FALSE COMFORT AND IMPOSSIBLE PROMISES: UNCERTAINTY, INFORMATION OVERLOAD, AND THE UNITARY EXECUTIVE

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[The time will assuredly come] when every vital interest of the state will be merged in the all-absorbing question of who shall be the next President?

—Alexander Hamilton

Reasonable people might reasonably fear that contemporary American government has gotten out of control. Even those who do not believe in a minimalist, night-watchman state justifiably worry that much U.S. policy making and implementation is now beyond the ability of even most politically engaged citizens to comprehend, let alone to assess on the merits and attribute to the appropriate institutional actors. In such a society, is it any longer possible to retain even an ideal conception of our collective civic identity as a government “of the people, by the people, [and] for the people”? 1

To this fundamentally important question, the unitary executive conception of the presidency emphatically answers “yes.” 2 Its argument is essentially this: the people can maintain control over the direction and performance of the national regulatory state through

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2 President Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863).


Two other important articles advocate the unitary executive approach without accepting that it is required as a matter of originalist constitutional interpretation: Elena Kagan, Presidential Administration, 114 HARV. L. REV. 2245 (2001); Lawrence Lessig & Cass R. Sunstein, The President and the Administration, 94 COLUM. L. REV. 1 (1994).
their ultimate representative, the President. Article II\(^4\) vests him with the full federal executive authority. All officials charged with implementing federal statutes are therefore his agents. Authorized to “take Care” that all federal laws “be faithfully executed,”\(^5\) he has the duty—and hence the power—to direct and, if necessary, correct the decisions of those agents.\(^6\) Unlike either the multi-member legislature or the collegial judiciary, his office is deliberately structured to focus responsibility and to foster resolute, purposeful and efficient action. Moreover, as the only official whose electoral constituency is nationwide, only he represents all Americans. When he coordinates policy, establishes administrative priorities, and sets the goals and limits of regulatory solutions, he answers to the whole people rather than to the narrow factional interests of particular regions. When he acts to secure our interests at home and abroad he, uniquely, reflects and embodies the mandate of the nation.

This is a bold solution to the riddle of how a twenty-first century global superpower can be governed both democratically and effectively. When, in addition, scholars such as Steven Calabresi and Christopher Yoo not only trace unitary executive theory back to the original constitutional understanding but also discern two hundred years of conforming executive practice,\(^7\) they undergird the theory’s


\(^5\) U.S. CONST. art. II, § 3.

\(^6\) “Power follows responsibility” reasoning is a staple technique of unitary executive interpretation. See, e.g., Memorandum from the U.S. Dep’t of Justice Office of Legal Counsel to William J. Haynes II, Gen. Counsel, Dep’t of Def. 4, 6 (Mar. 14, 2003), available at http://gulcfac.typepad.com/georgetown_university_law/files/march.14.memo.part1.pdf (arguing that “the Founders entrusted the President with the primary responsibility, and therefore the power, to protect the security of the United States,” and that the President has “complete discretion in exercising the Commander-in-Chief power”). I argue elsewhere that the converse reasoning—“responsibility follows power”—is a far more important constitutional principle. See Cynthia R. Farina, Presidential Virtue: An Essay on Constitutional Culture and Constitutional Conscience (Jan. 2010) (unpublished manuscript, on file with author).

A subset of unitary executive scholarship hesitates to recognize presidential power to direct specific regulatory outcomes, although it insists that the President can fire decisionmakers who do not make the decision the President prefers. See, e.g., Richard J. Pierce, Jr., Saving the Unitary Executive Theory from Those Who Would Distort and Abuse It: A Review of The Unitary Executive by Steven G. Calabresi and Christopher S. Yoo, 12 U. PA. J. CONST. L. 593, 597–98 (2010).


Challenges to the originalist case include: David M. Driesen, Toward a Duty-Based Theory of Executive Power, 78 FORDHAM L. REV. 71 (2009); Cynthia R. Farina, The Consent of
audacity with authenticity. In this Essay, I am less interested in debating the historical pedigree of unitary executive theory than in considering its remarkable ascendency over the last thirty years. No longer just the credo of the Federalist Society and Reagan Republicans, it has attained mainstream constitutional status and won adherents across the political spectrum.

Those outside the legal academy might respond that the greater wonder than the striking success of unitary executive theory is that it has taken law so long to catch up with larger cultural phenomena. Over the last hundred years, Presidents of both parties have been exploiting the growing pervasiveness and immediacy of mass media communications to establish a highly personal representative relationship with citizens. In the process, the presidency has been redefined as the core of American government. Speaking directly to the people, and enlisting their support in what thereby becomes the uniquely presidential enterprise of leading the country to safety and prosperity, modern Presidents have emerged as “the single head of the government and moral leader of the nation who speaks for and may be taken as equivalent to all the people.” In this “personal” (or “plebiscitary”) presidency, Congress and federal agencies recede to

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11 See, e.g., SAMUEL KERNELL, GOING PUBLIC: NEW STRATEGIES OF PRESIDENTIAL LEADERSHIP (2d ed. 1993); THEODORE J. LOWI, THE PERSONAL PRESIDENT: POWER INVESTED, PROMISE UNFULFILLED xi (1985); CRAIG A. RIMMERMAN, PRESIDENCY BY PLEBISCITE: THE REAGAN-
supporting roles in the enterprise of democratic governance: at best, they are sidekicks doing the actual work of implementing the President’s policy agenda. At worst, they are rogues and obstructionists to achieving the people’s interests that the President will overcome with the people’s help. Unitary executive theory (finally) provides the constitutional backstory for this ongoing political drama.

Still, recognizing unitary executive theory as the inevitable, if belated, legal apologia for the modern American presidency reframes the question, rather than resolving it: what is the attraction of personal, President-centered government as now justified by unitary executive theory? The President, in the cultural and the legal account, is an exceptionally faithful and beneficent representative of the people. Yet neither the contemporary process of presidential selection nor the observed behavior of voters, candidates, or Presidents corroborates the story of a “Representative-in-Chief,” whose immunity from regionalism and special interest politics enables him, uniquely, to identify and further some higher will of the whole nation. Moreover, the managerial claim that Presidents do—or could, if only our legal regime would acknowledge their full constitutional authority—bring coherence, rationality, and accountability to the vast U.S. regulatory enterprise is unrealistic, if not completely implausible. Lawyers should also recognize that this “Decider-in-Chief” story threatens the values of expertise and legality that have been foundations of the modern administrative state.12 Given all these improbabilities and contradictions, why is unitary executive theory, along with the larger socio-political phenomenon of President-centered government it legitimizes, so appealing to the popular and scholarly imagination?

Part I draws on cognitive, social, and political psychology to suggest that the extreme cognitive and psychological demands made on citizens by modern life create particular susceptibility to a political and constitutional ideology organized around a potent and beneficent leader, who champions the people’s interests in the face of internal obstacles and external dangers. Part II, which considers the exaggerated representational and managerial claims made by this ideology, draws on the large body of relevant work in election studies, public administration, and political science to argue that very conditions which make the personal, unitary executive presidency so appealing also, ironically, ensure that no President can be the leader it


promises. Finally, the conclusion considers the post-2008 revisionism that is now interpreting the George W. Bush Presidency as a perversion of unitary executive theory. It warns against the reassuring conclusion that a peculiar conjunction of inept but ruthless leadership13 and professional irresponsibility of epic proportions14 produced the excesses of that Administration. Accurate as those assessments may be, the vital lesson for the future is that the capacity for extremism is inescapably part of the unitary executive presidency.

I. FALSE COMFORT

[People] are guided by two chief motivations, the desire to make a good decision, and the desire to make an easy decision.

—Lau, Andersen, and Redlawsk, An Exploration of Correct Voting in Recent U.S. Presidential Elections15

Modern American citizenship is hard on the human psyche. The volume and breadth of social and economic policymaking undertaken by the federal government on our behalf is breathtaking. A recent empirical study estimates that regulatory agencies annually issue 600–800 notices asking for public comment on proposed rules, plus about 200 final rules that become effective without public comment.16 These agency actions run the gamut from the monumental to the (relatively) trivial; they may implicate deeply contested value judgments or involve resolution of mind-numbingly technical questions. In 2008 alone, the nearly 200 federal entities with rulemaking authority finalized regulations on issues ranging from permissible levels of airborne lead17 to handling onions grown in South Texas.18 They es-

ablished compensation levels for “bumping” airline passengers, set maximum hours of driving for commercial truckers, defined inflation adjustments for immigration law violation penalties, and specified minimum square footage of indoor and outdoor space for home child-care providers serving Head Start children.

The scale of federal policymaking is often incomprehensible to citizens. A single policy initiative, the bailout of financial institutions, is estimated to cost two trillion dollars over its lifetime—a figure with no reality to most of us until it is rescaled to “ordinary” dimensions (e.g., the cost of giving $5,500 to every U.S. resident), at which point it becomes frightening. The geographical scope of U.S. interest and influence is literally global. Countries about which the average person knows little, if anything, suddenly emerge as objects of need that claim our financial and human resources, centers of conflict that require our soldiers, and sources of threat that imperil our societal and personal well-being.

The Parts that follow examine how socio-political conditions of late twentieth and early twenty-first century America create an environment in which citizens are especially susceptible to the simplifying, palliating claims of the modern “personal” presidency and unitary executive theory.

A. Future Shock and Cognitive Compensation

The world of today . . . is as different from the world in which I was born as that world was from Julius Caesar’s. I was born in the middle of human history, to date, roughly. Almost as much has happened since I was born as happened before.

—Kenneth E. Boulding (1910–1993)

Attention is a finite and non-renewable resource.

Whenever we search for and choose intentional investments, the acts of searching and choosing themselves require attentional investments.

—Thorngate’s First & Fifth Principles of the economics of attention

In 1970, sociologist Alvin Toffler speculated that people in modern industrial societies live under conditions of such intense exposure to new information and accelerated rate of cultural change that they become vulnerable to a state of “future shock.” Rapid evolution of scientific knowledge, coupled with cumulating advances in communication, transportation, and other technologies, he argued, produce a state of sensory overstimulation, “information overload,” and “decision stress”:

[T]he increased rate at which situations flow past us vastly complicates the entire structure of life, multiplying the number of roles we must play and the number of choices we are forced to make . . . .

Moreover, the speeded-up flow-through of situations demands much more work from the complex focusing mechanisms by which we shift our attention from one situation to another. There is more switching back and forth, less time for extended, peaceful attention to one problem or situation at a time . . . .

There is, however, still another, even more powerfully significant way in which the acceleration of change in society increases the difficulty of coping with life. This stems from the fantastic intrusion of novelty, newness into our existence . . . .

The acceleration of change . . . radically alters the balance between novel and familiar situations. Rising rates of change thus compel us not merely to cope with a faster flow, but with more and more situations to which previous personal experience does not apply. And the psychological implications of this simple fact . . . are nothing short of explosive.


26 TOFFLER, supra note 24.

27 Id. at 33.
These psychological implications, Toffler posited, include the feeling of being overwhelmed with the complexity of modern life; a perception of individual and collective loss of control; increased tension, self-doubt, and anxiousness; and “a deepening sense of confusion and uncertainty.”

He hypothesized that people try to avoid these disturbing mental states through a number of strategies: attempting to return to past modes of thought and action, individually or through a collective “politics of nostalgia” (reversion); “search[ing] for a unitary solution” or explanation (super-simplification); and “flatly refus[ing] to take in new information” that further complicates decisions or calls into question existing beliefs (denial).

In the forty years since Future Shock was published, research has significantly advanced our understanding of human thinking and behavior. Yet, the picture contemporary psychologists paint of cognition, motivation, and social interaction aligns surprisingly well with Toffler’s predictions.

Cognitive psychology models the human brain as an information processor with a remarkable ability to conserve its own resources. Studies of attention and judgment reveal the brain making use of numerous strategies to stretch finite cognitive capacity; these strategies allow rapid, almost reflexive, determination of which pieces of information ought be attended to, how the pieces fit together, and what they signify. Chief among the strategies are heuristics (simple, “fast and frugal” rules of thumb for making judgments), schemata (mental models or scripts that organize our experience into generic patterns we use to interpret, and bridge gaps in, new information), and prototypes (items which, by representing the “most typical” char-

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28 Id. at 322.
29 Id. at 319–21.
32 “For example, one’s schema about university professors might include the information that they are bookish, methodical, verbose, and badly-dressed.” Patricia Pliner, Cognitive Schemas: How Can We Use Them to Improve Children’s Acceptance of Diverse and Unfamiliar Foods?, 99 British J. Nutrition S2, S2 (Supp. I 2008). The relationship between schemata and stereotyping is obvious.
acteristics that distinguish what is in a given category from what is not, provide a benchmark for categorizing new information).

Social and political psychologists discern these same mental strategies operating when individuals make choices about social behavior, group affiliation, and formation of political judgments. For example, prototyping and the use of schema helps us differentiate and evaluate social groups and political candidates. Extensive reliance on heuristics is thought by some political scientists to explain how relatively coherent mass public opinion can emerge from a nation of individuals who have little knowledge and less sophistication about political candidates and issues.

The human brain, in other words, works hard to manage incoming stimuli in a way that avoids “information overload.” Attention is a limited resource, and if the brain is forced to process more information than available cognitive capacity can manage, the individual experiences anxiety, fatigue, a sense of being overwhelmed, frustration, anger, increasingly poor decision making, depression, withdrawal, feelings of panic, and, ultimately, complete inability to act. Factors that contribute to the “cognitive load” of incoming information include quantity, interrelatedness, complexity, novelty, ambigu-


34 Michael A. Hogg, Uncertainty, Social Identity, and Ideology, 22 ADVANCES GROUP PROCESSES 203, 207 (2005). “If the salient characteristics of a particular politician are consistent with or representative of the prototypic Republican, say, then voters may readily infer that she is for a strong defense, low taxes, against government intervention in the economy, against abortion, and so on . . . .” Lau & Redlawsk, supra note 31, at 953.

35 For collection of the literature, see James N. Druckman, Does Political Information Matter?, 22 POL. COMM. 515 (2005); Lau & Redlawsk, supra note 31. This thesis is controverted. Lau and Redlawsk found that almost all voters use common political heuristics at times, and that such use is especially likely in situations of complex choice. However, use of heuristics by politically unsophisticated voters actually reduces the likelihood that they will choose the candidate most closely reflecting their views. Id.; see infra text accompanying notes 99–113. For discussion of why this is so, see Ilya Somin, Voter Ignorance and the Democratic Idea, 12 CRITICAL REV. 413 (1998) (vigorously disputing the theory that heuristics enable meaningful democratic judgment by an uninformed citizenry).


37 E.g., Carol A. Heimer, Thinking About How To Avoid Thought: Deep Norms, Shallow Rules, and the Structure of Attention, 2 REG. & GOVERNANCE 30, 30 (2008). See also Thorngate, supra note 25 (identifying six principles of “the economics of attention”).

ity, simultaneity, and intensity.\textsuperscript{39} As these factors cumulate, the uncomfortable sensations associated with approaching the limits of cognitive and attentive capacities increase; this, in turn, increases the value of cognitive strategies that reduce attentional and cognitive processing demands. Consciously or not, individuals under conditions of information overload gravitate toward ways of thinking that simplify issues, narrow the range of acceptable choices, and delegate decisional responsibility to someone perceived to have power or competence.\textsuperscript{40}

At the collective level, this phenomenon can increase the attractiveness of certain types of groups and belief systems. When people perceive that they cannot know, or understand, all the information necessary to be confident of making the right decision about something that matters to them, the result is a psychologically uncomfortable state of uncertainty.\textsuperscript{41} Social psychologist Michael Hogg explains:

People strive to reduce feelings of uncertainty, particularly uncertainty about and related to themselves, and about their social world and their place within it . . . . Some uncertainty is exciting, making us feel edgy and alive, but for most of us most of the time acute uncertainty, enduring uncertainty, and uncertainty about and related to self in social context is aversive.

People can reduce such uncertainty by affiliating with a group that defines the individual’s role and relationship to others, or by adhering to a belief system (an “ideology”) that offers an integrated set of beliefs and values explaining the world and specifying appropriate individual and social action.\textsuperscript{43}

\textsuperscript{39} For an excellent synthesis of the literature, see Eppler & Mengis, supra note 36, at 330–33. See also John Sweller & Paul Chandler, Why Some Material Is Difficult to Learn, 12 COGNITION & INSTRUCTION 185 (1994) (discussing problem in context of learning theory and instructional design).


\textsuperscript{41} See Janet A. Sniezek & Timothy Buckley, Becoming More or Less Uncertain, in INDIVIDUAL AND GROUP DECISIONMAKING: CURRENT ISSUES 87, 88 (N. John Castellan, Jr. ed., 1993) (“subjective uncertainty” is the individual’s perception of inaccessibility of information, in contrast to “environmental uncertainty” which is the objective reality that information is unavailable).

\textsuperscript{42} Hogg, supra note 34, at 209.

