"A GOVERNMENT THAT BENEFITS FROM EXPERTISE": UNITARY EXECUTIVE THEORY & THE GOVERNMENT'S KNOWLEDGE PRODUCERS

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INTRODUCTION

As the Supreme Court's conservative bloc has grown, so has its boldness in advancing unitary executive theory.[1] A decades-long project of the conservative legal movement,[2] unitary executive theory posits that the President must control all discretionary activity within

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1. *See, e.g.,* STEPHEN SKOWRONEK, JOHN A. DEARBORN, AND DESMOND KING, PHANTOMS OF A BELEAGUERED REPUBLIC 152–60; Stephen I. Vladeck, *The Imperial Presidency's Enablers: Why Executive Power Grows Unchecked*, FOREIGN AFFS. (Nov./Dec. 2021); Ganesh Sitaraman, *The Supreme Court 2019 Term: Political Economy of the Removal Power*, 134 HARV. L. REV. 352, 380–82 (2020).

2. *See, e.g.,* Sitaraman, *supra* note 1, at 376–82; Amanda Hollis-Brusky, *Helping Ideas Have Consequences: Political and Intellectual Investment in the Unitary Executive Theory, 1981–2000*, 89 DENV. U. L. REV. 197 (2011); Mark Tushnet, Symposium, *Presidential Power in Historical Perspective: Reflections on Calabresi and Yoo's the Unitary Executive: A Political Perspective on the Theory of the Unitary Executive*, 12 U. PA. J. CONST. L. 313, 313–19 (2010).

the executive branch.[3] In addition to asserting that text and history demand unity, the theory's supporters—which now include a majority of the Supreme Court—insist that unity is essential to preserve political accountability.[4] For example, in the 2020 case of *Seila Law, LLC v. Consumer Financial Protection*, the Court invalidated a statutory provision permitting the President to remove the director of the Consumer Financial Protection Bureau only for "inefficiency, neglect, or malfeasance."[5] Writing for a majority of the Court, Chief Justice Roberts touted the unique political accountability of the presidential office: "[o]nly the President (along with the Vice President) is elected by the entire Nation."[6] Roberts cautioned, however, that the people cannot hold the President to account for that which he cannot control.[7] Accountability thus is undermined by checks on presidential power in the administrative state, including "for cause" removal restrictions.[8]

These developments reflect a dramatic over-reading of constitutional text and history. A careful look at the historical episodes to which unitary executive theorists point—including the storied "Decision of 1789"—reveals that there was considerable disagreement, as well as ample confusion and ambivalence among the founding generation regarding the handful of questions that they addressed involving the scope of the President's control over subordinates.[9] Those questions, more so, all involved very specific proposals; they were not referenda on unitary executive theory.[10]

3. *See, e.g.,* Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary,* 105 HARV. L. REV. 1153, 1158, 1166 (1992); Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 58 (1995) [hereinafter Calbersi, *Some Normative Arguments*].

4. *See, e.g.,* Calabresi, *Some Normative Arguments, supra* note 3, at 35–37, 45, 59, 65–66; Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 97–99 (1994); Saikrishna Bangalore Prakash, Note, *Hail to the Chief Administrator: The Framers and the President's Administrative Powers*, 102 YALE L. J. 991, 998–99, 1012–15 (1993). *See also* Heidi Kitrosser, Symposium, *Law & Politics in the 21st century: The Accountable Executive*, 93 MINN. L. REV. 1741, 1747–48 & nn. 28–32 (2009) (summarizing accountability-based unity arguments and their sources).

5. Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2191 (2020).

6. See *id.* at 2203.

7. See *id.*

8. See *id.*

9. *See* HEIDI KITROSSER, RECLAIMING ACCOUNTABILITY: TRANSPARENCY, EXECUTIVE POWER, AND THE U.S. CONSTITUTION 155–57 (2015) [hereinafter KITROSSER, RECLAIMING ACCOUNTABILITY]. *See also supra* notes 71–73.

10. *See id.*

Nonetheless, unity advocates—including those on the Supreme Court—have stretched this evidence into a juristocratic directive[11] that limits the legislative options available to today's political branches to address problems in the modern administrative state.

Among the consequences of unitary executive theory's judicial ascendance is an ironic one: by restricting checks on politicization within the administrative state, the Supreme Court makes it harder, not easier, to preserve executive accountability. Although unfettered Presidential control may advance accountability in some cases, in others it can sorely undermine it. For instance, presidents can pressure subordinates to hide illegal behavior or to skew or suppress data so that they cannot meaningfully be held to account by the public or the other branches. A categorical unity directive ties the hands of the political branches should they seek to stave off these threats. It does so even when public pressure is intense enough to lead Congress to pass, and the President herself to sign legislation responding to such threats.

In this Essay, I elaborate on the ways that unity enhances the President's ability to hide or manipulate information, and on the implications of this phenomenon for unitary executive theory. The phenomenon's most obvious effect is to undermine unity's accountability-based justifications. In this respect, this Essay builds on a large body of work, by myself and by others, that chips away at the case for unity on textual, historical, and functional dimensions. Of more immediate practical significance, given the Roberts Court's enthusiasm for unitary executive theory, is that unity's impact on the flow of truthful information provides principled bases to limit unity's scope. At minimum, this impact justifies some independence from political control for what I call government's "knowledge producers"—those whose work regularly entails fact-finding, reporting, or analysis.

