a function of the degree of discretion delegated to government employees and the extent to which their actions can be monitored. Professionalism can make up for weaknesses in managerial controls, suggesting for example that the lawyers, scientists, public administrators, and economists engaged in rulemaking will act in a responsive and responsible manner.

Congress should therefore commission a study of what existing evidence tells us about the efficacy of managerial controls and professionalism in contexts like rulemaking. The newly reformed Administrative Conference of the United States (ACUS), the National Academy of Public Administration, or perhaps both together, are good candidates for this job.

## V. CONCLUSION

The nation has four ways to promote democratic accountability in agencies, yet the administrative presidency has been the preferred strategy for some time now. The proponents of the administrative presidency not only overlook the efficacy of managerial and professional accountability, they have created a system of oversight that reduces the impact of these alternative sources of accountability. As a result, shrinking the administrative presidency does not necessarily mean a net loss of democratic accountability.

Government effectiveness can be rebuilt if Congress and the White House recognize and rely to a greater extent on internal accountability

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232. NAT'L COMM'N ON THE PUB. SERV., *LEADERSHIP FOR AMERICA: REBUILDING THE PUBLIC SERVICE* 7 (1989).

233. See, e.g., PAUL R. VERKUIL, *OUTSOURCING SOVEREIGNTY* 164 (2007); David Fontana, *Government in Opposition*, 119 *YALE L. J.* 548, 611 (2009).

mechanisms. State governments can also experiment with a variety of controls. Scholars of administrative law can help to set the stage for this development by recognizing the potential of inside-out controls for establishing effective and accountable government.