\textsuperscript{43} Group affiliation "renders one’s own and others’ behavior predictable and thus allows one to avoid harm and plan effective action. It also allows one to know how one should feel and behave." Id. at 210. For an overview of studies demonstrating that uncertainty
tems are more capable of serving this function than others. The greatest degree of uncertainty reduction is afforded by groups and ideologies that (i) define themselves through unambiguous, uncompromising boundaries; (ii) adopt a highly focused, internally consistent set of beliefs and values; (iii) reject subtlety and contradiction in favor of a single, uncomplicated version of “the truth;” (iv) prize loyalty and conformity over individual critical judgment and initiative; and (v) offer a clear hierarchical structure, in which power is vested in a leader strongly associated with the group’s identity and trusted to determine its destiny.\textsuperscript{44} Appeals to authority and shared tradition often play an important part.\textsuperscript{45}

\begin{itemize}
    \item arising from social context makes people more likely to identify (or to identify strongly) with groups, see Michael A. Hogg, \textit{Subjective Uncertainty Reduction Through Self-Categorization: A Motivational Theory of Social Identity Processes}, 11 EUR. REV. SOC. PSYCHOL. 223 (2000).
    \item Michael A. Hogg et al., \textit{Uncertainty, Entitativity, and Group Identification}, 45 J. EXPERIMENTAL. SOC. PSYCHOL. 135 (2007); see also Hogg, supra note 34, at 211–13 (citing additional sources).
    \item On the importance of the group leader in times of uncertainty and crisis, see Daan van Knippenberg & Michael A. Hogg, \textit{A Social Identity Model of Leadership Effectiveness in Organizations}, 25 RES. ORGANIZATIONAL BEHAV. 243, 245–46 (2003). Michael Hogg and Daan van Knippenberg review studies suggesting that under conditions of strong group identification, members will attribute status, support, capability, and persuasiveness to the most prototypical member of the group. \textit{Social Identity and Leadership Processes in Groups}, 35 ADVANCES EXPERIMENTAL. SOC. PSYCHOL. 1 (2003) [hereinafter Hogg & van Knippenberg, \textit{Social Identity}]. “Attribution processes, specifically the fundamental attribution error, correspondence bias, or essentialism, operate to construct a charismatic and leadership persona for the prototypical leader.” Id. at 41; see also Michael A. Hogg, \textit{From Prototypicality to Power: A Social Identity Analysis of Leadership}, 18 ADVANCES GROUP PROCESSES 1, 1 (2001) [hereinafter Hogg, \textit{Prototypicality}] (analyzing how “prototypical group members can become leaders”). In other words, leaders whose attitudes, behaviors, etc. are seen as epitomizing the characteristics that separate “us” (in group) from “them” (out group) are perceived to be effective and so “acquire[] greater and more secure leadership ability.” Hogg & van Knippenberg, \textit{Social Identity, supra note 44, at 41.}
    \item For a broader discussion of these issues in the context of political leadership, see BARBARA KELLERMAN, \textit{BAD LEADERSHIP: WHAT IT IS, HOW IT HAPPENS, WHY IT MATTERS} 22 (2004).
    \item See Hogg, supra note 34, at 215–19 (discussing work on orthodoxy and authoritarianism). See also Michael A. Hogg, \textit{Uncertainty-Identity Theory}, 39 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 69, 93–94 (2007) (describing work of “postmodern paradox” theorists, who argue that the contemporary “atomistic, individual-oriented status societ[ies]” which have replaced stable matrices of rank, familial, and social relationship give rise to a paradox in which “people with today’s less structured self yearn for community and the collective affiliations of times past”).
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B. Present Shock and Palliative Politics


—Richard Saul Wurman, in The Employee Handbook of New Work Habits for a Radically Changing World

Anyone with an Internet connection today has access to exponentially greater quantities of writing, images, sound, and video than anyone on earth could have imagined just twenty years ago.

—David A. Bell, The New Republic

Against this background, consider the environment in which unitary executive theory has become a widely-endorsed and influential legal justification for the modern “personal” presidency.

In the forty years since Future Shock was published, the volume, pace, novelty, complexity, and simultaneity of information has, if anything, intensified. In 2000, and again in 2003, researchers at the Berkeley School of Information Management and Systems estimated the volume of new information created annually. Their findings were mind-boggling:

- Print, film, magnetic, and optical storage media produced about five exabytes of new information annually. One exabyte ($10^{18}$, or 1 billion billion, bytes) is roughly the amount of information in seventy-seven novels—for every person on earth. Five exabytes represents 37,000 times the information in the Library of Congress’s book holdings—or all the words spoken by humans to date.

- Electronic media—telephone, radio, TV, and the Internet—contained approximately 17.7 exabytes of new information (out of a much larger total information flow).

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49 This, and the other equivalencies given here, appear on multiple websites including id. and The Digital Big Bang (Feb. 20, 2008), http://ideonexus.com/2008/02/20/the-digital-big-bang/.

50 These estimates include audio and visual files, which are considerably larger than the equivalent information in text form. Still, the quantities involved are so huge that they
When Toffler wrote, the extension of Internet access to the general public through creation of the World Wide Web was barely on the horizon. In fewer than twenty years, the Web has exploded to 63 billion pages that can be readily retrieved by commercial search engines; its total content is vastly larger. The Internet has brought e-mail, texting, Instant Message, Twitter, and YouTube—media of such speed, immediacy, and accessibility that the increased information load has profoundly altered our working and social lives.

The depth and scope of cultural change experienced by Americans in the last four decades has been equally momentous. Social, political, and technological developments have included: the oil crisis, recycling, and global warming; the women’s movement, the fight for gay rights, and the end of apartheid; personal computers, pocket calculators, and videogames; fiber optics, lasers, and nanotechnology; microwave ovens, cable TV, and VCRs; multinational corporations, al Qaeda, and the TSA; the discovery of black holes, the creation of the International Space Station, and the demotion of Pluto; facelifts, MRIs, and organ transplants; the fall of the Berlin Wall, the dissolution of the USSR, and the recognition of (mainland) China; FedEx, remain sobering even if adjusted down by several orders of magnitude. For example, if the estimate of five exabytes, is reduced to five megabytes (i.e., from $10^{18}$ to $10^6$), the amount of new information annually would still be equivalent to the text of Shakespeare’s complete works.

51 The World Wide Web dates from the early 1990s; the technology that evolved into the Internet developed from research in the early 1970s.

52 The Size of the World Wide Web, http://www.worldwidewebsize.com/ (last visited Jan. 29, 2010). Search engines construct a database of the Web by using programs called spiders or Web crawlers, that begin with a list of known Web pages. The spider gets a copy of each page and indexes it, storing useful information that will let the page be quickly retrieved again later. Any hyperlinks to new pages are added to the list of pages to be crawled. Eventually all reachable pages are indexed, unless the spider runs out of time or disk space. Surface Web, http://en.wikipedia.org/wiki/Surface_Web (last visited Jan. 29, 2010).

53 Indexed pages constitute the “surface Web.” A 2001 study estimated that the “deep Web” is 1000 to 2000 times larger than “surface” content. See Michael K. Bergman, The Deep Web: Surfacing Hidden Value (2001), http://www.brightplanet.com/industry-insight/white-papers/. The deep Web can’t be reached for indexing by standard search engines in many cases because the web pages are generated on the fly (“dynamically”) by pulling content from databases or other locations in response to specific search requests. As this description implies, information in the deep Web is retrievable but not easily quantifiable. Id.

54 A recent study estimates that the time and distraction involved in managing information generated through these electronic media occupies a substantial percentage of the work day of “knowledge workers” and costs the U.S. $900 billion annually in lost productivity. Julian Sanchez, Report: Info Overload Costs $900 Billion, Blame Mr. Rogers (Dec. 30, 2008), http://arstechnica.com/news.ars/post/20081230-measuring-the-costs-of-info-overload.html.
Polaroid, and Starbucks; the end of the Cold War, the beginning of the War on Drugs, and the declaration of the War on Terror; the Human Genome Project, stem cell research, and cloning; the European Union, NAFTA, and Microsoft; AIDS, anti-smoking campaigns, and anthrax threats; no-fault divorce, in vitro fertilization, and assisted suicide; cell phones, camcorders, and MP3 players; disco, techno, and emo; CNN, Dr. Ruth, and reality television; the Euro, bar-coding, and GPS; Columbine and Oklahoma City, Katrina, and 9/11. That many of these developments are triumphs rather than tragedies is largely beside the point: even “good” change creates stress if it is too swift and fundamental.

In this cognitively demanding, rapidly shifting, frequently bewildering, and increasingly threatening world, Americans maintain a complex and conflicted relationship with government. We insist that public agencies and institutions should care for those in need, protect the environment, assure health care for all, police the safety of food, drugs, and other products, and defend our homes and borders. Yet, we believe that programs run by government tend to be wasteful and ineffective, and that regulation of business usually does more harm than good. We are convinced that voting gives us a voice in how government operates. At the same time, we doubt that government officials care what we think, and increasingly question the ability of the public to make wise political choices. As government takes greater responsibility for our physical, social, and economic well-being, we insist that greater transparency is the touchstone of democratic accountability. Yet, more information further


56 See THE PEW RESEARCH CTR., supra note 55, at 45–47.


59 See, e.g., Memorandum from President Barack Obama to the Heads of Executive Dep’ts and Agencies, Transparency and Open Gov’t (Jan. 21, 2009), available at
strains the already overtaxed attentional and cognitive processing resources we need to comprehend what government is doing.\textsuperscript{60}

Numerous studies and polls reveal that contemporary Americans believe fervently in our system of government, while knowing little about the people and processes through which it operates.\textsuperscript{61} Although this lack of civic understanding is often deplored,\textsuperscript{62} it is also not surprising. The United States is the geographically largest and most heterogeneous democratic country in the world, and the structures through which it is governed are probably the most complicated and confusing of any contemporary democracy.\textsuperscript{63} We are committed to federalism. This means that authority over economic, social, and personal affairs is dispersed across national, state, and local government entities; the local level, closest to the people, itself comprises a byzantine jurisdictional tangle of counties, cities, townships, towns, villages, and school districts. We are also committed to separation of powers. This means that each of these levels typically has distinct legislative, executive, and judicial bodies, the names and powers of which vary considerably.\textsuperscript{64} The administrative agencies, boards, and commissions also typically found at each level further multiply the number of governing entities able to make public policy and create rules with the force of law. And, to complicate matters even further from the average citizen’s perspective, official entities at one level are required to obey, even enforce, the legal rules of higher-level entities, and so the “law” they announce to the public may be an amalgam of local, state, and national rules. Finally, the scope and content of pol-

\textsuperscript{60} The increasingly problematic relationship between transparency demands and democratic engagement is explored in Oren Perez, Complexity, Information Overload, and Online Deliberation, 51/S. J. L. & POL’Y FOR Info. Soc. 43 (2009).

\textsuperscript{61} “The widespread ignorance of the general public about all but the most highly salient political events and actors is one of the best documented facts in all of the social sciences. . . . Bare majorities know the simplest facts about how government works, and fewer still hold ‘real’ attitudes toward even the most important political issues of the day.” Lau & Redlawsk, supra note 31, at 951 (collecting sources) (citations omitted); see infra Part II.

\textsuperscript{62} E.g., Somin, supra note 35, at 416 (“[T]he fact that a majority of American voters with an opinion on the issue believe that the federal government is too large and powerful and simultaneously favor increased spending in almost every major area of federal involvement” demonstrates the absence of the minimum knowledge required for meaningful democratic participation).


\textsuperscript{64} For example, in New York, “Supreme Court” denotes the trial courts of general jurisdiction. In Massachusetts, the “General Court” is the legislature.
icy measures no longer reliably match the level of the entity making them: city councils, thinking globally and acting locally, ban the products of misbehaving foreign countries, while agencies of the national government specify the dimensions of curb ramps on village streets.

With the convoluted structures, overlapping powers, and diffused responsibility of this system, contrast the elegant simplicity, clarity, and logic of President-centered government under unitary executive theory. A single leader possesses the responsibility and power to oversee modern regulatory government, coordinating, rationalizing, and correcting its myriad decisions. Unique among public officials, he is elected by the entire country. He is therefore attuned to the will of all, rather than beholden to the parochial demands of a few. Congress is inevitably torpid, conflicted, and erratic. His office is intentionally structured for swift, resolute, and purposeful action. Legislators shirk personal responsibility, and administrators hide behind bureaucratic gibberish. The personal President is readily identifiable, highly visible, and inescapably accountable to the people, who watch and listen as he leads the country and addresses the world. Commander of our armed forces, focal point of our intelligence gathering, and head of a cadre of loyal and expert advisers, he commands the knowledge and the power of the nation.

This account responds powerfully to the uncertainty and overwhelming complexity of modern life. Scholars of the presidency have long recognized that the modern President serves as an important cognitive aid for Americans;\textsuperscript{67} unitary executive theory supplies a coherent and compelling ideological framework for amplifying this effect. The theory rejects the fuzzy contextual reasoning of checks-and-balances for the certainty of roles fixed by separation of powers: “[the three vesting] clauses appear clearly to divide the world of governmental powers into a finite set of three, . . . each of which is assigned to one and only one governmental actor.”\textsuperscript{68} It speaks in absolutes: “the Constitution unambiguously gives the President the power

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\textsuperscript{68} See, e.g., Steven G. Calabresi, \textit{The Vesting Clauses as Power Grants}, 88 NW. U. L. REV. 1377, 1390 n.45 (1994).
\end{footnotesize}
to control the execution of all federal laws.” It draws bright lines: the President’s “power to superintend, control, and ensure the faithful execution of the laws” entails “the power to remove and direct all policymaking subordinates in the executive branch.”

It establishes a leader with unique claims to authority that simultaneously legitimate his actions (“he, and he alone, speaks for the entire American people”) and guarantee the beneficence of his judgments (“[Because] the national majority coalition...will, by its very nature, be likely to be moderate, temperate, and just, so too will its agent be likely to be moderate, temperate, and just.”). It is authenticated by appeal to the wisdom of our ancestors, the plain meaning of our authoritative founding text, and the practice of our forefathers. No wonder that, over the last thirty years, unitary executive theory as apologia for the modern “personal presidency” has grown from a sectarian constitutional creed to a mainstream civic religion.

II. IMPOSSIBLE PROMISES

Leaders, even bad ones, can provide a sense of order and certainty in a disordered and uncertain world.

—Barbara Kellerman, *Bad Leadership*

Overpromising is a danger at any time, but it is a particular danger now because the public mood is so unsettled.

—Peter McNamara, in *Divided Government*

By emphasizing singularity over multiplicity, absolutism over contingency, and established truth over emergent meaning, unitary executive theory displays the *formal* criteria of a particularly effective ideological resolution for the stress of modern civic uncertainty. At the same time, its principal *substantive* claims respond directly to core anxieties about the contemporary American enterprise of self-government. The “democracy claim” assures us that we do continue

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69 Calabresi & Prakash, supra note 3, at 570.
70 Calabresi & Yoo, supra note 7, at 29 (emphasis added).
71 Calabresi, supra note 3, at 36.
72 Calabresi, supra note 3, at 67; accord Steven G. Calabresi & Nicholas Terrell, *The Fatally Flawed Theory of the Unbundled Executive*, 93 Minn. L. Rev. 1606, 1734 (2009) (“The President must answer to the entire nation and must consider all the effects and penumbras of executive actions.”).
73 See supra text accompanying note 7.
74 Kellerman, supra note 44, at 22.
to govern ourselves, even as our nation has become a global super-
power, because we choose our leader through a process that yields a
representative of the “entire American people.” The “managerial
claim” promises that this leader can supervise and control the vast
federal domestic and foreign policy machinery that is largely beyond
the ken of the normal citizen, aligning its outputs with the nation’s
(our) interests.

Yet, as the following Parts explain, President-centered government
cannot deliver what it promises—in part because of the very circum-
stances of modern life that make unitary executive theory so deeply
appealing.

A. **The Democracy Claim: The President as Representative-in-Chief**

People now and always have wanted their President to be something bigger
than life.

—Stephen Hess

Although the democracy claim is a key tenet of unitary executive
theory, its proponents do not offer a single, completely specified
model of exactly how the President comes to be the truest, best rep-
resentative of all the people of the nation. Three possibilities are fair-

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76 Calabresi, *supra* note 3, at 36.

77 A small but determined literature has challenged the claims of unitary executive theory;
in addition to historical critiques cited *supra* note 7, it includes: Farina, *supra* note 7; Cynthia R. Farina, *Undoing the New Deal Through the New Presidentialism*, 22 HARV. J.L. & PUB.


78 *Quoted in Alison Mitchell, Campaign Trail or Garden Path?, N.Y. TIMES, July 2, 1995, at E5.*
ly inferred from the literature defending President-centered government:

(1) **Instructing our Representative.** This account of the representative rapport between President and people is the most straightforward—and the most democratically ambitious. It envisions presidential elections operating as, in effect, national policy referenda. During the months of campaigning, voters engage in an extraordinary period of nationwide reflection and debate on important domestic and international issues. They then cast their ballots endorsing a particular policy agenda for the next four years. The victorious presidential candidate thus emerges with a genuine popular mandate to accomplish specific programmatic objectives.

This account underlies the demand for enhanced presidential control over the content of domestic, as well as foreign, policy. It also can support the familiar political imagery of the President and the people working together to govern.

(2) **Wise and Faithful Agent of the “National Majority Coalition”:** A second, more democratically modest account, conceptualizes presidential elections as quadrennial occasions for a nationwide coalition of interests, representing at least 51% of the people, to select its chief political agent. This account does not depend on all (or even most) voters having a specific agenda of well-formed policy preferences. Rather, it sees the events that begin with the caucuses and primaries and culminate in the general election as a process wherein a majority of Americans discover the leader best suited (whether by character,
political philosophy, experience, or substantive commitments) to realize their political goals and act consistent with their political beliefs (however specified or general those might be).