In Part I, I summarize relevant aspects of the existing doctrine involving unitary executive theory. I focus predominantly on the doctrine's justifications and on the questions of scope that it has left open. In Part II, I expand on unity's capacity to enable presidential manipulation of information and thus to undermine accountability. I situate this observation within other work that critiques unity on

11. *See* Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 Yale L. J. (forthcoming 2022) (using the term "juristocratic separation of powers" to reference the Supreme Court's imposition of its own conclusions regarding presidential powers on the political branches).

functional, textual, and historical grounds, and note that unity's relationship to information manipulation bolsters the case against a juristocratic unity directive. At minimum, the relationship warrants limits on unity's scope. In Part III, I explore the nature of these limits. In the concluding section that follows Part III, I draw connections between my arguments and Professor Driesen's important work on anti-authoritarianism, including the book—*The Specter of Dictatorship*—that inspired this symposium.

I. DOCTRINAL JUSTIFICATIONS

A. The Pre-Roberts Court Years

The first sustained judicial case for unitary executive theory was made, fittingly, by a former President turned Chief Justice—William Howard Taft—in the 1919 case of *Myers v. United States*.[12] The *Myers* Court held unconstitutional an act that required the President to obtain Senate approval to remove a postmaster whom the President had appointed with the Senate's advice and consent.[13] Writing for the majority, Taft placed a great deal of emphasis on the episode now commonly called the "Decision of 1789."[14] This decision entailed a lengthy debate in the First Congress on the President's power to remove officers.[15] The debate culminated in legislation that assumed a presidential power to remove the secretary of foreign affairs.[16] In Taft's view of the 1789 legislative record,[17] the outcome reflected a majority consensus in each house to the effect that the President alone possesses the constitutional power to remove officers; Congress may not reserve a role for itself in the removal process.[18]

Taft allowed that the 1789 legislation initially was received "by lawyers and jurists with something of the same division of opinion as

12. Myers v. United States, 272 U.S. 52, 135 (1926). *See also* Robert Post, *Tension in the Unitary Executive: How Taft Constructed the Epochal Opinion of Myers v. United States*, 45 J. SUP. CT. HIST. 167, 167 (2020) (noting that "Taft is the only person ever to have served as both president of the United States and as chief justice of the Supreme Court," and that this "unique confluence of roles is evident in *Myers*.").

13. *See Myers*, 272 U.S. at 176.

14. *See id.* at 146.

15. *See id.* at 117.

16. *See id.* at 114.

17. *See id.* at 115 (Taft focused especially on the debate in the House, as the Senate had debated "in secret session, without report").

18. *Myers*, 272 U.S. at 115.

that manifested in Congress."[19] Yet such discord, he assured, gave way within a few years to an "acquiescence" that "was universally recognized."[20] This acquiescence, Taft acknowledged, was disrupted during Reconstruction, most notably by two events: the passage of the Tenure of Office Act, prohibiting removals of certain officers, including the Secretary of War, without Senate approval, and the House's impeachment of Andrew Johnson based partly on his failure to comply with that Act.[21] Taft minimized the significance of these occurrences, attributing them to "a heated political difference" between Johnson and postbellum Republicans over Reconstruction.[22] Taft was considerably more pointed in correspondence with his fellow Justice Pierce Butler during the writing of the *Myers* opinion, telling Butler that he feels "humiliated as a Republican" when he "stud[ies] the injustice that the radical Republicans did to Andrew Johnson," and that the Congress that passed the Tenure of Office Act and impeached Johnson "was controlled by a militant, triumphant and harsh political group."[23] Taft also downplayed the significance of subsequent legislation that he deemed inconsistent with the Decision of 1789.[24] Presidents who signed such laws, he wrote in *Myers*, did so not in "acquiescence" to their constitutionality, but "by reason of the otherwise valuable effect of the legislation approved."[25]

Writing for the Court in *Myers*, Taft also detailed the arguments that he believed had carried the day in 1789, stressing the *Myers* Court's agreement with those points and elaborating on some of them.[26] Among the arguments that Taft embraced was the notion—

19. *Id.* at 136.

20. *See id. Cf.* Myers, 272 U.S. at 152 (suggesting that Congress may not, "by its mere subsequent legislation" reverse a constitutional construction established by an earlier Congress and long acquiesced in by "all the branches of the government.").

21. *See id.* at 166.

22. *Id.* at 175.

23. *See* Letter from William Howard Taft, U.S. Supreme Court J., to Pierce Butler, U.S. Supreme Court J., (Sept. 16, 1925) (Taft Papers) (quoted in Post, *supra* note 12 at 173–74). In their groundbreaking new article, Nikolas Bowie and Daphna Renan dig yet more deeply into the connection between the "Lost Cause historiography" in which Taft was "steeped" and the *Myers* opinion. *See* Bowie & Renan, *supra* note 11. Indeed, Bowie & Renan persuasively trace the very notion of a juristocratic separation of powers to Lost Cause ideology. *See generally* Bowie & Renan, *supra* note 11.

24. *See Myers*, 272 U.S. at 170.

25. *Id.*

26. *See id.* at 115 (explaining that the Court's opinion will focus predominantly on arguments made by James Madison, "then a leader in the House," as those arguments were "masterly, and [Madison] carried the House", and also noting that

now commonly called the "vesting clause thesis"—that Article II's first sentence, which states that "[t]he executive Power shall be vested in a President of the United States of America," is not merely introductory, but grants substantive power to the President.[27] From this grant of power, as well as Article II's charge that the President "shall take care that the laws be faithfully executed," Taft discerned the "reasonable implication" that the President must have the power to appoint and remove all who are charged to "act under his direction in the execution of the laws," except where the Constitution expressly qualifies that power.[28]

At the core of the reasoning in Taft's *Myers* opinion, and intertwined with its textual and historical arguments, is the functional rationale that the President can neither do his constitutional duty nor be held politically accountable for the same unless he possesses the removal power.[29] Quoting James Madison in the 1789 debate, Taft wrote:

> If the President should possess alone the power of removal from office, those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest will depend, as they ought, on the President, and the president on the community.[30]

Taft also stressed the relative depth of presidential accountability, as "the President, elected by all the people, is rather more representative of them all than are the members of either body of the Legislature, whose constituencies are local and not country wide."[31]

The *Myers* Court thus put in place the essential elements—the Decision of 1789, the vesting and "take care" clauses, and the notion of presidential accountability—of the case for a unitary executive to which the Roberts Court would return nearly a century later. In the interim, however, the Court adopted a considerably more flexible posture toward removal restrictions. In 1935—just nine years after

the Court will "supplement[]" Madison's arguments "by additional considerations which lead this Court to concur therein.").

27. *See id.* at 117; U.S. CONST. art. 2, § 1, cl. 1.

28. *Meyers,* 272 U.S. at 117. The *Myers* Court also adopted the related point that the power to remove is incident to the power to appoint, and so a presidential removal power can be inferred from the textual grant of appointment power to the President. *Id.* at 119. No similar role in removal can be inferred for the Senate, as the removal power is not incident "to the power of advising and consenting to appointment." *Id.* at 122.

29. *See id.* 133.

30. *Id.* at 131.

31. *Meyers, 272 U.S.* at 123.

Myers—the Court unanimously upheld a statute that limited the President's power to remove Federal Trade Commission (FTC) members to cases involving "inefficiency, neglect of duty, or malfeasance in office.'"[32] Writing for the Court, Justice Sutherland explained that FTC Commissioners perform quasi-legislative and quasi-executive tasks that necessitate some independence from presidential control.[33] *Myers*' holding, he reasoned, is "confined to purely executive officers."[34] Several decades later, the Court recast *Myers* in still narrower terms. Over the course of two cases in the 1980s—*Bowsher v. Synar*[35] and *Morrison v. Olson*[36]—the Court characterized *Myers*' "essence" as a directive against Congress reserving the removal power for itself.[37] *Myers* thus did not categorically bar other limits on the removal power, such as good cause requirements, even for purely executive officers.[38] Writing for the Court in *Morrison*, Chief Justice Rehnquist deemed the question in each case to be a flexible, functional one: "whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty."[39]

Justice Scalia was the Court's lone dissenter in *Morrison*.[40] He quoted the vesting clause—"'[t]he executive Power shall be vested in a President of the United States,'" and added that "this does not mean *some of* the executive power, but *all of* the executive power."[41] Scalia also emphasized political accountability.[42] The President, he observed, "is directly dependent on the people." Indeed, the Constitution's founders touted the relative accountability of a single president as opposed to a multi-member body: "since there is only *one* President

32. Humphrey's Ex'r v. United States, 295 U.S. 602, 619 (1935); *see also id.* at 626.

33. *See id*. at 628–29.

34. *Id.* at 631–32. More pointedly, Justice Sutherland specified that any aspects of Justice Taft's lengthy exposition in *Myers* going beyond that core point are mere dicta. Sutherland also declared that, "[i]n so far as" any statements in Justice Taft's opinion in *Myers* "are out of harmony" with those expressed in *Humphrey's Executor*, the former "are disapproved." *Id.* at 626.

35. *See generally* 478 U.S. 714 (1986).

36. *See generally* 487 U.S. 654 (1988).

37. *See Morrison*, 487 U.S. at 686 (citing Myers v. United States, 272 U.S. 52, 161 (1926).

38. *See id.* at 689.

39. *Id.* at 691.

40. *See id.* at 697–734.

41. *Id.* at 705 (Scalia, J., dissenting).

42. *Morrison,* 487 U.S. at 729.

. . . [t]he people know whom to blame" when something goes awry.[43] In the case of prosecutors, for example, an unfettered presidential removal power ensures that, "when crimes are not investigated and prosecuted fairly . . . the President pays the cost in political damage to his administration."[44]

Although Justice Scalia acted alone when he dissented in *Morrison*, his opinion has become a classic of unitary executive theory literature.[45] More consequentially, a growing majority of the Roberts Court appears to share Scalia's sympathies, and, for that matter, those expressed by Chief Justice Taft nearly a century ago.[46]

B. The Roberts Court

Since 2010, when Chief Justice Roberts wrote for the majority in *Free Enterprise Fund v. Public Company Accounting Oversight Board* (*PCAOB*),[47] the Roberts Court has distanced itself from the deference exhibited in *Humphrey's Executor* and *Morrison*. To be sure, the Court has not, thus far, overruled either case. Rather, it has distinguished their facts from those presented in more recent cases. In *PCAOB*, the Court invalidated a provision that separated members of the PCAOB from Presidential removal by two layers of for-cause separation: A PCAOB member could be removed by the Securities and Exchange Commission (SEC) only upon a finding of one or more statutorily specified grounds,[48] and an SEC commissioner could be removed by the President only for "'inefficiency, neglect of duty, or malfeasance in office.'"[49] Writing for the Court, Chief Justice Roberts said that this restriction is unlike any previously upheld by the Court, and exceeds the legislature's power.[50] A decade later, Chief Justice Roberts penned another majority opinion, in *Seila Law v. Consumer Financial Protection Bureau* (CFPB).[51] There too, the Court distinguished but did not overrule precedent.[52] The *Seila* Court struck