This account appears to be what fuels the strong unitary executive preference for presidential policy direction vis-à-vis that of Congress—which appears by contrast to be an inferior democratic institution, affording representation that is necessarily limited and partial.\(^8^4\) This account can also support the political imagery of the plebiscitary President speaking, uniquely, for the people of the nation.\(^8^5\)

(3) The Benevolent Dictator\(^8^6\): In this third account, presidential elections are a device for conferring formal authority on a leader while incentivizing him to exercise this power for the general good rather than narrow factional interests. This conception is the thinnest in democratic terms: why people vote as they do is unimportant; no particular proportion of popular support is required, so long as the constitutionally specified process is followed. The key is that selection of the President requires participation of the whole nation. This attunes him to “the general national will” and leads him to resist factional demands for “policies at variance with those the nation as a whole might want.”\(^8^7\)

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84 See, e.g., Calabresi, supra note 3, at 36–38; cf. Kagan, supra note 3, at 2336 (arguing that political actors other than the President have “a far more tenuous connection to national majoritarian preferences and interests”).

One of the clearest articulations of this idea appears, remarkably, in a 1918 article by the Director of the Commercial University at Munich, Dr. M.J. Bonn. In the article, Dr. Bonn attempted to explain the American political system to his countrymen, on the occasion of the U.S. entering World War I:

> The President is the choice of the American people. He is far more so than the Senate or the House of Representatives. The Senate represents individual states. The members of the House represent particular electoral districts. The President represents the whole nation, both minority and majority. . . . If the President tries to exercise an authority superior to that of the Senate and House, this is not a despotitic maneuver. His attitude is supported by a feeling that he alone is elected by the whole nation, which speaks in his name.


85 A second political story Professor Hinckley found in modern presidential speeches, see supra note 82, is that the President, the American people and the nation are one, “linked by the word ‘we,’ and . . . indistinguishable from one another.” HINCKLEY, supra note 10, at 131.

86 This characterization may seem disparaging but it comes directly out of a text important to unitary executive theory, THE FEDERALIST NO. 70 (Alexander Hamilton), quoted at infra text accompanying note 140.

87 Calabresi, supra note 3, at 64 n.105; see, e.g., Kagan, supra note 3, at 2335 (“[B]ecause the President has a national constituency, he is likely to consider . . . the preferences of the
This account permits the simultaneous insistence that the President is entitled to virtually complete autonomy and is uniquely motivated to govern in the national interest. No one can direct presidential judgment because the Constitution gives the executive power to the duly elected President alone. However, because he comes to power only on the vote of the whole nation, the President is motivated to exercise power in ways that further the interests of the national community as a whole. This account also can support the political imagery of the “personal” President single-handedly carrying out the work of the government, often in the face of congressional irresponsibility and bureaucratic ineptitude.

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general public, rather than merely parochial interests.”); Lessig & Sunstein, supra note 3, at 105–06 (“[B]ecause the President has a national constituency . . . [presidential control] appears to operate as an important counterweight to factional influence over administration.”); see also Frank H. Easterbrook, Unitary Executive Interpretation: A Comment, 15 CARDOZO L. REV. 313, 320–21 (1993); Geoffrey P. Miller, The Unitary Executive in a Unified Theory of Constitutional Law: The Problem of Interpretation, 15 CARDOZO L. REV. 201 (1993) (both identifying the President as uniquely resistant to factional control).

E.g., Memorandum from the U.S. Dep’t of Justice Office of Legal Counsel to William J. Haynes II, Gen. Counsel, Dep’t of Def., Application of Treaties and Laws to al Qaeda and Taliban Detainees 14 (Jan. 9, 2002), available at http://www.torturingdemocracy.org/documents/20020109.pdf (“[T]he president is vested with all of the federal executive power . . . .”); Online Discussion with Steven G. Calabresi, on WashingtonPost.com (June 27, 2008) (transcript available at http://www.law.northwestern.edu/news/article_full.cfm?eventid=3804) (“The executive power was understood as being quite broad in 1787, and it is given to the president. Moreover, the Constitution says Congress can act only when both houses concur and the courts can act only when there is a case and controversy. Anything the government does that does not involve bicameralism and presentment or adjudication of a case or controversy is executive and is in the president’s domain.”).


E.g., Calabresi, supra note 3, at 59 (emphasizing the President’s “unique claim to legitimacy” as the only representative “accountable to a national voting electorate and no one else”); id. at 36 (“The essential ingredient to combating the congressional collective action problem is the President’s national voice, because he, and he alone, speaks for the entire American people.”).

The third story that, according to Professor Hinckley, pervades modern presidential public rhetoric, see supra notes 82 & 85, is that Presidents work alone, with little help from Congress, advisers, or agency officials. HINCKLEY, supra note 10, at 131.
These three accounts differ in the mechanism that produces a leader in singular rapport with the people of the nation, but each insists that the President is the epitome of democratic representation. Each also resonates with particular aspects of the modern political phenomenon that is the “personal” plebiscitary presidency. And, on closer examination, each rests on a simplified and idealized version of the American political process that is more mythic than real.

1. “Instructing our Representative”

[...]

—Ilya Somin, *Voter Ignorance and the Democratic Idea* 91

There is simultaneously too much information for any person to use competently, and most people are paying very little attention . . . .

—Elizabeth Garrett, *The Law and Economics of “Informed Voter” Ballot Notations* 92

For presidential elections to function as occasions for citizens to specify the policy course of government, several conditions must exist: (i) voters have a coherent collection of preferences on important policy issues; (ii) the slate of presidential contenders includes candidates with clearly articulated policy agendas, at least one of which substantially coincides with voters’ preferences; and (iii) citizens successfully vote their preferences, casting their ballots for the candidate whose policy agenda in fact most closely corresponds with their own. This is the story-book account of how representative democracy works. Unfortunately, everything we know about voter and candidate behavior suggests that this story has little relation to what actually happens in presidential elections.

We can begin with what appears the strongest case for conceptualizing presidential elections as national policy referenda: the 1980s, which is, not coincidentally, the same political period in which unitary executive theory emerged as a fully formed, coherent ideology. Three consecutive presidential campaigns offered voters well-defined and sharply contrasting visions of the appropriate role of the federal government in regulating business and providing social services. And the people responded by giving decisive victories to Ronald Reagan twice (over incumbent Carter in 1980, then Mondale in 1984), and

then to his Vice President and self-defined successor, George H.W. Bush (over Dukakis in 1988). This all seems evidence of a nation of voters using the quadrennial ballot to endorse the Reagan Revolution of scaled-back domestic programs, increased military spending, free market economics, and social conservatism.\footnote{George H.W. Bush’s 1988 platform was so conspicuously framed as a continuation of Ronald Reagan’s policies that 1988 has been called Reagan’s third election.}

Yet the facts are otherwise. Scholars of public opinion and voting behavior have repeatedly shown that most Americans in the 1980s did not support the new conservative agenda that included dismantling federal regulatory programs. Surveys throughout the period solidly establish that a majority thought the federal government should be spending more on education, the environment, healthcare, and the poor.\footnote{E.g., Benjamin I. Page & Robert Y. Shapiro, The Rational Public: Fifty Years of Trends in Americans’ Policy Preferences 169–70, 373–74 (1992); Martin P. Wattenberg, The Rise of Candidate-Centered Politics: Presidential Elections of the 1980s 101–10 (1991); Scott L. Althaus, Information Effects in Collective Preferences, 92 Am. Pol. Sci. Rev. 545 (1998).} To be sure, the size of this majority was smaller in 1980 than at any previous time since the early 1950s.\footnote{See also David E. RePass, Searching for Voters Along the Liberal-Conservative Continuum: The Infrquent Ideologue and the Missing Middle, Forum, June 2008, at 16, 45, http://www.bepress.com/forum/vol6/iss2/art5 (concluding from American National Elections Studies data, inter alia, that 1980 and 1984 victories did not reflect widespread voter support for Reagan’s new conservatism). See generally, Christopher Ellis & James A. Stimson, Pathways to Ideology in American Politics: The Operational-Symbolic “Paradox” Revisited, 3–4 (Apr. 7, 2005), \textit{available at www.unc.edu/~jstimson/Pathways.pdf} (using data from 1970–2005 to show that Americans always on average “prefer policies through which the government does and spends more to solve social problems,” and that this “clear preference . . . . varies within a relatively small range, never quite touching the neutral point even at its most extreme conservative moments”).} Significantly, however, the majoritarian preference for activist regulatory government began to grow steadily and markedly from the time Ronald Reagan was first elected. By 1984, when Reagan was reelected by a larger popular vote than in 1980,\footnote{Both voter turnout and Reagan’s margin of victory were higher in 1984. \textit{See} Dave Liep’s Atlas of U.S. Presidential Elections, 1984 Presidential General Election Results, http://uselectionatlas.org/RESULTS/national.php?year=1984&f=0&off=0&eject=0 (last visited Jan. 29, 2010).} the proportion of Americans voicing “liberal” regulatory policy preferences had risen to levels considerably higher than when Jimmy Carter won the presidency in 1976.\footnote{Stimson, supra note 95, at 68.} By the 1988 election of George H.W. Bush, this proportion had risen to about the lev-
el of the 1964 election, when Lyndon Johnson and his proposed Great Society program beat Barry Goldwater in a landslide.\footnote{Id. Johnson made the Great Society programs the centerpiece of his domestic policy agenda in a speech given in the spring preceding the 1964 election.}

The 1980s are thus highly problematic for the “Instructing Our Representative” account of presidential electoral politics, but there is more. Political scientists Richard Rau, David Anderson, and David Redlawsk used data from the 1972–2004 presidential elections to measure the extent of “correct voting.”\footnote{Lau, Andersen & Redlawsk, supra note 15, at 396, 400.} They defined a vote as “correct” if it was cast for the candidate whose expressed issue positions most closely matched the voter’s collection of expressed, weighted preferences.\footnote{Drawing data from the long-running American National Election Studies (ANES) survey, the researchers constructed a measure using (i) information about voter preferences on specific issues; (ii) information from which relative weight of preferences (i.e., how important each policy issue was to the particular voter) could be gauged; and (iii) information about candidate positions on the issues. Id. at 396–97.} Averaging all the elections in this thirty-two-year period, they found that “about one-quarter of all voters voted incorrectly, sending a misleading message about the direction of their preferences.”\footnote{Id. at 406 (emphasis added).} The range of “incorrect voting” in the period was set by two elections that seem particularly important to unitary executive claims: the highpoint of “incorrect” voting (49% of voters) came in the legendary 1980 victory of Ronald Reagan over incumbent Jimmy Carter; the low point (15%) came in the notorious 2000 election, when Al Gore won the popular vote only to lose to George W. Bush in the Electoral College.\footnote{Id. at 401.}

The Rau, Anderson, and Redlawsk study is the most extensive on issue voting in U.S. presidential elections, but its conclusions are consistent with other, more time-limited studies.\footnote{E.g., Ilya Somin, When Ignorance Isn’t Bliss: How Political Ignorance Threatens Democracy, POL’Y ANALYSIS (Cato Institute), Sept. 22, 2004, at 2, available at http://www.cato.org/pubs/pas/pa-525es.html (reviewing “the overwhelming evidence that the American electorate fails to meet even minimal criteria for adequate voter knowledge” on specific issues in 2004 election and on general political knowledge).} Whether we look at issues that have been politically salient for decades, issues that become prominent in particular presidential campaigns, key political facts on which voter judgment depends, or simply background understanding of basic civics, crucial gaps and significant errors exist in voter knowledge.\footnote{For example, deregulation and decreased national government spending were prominent and consistent themes of Ronald Reagan’s campaigns and presidency. Yet, when the 1988 ANES asked about the pattern of federal spending on the environment, the
nary national political engagement, but a large proportion of voters still do not know enough to vote their preferences accurately.\(^{105}\)

From the cognitive perspective, this all makes sense. The federal policy agenda is wide-ranging, the “facts” about individual issues are often not only complex but controverted, and the various proposed solutions frequently involve complicated interdependencies and trade-offs among incommensurable values. Candidates, whether from deliberate strategy or less-than-optimal personal communication skills, are often unclear about their policy positions.\(^{106}\) Mass me-

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\(^{105}\) Political scientists have largely abandoned the simplistic account of presidential elections as national policy referenda that can be legitimately interpreted as issue mandates. In the words of one prominent scholar in the area, “[i]f voting-behavior scholarship were the Wild West, mandate would have been tarred and feathered, ridden out on a rail.” STIMSON, supra note 95, at 113.

dia and the Internet have radically increased the amount of readily accessible relevant political information, but they have also increased the volume of irrelevant “noise” and created new challenges for assessing information accuracy, completeness, and currency.\footnote{107} Even if the only thing Americans did during presidential campaign cycles was think about politics—a state of affairs as undesirable as it is unlikely—the attentive and processing capacities of most voters would likely be overloaded. Some researchers have found evidence that many Americans do not adopt a systematic, consistent belief system that is either conservative or liberal.\footnote{108} Such a schema provides a cognitive framework within which to interpret political information efficiently; without one, people find it more difficult to assess competing policy positions and develop stable, consistent political opinions.\footnote{109} Other research has underscored that even knowledgeable citizens have difficulty voting their preferences as the political environment becomes more informationally complex. Lau, Anderson, and Redlawsk found that the level of education corresponded positively with correct presidential voting unless voting conditions proliferated the number of required choices—as, for example, when a large number of local referenda are presented in the same election as the presidential ballot. In such circumstances, the most educated voters were actually substantially \textit{less} likely than the least educated voters to cast a “correct” vote for President.\footnote{110}

Moreover, there is evidence that knowledgeable voters sometimes deliberately “sacrifice” their preferred position on one or more issues...

\begin{itemize}
\item \footnote{107} Cf. Bruce W. Hardy, Kathleen Hall Jamieson & Kenneth Winneg, \textit{Wired to Fact: The Role of the Internet in Identifying Deception During the 2004 U.S. Presidential Campaign}, in \textit{ROUTLEDGE HANDBOOK OF INTERNET POLITICS} 131 (Andrew Chadwick & Philip N. Howard eds., 2009) (concluding that during the 2004 presidential campaign, citizens who used the Internet for political information had higher ability to distinguish deception from fact during the campaign).
\item \footnote{108} E.g., RePass, \textit{supra} note 94.
\item \footnote{109} \textit{Id.} Other studies have found that among voters with the least political knowledge, even the most basic political heuristics (e.g., political party) do not help; in fact, such voters are likely to make \textit{more} errors when they employ these heuristics. \textit{See} Lau, Anderson & Redlawsk, \textit{supra} note 15, at 398, 404; Lau & Redlawsk, \textit{supra} note 31.
\item \footnote{110} The researchers commented: “It is as though the most educated try to make sense of every different choice they have, but when there are too many choices they become overwhelmed and cannot make a good decision in the presidential election (nor, presumably, on the referenda, although we have no data on this point).” Lau, Anderson & Redlawsk, \textit{supra} note 15, at 405.
\end{itemize}
when they cast their ballot. Typically, such voters refuse to cross over to the candidate of the other party despite disagreeing with their party’s candidate on one or more issues important to them. That this happens is hardly surprising. Given the very large number of policy issues potentially within the President’s sphere of influence, and the need to choose between only two (very rarely, three) serious contenders, the real surprise would be if many reasonably informed voters could find a candidate whose bundle of policy positions corresponds perfectly to their own set of issue preferences. Such voters may respond “correctly” to imperfect options—i.e., they may choose the candidate whose location in a multiple issue space is closest to their weighted preferences. But the fact that they must select a candidate despite his position on one or more issues that matter to them is yet one more commonly observed fact of American political behavior that undermines the account of presidential elections as extraordinary democratic moments, when citizens instruct their government on their desired policies by choosing a Representative-in-Chief who mirrors their preferences.

111 For example, responses from the 1992 ANES revealed that 54% of Republicans and 31% of Democrats held positions on abortion that clearly conflicted with the announced position of their party’s candidate. See Alan I. Abramowitz, It’s Abortion, Stupid: Policy Voting in the 1992 Presidential Election, 57 J. POL. 176, 179 (1995). This conflict produced defections by 17% of Republicans and 6% of Democrats—percentages that reveal abortion as one of the very few policy issues that have been dispositively salient for an appreciable number of voters in recent decades. Id. Indeed, Professor Abramowitz’s analysis concluded that abortion had a stronger effect on candidate choice than any other specific policy issue including the Gulf War. Id. at 184–85. More significant for present purposes, the vast majority of pro-choice Republicans and pro-life Democrats cast their vote for a candidate whose position on the issue they rejected.


113 Steven Calabresi and Nicholas Terrell argue that being forced to prioritize one’s preferences and make tradeoffs is an affirmative advantage offered by presidential elections because “we ought not only care about what viewpoints get majority support but also how intensely those viewpoints are held.” Calabresi & Terrell, supra note 72, at 1725. Surely, though, this reasoning sensibly applies only for policy issues that have reasonably direct interdependencies. If I believe that government should act more aggressively to clean up the environment and that abortion should be illegal in all cases, what useful information to my representative comes from forcing me to choose between these preferences—unless one believes that responding to single-issue zealotry is the pathway to good government? Cf. Carmines & Stimson, supra note 112 (finding that voters who vote based on “easy” issues—issues that are symbolic rather than technical, deal with policy ends rather than means, and have been salient on the political agenda for a long time—resemble the relatively unknowledgeable and unengaged non-issue voter more than the relatively politically sophisticated “hard issue” voter). Even with respect to preferences that appear more directly interdependent—e.g., I prefer less government spending and more aggressive government protection of the environment—my choices will often be artificially constrained by the limited array of policy bundles offered by the candidates. I may also pre-
2. “Faithful Agent of the National Majority Coalition”

Presidential action thus becomes—in a symbolic sense—our action; a scattered, divided, uncertain people are made one and exercise their popular power through their surrogate.