43. *Id.*
44. *Id.* at 728–29.
45. *See* Sitaraman, *supra* note 1, at 380; Hollis-Brusky, *supra* note 2, at 209–10.
46. *See* Sitaraman, *supra* note 1, at 380.
47. 561 U.S. 477 (2010).
48. *See generally* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd. (PCAOB), 561 U.S. 477, 486 (2010).
49. *Id*. at 496.
50. *Id*. at 514.
51. *See* 140 S. Ct. 2183, 2191 (2020).
52. *See id.* at 2189.

down a removal provision permitting the President to remove the CFPB director only for "inefficiency, neglect of duty, or malfeasance in office."[53] Although this provision entailed only one level of for-cause review, the Court distinguished it from the single-tiered for-cause provision governing FTC commissioner removal in *Humphrey's Executor*.[54] Unlike the multi-commissioner-headed FTC, the CFPB is led by a single director.[55] Because the CFPB statute concentrates so much power in one person, that person must be subject to at will removal by the President.[56] The Court invoked the same reasoning one year later, in 2021's *Collins v. Yellen,* striking down a statutory provision governing removal of the Federal Housing Finance Agency (FHFA)'s director.[57] Like the CFPB director, the FHFA director was the sole head of her agency.[58] And as with the CFPB head, the President could remove the FHFA director only for cause.[59]

Although *Humphrey's Executor* and *Morrison* remain formally in place, both the reasoning and the results of *PCAOB*, *Seila*, and *Collins* signal a unitary turn. In *PCAOB*, the Court cited the "landmark case of *Myers v. United States*,"[60] suggesting that it stood for a general rule of presidential removal power from which limited deviations may occasionally be tolerated.[61] The Court leaned into this framing more dramatically in *Seila*, declaring that "our precedents have recognized only two exceptions to the President's unrestricted removal power."[62]

The Roberts Court's pro-unity arguments are similar to those made by Chief Justice Taft in *Myers* and Justice Scalia in *Morrison*. Like both Taft and Scalia, the Roberts Court suggests that the vesting and "take care" clauses demand presidential control over all who exercise executive power.[63] And, like Chief Justice Taft, the Roberts Court deems removal power questions to have been "settled" by the

53. *Id.* at 2193.

54. *See id.* at 2189.

55. *See id.* at 2192.

56. *See Seila* 140 S. Ct. at 2202–04.

57. *See* 141 S. Ct. 1761, 1770 (2021).

58. *See id.*

59. *See id.* at 1771.

60. Free Enter. Fund v. PCAOB, 561 U.S. 477, 492 (2010).

61. *See id.* at 495 ("we have previously upheld limited restrictions on the President's removal power").

62. *See* Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2192, 2206 (2020) ("the President's removal power is the rule, not the exception.")

63. *See Seila,* 140 S. Ct. at 2191, 2197, 2205; *PCAOB*, 561 U.S. at 484, 492, 498.

Decision of 1789.[64] Most fundamentally, the Roberts Court frames unity as essential to accountability.[65]

At the heart of the Roberts Court's arguments, and woven throughout its textual and historical points, is the notion of political accountability. The majorities in *PCAOB*, *Seila*, and *Collins* all followed Justice Taft's lead in quoting James Madison's statement from the Debate of 1789 to the effect that "the lowest officers, the middle grade, and the highest," ought to depend "on the President, and the President on the community."[66] The argument to which the quote lends itself should be familiar by now: the President is the sole elected member of the executive branch; he is, in fact, uniquely accountable as the only nationally elected figure in American politics.[67] If the President is unable to control those who exercise executive power, the people have no one to hold responsible for such exercises of power. The chain of dependence, and of political accountability, is broken.[68]

II. FLAWED JUSTIFICATIONS

A. Overview of Some Major Criticisms

Despite unity's momentum in the Supreme Court, its justifications are deeply flawed. A great deal has been written over the years detailing some of unity's textual and historical errors. Scholars have rightly pointed out, for example, that Justice Scalia—and now the Roberts Court, following suit—proceed as though the vesting clause begins with the words "all of," when the clause states, in full, that "[t]he executive Power shall be vested in a President of the United States of America."[69] They have also shown that history belies the casual assumption that "the executive power" encompasses an

64. *Seila,* 140 S. Ct. at 2191–92, 2197–98; *PCAOB*, 561 U.S. at 492.

65. *See Seila,* 140 S. Ct. at 2203.

66. 1 Annals of Cong. at 499 (J. Madison) (*quoted in Seila,* 140 S. Ct. at 2203; Collins v. Yellen, 141 S. Ct. 1761, 1784 (2021); *Free Enter. Fund,* 561 U.S. at 498); *see also* Myers v. United States, 272 U.S. 52, 171 (1926) and accompanying text (quoting Taft's use of same quote in Myers).

67. *See Seila,* 140 S. Ct. at 2203.

68. *PCAOB,* 561 U.S. at 497–98; *Seila,* 140 S. Ct. at 2203; *Collins*, 141 S. Ct. at 1784.