—Bruce Miroff, in *Rethinking the Presidency* 114

This second account of how all the people are represented in President-centered government appears more promising, for it does not make the high demands on citizen attention and judgment required in the “Instructing Our Representative” account. Rather, it relies on the democratic decision principle of majority rule: the prevailing presidential candidate is the one who can inspire the support of enough Americans to forge a national majority; after he is in office, he will work to remain responsive to a combination of individuals and groups “large enough to keep his approval rating above fifty-one percent.” 115 This account does not depend on voters having coherent, specific policy preferences that are accurately mapped onto unambiguously expressed, equally specific issue platforms offered by presidential contenders. The representational rapport between President and people rests on the formation and cultivation of a nationwide majority coalition, members of which determine who is best suited to exercise power on their behalf, and then maintain or withdraw their support as they assess his ongoing performance in office. The bases on which these judgments are made need not be consistent, or even specifiable; the make-up of the coalition need not remain stable. It is enough that a majority of Americans know what they want when they see it. The invisible hand of the national democratic marketplace does the rest.

But even this more modest account of presidential democracy founders on basic facts of contemporary presidential politics. Most fundamentally, modern Presidents are not chosen by anything close

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114 Bruce Miroff, *Monopolizing the Public Space: The President as a Problem for Democratic Politics*, in *Rethinking the Presidency* 218, 223 (Thomas E. Cronin ed., 1982).

115 Calabresi & Terrell, *supra* note 72, at 1702.
to a majority of the country eligible to vote. In recent decades, the successful candidate has won the presidency on the votes of, on average, fewer than 30% of adult Americans. This is not some complicated artifact of the Electoral College system.\(^{116}\) It represents simple (and routinely ignored) math: the reported popular vote must be adjusted by voter turnout, which has averaged 55.9% in the presidential elections since 1980.\(^ {117}\) Doing the math requires some fairly significant readjustments in our thinking about presidential “majorities”: the 1980 “mandate” to Ronald Reagan was conferred by 27.5% of eligible Americans; in 1992, Bill Clinton defeated incumbent George H.W. Bush on the ballots of 25% of those who could vote; the controversial 2000 victory to George W. Bush rested on 26% of potential voters; in the historic 2008 election, Barak Obama received the largest proportion of popular support in more than forty years of presidential selection: 32.6%\(^ {118}\).

These figures cast a very different representational light on presidential elections. Still, we could accept the “agent of the national majority coalition” account, in substance at least, if we could be assured that those who vote are themselves a representative cross-section of eligible Americans. Conventional political science wisdom was indeed that the preferences of presidential voters do not differ significantly from those of nonvoters. The benchmark study was Wollinger and Rosenstone’s analysis of data from the 1972 presidential election, which concluded that the views of voters in the Nixon-McGovern race were “virtually a carbon copy” of the general population on a range

\(^ {116}\) The impact of that system on presidential representation is discussed in the next Part.

\(^ {117}\) This average uses the most generous calculation of turnout, removing noncitizens and felons disenfranchised by state law to include only those who could legally have voted. See United States Elections Project, Voter Turnout, http://elections.gmu.edu/voter_turnout.htm (last visited Jan. 29, 2010). Since 1980, both these categories have increased, so that the “voting age population” is about 9% greater than the “voting eligible population.” See Michael P. MacDonald, Every Eligible Voter Counts: Correctly Measuring American Turnout Rates, BROOKINGS INST., Sept. 29, 2004, http://www.brookings.edu/papers/2004/0909elections_mcdonald.aspx.

Turnout rates in the U.S. tend to be among the lowest in industrialized democracies. See Arend Lijphart, Unequal Participation: Democracy’s Unresolved Dilemma, 91 AM. POL. SCI. REV. 1 (1997). The modern low point was 1996 (Clinton/Dole), in which only 51.7% of eligible Americans voted. See United States Elections Project, supra.

of policy issues.\textsuperscript{119} Although other studies generally supported these results,\textsuperscript{120} the conclusion that voters and nonvoters have the same policy preferences seemed counter-intuitive at best, for it is well-established that voters differ substantially from nonvoters on demographic dimensions that often have political significance: younger Americans, people of color, the poor, those who are less well educated, and those who are unmarried are consistently and markedly underrepresented among those who cast a ballot.\textsuperscript{121} More recent work is far more skeptical of the conventional wisdom. Studying data from the 1972–2004 national elections, Jan Leighley and Jonathan Nagler conclude that “after 1972, voters and non-voters differ significantly on most issues relating to the role of government in redistributive policies. . . . [V]oters are substantially more conservative than non-voters on class-based issues.”\textsuperscript{122} Studies disaggregating national opinion at the state and local level have similarly concluded that significant differences exist between the preferences of voters and nonvoters, typically skewed in a conservative direction.\textsuperscript{123} Part I reviewed

\textsuperscript{119} Raymond E. Wolfinger & Steven J. Rosenstone, Who Votes? 109 (1980).

\textsuperscript{120} A 2001 review concluded that “[o]ne of the least contested conclusions in the study of political behavior is that voters’ political attitudes and policy positions are fairly representative of non-voters.” Patrick Ellcessor & Jan E. Leighley, Voters, Non-Voters and Minority Representation, in \textit{Representation of Minority Groups in the U.S.: Implications for the Twenty-First Century} 127 (Charles E. Menifield ed., 2001).


\textsuperscript{122} Leighley & Nagler, supra note 121, at 18. The authors point out that some earlier studies did find evidence of policy preference differentials. For example, Bennett and Resnick’s 1990 study of data through 1988 found few voter/nonvoter differences on partisanship, ideology, and foreign policy, but discovered that nonvoters were “slightly more in favor of an increased government role in the domestic arena. They are more likely to oppose curtailment of government spending for health and education services, and. . . . to support government guarantees that everyone has a job and a good standard of living.” Moreover, nonvoters were significantly more likely to favor spending on core domestic programs. Stephen Earl Bennett & David Resnick, \textit{The Implications of Nonvoting for Democracy in the United States}, 34 Am. J. Pol. Sci. 771, 789–93 (1990).

\textsuperscript{123} See, e.g., Hajnal, supra note 121, at 8 (focusing on local elections, to conclude that “low turnout results in losses in mayoral elections, less equitable racial and ethnic representation on city councils, and spending policies that are less in line with the preferences of racial and ethnic minorities and other disadvantaged groups”); Jean-François Godbout & Mathieu Turgeon, A Matter of Degree: Policy Preferences and the Probability to Vote 1 (Aug. 30, 2008), (unpublished manuscript, available from a link at
some of the profound social and cultural changes in the United States since the early 1970s; over that time, the population has become more racially heterogeneous, disparities in economic well-being have increased, and the proportion of married citizens has decreased while that of older Americans has increased. In the same period, the policy agenda of the federal government has become even more ambitious, as such major regulatory initiatives as environmental, workplace, and consumer protection developed. Our understanding of whether and how the preferences of nonvoters differ from those of voters is still far from perfect, but what we do know should make us deeply wary of attempts to translate the votes of less than a third of eligible Americans into the democratic talisman of a “national majority coalition.”

Finally, two other modern political phenomena seem relevant to the attempt to locate the President’s representational superiority in the support of a majority of the electorate. The first is the post-World War II propensity of voters to saddle the President with a Congress controlled by the opposition party. Few questions of American electoral politics are more contentious than attempts to explain divided government. Some scholars perceive voters engaged in “policy bal-

http://sites.google.com/site/polgodbout/home/research) (finding “significant, constant, and systematic difference in attitudes on a range of policy issues” and that “as the probability of voting increases, the likelihood of having conservative views increases”).


125 Between 1967 and 2001, the proportion of aggregate income held by the richest fifth of the population increased from 43.8 to 50.1%; the proportion held by the poorest fifth decreased from 4% to 3.5%. Id. at 2 (using 2000 Census data).

126 Id.

127 A more radical proponent of the national majority coalition account might insist that we should count only those citizens who actually exercise their right to choose their political agent. Even if this redefinition of the President’s true representational constituency were accepted, it runs up against the disturbing frequency of modern Presidents who have been rejected by the majority of voters. Since 1960, five Presidents have come into office on less than 50% of the popular vote: Kennedy 1960 (49.7%); Nixon 1968 (43.4%); Clinton 1992 (43.0%); Clinton 1996 (49.2%); Bush 2000 (47.9%). By contrast, in the first sixty years of the twentieth century, only three elections produced non-majoritarian winners: Wilson 1912 (41.8%); Wilson 1916 (49.2%); Truman 1948 (49.5%). Wholly apart from Electoral College effects, the presence of third party candidates can give us a President who falls substantially short of persuading a majority of voters that he is best suited to exercise power on their behalf. STANLEY & NIEMI, supra note 118, at 18–20 tbls. 1–7.

ancing” or even “cognitive Madisonianism.” This latter view—that voters are, at least to some degree, hedging their representational bets and consciously dividing power—receives apparent support from several years of various survey evidence in which a substantial number of Americans insist the country is better off if the same party does not control both the presidency and Congress. A strong dissenting view insists that divided government is an unintentional consequence of particular electoral circumstances, including the shift from a party-based system to candidate-centered politics, incumbency, and campaign financing. Noting the generally low level of political sophistication, the non-intentionalist view questions whether people really understand or mean what the survey evidence seems to be saying.

The basic idea is that voters use different considerations in voting for different types of offices. E.g., Fiorina, supra note 128, at 65 (“Essentially, [the voters] have the Republicans bake the economic pie (and protect it from marauding bears and other dangers), but allow the Democrats to divide it up.”); Jacobson, supra note 128, at 113 (stating that the public sees Republicans as better at national defense and handling inflation). These explanations fit the national political scene better in the 1980s, when Republicans controlled the presidency and Democrats the Congress, than the 1990s, when the pattern reversed, although variations have been suggested; see, e.g., Niemi & Weisberg, supra note 128, at 276 (suggesting that voters might have needed Republican Presidents less once the Cold War ended).

A version of the divided government question has been part of the ANES survey for many years. Gallup has asked about divided government since at least 2000. Lydia Saad, Support Up for Divided Government and Major Third Party, GALLUP, Sept. 14, 2006, http://www.gallup.com/poll/24502/Support-Divided-Government-Major-Third-Party.aspx (summarizing results from 2000–2006 of response to question: “Do you think it is better for the country to have a President who comes from the same political party that controls Congress, (or do you think it is better) to have a President from one political party and Congress controlled by another?”). A number of other popular and scientific polls have posed the question at various times.

E.g., Burden & Kimball, supra note 128.

E.g., Lee Sigelman, Paul J. Wahlbeck & Emmett H. Buell, Jr., Vote Choice and the Preference for Divided Government: Lessons of 1992, 41 AM. J. POL. SCI. 879, 883 (1997) (concluding that people who express the divided government preference on the ANES survey were only slightly more likely than the typical voter to split their ballots); John R. Petrocik & Joseph Doherty, The Road to Divided Government: Paved Without Intention, in DIVIDED...
Still other researchers conclude that the survey data probably overstate the strength of popular support for deliberately dividing power but that flawed measurement and data inadequacies prevent a conclusive understanding of public attitudes.\textsuperscript{134} Obviously, any conclusion on the “meaning” of divided government is well beyond my scope here, but the relative infrequency with which the President gets from voters a predictably “cooperative” Congress is another salient aspect of national electoral politics that calls into question the simplistic account of a majority coalition of Americans choosing the President as the one political agent who will reliably further their interests.

The second problematic phenomenon for this account is that modern Presidents in fact do not reliably manage to keep their policies attuned to the will of enough individuals and groups “to keep [their] approval rating above fifty-one percent.”\textsuperscript{135} The overall average approval rating for the presidencies of Richard Nixon, Gerald Ford, Jimmy Carter, and George W. Bush all fell below the 50\% mark.\textsuperscript{136} Of the remaining Presidents over the last four decades, Ronald Reagan and Bill Clinton managed to keep their overall average above 50\%, but each had extended periods when considerably fewer than a majority of Americans approved of the job they were doing; only George H.W. Bush succeeded in keeping his approval rating above 50\% overall, and for most periods of his presidency.\textsuperscript{137} These are not the patterns of a representative who sees himself as “the con-

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\item[134] Government, supra note 128 (finding non-sensible patterns in the survey responses and concluding that “[p]artisanship and situational rationalization” were more likely explanations than “strategic vision”).
\item[135] See Hill, Craig & Christie, supra note 128.
\item[136] Calabresi & Terrell, supra note 72, at 1702.
\item[137] Presidential Approval Ratings—Gallup Historical Statistics and Trends, GALLUP, http://www.gallup.com/poll/116677/Presidential-Approval-Ratings-Gallup-Historical-Statistics-Trends.aspx (last visited Jan. 29, 2010). Public approval response to President George W. Bush has been a topic of particular interest. E.g., Richard A. Brody, The American People and President George W. Bush: The Fall, the Rise and Fall Again, FORUM, June 2008 (looking at approval polls from ten polling organizations to conclude that Bush was unique in the sustained weakness of his level of public support); Waldman & Jamieson, supra note 106, at 161 (suggesting that the rhetorical framing of the 2000 election, which produced widespread voter misperception of Bush’s policy agenda vote, fueled public approval problems from the outset).
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scious agent[ of] a national majority coalition.” The next Part discusses why the constitutional design of the presidency itself defeats such a conception.

3. The “Benevolent Dictator” Model

[T]he rest of us ought to remember that the politics of winning and governing often collide.

—Robert Samuelson

Neither the informational, attentional, and communication obstacles to interpreting presidential election results as policy referenda, nor the multiple factors that undermine the claim of presidential majoritarianism, might be fatal to the “democracy claim” of unitary executive theory if the President is the one representative reliably motivated to act decisively for the national good and resist the distorting influence of faction. Alexander Hamilton sketches the idea in _Federalist_ 70, one of the core texts of unitary executive theory:

Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy. Every man the least conversant in Roman history knows how often that republic was obliged to take refuge in the absolute power of a single man, under the formidable title of dictator, as well against the intrigues of ambitious individuals who aspired to the tyranny, and the seditions of whole classes of the community whose conduct threatened the existence of all government, as against the invasions of external enemies who menaced the conquest and destruction of Rome.

In the “Benevolent Dictator” account, the President is incentivized by the very structure of the office to make policy decisions that benefit the whole rather than favoring any regional or interest-group part.

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138 Calabresi, _supra_ note 3, at 67. In making this point, I accept the terms of the argument as framed by unitary executive theorists. My own view is that constitutionally appropriate representative behavior by the President falls in between using approval ratings as the measure of good public policy, and ignoring them.


The least democratically demanding explanation of why President-centered government is representationally superior, it requires little more than that the President recognize the national identity of his constituency.\textsuperscript{141} No majority of citizens need vote for or continue to support the winning candidate; voters need have no particular understanding of the issues. The quadrennial election identifies the one individual who, from the unique vantage point of responsibility to represent the nation, will deploy power in the interests of all.\textsuperscript{142} This account is as close as it gets to representation without the people.

Yet even this thinnest of representational theories runs up against the facts. Popular and scholarly opinion may be divided over whether the Electoral College system is one of the Framers’ best, or worst, political innovations,\textsuperscript{143} but what cannot be disputed is its success in focusing the attention of would-be Presidents on geography. Because population is not evenly distributed across the country, any per-capita allocation of electors will make high-density regions presumptively most interesting to the candidate seeking electors. California alone offers one-fifth of the crucial votes needed for victory—more than the 15 electoral vote-poorest states combined. New York, Texas, and California, with about one-fourth of the nation’s population, represent 44% of the magic 270 votes.\textsuperscript{144} The constitutional formula tried to mitigate such geographical inequities by giving low population states a boost: electors are allocated on the basis of House plus Senate delegations. However, high-population states regained the advantage by adopting the winner-take-all “unit rule,” which dangles an entire block of electors in front of presidential hopefuls.\textsuperscript{145} The result is a

\textsuperscript{141} See, e.g., Calabresi, supra note 3, at 59 (asserting that the President’s “unique claim to legitimacy” comes from his “being the only official who is accountable to a national voting electorate and no one else”).

\textsuperscript{142} For discussion of the distinction unitary executive literature draws between “the general national will” and local, state, and national factional interests which advocate “policies at variance with those the nation as a whole might want,” see Farina, supra note 7, at 989–90, 989 n.8 (citations omitted).


system in which some voters are, by virtue of their location, worth a
great deal more to presidential contenders than others. 146

Whether or not presidential voters are rational well-informed ac-
tors, presidential candidates—and their campaign advisers—certainly
are: both anecdotal and empirical evidence confirm that campaign
strategies are built around the geography of achieving 270 votes. 147

The precise nature of these strategies has been much debated and
the strategies have evolved over time; here, once again, radical
changes in the information and communications environment are
having significant impact. Initially, attention focused on the extent to
which high-population states reliably received more than their fair
share of candidate visits, advertising, and other resources. 148

Then, the impact of political competitiveness was factored into the models
constructed by elections researchers 149—and, as several of the tradi-
tional electoral mega-states have been relegated to “safe” status (e.g.,
New York to Democrats, Texas to Republicans), candidates indeed
have focused on the relatively small group of “battleground” states in
which the outcome is doubtful. 150 In the most recent elections, mass
media communications and the ease with which information now can
be collected, analyzed, and disseminated digitally, is enabling even
more precise regional focusing: comparatively cheap, easy polling

146 See, e.g., Lawrence D. Longley & James D. Dana, Jr., New Empirical Estimates of the Biases of
to Hispanic, Jewish, urban, Far West, and Eastern voters, and disadvantages to voters in
Mountain, Southern, and Midwestern states as well as to blue-collar, rural, and Black vot-
ers).