69. *See, e.g.,* Jed Handelsman Shugerman, *Presidential Removal: The Marbury Problem and the Madison Solutions*, 89 FORDHAM L. REV. 2085, 2086–87, 2098-2102 (2021); Victoria Nourse, *Reclaiming the Constitutional Text from Originalism: The Case of Executive Power*, 106 CALIF. L. REV. 1, 23–24 (2018).

unfettered removal power as a matter of original meaning.[70] And they have demonstrated the significantly overstated nature of the unitary executive case from the Decision of 1789.[71] With respect to the latter, Congress's vote on statutory language that assumed a presidential power to remove the Secretary of Foreign Affairs did not necessarily reflect a majority view in either chamber to the effect that the President possesses a constitutionally unfettered removal power over all executive officers. [72] Furthermore, as I observed in earlier work, even if it were clear—and it decidedly is not—that a bare majority of the First Congress came to a pro-unity view after much debate and contestation, that would tell us only that unity was a heavily contested concept at the time, a point also evidenced by Alexander Hamilton's assumption in Federalist 77 that Senate approval would be necessary to remove officers, and by the heterogeneity of federal post-ratification removal practices and founding-era removal practices in states with strict separation-of-powers clauses in their constitutions.[73] A concept that was deeply contested at the founding is not one that is plainly embedded in the text as a matter of original meaning. Absent such a textual directive, there is no reason to bind future generations, by judicial fiat, to the view at which members of the First Congress happened to arrive in passing one piece of legislation.

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70. *See, e.g.,* Daniel D. Birk, *Interrogating the Historical Basis for a Unitary Executive*, 73 STAN. L. REV. 175, 228–29 (2021); *Cf.* Julian Davis Mortenson, *The Executive Power Clause*, 168 U. PA. L. REV. 1269, 1334 (2020) (citing exhaustive historical research and concluding that the founding generation agreed that "the executive power" was a substantively "empty vessel authorizing only the implementation of instructions issued by a legislative authority.").

71. *See, e.g.,* Christine Kexel Chabot, *Interring the Unitary Executive*, NOTRE DAME L. REV. (forthcoming); Jed Handelsman Shugerman, *Presidential Removal: The Marbury Problem and the Madison Solutions*, 89 Fordham L. Rev. 2085, 2097-98 (2021); Birk, *supra* note 70, at 187-88; Jed Handelsman Shugerman, *The Imaginary Unitary Executive,* LAWFARE (July 6, 2020), https://www.lawfareblog.com/imaginary-unitary-executive. *See also* KITROSSER, RECLAIMING ACCOUNTABILITY, *supra* note 9, at 155–57.

72. *See* KITROSSER, RECLAIMING ACCOUNTABILITY, *supra* note 9, at 155–57. Indeed, recent historical work by Jed Shugerman demonstrates that the "[t]he Decision of 1789 was actually a strategic ambiguity, a wily switch from an explicit grant of power to an ambiguous contingency clause," precisely "because Madison and the presidentialists lacked support in the House and Senate." Shugerman, *Presidential Removal*, *supra* note 69, at 2097-98.

73. KITROSSER, RECLAIMING ACCOUNTABILITY, *supra* note 9, at 155–57. Newer work sheds greater light still on the plethora of post-ratification legislation and practices that depart from unity. *See, e.g.,* David Driesen, The Specter of Dictatorship 28–31 (2021) [hereinafter DRIESEN, THE SPECTER OF DICTATORSHIP]; Chabot, *supra* note 71; Peter M. Shane, *The Originalist Myth of the Unitary Executive*, 19 U. Pa. J. Const. L. 323, 328-30, 352-360 (2016).

This brings us to the functional argument for unity, namely, the accountability-based case made by the Roberts Court and, in earlier times, by Chief Justice Taft and by Justice Scalia. This argument, too, cannot withstand serious scrutiny. Scholars have undermined it on multiple fronts over the years. As I wrote in 2015, Critics observe, for one thing, that [unity] proponents assume an unduly simplistic version of accountability. Proponents equate accountability with the placing of thousands of administration decisions—ranging from the high profile to the deeply technical and obscure—in the hands of a single person who is subject to reelection once. . . [T]his vision of accountability is inconsistent with the far more complex accountability envisioned by the Constitution [which] creates a web of accountability shared by multiple legislators representing multiple constituencies and by the president alike. Furthermore, constitutional accountability mechanisms are not directed solely toward vindicating majority policy preferences . . . but also toward guarding against abuse, incompetence, and majoritarian tyranny. In the context of the administrative state, critics argue, constitutional accountability values demand not only multiple avenues for political accountability, but also intra-bureaucratic accountability mechanisms characterized by "complex chains of authority and expertise."[74]

Scholars also cite the selective nature of unity advocates' respect for the popular will. Blake Emerson observes, for example, that the Justices who favor unity "argu[e] that Congress cannot interfere with the President's popular warrant to control the administration of federal

74. KITROSSER, RECLAIMING ACCOUNTABILITY, *supra* note 9, at 163. *See also id. at* 258, 259, nn. 66–68 (first citing Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2076–83, 2119–22, 2134–35 (2005); then citing Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531, 552–59, 564–65 (1998); and then citing Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1785 (1996); and then citing Peter M. Shane, *Political Accountability as a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161, 197–209 (1995); and then citing Peter M. Shane, Symposium, *Separation of Powers and the Executive Branch: The Reagan Era in Retrospect: Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 596, 613–14 (1988–89)). For more recent discussions of the accountability-promoting effect of internal executive branch checking mechanisms, including restraints on political control of the administrative state, *see, e.g.,* JON MICHAELS, CONSTITUTIONAL COUP PRIVATIZATION'S THREAT TO THE AMERICAN REPUBLIC 63–65, 155–56, 170–71, 176–77 (2017); Gillian E. Metzger, *Foreward: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 71–72, 79–81 (2017).

law."[75] Yet they "do not grapple with the competing democratic authority of Congress to structure the Executive" branch.[76] I would add that Justice Scalia's *Morrison* dissent is particularly brazen in this regard. As we have seen, Scalia stresses that political accountability is undermined by the President's inability to exercise his will over the independent counsel.[77] Yet he expresses disdain for the political responsiveness reflected in congressional votes to establish an independent counsel.[78] Dissenting in *Morrison*, Scalia writes that he "cannot imagine that there are not many thoughtful men and women in Congress who realize that the benefits of [the independent counsel] legislation are far outweighed by its harmful effect upon its system of government."[79] Their desire to appeal to constituents, however, apparently overcomes their good sense: "it is difficult to vote not to enact, and even more difficult to vote to repeal, a statute called . . . The Ethics in Government Act."[80] In other words, political accountability is an essential, protective force in the case of the presidency. For members of Congress, however, it is a dangerous temptation.