147 Cf. Lau, Andersen & Redlawsk, supra note 15, at 404–05 (including in multivariate analy-
sis of “correct voting” the number of candidate visits and political ads in state, and finding
that “[h]olding other variables [constant], this translates into an increased probability of
a correct vote of about 12% in battleground states where both candidates are blanketing
the airwaves with ads, compared to states that the candidates are largely ignoring”).

148 E.g., Steven J. Brams & Morton D. Davis, The 3/2’s Rule in Presidential Campaigning, 68 Am.
Pol. Sci. Rev. 113 (1974) (modeling disproportionate impact of large-state voters and
finding predictive fit with actual candidate behavior); Claude S. Colantonio, Terrence J.
Levesque & Peter C. Ordeshook, Campaign Resource Allocations Under the Electoral College, 69
Am. Pol. Sci. Rev. 141 (1975) (reexamining the Brams & Davis data; agreeing that Elec-
toral College affects campaign resource-allocation decisions, but concluding that strategic
model is more complex and multi-factored).

149 E.g., George Rabinowitz & Stuart Elaine MacDonald, The Power of the States in U.S. Presiden-
tial Elections, 80 Am. Pol. Sci. Rev. 65 (1986) (employing a “pivotal player” analysis that
adjusts size for “political competitiveness” and concluding that California, Texas, Illinois,
and Ohio are substantially more important in presidential elections than warranted by
simply population).

150 See David A. Hopkins & Darshan J. Goux, Repealing the Unit Rule? Electoral Vote Alloca-
http://www.allacademic.com/meta/p_mla_apa_research_citation/2/6/6/3/9/p266590_ index.html).
plus targeted cable media advertising and Internet-based campaign outreach allow candidates to identify communities and interests that could decide key states.\footnote{See \textsc{Daron R. Shaw}, \textsc{The Race to 270: The Electoral College and the Campaign Strategies of 2000 and 2004}, at 61 (2006) (account, by elections researcher and adviser to Bush 2000 and 2004 campaigns, of how campaigns routinely “calculated the relative cost efficiency of advertising for each of the media markets within our list of battleground states;” this ranking drove media expenditures); see also Darshan J. Goux, \textsc{A New Battleground? Media Perceptions and Political Reality in Presidential Elections, 1960–2004}, at 15–16 (Aug. 31 2006) (unpublished manuscript, available at http://www.allacademic.com/meta/p_mla_apa_research_citation/1/5/2/4/8/p152483_index.html) (finding that candidates have targeted “key states” for many years, but noting that technology—including “household-by-household computer analyses, targeted cable media buys, and other technologies”—provides targeting opportunities earlier campaigns lacked).}

In sum, the constitutionally ordained method of selection itself assures that presidential candidates will be fully attuned to regional politicking, and modern information and communication technology has amplified this effect. As one observer puts it, “a wise presidential campaign strategist sees the political map as the intersection of battleground states and media markets.”\footnote{Michael John Burton, \textsc{Book Review}, \textsc{122 Pol. Sci. Q.} 511, 512 (2007) (reviewing \textsc{Shaw, supra note 151}).} A subsidiary (but, in the present context, especially important) consequence of most states’ adopting the unit rule for allocating their electors is that a plurality victory is as good as sweeping the state. Thus, the rational candidate knows he need not appeal to a majority of a state’s voters, so long as he can assemble a coalition of interests large enough to allow him to beat his closet rival.\footnote{See \textsc{Cynthia R. Farina}, \textsc{Faith, Hope, and Rationality or Public Choice and the Perils of Occam’s Razor}, \textsc{28 Fla. St. U. L. Rev.} 109, 125–30 (2000) (discussing reasons why a candidate perceives “a patchwork of potential interest coalitions, whose utility to him depends upon a combination of their geographical location and concentration, and their marginal value in assembling a plurality within the state”).} With the growing ability to pinpoint the groups who can contribute to that coalition, and execute an outreach strategy targeted specifically to them, the would-be President comes into office thoroughly enmeshed in interest-group politicking.\footnote{The Bush 2000 and 2004 campaigns found that the “media buys” and other campaign activity that resulted from calculating the “relative cost efficiency” of putting resources into the various “media markets” within their battleground states had a positive, often significant impact on both vote share and voter perception of candidate favorability. \textsc{Shaw, supra note 151, at 137. See also Daron R. Shaw, \textsc{The Effect of TV Ads and Candidate Appearances on Statewide Presidential Votes, 1988–96}, 93 Am. Pol. Sci. Rev. 345 (1999) (finding evidence that candidate TV advertising and appearances from 1988, 1992, and 1996 campaigns affected statewide preferences as well as the Electoral College vote). The Lau, Andersen & Redlawsk study, \textsc{supra note 15, determined that “correct” voting correlated positively with the more heavily presidential candidates campaigned in the}}
It would be an heroic assumption indeed to believe Presidents, once they take office, shed the regional sensitivities and interest-group commitments that got them elected, as easily as a snake sheds a shabby and confining skin. Anecdotal evidence certainly suggests that they, and their close advisers, are specially responsive to the individuals and groups who helped “deliver” the previous election, or might be crucial to winning the next one. Moreover, a growing body of modeling and empirical analyses confirms that Presidents tend to behave consistently with basic tenets of political economy.

Examination of use of the veto power, grantmaking by executive agencies, and other federal spending has found evidence that re-

state, presumably because this increases the amount of salient information available to voters.

155 “You can’t beat an incumbent president. Remember, he’s got a hundred billion dollars at his disposal to distribute back to local governments, and he can send that money anywhere he wants. Everybody from Alabama to Alaska files for projects, and the administration decides which ones to approve. In an election year, they go where the votes are.”


156 Under the incentive-based “battleground hypothesis,” Presidents favor states that are competitive between the parties, as a way to woo electoral votes in coming elections; under the reward-based “presidential-support” hypothesis, Presidents steer spending to states that provided relatively large proportions of popular votes in the previous election to cement future support. For an overview of the theoretical and empirical literature see Valentino Larcinese, Leonzio Rizzo & Cecilia Testa, Allocating the U.S. Federal Budget to the States: The Impact of the President 68 J. POL. 447, 447–49 (2006); Andrew J. Taylor, The Presidential Pork Barrel and the Conditioning Effect of Term, 38 PRESIDENTIAL STUD. Q. 96 (2008).

157 See Kevin B. Grier, Michael McDonald & Robert D. Tollison, Electoral Politics and the Executive Veto: A Predictive Theory, 33 ECON. INQUIRY 427, 428 (1995) (finding “significant evidence” that “presidential veto decisions are influenced by the floor votes of senators from . . . electorally crucial states” through a sample of bills from 1970–1988); see also Nolan M. McCarty, Presidential Pork: Executive Veto Power and Distributive Politics, 94 AM. POL. SCI. REV. 117, 118 (2000) (challenging the “assumption of presidential universalism when applied to budgetary politics” and modeling how the veto can affect both overall level of spending and the distribution across political jurisdictions).

158 E.g., Thomas A. Garrett & Russell S. Sobel, The Political Economy of FEMA Disaster Payments, 41 ECON. INQUIRY 496 (2003) (examining data from 1991–1999 to show that nearly half of Federal Emergency Management Agency disaster relief is politically motivated, with states that are politically important to the President receiving a disproportionately large share of disaster declarations and expenditures).

159 E.g., Larcinese, Rizzo & Testa, supra note 156 (using data from 1982–2000 to show a disproportionate flow of federal funds to those states that heavily supported the President in the prior election and states with governors of the President’s party); Walter R. Mebane, Jr. & Gregory J. Wawro, Presidential Pork Barrel Politics (July 13, 2002) (unpublished manuscript, available at http://www-personal.umich.edu/~wmebane/targeting.pdf) (finding that “presidents pursue strategies to target federal expenditures to local areas to
sources are allocated strategically to electorally crucial regions—as Bush Administration Deputy Chief of Staff Karl Rove put it, “asset deployment.” Presidencies, it seems, are not immune to the problem that plagues every other elected official: reconciling the representational duty of even-handed public-regardingness with the political need to reward past, and secure future, support. In this, as in most things having to do with the presidency, only the scale is different. For the President, the nation is his pork barrel.

B. The President as Manager-in-Chief: The Good Government Claim

What Presidents do every day is to make decisions that are mostly thrust upon them, the deadlines all too often outside their control, on options mostly framed by others, about issues crammed with technical complexities and uncertain outcomes.

—Richard E. Neustadt, Presidential Power and the Modern Presidents

The second promise of unitary executive theory is that strong presidential leadership will bring informed coordination and purposeful efficiency to the unrestrained, chaotic sprawl of modern regulatory government. As with the democracy claim, the management claim is an assertion of uniquely presidential capacity vis-à-vis the other branches. Unitary executive theorists are wont to disparage congressional oversight as not only erratic but also riddled with parochial and other narrow factional bias. Even judicial review of agency action comes under fire for intermeddling with presidential prerogatives, except to the extent that the court is protecting traditional property and liberty interests from regulatory depredations.
This Hamiltonian “good government” claim about President-centered government is distinct from the claim that the President should control regulatory policy because he alone represents all the people. Ultimately, however, the two merge. Few informed observers disagree that U.S. regulatory policy would benefit from coordinating related programs, rationalizing the exercise of overlapping statutory jurisdiction, minimizing conflicting regulatory requirements, and generally ensuring that agencies are working through problems in ways that most effectively deploy finite public and private resources. This sort of managerial rationality is not what fuels scholarly and political debates over the extent of presidential power. The controversy comes, as we move into the realm of setting regulatory priorities, determining how benefits, costs, and risks will be assessed, favoring (or disfavoring) certain regulatory objectives, and deciding whether and how resources will be allocated to enforcement. In these areas, “better” regulatory government becomes harder to define without reference to specific substantive preferences and political philosophies. Unitary executive’s managerial claim insists upon presidential control in these areas as well, building on the representational claim that the President’s policy agenda best expresses the people’s will and nation’s interests. In this way, the solution to how the people can meaningfully be represented in modern regulatory government becomes inextricably intertwined with the promise that presidential direction means coordinated, efficient, and effective regulatory policy.

1. The Magnitude of the Task

The President is the most overworked and underinformed decisionmaker in the American policymaking system.

—Rachlinksi & Farina, *Cognitive Psychology & Optimal Government Design* ¹⁶⁴

Information is to decision making what fuel is to fire. Too much or too little can be equally devastating.

—Review of *Groupthink or Deadlock: When Do Leaders Learn from their Advisors?* ¹⁶⁵


¹⁶⁵
The impressive trappings of the office and the often deliberate cultivation of a larger-than-life presidential image\textsuperscript{166} tend to obscure an elemental fact: the President faces the same cognitive challenges as the rest of us in managing information flows, prioritizing multiple demands for attention, and comprehending and analyzing novel situations. More accurately, these demands are vastly more onerous, relentless, and insistent on the President than on any other American—and, perhaps, on any other individual on the planet. He overlooks an issue universe that spans all substantive policy areas, extends to critical international as well as domestic problems, and presents an extraordinary number of high stakes decision points.\textsuperscript{167}

What is entailed in “managing” U.S. regulatory policy? At the formal level, thousands of statutes delegate regulatory power to hundreds of administrative units with formal policymaking authority.\textsuperscript{168} These are located in fifteen Cabinet departments, dozens of independent commissions, and various other free-standing entities. These entities exercise their regulatory power through an array of procedural mechanisms. The most important, and public, of these include: promulgating regulations with the binding force of law (rulemaking); issuing “guidance” documents that state the agency’s interpretation of its statutes and rules and announce its policy on enforcement or other matters;\textsuperscript{169} adjudicating charges of regulatory vio-


\textsuperscript{166} See supra notes 10–11 and accompanying text.

\textsuperscript{167} One of the best discussions of the complexity within which the modern President is embedded appears in BRADLEY H. PATTERSON, JR., THE WHITE HOUSE STAFF: INSIDE THE WEST WING AND BEYOND 9–21 (2000).


\textsuperscript{169} For example, the National Highway Transportation Safety Administration issues six different varieties of regulatory guidance: Preambles, “generally applicable . . . interpretations or policy statements,” guidance letters to specific individuals or entities, “[o]ral [g]uidance [s]tatements by [s]enior [a]gency [o]fficials,” grant guidelines, and compliance guides. National Highway Traffic Safety Administration, About NHTSA, http://www.nhtsa.dot.gov/portal/site/nhtsa/menuitem.e9b6cf87605e4e5033ed6830345c
lations; and resolving applications for permits, licenses, benefits, and grants. Less public, but not necessarily less significant, exercises of authority include: ruling on petitions for rulemaking and requests for enforcement action, setting enforcement priorities, and allocating budget resources among programs. Although most agencies use most of these methods, cross-government harmonization of regulatory practices exists at only a fairly high level of generality. Even in rulemaking—the most public, legally specified, and formally significant exercise of regulatory authority—the terminology, procedural details, and information disclosure policies differ significantly from agency to agency.\(^\text{170}\)

Hence, the President attempting to manage regulatory government looks out over a vast enterprise comprising a huge portfolio of economic, health, safety, and social issues, being acted upon by hundreds of distinct entities composed of 2.1 million full-time civilian employees, and having distinctive internal structures and decision-making processes and largely unstandardized operating procedures and information reporting practices. This lack of uniformity, coupled with a dearth of meaningful government-wide reporting requirements, makes it difficult reliably to generate even basic measures of the amount of federal regulatory activity.\(^\text{171}\) The snapshot that follows therefore has an element of randomness (in, for example, which agencies are included and the time period of their data), but it gives at least an impressionistic sense of the magnitude of federal regulatory decision making to be “managed.” For several items, a per

\(^{44cc/\text{.\ } See\ generally\ Office\ of\ Mgmt.\ &\ Budget,\ Executive\ Office\ of\ the\ President,\ OMB\ Bull.\ No.\ 07-02,\ Final\ Bulletin\ for\ Agency\ Good\ Guidance\ Practices\ (2007),\ available\ at\ http://www.whitehouse.gov/omb/memoranda/ny2007/007-07.pdf\ (describing\ the\ nature\ of,\ and\ variations\ in,\ agency\ guidance).\(^\text{170}\)\)

\(^{170}\) This became apparent when the George W. Bush administration decided to build a government-wide online electronic rulemaking docket. The rulemaking process is heavily regulated by statutory and judicial administrative law, as well as presidential executive order. So, one might expect a fair degree of standardization. In fact, inter-agency variation has bedeviled efforts to create a cross-agency system with more than skeletal capabilities. See Comm. on the Status and Future of Federal E-Rulemaking, Achieving the Potential: The Future of Federal E-Rulemaking 17–19 (2008), available at http://ceri.law.cornell.edu/documents/report-web-version.pdf.

\(^{171}\) This fundamental data problem leads analysts to use the number of pages in the Code of Federal Regulations (CFR) or the Federal Register as a proxy for quantum of federal regulation. See, e.g., John W. Dawson, Regulation and the Macroeconomy, 60 Ky. L. Rev. 15, 16–17 (2007) (reviewing studies). For a rough sense of the amount of regulatory activity completely invisible to these measures, see the remarkable collection of resources on “administrative actions which are outside the scope of the CFR or [Federal Register]” maintained by the University of Virginia Library, Government Information Resources: Administrative Decisions & Other Actions By Agency, http://www2.lib.virginia.edu/govtinfo/fed_decisions_agency.html (last visited Jan. 29, 2010).
week average is included; this is an heuristic to make the problem of regulatory “information load” more concrete, rather than any sort of descriptive claim about the frequency or regularity of agency output.

- New agency regulations promulgated annually: 3500–4000 (67–77 per week). In the first 10.5 months of 2009, about 500 of these (11 per week) were considered important enough to be reviewed by the Office of Regulatory Information (OIRA) in the White House Office of Management & Budget (OMB). Of this subset, about 100 (2 per week) are “economically significant” rules that require full OIRA review of costs, benefits, etc.

- Civilian full-time executive branch employees (FY2010 estimate): 2.12 million

- Number of bureaus, divisions, units, and programs listed in the directory of the Department of Health & Human Services: more than 3000

- Interpretive rules/other guidance:
  - Centers for Medicare & Medicaid Services (HHS): “thousands” annually;
  - FDA (2003): 105 (2 per week);

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174 Id. “Economically significant” rules are those that “[h]ave an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.” Exec. Order No. 12,866, § 2(f), 50 Fed. Reg. 51,735 (Sept. 30, 1993). In 2009, average OMB review time has been thirty-two days for significant rules and forty days for others.