B. Unity's Threat to Transparency and Accountability

In my own past work on the unitary executive, I have focused predominantly on the threat that a categorical unity directive poses to accountability through its impact on transparency. I have explained that executive branch accountability has both formal and substantive components.[81] Formally, the people and the other branches must have mechanisms to respond to executive branch successes and failures alike.[82] Substantively, the public and the other branches must have the means to discover such misdeeds in the first place.[83] Unity is partly responsive to formal accountability, concentrating power in one

75. Blake Emerson, *Liberty and Democracy Through the Administrative State: A Critique of the Roberts Court's Political Theory*, 73 HASTINGS L. J. 371, 376 (2022).

76. *Id.* Emerson also quite rightly calls out the upside-down nature of this selectivity from an originalist perspective: The Constitution's founders did not envision the President as a democratic figure. "Executive democracy thus operates within the conservative jurisprudence as a living reinterpretation of the Constitution that favors greater presidential control of the administration." *Id.* at 405.

77. *See generally* Morrison v. Olson, 487 U.S. 654 (1988) (Scalia, J., dissenting).

78. *Morrison*, 487 U.S. at 733 (Scalia, J., dissenting).

79. *Id.*

80. *Id.*

81. KITROSSER, RECLAIMING ACCOUNTABILITY, *supra* note 9, at 15.

82. *Id.* at 16–17.

83. *Id*. at 15–17.

nationally elected and highly visible figure who is subject to one re-election opportunity and to the possibility of impeachment. Yet a categorical unity directive can gravely damage accountability's substantive aspects. It can do so by enhancing the President's ability, directly or through subordinates, to shield or manipulate the very information against which the public and the other branches may judge his actions.[84]

1. The Example of Inspectors General

Consider the case of inspectors general (IGs). The modern system of IGs was created in 1978 with the passage of the Inspector General Act.[85] IGs are meant to serve as internal watchdogs, ferreting out illegality, inefficiency, fraud, and other problems within agencies.[86] IGs' reporting requirements extend both to their agencies and to Congress.[87] As Paul Light has written, "the IGs have but one tool at hand: monitoring. They are to look, not act, recommend, not implement."[88] IGs embody the notion of substantive accountability and its role as a precursor to formal accountability. IGs' tools are information and the ability to gather it.[89] It is up to others—within agencies, Congress, and the public—to act on IGs' findings and recommendations.[90]

IGs are a classic example of officers whose independence can enhance substantive accountability by shining light on mistakes and misdeeds within the executive branch. More so, as Light points out, IGs possess the power only to investigate, report, and recommend.[91] They cannot implement their own recommendations.[92] IGs thus have little direct effect on law execution. Rather, their impact stems from the information that they expose, and from reactions thereto both within and outside of the executive branch. For IGs, then, the benefits of independence are significant, while the case for unfettered presidential control is relatively weak.

84. *Id.* at 163–66.

85. PAUL C. LIGHT, MONITORING GOVERNMENT: THE INSPECTOR GENERAL AND THE SEARCH FOR ACCOUNTABILITY 16–17 (1993).

86. *Id.* at 16–17.

87. *Id.* at 24.

88. *Id.* at 16.

89. *See* CONG. RSCH. SERV., STATUTORY INSPECTORS GENERAL IN THE FEDERAL GOVERNMENT: A PRIMER 10 (2019).

90. *See id.* at 23–24.

91. *See id.* at 10, 23–24.

92. *See id.* at 23–24.

Nonetheless, IGs have only limited independence at present. The President can fire them for any reason, although he is required by statute to tell Congress why he is terminating them thirty days in advance of their removal.[93] IGs' at-will status endangers substantive accountability. More concretely, it undermines IGs' ability to investigate matters that could damage the president or his allies politically. Although this danger cuts across administrations, it was cast in especially sharp relief during the Trump presidency. President Trump notoriously fired several Inspectors General who investigated controversies ranging from the administration's handling of the Covid-19 pandemic to the call between Trump and the Ukrainian President that led to Trump's first impeachment.[94]

The dramatic events of the Trump administration inspired legislative proposals to, among other things, condition the President's termination power over IGs on the presence of good cause and limit the President's ability to replace fired IGs with political cronies.[95] Given the trajectory of the removal cases, however, it is conceivable that the Supreme Court would invalidate a for-cause limitation.[96] The very possibility of such invalidation also can inspire (or rationalize) legislative inaction.

Unity also has long been reflected in executive branch reactions to IGs. Beginning with the Carter Administration's response to the IG Act's passage in 1978, administrations have protested IGs' statutory responsibilities to report directly to Congress, arguing that it disrupts presidential control of a unitary executive branch.[97] Unity-fueled skepticism toward the role of IGs and toward removal impediments also have smoothed the path for presidents to fulfill their congressional

93. *See* Bob Bauer & Jack Goldsmith, *Inspector General Reform on the Table*, LAWFARE (Oct. 5, 2021), https://www.lawfareblog.com/inspector-general-reform-table.

94. *See, e.g., Id.*; Melissa Quinn, *The Internal Watchdogs Trump has Fired or Replaced*, CBS NEWS (May 19, 2020), https://www.cbsnews.com/news/trump-inspectors-general-internal-watchdogs-fired-list/; Michael C. Dorf, *Inspector General Firings Highlight the Danger of the Unitary Executive Theory*, DORF ON LAW (May 18, 2020), www.dorfonlaw.org/2020/05/inspector-general-firings-highlight.html.

95. *See, e.g.,* Bauer & Goldsmith, *supra* note 93.

96. *See, e.g.,* Bauer & Goldsmith, *supra* note 93; Dorf, *supra* note 94.

97. KITROSSER, RECLAIMING ACCOUNTABILITY, *supra* note 9, at 180-81 (citing Memorandum from John M. Harmon, Acting Assistant Att'y Gen., Inspector General Legislation (Feb. 21, 1977)); *see also* Dorf, *supra* note 94.

notification responsibilities with removal rationales that are perfunctory at best.[98]

2. Disciplinary Experts, Including Civil Servants

In a 1988 memorandum opinion, the Justice Department's Office of Legal Counsel (OLC) took the position that Congress could not constitutionally require the Director of the Centers for Disease Control (CDC) to mail "AIDS information flyers" to the public "without necessary clearance" by the President.[99] "It matters not at all," the OLC explained, "that the information in the AIDS fliers may be highly scientific in nature. The President's supervisory authority encompasses *all* of the activities of his executive branch subordinates, whether those activities be technical or non-technical in nature."[100]

This passage illustrates one of the starkest ways in which unitary executive theory can endanger substantive accountability: by demanding presidential control over scientific (or other technical or expertise-driven) reporting and analysis.[101] Such control enables presidents to squelch or manipulate information not because it is incorrect but because it reveals official misconduct or reflects facts that clash with an administration's policy preferences. Presidents can exercise this control by firing experts who deliver unwelcome messages. A recent example is President Trump's firing of

98. *See* Dorf, *supra* note 94 (referencing President Trump's stated reasons for removing State Department IG Steve A. Linick: "it is vital that I have the fullest confidence in the appointees serving as Inspectors General. This is no longer the case with regard to this Inspector General"); Bauer & Goldsmith, *supra* note 93 (citing President Obama's stated reason—a lack of "the fullest confidence"—for removing an Inspector General in 2009).

99. Charles J. Cooper, *Statute Limiting the President's Authority to Supervise the Director of the Centers for Disease Control in the Distribution of an AIDS Pamphlet, in* OPINIONS OF THE OFFICE OF LEGAL COUNSEL OF THE UNITED STATES DEPARTMENT OF JUSTICE: CONSISTING OF SELECTED MEMORANDUM OPINIONS ADVISING THE PRESIDENT OF THE UNITED STATES, THE ATTORNEY GENERAL, AND OTHER OFFICERS OF THE FEDERAL GOVERNMENT IN RELATION TO THEIR OFFICIAL DUTIES 47 (12th ed. 1988).

100. *Id.* at 57. This "necessarily follows," the opinion continues, "from the fact that the Constitution vests '[t]he entire executive Power,' without subject matter limitation, in the President." *Id.*

101. Among other things, this demand is manifest in the longstanding requirement across multiple administrations that executive branch personnel must clear congressional testimony and other communications with the Office of Management and Budget. KITROSSER, RECLAIMING ACCOUNTABILITY, *supra* note 9, at 181 (noting that, "[l]ike previous administrations, the Obama administration requires testimony and certain other statements by executive branch employees to be cleared by the OMB") and describing the practice's connection to unitary executive theory.

Department of Homeland Security expert Christopher Krebs for debunking Trump's false claims that the 2020 election involved massive cyber-fraud.[102] A president may also seek to head off offending statements more directly, demanding changes to testimony or reports before they become public. On several occasions over the past few decades, for example, presidential political appointees have sought to weaken government scientists' statements about the origins and trajectory of climate change.[103]

Of course, fully successful White House efforts to manipulate information would remain in the shadows; Congress and the public would see only the carefully-crafted end-product.[104] Although known attempts at political manipulation—like the examples just cited—are concerning in their own rights, they alert us to graver risks of more insidious manipulations.

The most seamless way for administrations to control information is to deepen politicization's reach throughout the federal bureaucracy, rather than relying solely on the high-profile officials who lead agencies or on centralized White House review. Specifically, presidents can seek to staff agencies as thickly as possible with political appointees who serve at their pleasure and who can be chosen partly for their party affiliation or other indicia of loyalty.[105] Assuming that a cadre of career civil servants remain, but that the ratio of political appointees to civil servants is increased, the President can enhance his ability to control messaging in two ways. First, by having political loyalists themselves help to create reports or testimony. Second, by placing such loyalists in positions of influence over career civil servants, including scientists and other subject matter experts.[106]

The most extreme means by which unity could deepen politicization would be by thinning, if not eliminating the civil service. In his excellent book that inspired the symposium for which I write this piece, David Driesen expresses concern about the impact of

102. *See* Alana Wise, *Trump Fires Election Security Director Who Corrected Voter Fraud Disinformation*, NPR (Nov. 17, 2020), https://www.npr.org/2020/11/17/936003057/cisa-director-chris-krebs-fired-after-trying-to-correct-voter-fraud-disinformati.

103. KITROSSER, RECLAIMING ACCOUNTABILITY, *supra* note 9, at 182–83, 192–93, nn. 38, 91–95.

104. *See id.* at 181.