176 Patterson, supra note 167, at 18.


• EPA (1996–1999): “over two thousand”\textsuperscript{179}
• OSHA (2008): 66 interpretations\textsuperscript{180} and 16 directives\textsuperscript{181} (1.5 per week)

- Enforcement Activity
  - EPA (2008): 20,000 inspections (384 per week); 2056 administrative complaints (39 per week); 280 cases referred for civil enforcement (5 per week); 319 environmental crime cases initiated (6 per week)\textsuperscript{182}
  - OSHA (2007): 39,324 inspections (756 per week)\textsuperscript{183}
  - FDA (2008): 15,245 inspections (293 per week); 17,907 import refusals (344 per week); 2,721 recall events (52 per week); 445 warning letters (8.5 per week); 369 convictions (7 per week); 8 seizures\textsuperscript{184}

- Administrative Orders
  - EPA (2008): 2084 penalty orders (40 per week); 1390 compliance orders (27 per week)\textsuperscript{185}
  - OSH Review Comm. (2007): 2058 cases disposed of (39 per week)\textsuperscript{186}

\textsuperscript{179} Nina A. Mendelson, Regulatory Beneficiaries and Informal Agency Policymaking, 92 CORNELL L. REV. 397, 399 (2007) (citing COMM. ON GOV’T REFORM, NON-BINDING LEGAL EFFECT OF AGENCY GUIDANCE DOCUMENTS, H.R. REP. NO. 106-1009, at 5 (2000)).
\textsuperscript{185} ENVTL. PROT. AGENCY, supra note 182.
\textsuperscript{186} U.S. DEP’T OF LABOR, OCCUPATIONAL SAFETY & HEALTH REVIEW COMM’N, FY 2007 PERFORMANCE AND ACCOUNTABILITY REPORT, INDEPENDENT AUDITOR’S REPORTS AND
Currently active agency requests to collect information from the public (each of which, under the Paperwork Reduction Act, must be approved by OMB initially, and every three years thereafter\textsuperscript{187}): 8780 (168 per week)\textsuperscript{188}

Agency proposed draft bills cleared by OMB (per Congress): 350–500\textsuperscript{189}

Proposed reports/testimony cleared by OMB (per Congress): 3500–4000\textsuperscript{190}

Pages in the Federal Register: 80,700 (1552 per week)\textsuperscript{191}

This is a rough, obviously incomplete picture of the basic information load generated by the federal regulatory enterprise, but it conveys the immensity of the task of supervision. Thanks to the Unified Regulatory Agenda,\textsuperscript{192} the White House now has a reasonably good tool for tracking rulemaking activity, and OMB is attempting to monitor the issuance of at least “significant” guidance.\textsuperscript{193} But would-be managers of regulatory policy still have no mechanism for systematic, cross-agency monitoring of administrative adjudication, the granting of permits and licenses, the denial of petitions for rulemaking, enforcement practices, etc. To be sure, a great deal of this regulatory activity concerns (relatively) minor matters that may not merit White


\textsuperscript{188} U.S. OFFICE OF MGMT. & BUDGET, OFFICE OF INFORMATION AND REGULATORY AFFAIRS INVENTORY OF CURRENTLY APPROVED INFORMATION COLLECTIONS, available at http://www.reginfo.gov/public/do/PRAReport?operation=5 (total as of December 2009). These produce more than 64 billion responses annually, at an estimated annual cost of more than $57 billion. \textit{Id.}

\textsuperscript{189} This range comes from summaries provided by OMB at the outset of the G.W. Bush and Obama Administrations, respectively. \textit{See} Memorandum from Mitchell E. Daniels, Jr., Dir. to the Heads of Dep’ts and Agencies, Legislative Coordination and Clearance (Feb. 15, 2001), available at http://georgewbush-whitehouse.archives.gov/omb/memoranda/m01-12.html; Memorandum from Peter R. Orszag, Dir. of Office of Mgmt. & Budget to Heads of Dep’ts and Agencies, Legislative Coordination and Clearance (Jan. 27, 2009), available at http://www.whitehouse.gov/omb/assets/memoranda_fy2009/m09-09.pdf.

\textsuperscript{190} This range comes from summaries provided by OMB at the outset of the G.W. Bush and Obama Administrations, respectively. \textit{See} Memorandum from Mitchell E. Daniels, Jr., \textit{supra} note 189; Memorandum from Peter R. Orszag, \textit{supra} note 189.


\textsuperscript{192} \textit{See} GPO ACCESS, THE UNIFIED AGENDA: MAIN PAGE (2009), available at http://www.gpoaccess.gov/ua/index.html (“[The Unified Agenda] summarizes the rules and proposed rules that each Federal agency expects to issue during the next year.”).

\textsuperscript{193} \textit{See} OFFICE OF MGMT. & BUDGET, \textit{supra} note 169.
House-level attention, but this simply increases the challenges of informational triage.

Moreover, managing the policy output of administrative agencies is by no means all that the modern President undertakes to do. As well as being head of the government, he is expected also to be head of state and leader of his party. The following are some indicators of the informational and attentive demands of those other roles:

- Relations with Congress (2008 unless otherwise noted)
  - Measures introduced in House and Senate: 4815 (92.5 per week)\textsuperscript{194}
  - Statements of Administration Position on pending legislation (2007): 142 (2.7 per week)\textsuperscript{195}
  - Votes: 472 House; 215 Senate\textsuperscript{196}
  - Measures Passed: 1588 (30.5 per week)\textsuperscript{197}
    - Vetoes: 4\textsuperscript{198}
    - Average annual Bush Administration signing statements issued: 19\textsuperscript{199}
  - Budget
    - Smallest Cabinet Department budget (Interior, 2010 est.): $11.9 billion\textsuperscript{200}
    - Largest Cabinet Department budget (Health & Human Services, 2010 est.): $873 billion\textsuperscript{201}
  - Nominations
    - Civilian: 3632 (70 per week)\textsuperscript{202}

\textsuperscript{197} \textit{Id.} These include bills and joint, concurrent, and simple resolutions.
\textsuperscript{198} \textit{Id.}
\textsuperscript{199} \textit{See} Joyce A. Green, List of All Signing Statements Issued by George W. Bush, http://www.coherentbabble.com/listGWBall.htm (last visited Jan. 29, 2010).
\textsuperscript{201} \textit{Id.} at 288.
Military: 18,674 (359 per week)

- Foreign Affairs
  - Treaties and executive agreements: 136 (2.6 per week)
  - Foreign personal appearances annually: 32 (2.6 per month)

- Public
  - Presidential speeches: 23 (2 per month)
  - News conferences: 18 (1.5 per month)
  - Other non-partisan public appearances: 298 (25 per month)
  - Partisan political appearances: 65 (5 per month)

- Executive orders: 37 (3 per month)

In sum, the task of overseeing contemporary U.S. government is almost incomprehensibly huge. To monitor and assess the current stream of information relevant to policy formulation—let alone to interpret, synthesize, and formulate a position on this typically complex and often conflicting flow—is a task for an institution, not an individual. An institution is, accordingly, what the modern presidency has become.

2. The Presidential Branch

The Constitution includes not a word about the White House staff, and they are barely mentioned in statute. Staff members have zero legal authority in their own right, yet 100 percent of presidential authority passes through their hands.

—Bradley H. Patterson, Jr., *The White House Staff: Inside the West Wing and Beyond*
With the bureaucratizing of the presidency, it is hardly surprising that the White House fell heir to all the problems of a bureaucracy, including the distortion of information as it passes through the chain of command . . . .

—Stephen Hess, *Organizing the Presidency* ²¹²

In contemporary political and constitutional mythmaking about the presidency, the President works alone—a solitary leader who makes the hard choices, does what needs to be done, and bears by himself the weight of power and responsibility. Political scientist Hugh Heclo contrasts the reality:

Our most familiar image of the presidency finds a man, sitting alone, in the dimly lit Oval Office. Against this shadowy background the familiar face ponders that ultimate expression of power, a presidential decision.

It is a compelling and profoundly misleading picture. Presidential decisions are obviously important. But a more accurate image would show a presidency composed of at least a thousand people—a jumble of personal loyalists, professional technocrats, and bureaucratic staff with one man struggling, often vainly, to stay abreast of it all. What that familiar face ponders in the Oval Office is likely to be a series of conversations with advisers or a few pages of paper containing several options. These represent the last distillates produced from immense rivers of information flowing from sources—and condensed in ways—about which the president probably knows little. ²¹³

Stories about a cast of thousands do not capture the popular imagination in the same way as the struggles of a lone protagonist. But the managerial promises of unitary executive theory cannot be assessed without understanding the role of White House staff and other political appointees in constructing the modern presidency.

American Presidents have never tried to manage the information and expertise demands of government on their own. The original institution to assist them was the Cabinet. The Cabinet was also the first of many presidential support structures that, under the pressure of expanding federal government, outgrew their original objective to supply “a few loyal and intelligent individuals who would offer counsel when asked and would keep such consultations confidential.”³¹⁴

As the executive departments grew in magnitude and complexity over the late nineteenth and early twentieth century, it became obvious

²¹¹ PATTERSON, supra note 167, at 2.
that Presidents needed something other than their Cabinet to collect information, provide advice, and help them coordinate key areas and programs. In 1937, the President’s Committee on Administrative Management—the group of prominent political science and public administration experts known to administrative law scholars as the Brownlow Commission—warned, “The President needs help.” Assessing existing support as “entirely inadequate,” it recommended:

[The President should] be given a small number of executive assistants who would be his direct aides in dealing with the managerial agencies and administrative departments of the Government. These assistants, probably not exceeding six in number, would be in addition to his present [Cabinet] secretaries, who deal with the public, with the Congress, and with the press and the radio.

The result of this and other recommendations was FDR’s creation of the Executive Office of the President (EOP), a new institution that brought budget management into the White House and provided the capacity for additional staff support for the President. At the time, the EOP was seen as the solution to “effective coordination of the tremendously wide-spread federal machinery.”

From its initial, fairly modest size, the EOP burgeoned rapidly. Today, the entity created to allow the President to manage the federal bureaucracy is itself the size of a small agency. Currently comprising about 1800 people (down from a high of 2000 in 1980), the EOP under President Obama consists of thirteen major offices, boards, and councils, some of which have significant subunits. The most relevant for present purposes is OMB, with about five hundred

215 Woodrow Wilson’s Council of National Defense is generally identified as the first serious experiment in a special institution to assist the President in managing a policy domain. See id. at CRS-1 to CRS-2.


217 Id.

218 The EOP was created after passage of a statute authorizing the President to propose reorganization plans. After Congress approved his plan by joint resolution, Roosevelt issued an executive order constituting the Executive Office.

219 THE EXECUTIVE OFFICE OF THE PRESIDENT, supra note 214, at CRS-8 (quoting the Brownlow committee).


221 See STANLEY & NIEMI, supra note 118, at 256–57.

222 See the list at WhiteHouse.gov, Executive Office of the President, http://www.whitehouse.gov/administration/eop.
career and political appointees.223 About half of these people work in
the Resource Management Offices, currently five units defined by
subject area224 and staffed with program examiners who “develop and
support the President’s Budget and Management Agenda.”225 The
remainder work in units that oversee procurement, financial man-
agement, and computing and information technology policy,226 that
develop the Administration position on pending bills and clear agen-
cies’ proposed legislation and congressional testimony,227 and that
conduct rulemaking review.228 The EOP’s budget for the 2010 fiscal
year is $439 million.229

As the EOP grew in tandem with the job of managing the execu-
tive branch, Presidents needed a source of “immediate information
and advice on pressing national problems that could not be readily
obtained from the larger executive office,”230 As a result, the White
House Office (WHO) emerged as the core of the current presidential
support structure. Typically headed by the President’s Chief of Staff,
the WHO is the part of the EOP most tailorable to the organizational
and decision-making preferences of each individual President.231 But
the WHO has not been immune from the pressures of increasing in-
formation management and analytical demands, and growing presi-
dential ambitions. In the Obama Administration, it comprises two

223 See Office of Mgmt. & Budget, The Budget for Fiscal Year 2010, at 1109, (2009),
224 These are: Natural Resource Programs; Education, Income Maintenance and Labor Pro-
grams; Health Programs; General Government Programs; and National Security Pro-
grams. Office of Management & Budget, Executive Office of the President, Organization
225 Office of Mgmt. & Budget, The Mission and Structure of the Office of
226 See Office of Mgmt. & Budget, Office of E-Government & Information Technology,
http://www.whitehouse.gov/omb/e-gov/; Office of Mgmt. & Budget, Office of
Office of Mgmt. & Budget, Office of Federal Procurement Policy,
http://www.whitehouse.gov/omb/procurement_default/.
227 Memorandum from Peter R. Orszag, supra note 189; Office of Management & Budget,
Office of Management and Budget’s Legislative Information System,
http://www.whitehouse.gov/omb/gils_lrd-gils/.
228 See Office of Mgmt. & Budget, Office of Information & Regulatory Affairs,
http://www.whitehouse.gov/omb/regulatory_affairs/default/.
229 Office of Mgmt. & Budget, supra note 200, at 409 tbl.27.1. The total budget for the
EOP is shown as $747 million, but $308 million of this is the Iraq Relief and Reconstruc-
tion Fund.
230 Ragsdale, supra note 10, at 321.
231 See id. at 343–45 (showing wide variation over time in number and function of units in
WHO).
dozen different substantive and administrative units employing almost five hundred people.\footnote{OFFICE OF MGMT. & BUDGET, supra note 223, at 1109; The White House, Executive Office of the President, http://www.whitehouse.gov/administration/eop (last visited Jan 29, 2010).}

Thus, the trajectory of modern government has been mirrored within the presidency: constantly pressed by the expanding scope and complexity of the federal policy agenda and the entities charged with pursuing it, Presidents develop new structures to compile and analyze information, provide advice, and assert control. Those structures ramify, growing in size and specialization as the task of supervision grows. And Presidents come to need yet another institution, to mediate between them and the structures developed to give them help. The increasing appearance in recent administrations of “czars”—individuals appointed by the President to facilitate policy monitoring and development across traditional executive branch organizational units—may be the next iteration of this pattern.\footnote{Although the practice dates back at least as far as the Nixon Administration’s “energy czar,” this has been a controversial point in the Obama Administration. The Senate recently held two hearings on the issue. See Examining the History and Legality of Executive Branch “Czars” Before the S. Judiciary Comm., Subcomm. on the Constitution, 111th Cong. (2009), available at http://judiciary.senate.gov/hearings/hearing.cfm?id=4098; Presidential Advice and Senate Consent: The Past, Present, and Future of Policy Czars Before the S. Comm. on Homeland Security & Governmental Affairs, 111th Cong. (2009), available at http://hsgac.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=5b22e173-5b7f-46a0-b2ab-d300b6381de4.}

The evolution of this large, multi-layered structure to assist the President in understanding and controlling the government—which some political scientists are now calling the “presidential branch”\footnote{A report published by the National Academy of Public Administration on the eve of the Obama Administration urged creation of a new Office of Federal Management to remedy perceived failures of OMB to “do[] an effective job of managing the executive branch in the President’s interests.” Ironically, its title echoed the assessment of the Brownlow Commission seventy years earlier. See Ronald C. Moe, The President Needs Help: Proposed Office of Federal Management, 4 (Nat’l Acad. of Pub. Admin., Issue Paper, 2008), available at http://www.napawash.org/pmc/papers/Moe_Proposed_Office_Federal_Management_9_08_08.pdf.}—has two significant consequences for the present discussion.

leadership on the one hand, and the chaotic, democratically deficient collectivity of congressional action on the other, is over-simplified to the point of inaccuracy. In important ways, modern presidential leadership is constituted through, and carried out by, a large and diverse group of White House advisers and staff. This is not meant to imply that anyone in this group disputes who is really “the boss.” Rather, it is an effort to import into legal theorizing about the presidency a real world dynamic long recognized by organizational theorists and other social scientists: leaders need followers as much as followers need leaders.\(^{235}\) The President is dependent upon his advisers and supporting staff because he must be; his dependency increases as the demands of the office and the scope of presidential ambition grow. They identify the individuals, groups, and issues that merit his personal attention,\(^{236}\) determine the content and framing of the information he receives,\(^{237}\) and communicate “the White House position” on various policy matters to everyone else.\(^{238}\) None of these people, save the Vice President, is elected; most of them are invisible to the public.\(^{239}\)


\(^{236}\) See, e.g., FRED I. GREENSTEIN, THE PRESIDENTIAL DIFFERENCE: LEADERSHIP STYLE FROM FDR TO GEORGE W. BUSH 152–53 (2d ed. 2004) (describing the frustration of some of Reagan’s principal advisers when staff structure changed to hierarchical model under Chief of Staff Donald Regan, who rigorously controlled access to the President).

\(^{237}\) See, e.g., RICHARD M. PIOUS, WHY PRESIDENTS FAIL 92–107 (2008) (arguing that Carter’s pollster Patrick Caddell was key in shaping his perception of the existence and nature of a crisis in his presidency); Andrew Rudalevige, “The Decider”: Issue Management and the Bush White House, in THE GEORGE W. BUSH LEGACY 135, 139 (Colin Campbell et al. eds., 2008) (concluding that the “centralized politicization” of the George W. Bush Administration increased responsiveness to presidential policy preferences, but excluded analyses and alternatives that the President needed to calculate those preferences in an informed way).

\(^{238}\) For a vivid picture of how relations become strained between staff on the one hand and members of the Cabinet and other high-level presidential appointees on the other, see HESS, supra note 212, at 16–18. See also SHIRLEY ANNE WARSHAW, POWERSHARING: WHITE HOUSE-CABINET RELATIONS IN THE MODERN PRESIDENCY (1996) (describing increasing dominance of White House vis-à-vis Cabinet departments in policymaking since Nixon presidency).

\(^{239}\) The intense controversy over Dick Cheney’s role during the George W. Bush Administration, see, e.g., BARTON GELLMAN, ANGLER: THE CHENEY VICE PRESIDENCY (2008); SHIRLEY ANNE WARSHAW, THE Co-PRESIDENCY OF BUSH AND CHENEY (2009), underscores that Americans are not prepared to accept that even an elected presidential adviser has significant power in Administration policymaking. The scope of Cheney’s influence was surely atypical, but he is not the first modern Vice President to draw criticism for undue influence on policy. Dan Quayle’s role while chairing the Council on Competitiveness was a frequent bone of contention during the George H.W. Bush Administration. See CHARLES
Second, overseeing this multi-layered support structure is itself a formidable management imperative for the new President. A vast literature—authored by White House veterans, scholars of the presidency, and experts in public administration—is devoted to how the White House establishment has been, and ought to be, selected, organized and supervised.\textsuperscript{240} Much of this literature recounts the failures of previous chief executives: delegating too much to others, or not enough; allowing the President’s closest aides too great a power to filter whom he sees and what he hears, or attempting vainly to see and hear everything himself; establishing advising and decision structures that stifle questioning and disagreement, or trying to craft policy and take action based on infighting and ambivalent dithering. The advice on how to avoid these errors varies, but the basic lesson is the same: for the modern President, the quest to direct the federal government begins with the challenge of managing his own house.

The people on whom the President relies to help him control the government are not all in the White House. In appointing Cabinet Secretaries, agency heads, and various subordinate agency officials, the President in theory extends his influence throughout the executive branch by placing “his” people in key positions of responsibility. In actual practice, Presidents have mixed success using political appointments as instruments of organizational oversight and policy direction.\textsuperscript{241} The sheer size of federal government creates an impossi-
ble management paradox. On the one hand, presidential appointees represent only a very thin layer at the top of the major regulatory entities. This has been a source of frustration for Presidents, and recent administrations have sought to extend the influence of political appointees in the administrative policymaking process. On the other hand, the opportunity to select even a tiny fraction of the executive branch workforce translates into the President finding more than 3300 people to be his voice out in the government. Stephen Hess, staffer in Republican administrations and adviser to Republican and Democratic Presidents, describes how political reality compromises the theory of extended presidential control through appointment:

(presenting case studies of the New Source Review Program and the National Security Agency’s domestic surveillance program as instances when political appointees either delayed implementation of or thwarted entirely the President’s policy preferences).

For example, less than 0.5% of EPA’s nearly 18,000 employees are presidentially appointed; of employees at the manager level, the percentage is 2.91%. See DAVID E. LEWIS, THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE 82, 105 (2008) (giving data for other agencies as well).

This has not occurred through an overall increase in the number of political appointees, see id. at 100 tbl.4.3, but rather through such strategies as heightened White House control over positions formally filled by agency heads, see note infra 244 (Schedule C appointments), shifting the proportion of political appointees among agencies depending upon the degree to which the agency’s general policy orientation departs from the President’s agenda, see note 268 infra (describing patterns in Clinton, and both Bush, presidencies); and “management” steps such as the Bush Administration’s Executive Order 13,422 (2007), which required a presidentially-appointed regulatory policy officer to serve as the gatekeeper for agency rulemaking. LEWIS, supra note 242, at 103; see also Amending Executive Order 12866: Good Governance or Regulatory Usurpation? Part I and Part II: Hearings Before the Subcomm. on Investigations and Oversight of the H. Comm. on Science and Technology, 110th Cong. (2007), available at http://science.house.gov/Publications/hearings_markups_details.aspx?NewsID=1777 (testimony of numerous regulatory law experts criticising this for extending White House political control over regulation).

This figure is based on 2004 data and includes three components: (i) just under 1000 PAS (presidential appointment, senate confirmation) executive policymaking positions, which include the very top of the management pyramid in agencies, plus US attorneys and ambassadors; (ii) about 700 positions in the Senior Executive Service, the senior management level that may, by statute, be up to 10% political appointees; and (iii) about 1600 Schedule C positions, which include special or confidential assistants to PAS appointees, directors of communications, and legislative liaisons. Although technically selected by the agency head, the White House has exercised significant control over Schedule C appointments since the Reagan administration. Gabriel Horton & David E. Lewis, Turkey Farms, Patronage, and Obama Administration Appointments 5 (Ctr. for the Study of Democratic Inst., Working Paper No. 09-03, 2009), available at http://www.vanderbilt.edu/csdi/working%20papers/gabe%20and%20dave%20nov%2009.pdf (analyzing biographical data of more than 1000 people appointed in first 6 months of Obama Administration). The figure given in the text is conservative. The total number may be as high as 9000 once judgeships and advisory commission appointments are included. See id. at 5 n.7.
A president-elect has political debts and obligations, but they are not necessarily to those with the backgrounds he now needs. Thus he sometimes picks incompetents. Often he turns to strangers. With each appointment, he makes a contract to share his responsibilities. If it turns out that the appointee and the president disagree, the appointee can quit or the president can fire the appointee. Either action is a tacit admission of failure on the part of the nation’s leader. More commonly, the president and the appointee split their differences and the president loses some part of the direction of his administration.

In sum, although the President is a single individual, the modern presidency is a large and complicated institution. It is constituted from a mélange of people that includes substantive policy and technical experts, those with “insider” experience in Washington government, campaign and party loyalists, representatives of interest groups whose support helped the President get elected and/or is needed to advance his policy agenda, and nominees capable of surviving the confirmation process. These people bring widely varying skills and competency to their interaction with the career officials and front-line staff who hold the substantive and institutional knowledge to make things happen (or not) within agencies. Using them to accomplish the diffusion of presidential leadership through the executive branch poses considerable management challenges. More importantly, it involves substantial agency costs that advocates of President-centered government ignore. No strategy of selection and direction allows the President to fill several thousand (or even several hundred) vacancies with people who are his alter ego—that is, who will unfailingly give him the information he would want to have (if he knew it existed) and who will reliably convey to the people who do

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245 HESS, supra note 212, at 13.

246 See RAGSDALE, supra note 10, at 321 (describing three strategies Presidents use in appointments: "Get the best people possible" (the bureaucratic strategy); "Get the people you know best" (the intimacy strategy); and "Get people from the party and interest groups" (the representation strategy)); Martha Joynt Kumar, The White House as City Hall: A Tough Place to Organize, 31 PRESIDENTIAL STUD. Q. 44, 47, 49–50 (2001) (describing four groups from which Presidents make appointments: Campaign people, who tend to "think in a short time span, see the world in black and white, and have a sense of attack"); personal presidential choices, "a handful of people to occupy positions [Presidents] consider to be crucial to the manner in which their presidenc[ies] function"; substantive policy people, "whose first thought is not the politics of it but the substance of it"; and people with White House experience, who know "how White Houses work and are structured, [and] how decisions get made" (internal quotations omitted)).

247 Political scientist George Krause helpfully conceptualizes these costs as problems of “vertical coordination between presidents and their subordinates”; “horizontal coordination among subordinates,” and “credible commitments arising from” relatively short tenure in office. George A. Krause, Organizational Complexity and Coordination Dilemmas in U.S. Executive Politics, 39 PRESIDENTIAL STUD. Q. 74, 75 (2009).
the day-to-day work of government the message he would want them to hear.

3. The Man Behind the Curtain

Trends have made more difficult for presidents that which was always difficult but less aspired to—command of the instrumentalities of government and control over policy.


[Presidents] seek singular control of information and policy decisions but are forced to work through a collective apparatus. The pastiche of staffs, interests, and loyalties make it difficult for presidents to gain either the information or the control they seek. . . . The problem of control seems inherently unsolvable.

—Lyn Ragsdale, *Vital Statistics on the Presidency* 249

Like the democracy claim, the “good government” claim of unitary executive theory lays a simplistic, reassuring veneer over a messy, disquieting reality. Its wise, well-informed, and deliberative Manager-in-Chief is ready and able to provide the hands-on leadership that can infuse rational coordination, sensible prioritization, and public-regarding direction into the sprawling and conflicted federal policymaking enterprise. In fact, however, when the ambition of a unitary executive President to control federal regulatory policy meets the massive scope and complexity of modern regulatory government, the results are very different from what unitary executive theory promises.

First, Presidents may aspire to comprehensive, coherent direction of regulatory policy but White House control is in fact sporadic, at times cacophonous, and often imperfectly realized. How could it be otherwise? It is costly for Presidents and their advisers to monitor the mass of agencies’ policymaking activities, to develop positions on the often complex underlying substantive issues, to communicate those positions to the people formally empowered to decide, and to actually get a decision implementing the President’s policy.

With respect to locating appropriate targets for presidential attention, the White House—like Congress—can use “fire alarm” signals from interest groups, influential constituents, and the media to iden-

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249 RAGSDALE, supra note 10, at 321–22 (emphasis omitted).
tify targets of interest. But formal modeling and empirical work confirm what intuition suggests about this solution to the costs of information gathering and expertise gaps: it cannot produce consistent, systematic oversight, and so introduces significant biases into the regulatory process. Moreover, identifying the regulatory targets of White House interest is only the beginning. The specific actions consistent with the President’s policy agenda must be determined, and conveyed to the people in agencies with the authority to take them. As the power of the presidency has become (in the words of presidential scholar Hugh Heclo) “more extended, scattered and shared, . . . less of a prerogative, less unilateral, and less closely held by the man himself,” the “President’s” position may in fact be constructed, and delivered, by multiple voices. Academic and insider accounts of White House operations describe an intensely absorbed, highly energized atmosphere generated by staff units with distinct expertise and perspectives. At their best, they robustly debate the multiple substantive and political implications of policy options; at their worst, they vie for advantage and influence. 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

250 E.g., Barry R. Weingast, Caught in the Middle: The President, Congress, and the Political-Bureaucratic System, in THE EXECUTIVE BRANCH 312, 329–30 (Joel D. Aberbach & Mark A. Peterson eds., 2005) (use of fire-alarm oversight creates incentives for political appointees to avoid actions that harm constituents of their Congressional or White House principals); see also Hugo Hopenhayn & Susanne Lohmann, Fire-Alarm Signals and the Political Oversight of Regulatory Agencies, 12 J. L. ECON. & ORG. 196 (1996); cf. Sidney A. Shapiro, Political Oversight and the Deterioration of Regulatory Policy, 46 ADMIN. L. REV. 1, 9–10 (1994) (describing how Reagan Administration initiation of centralized OMB review of rules revealed shortcomings of fire alarm oversight that led Congress to change its strategy).

251 Heclo, supra note 213, at 30.

252 E.g., RAGSDALE, supra note 10, at 316, 345 (offering empirical data about WHO under various Presidents, and noting that during George W. Bush Administration, “the level of specialization, especially in the WHO, is striking”); WARSHAW, supra note 220, at 14 (describing how the “White House staff has become a series of separate, and generally institutionalized, units with different responsibilities, different constituencies, and different operating behavior”).

253 See HESS, supra note 212, at 5 (identifying one characteristic of the modern presidency as “that presidential assistants have increasingly become special pleaders”); Robert Durant, Back to the Future? Toward Revitalizing the Study of the Administrative Presidency, 39 PRESIDENTIAL STUD. Q. 89, 106 (2009) (arguing that over time “presidential appointees tend to become just as stove-piped, jurisdictional, and imperialistic in their thinking and actions” as the agencies whose policy the White House is trying to direct).
flowing down to agency officials about “what the President wants done” will at times be ambiguous, even contradictory.\textsuperscript{254}

And even when a clear policy position emerges, the White House is not alone in trying to control the regulatory outcome. A significant element of the unitary executive debate involves the true locus of authority to exercise the power delegated in regulatory statutes.\textsuperscript{255} Regardless of the formal allocation of power, however, presidential preferences must in fact compete with those of multiple congressional committees with jurisdiction over the issue; interest groups who can provide or withhold crucial political support to the President, as well as mobilize media and grassroots opinion; state governors and other local officials who feel the regional impacts of regulatory actions; and sometimes even the divergent views of the agency leadership he appointed.\textsuperscript{256} Even Presidents must pick their battles, and the White

\textsuperscript{254} See, e.g., GEORGE G. EDWARDS III & STEPHEN J. WAYNE, PRESIDENTIAL LEADERSHIP: POLITICS AND POLICY MAKING 288–95 (6th ed. 2003) (discussing range of personal, political, and organizational factors that can impede transmission of clear, consistent policy directives from President to agencies); HESS, supra note 212, at 177–78 (discussing the serious potential for “distortion” as a major management problem: “Simple messages have the best chance of surviving intact. But presidential messages are rarely simple, and in the modern White House fewer and fewer aides hear directly from the president what he really wants done”); Lisa Schultz Bressman & Michael P. Vandenbergh, \textit{Inside the Administrative State: A Critical Look at the Practice of Presidential Control}, 105 MICH. L. REV. 47, 66–69 (noting that, in interviews, EPA political appointees from George H.W. Bush and Clinton Administrations described how multiple White House staff purported to speak for the President, at times with contradictory direction).

\textsuperscript{255} The strongest unitary executive position (not endorsed by all unitarians) is that, regardless of the identity of the official to whom a statute purports to delegate regulatory authority, the only true recipient of the power can be the President. Inasmuch as he is alone vested by Article II with the executive power, action by the statutory designee is at his sufferance, and he may at any point determine to take the action himself. \textit{Compare}, e.g., Calabresi, supra note 3, at 82–85, \textit{with} Pierce, supra note 6, at 520 (arguing that the President has the power to fire decisionmakers who disobey a presidential directive, but not to exercise the delegated authority himself).

\textsuperscript{256} Several empirical studies document how competition between presidential and congressional preferences in environmental regulation has produced fluctuating levels of EPA activity. \textit{E.g.}, B. Dan Wood, \textit{Bureaucrats, Principals, and Responsiveness in Clean Air Enforcements}, 82 AM. POL. SCI. REV. 213 (1988); B. Dan Wood & Richard W. Waterman, \textit{The Dynamics of Political Control of the Bureaucracy}, 85 AM. POL. SCI. REV. 801, 818–21 (1991). For evidence of the impact on attempted White House control from congressional and other sources of regulatory policy competition, see, for example, Wood & Waterman, \textit{supra} note 256, at 806–07 (finding that early Reagan Administration success in cutting back on antidiscrimination enforcement by Equal Employment Opportunity Commission diminished after controversial General Counsel Michael Connelly resigned and was replaced by a “career-oriented” appointee who was “more palatable to the Congress and EEOC constituencies”); \textit{id.} at 811–12 (finding competing congressional and presidential influence on number of safety violations cited by Nuclear Regulatory Commission inspectors); \textit{id.} at 815–16 (finding decline in number of National Highway Transportation Safety Administration engineering evaluations, despite strong Administration interest in auto safety,
House will sometimes be forced strategically to refrain from policy direction. Capturing these complexities of policy leadership in contemporary U.S. government, White House veteran Stephen Hess describes how Presidents come to discover that:

the experience of being president was different from what [they] thought it would be or from what [they] learned in [their] civics textbooks. Four years or eight years seemed like a very long time from the outside, a very short time when [they were] in office. It is never long enough to do any real planning—to think about where the country ought to be, even in the next decade, and to design programs to get from here to there. [Their] time was consumed by crises and the demands of others, bargaining with legislators, waging feuds, performing small symbolic acts, worrying about getting reelected, finding people for jobs and getting rid of them (often by kicking them upstairs), approving budgets that [they] could only change around the edges. [They] never really “ran” the government, as [they] had expected. 257

The second significant dimension on which the reality of presidential oversight differs from the unitary executive story is politics. Presidents since Ronald Reagan have unabashedly admitted that their “management agenda” involves not only coordination, rationalization, and conflict resolution, but also aligning regulatory outputs with “the President’s priorities.” 258 So long as the story features a Representative-in-Chief who truly and distinctively embodies the voters’ mandate, the wishes of the national majoritarian coalition, or the interests of the whole nation, this expansive view of what counts as “management” can claim to be a virtue. Conflating management with the imposition of a particular set of policy preferences becomes far more problematic, however, once the President’s delphic claim to

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257 Hess, supra note 212, at 20.
channel the will of the people is called into question—and it is deeply disturbing when the account is fleshed out to include the central role of White House staff and other political appointees, who have no even colorable claim to oracular representational status.

A less simplistic and romanticized understanding of presidential politics would predict that presidential policy direction will reflect the jumbled mix we see elsewhere in the democratic political environment: disinterested conception of the public good; constituency service; rational strategy for consolidating and extending political influence; narrowly self-interested (if not actually unethical) behavior; and ordinary, garden variety ambivalence and equivocation. This is indeed what anecdotal and (limited) empirical evidence reveals. White House direction of regulatory policy sometimes takes the politically-tough high road of far-sighted wisdom; the rest of the time, it attends to some regulatory players more than others, responds to the wishes of groups that have been important to the President's political success, favors electorally significant interests and areas, and furthers the personal interests of close presidential advisers. This does not make presidential policy preferences more suspect than those of other major actors in the regulatory arena, but it should warn us against giving the President monopoly power over regulatory policy under the guise of "good government" management, rather than forcing the

259 See, e.g., Virginia Sapiro & David T. Canon, Race, Gender, and the Clinton Presidency, in THE CLINTON LEGACY 169, 170 (Colin Campbell & Bert A. Rockman eds., 2000) (discussing how Bill Clinton "focused substantial attention on the distinctive needs" of African Americans, Hispanics and feminist women’s groups through appointments, policies and “symbolic politics,” and received in return support at crucial moments in his presidency); Duffy, supra note 239, at 387–95 (discussing examples that fueled criticism of George H. W. Bush Administration Council on Competitiveness for “granting privileged access to industry groups, allowing them to push for [regulatory] concessions they were unable to attain from Congress or the EPA” while keeping public interest groups “at arms-length”).

260 Mark A. Peterson, Still a Government of Chums: Bush, Business, and Organized Interests, in THE GEORGE W. BUSH LEGACY 288, 313–15 (Colin Campbell et al. eds., 2008) (discussing a range of policy contexts and concluding that business and conservative interest groups and organizations “financed [George W. Bush’s] campaigns, provided a significant proportion of the personnel for his administration, granted the coherent coalitional resources to gain leverage over legislation and policymaking in support of their shared agendas, and were richly rewarded with policy outcomes not to be widely shared with anyone else”); cf. Mark A. Peterson, Clinton and Organized Interests: Splitting Friends, Unifying Enemies, in THE CLINTON LEGACY 140 (Colin Campbell & Bert A. Rockman eds., 2000) (discussing contradictions and failures of Clinton’s interest group strategies with respect to traditional Democratic supporters such as organized labor).

261 See supra notes 155–60 and accompanying text.

262 See, e.g., WARSHAW, supra note 239, at 132–58 (reviewing energy, environmental, and procurement contexts in which Vice President Cheney controlled policy outcomes to the benefit of former clients, associates, and future employer).
White House to compete in the democratic marketplace with all the other voices contending to define what regulatory policy best serves the people’s interests.

The third significant area in which the reality of presidential “management” differs from unitary executive promises involves the cost to certain values that have been central to the growth of the regulatory state. One of these values is expertise. We no longer believe—if we ever did—that achieving good regulatory policy requires only assembling the right team of experts. But even before the science controversies of the George W. Bush Administration, informed observers of the regulatory process had become concerned that aggressive presidential directory efforts induce the opposite sort of error: treating regulation as if it were all (or mostly) politics. A philosophy of governing rooted in claims about the representational supremacy and superior managerial rationality of presidential control will predictably devalue the role of knowledge (and knowledge-holders) lying outside the President’s purview. Even if the democracy and managerial claims of unitary executive theory were well-founded, a predilection for subordinating subject-area experience and scientific opinion to political judgment is a more serious threat to sound regulatory policy than overstating the value of expertise. Experts cannot give us the right answers when fundamental value choices must be made, but they can define the range of sensible regulatory options, bring to bear practical wisdom informed by experience, and prevent us from making costly cognitive errors of perception and judgment.

Concerns that the unitary executive approach to management actually threatens sound regulatory decision making have been validated by David Lewis’s recent analysis of bureaucratic performance during the George W. Bush administration, the presidency that built


265 It does not seem coincidental that Ronald Reagan, in whose presidency unitary executive theory was born, was also known for the vehemence of his public derision of “the bureaucracy”—i.e., career federal executive employees.

266 See Rachlinski & Farina, supra note 164, at 575–77, 579–82, 601–03 (exploring the strengths and weaknesses of lay and expert decision making, and the resulting dangers of excessive political control over regulatory outcomes).
on and extended twenty years of determined politicization of administrative agencies. On the Program Assessment Rating Tool (PART)—the numerical measure devised by the Administration and administered by OMB to grade program performance—programs headed by political appointees got systematically lower grades than those led by career managers; higher percentages of appointees on the management team also produced lower PART scores. Analyzing demographic characteristics of careerists and appointees that might plausibly relate to management performance, Professor Lewis found that previous experience in the program and longer tenure in management positions were the systematic differences that had explanatory value.

Programs managed by political appointees also fared badly in another Bush Administration measure of performance—the Federal Human Capital Survey, designed to measure “employees’ perceptions of whether, and to what extent, conditions characterizing successful

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268 Lewis, supra note 242, at 172–84. Analyzing how Presidents shifted the incidence of political appointees across agencies, Professor Lewis found that Presidents George H.W. Bush and George W. Bush targeted agencies with a “liberal” policy orientation for additional appointments, while President Clinton targeted those with a “conservative” orientation. Id. at 127–28 (finding, inter alia, that “[t]he advent of a Republican administration is estimated to increase the number of [Senate-confirmed] appointees by 50 positions in liberal or moderate agencies compared to only 10 in conservative agencies”). These results were robust even after controlling for differences among programs (e.g., type, budget), variations in management environment (size, executive or independent, internal organization), and policy content (liberal/conservative tilt, creation during divided government). Id. at 180–84.

269 Id. at 188–89. Professor Lewis observes that political appointees lack “site-specific knowledge[,] . . . expertise in specific policy areas, familiarly with key stakeholders, an understanding of the folkways and informal power relationship of the agency and its policy arena, and aspects of federal work as mundane as how the accounting, records, and personnel systems work.” Id. at 144. Even demographic characteristics that would seem to favor appointee managers in terms of program performance—higher levels of education, private management experience, and previous work in the White House or Congress—could not compensate. Id. at 185. The average tenure of top appointees (PAS) was only twenty-four months; that of lower level appointees was even shorter. Id. at 145. Professor Lewis points out that shorter management tenure has implications throughout the program: “Increased turnover creates leadership vacuums, sends mixed signals about agency goals, and diminishes an agency’s commitment to reform, resulting in generally poorer performance.” Id. at 145. It also “disrupts working relationships among functionally related agencies and programs.” Id.
organizations are present in their agencies.\textsuperscript{270} Those programs got systematically lower employee ratings on leadership, management and work climate than programs run by careerists.\textsuperscript{271} As the percentage of appointees on the management team increased, employees were less likely to respond that their agency’s management “generate[s] high levels of motivation and commitment in the workforce,” “review[s] and evaluate[s] the organization’s progress toward meeting its goals,” and “promote[s] communication among different work units.”\textsuperscript{272}

The second core value at risk from the unitary executive management claim is most immediately conceptualized as legality—but might ultimately be understood as democracy itself. Peter Strauss has powerfully described how White House direction can disrupt the intricate network of statutory and judicially-imposed duties and constraints within which agencies must act.\textsuperscript{273} To be sure, legality is no more the sole guarantor of sound regulatory policy than expertise. But presidential judgment cannot supply all that is lost when politics supersedes administrative law. Our perennial focus on making regulatory processes faster, cheaper, and smarter tends to obscure one of the existing, most fundamental strengths of those processes: judged by the current top two metrics of democratic government—“transparency” and “participation”—administrative policymaking is clearly superior to any other type of federal government decision making. By law, most important regulatory actions must be publicly announced. Agencies do not have the presidential prerogative of making law by secret directive and unannounced modification.\textsuperscript{274} By

\begin{itemize}
  \item \textsuperscript{270} U.S. Office of Personnel Mgmt., Ensuring the Federal Government Has an Effective Civilian Workforce, Federal Human Capital Survey, http://www.fhcs.opm.gov/. The Survey was administered every other year by the Office of Personnel Management, an independent agency that manages the civil service. Professor Lewis analyzed 2002 and 2004 data.
  \item \textsuperscript{271} See Lewis, supra note 242, at 189–94.
  \item \textsuperscript{272} Id. at 195. The quoted language comes from the Survey questions.
  \item \textsuperscript{273} See Strauss, supra note 12; Peter L. Strauss, Presidential Rulemaking, 72 Chi.-Kent L. Rev. 965 (1997).
  \item \textsuperscript{274} Although executive orders are now routinely published in the Federal Register, a significant number of presidential directives are not publicly available. See the lists maintained by the Federation of American Scientists. Fed’N of Am. Scientists, Presidential Directives and Executive Orders, http://www.fas.org/irp/offdocs/direct.htm (last visited Jan. 29, 2010). The George W. Bush Administration OLC advised that no public notice was required when the President determined to modify or depart from a published executive order. While this advice seems consistent with existing law, commenters were quick to point out its implications with respect to, for example, Executive Order Number 12,333, 46 Fed. Reg. 59,941 (Dec. 4, 1981), which limits executive branch electronic surveillance of Americans traveling abroad, who are not covered by existing statutory protec-
law, any individual (even those disenfranchised from voting) can comment on a proposed rulemaking and is entitled to have his or her comment considered by the agency. Those who get to address congressional or White House policy makers do only as a matter of grace, and no one suggests such privileges are universally available or equitably distributed. Even in administrative adjudication, opportunities for participation are broader than in the federal courts, who hear only those with certain, legally cognizable types of injuries and interests.

By law, most important regulatory decisions must be publicly justified, with reference to a contemporaneous factual record and reasons that are sensible and within the agency’s statutory charge. The obligation to explain their exercise of public power is minimal on Congress and effectively nonexistent on the President. By law, agencies must open their deliberative meetings to any member of the public, and respond to requests for information about their activities from any individual or group. Congress, the President, and the courts are categorically exempt from the Freedom of Information Act (FOIA) and the Government in the Sunshine Act.

To be sure, the reality of public engagement in regulatory decision making is nowhere near the level of legally-supported transparency and participation. However, not even the potential of broad-based citizen understanding and involvement exists if the processes of administrative law are short-circuited or overridden by White House direction. Here as well, unitary executive theory turns out to undermine, rather than advance, a constitutive ideal of the regulatory

275 Unless the statute implicates a suspect class or fundamental right, or attempts to abrogate the states’ sovereign immunity, Congress gets the benefit of judicial willingness to hypothesize “any state of facts [that] reasonably may be conceived to justify” its policy judgment. McGowan v. Maryland, 366 U.S. 420, 426 (1961).

276 See Kevin M. Stack, The Reviewability of the President’s Statutory Powers, 62 VAND. L. REV. 1171, 1210–11 (2009) (discussing the “background presumption” of presidential exceptionalism and arguing that longstanding doctrines that exclude judicial review of presidential findings and determinations should be replaced).

277 5 U.S.C. §§ 552, 552b (2006). The exemptions of Congress and the judiciary are explicit. See id. §§ 551; 552(f). The exemption of the President is implicit. See Franklin v. Massachusetts, 505 U.S. 788, 801 (1992). The Executive Office of the President is expressly included in these transparency statutes, but increasingly expansive claims of executive privilege temper the practical effect of the statutory inclusion. See infra notes 278–79 and accompanying text.

278 For a proposal to change this legal regime with respect to transparency at least, see Nina A. Mendelson, Disclosing “Political” Oversight of Agency Decision Making, 108 MICH. L. REV. (forthcoming 2010).
state. Invoking the principle of executive privilege, the George W. Bush Administration routinely refused congressional requests for information relevant to agency and program oversight, substantially increased the number of classified documents as secret and the range of executive officials with authority to impose this classification, substantially increased the number of FOIA denials on grounds other than the national security exemption, and asserted power to prevent the release of a previous administration’s records even if the former President disagrees.279 This assertion of presidential prerogative to control access to information is so extreme, in degree and comprehensiveness, that even those generally sympathetic to executive privilege conclude that the doctrine has been stretched almost beyond recognition.280 Yet, as the Conclusion develops further, the progression toward extremism is not surprising given the nature of unitary executive ideology.

CONCLUSION

Leaders and followers share responsibility for leadership, bad as well as good. . . None of us is off the hook.

—Barbara Kellerman, Bad Leadership281

The movement toward President-centered government is one of the most significant trends in modern American history. During most of this time, the shift has been incremental, de facto, and situational. The President was the natural beneficiary of leadership needs and opportunities created by the domestic growth of a massive federal regulatory enterprise and the international emergence of world-wide warfare and global geopolitics. This pragmatic evolution towards a balance of power decidedly in favor of the executive was immeasurably aided by communication technologies that allowed the President to reach out personally to the people, explaining and exhorting, framing events and seeking alliance.

These political and cultural developments maintained an uneasy relationship with the Constitution. When put to legal test, vigorous


280 See, e.g., Mark J. Rozell, Executive Privilege Revived?: Secrecy and Conflict During the Bush Presidency, 52 Duke L.J. 403 (2002) (assessment, by a scholarly defender of executive privilege, that the Bush Administration has weakened the principle of executive privilege by overreaching and departing from “recognized” executive privilege norms).

281 See Kellerman, supra note 44, at 226.
assertions of presidential power did not map well onto existing understandings of constitutional authority. Then came the 1980s. Unitary executive theory appeared, to make an unapologetic, even aggressive, case for President-centered government. Presidential control over domestic policy and international affairs was elegantly and passionately shown to be not only the type of government Americans need in an increasingly dangerous world, but also the intended constitutional order of things.

Presidential behavior has not been the same since. Armed with unitary executive theory, Presidents of both parties (even those careful not to rely on its originalist constitutional reasoning) have gone on the offensive. They and their advisers have claimed directory authority over the people and the decisions involved in regulatory policymaking. They have asserted the prerogative to collect, hold close, and act unilaterally upon the information needed to preserve the security of the nation and the safety of its citizens. They have become hypervigilant to discover, and quick to protest against, perceived incursions on their power by Congress, the courts and even private parties. Unitary executive theory has given Presidents a new sense of entitlement to get their way in leading the nation.

As for the rest of us, unitary executive theory tells us a story we want to hear. The democracy claim promises a representative uniquely fitted by constitutional design to extract from the Babel of modern democratic politics the essence of what we truly desire, and the nation truly needs. The managerial claim promises that the President, if he can deploy all the powers the Constitution means him to have, will direct the process of national policymaking to fulfill these needs and desires. The rapidly changing complexity, and the newly appreciated precariousness, of modern American life make the simplicity, certainty, and assurance of this story deeply appealing. At the same time, the extraordinary demands of governing a large, heterogeneous nation with an ambitious regulatory agenda and globally defined interests make unitary executive theory’s promises impossible for any President to fulfill.

My aim is not to suggest that some other government actor is better suited to play the part of Representative and Manager-in-Chief, or

to deny that the President has a unique, extensive, and central role to play in modern American government. Rather, as I and others have argued elsewhere, the essential point is that no one institution of government is authorized, or able, to speak for the people and to manage singlehandedly the enterprise of contemporary regulatory government. We must expect and challenge all the institutions of government—Congress, the President, the courts, and agencies themselves—to be part of an ongoing process through which democratic legitimacy is created and effective policy discovered, a process that must seek new and more effective ways to inform and engage citizens. A fundamental danger of unitary executive theory is that we will be lulled into thinking that this unwieldy, constant, and demanding work need not be done, so long as we select the “right” person to be President.

The other fundamental danger is that we will attribute excesses done in the name of unitary executive theory to the idiosyncratic failings of individuals, rather than recognizing them as intrinsic, largely uncontrollable risks of the theory itself. What we saw from unitary executive leadership during the period of severe societal stress following September 11 aligns disturbingly well with a pattern familiar to psychologists who study extremist groups and ideologies. Questions about the leader’s choices are constructed as attacks; disagreement is cast as disloyalty. The group’s authority structure becomes more suspicious and closed. No incipient challenge to the belief struc-

283 See Farina, supra note 7; Shane, Political Accountability, supra note 77; Peter L. Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch, 84 COLUM. L. REV. 573, 578 (1984).


ture is allowed to go uncontested. Any power the leader needs to meet the danger becomes his by right, for no ordinary rules can interfere with the duty—which is his alone and outweighs all his other responsibilities—to preserve the group. It turns out that the qualities of a group or belief system most effective at reducing the cognitive and psychological stress of uncertainty are also the seeds of fanaticism. Many of those sympathetic to unitary executive theory have been dismayed by its operationalization in the Bush Administration. They insist that President Bush and his advisers radicalized, even distorted, the theory. But the unitary executive presidency of that Administration is recognizably the presidency of the literature that argues the constitutional and normative case for unitary executive theory. The demands (and opportunities) of national crisis merely accelerated the trajectory of its development.

Unitary executive theory is politically and culturally powerful because of its uncomplicated, unconditional certitude. In the words of two prominent proponents, “The Constitution grants the President the authority to superintend the administration of federal law. There are no caveats. There are no exceptions.” Because of these same qualities, it is a philosophy for governing that contains no meaningful limits. Particularly in the rapidly changing complexity, and newly appreciated precariousness, of modern American life, this is comfort purchased at too dear a price.

287 Consider more than a thousand constitutional objections in signing statements, which ranged from attacking the legitimacy of core substantive provisions of the law being signed, to protesting such seemingly mundane provisions as defining the substantive expertise required for agency officials. See Peter M. Shane, Presidential Signing Statements and the Rule of Law as an “Unstructured Institution”, 16 WM. & MARY BILL RTS. J. 231 (2007).

288 Consider the reasoning advising the President that, in waging the war on terror, he was not bound by international agreements like the Geneva Convention, or domestic law like the statutory prohibition of torture. See, e.g., Memorandum from the U.S. Dep’t of Justice, Office of Legal Counsel, to Daniel J. Bryant, Assistant Attorney Gen., Office of Legislative Affairs, Applicability of 18 U.S.C. §4001(a) to Military Detention of United States Citizens (June 27, 2002), available at http://www.justice.gov/olc/docs/memodetentionuscitizens06272002.pdf; Memorandum from the U.S. Dep’t of Justice, Office of Legal Counsel, supra note 6.


290 Calabresi & Prakash, supra note 3, at 664.