105. *See id.* at 189; *see also id.* at 189 n. 77 (citing Terry Moe, *The Politicized Presidency*, in THE NEW DIRECTION IN AMERICAN POLITICS 244–45 (John E. Chubb & Paul E. Peterson eds., 1985)).

106. *See id*. at 189–90.

unitary executive theory on federal civil servants.[107] He writes, "while scholarly unitary executive proponents usually do not mention the civil service, the theory envisions a system of complete presidential hierarchical control, which seems at odds with the whole concept of the civil service."[108] This concern is well-placed. Indeed, recall OLC's 1988 statement to the effect that "[t]he President's supervisory authority encompasses *all* of the activities of his executive branch subordinates, whether those activities be technical or non-technical in nature."[109] It is easy to see how this reasoning could apply to career civil servants, including scientists, economists, auditors, and others in roles that demand disciplinary expertise. Such a development would extend politicization, and the potential political control of information, throughout the federal bureaucracy.

III. PRESERVING "A GOVERNMENT THAT BENEFITS FROM EXPERTISE"

In an ideal world (as I see it), the Roberts Court would recognize that unitary executive theory dramatically over-reads history and text. It would also acknowledge that unity "sometimes advances accountability, sometimes does not advance it, and sometimes deeply undermines it."[110] It might thus conclude that the nature and extent of the President's removal power and other aspects of presidential control in the administrative state are predominantly policy questions to be worked out by the political branches in the arduous legislative process, subject only to functional limits like those articulated in *Morrison*.[111] In this fanciful universe of mine, the Court would tightly limit, if not overrule its decisions in *PCAOB*, *Seila*, and *Collins*, extending them no further than the reach of their respective facts.

To paraphrase Justice Scalia, however, I am a dreamer, "not a nut,"[112] and I see little chance that the Court as currently composed will turn its back on a robust unity doctrine. Yet this harsh reality does not preclude meaningful limits on judicial expansion of the unitary

107. DRIESEN, THE SPECTER OF DICTATORSHIP, supra note 73, at 5.

108. *Id.* at 5.

109. Cooper, *supra* note 99, at 57. This "necessarily follows," the opinion continues, "from the fact that the Constitution vests '[t]he entire executive Power,' without subject matter limitation, in the President." *Id.*

110. Heidi Kitrosser, *Presidential Administration: How Implementing Unitary Executive Theory Can Undermine Accountability,* 40 ADMIN. & REG. L. NEWS 4, 4 (2015).

111. *See* Morrison v. Olson, 487 U.S. 654, 688–90 (1988).

112. Nina Totenberg, *Justice Scalia, the Great Dissenter, Opens Up,* NPR (Apr. 28, 2008), https://www.npr.org/templates/story/story.php?storyId=89986017 (quoting Justice Scalia stating, "'I'm an originalist and a textualist, not a nut.'").

executive. The Court can and should recognize the special risks to accountability posed by unfettered presidential control over what I have elsewhere called public knowledge producers. Slightly tweaking Vicki Jackson's concept of "knowledge institutions," I define public knowledge producers as those government entities, officials, or employees who, in the ordinary course of their work, engage in "knowledge production or dissemination . . . according to disciplinary norms."[113] This includes government scientists, economists, and other disciplinary experts. It also includes those whose roles entail internal oversight using professional investigative or auditing norms, such as Inspectors General.

There are several respects in which the Court can preserve the political branches' ability to pass legislation that protects the integrity of public knowledge production. First, the Court can affirm the constitutional validity of civil service tenure protections, which are of central importance to career experts, including knowledge producers throughout the federal government. Should the Court confront a challenge to such protections, it can put greater weight behind its suggestion, in *PCAOB*, that the civil service raises distinct issues not present in cases involving higher-level officials. Specifically, the *PCAOB* Court stated that "[n]othing in [its] opinion . . . should be read to cast doubt on the use of what is colloquially known as the civil service system within independent agencies."[114] Writing for the Court, Chief Justice Roberts based this distinction on the notion that many civil servants "would not qualify as 'Officers of the United States' who 'exercise significant authority pursuant to the laws of the United States.'"[115] To this observation regarding the limited scope of civil servants' roles, we may add one about the work that they do perform. Namely, that much of it is grounded in training and expertise shaped by disciplinary norms. Insofar as that work entails knowledge production—generating reports, for example, or undertaking audits or inspections—it creates much of the factual backdrop against which the public and the other branches can judge elected officials. By guarding

113. Heidi Kitrosser, *Protecting Public Knowledge Producers* (forthcoming) (on file with author) (citing Vicki Jackson, *Knowledge Institutions in Constitutional Democracies: Preliminary Reflections*, 2021 7 CAN. J. COMPAR. & CONTEMP. L. 156, 166 (2021).

114. Free Enter. Fund v. PCAOB, 561 U.S. 477, 507 (2010). Presumably, the *PCAOB* Court singled out independent agencies, rather than executive agencies, because the for-cause protections enjoyed by independent agency heads ensure that civil servants in such agencies will be separated from presidential control by at least two for-cause layers.

115. *Id.* at 506 (quoting Buckley v. Valeo, 424 U.S. at 1, 126 (1976)).

against political interference with knowledge production, civil service protections support political accountability.

Indeed, Justice Roberts acknowledged the value of expertise in *PCAOB*, even as he stressed that it must co-exist with political accountability. As he put it, "One can have a government . . . that benefits from expertise without being ruled by experts."[116] It is easy to agree with this common-sense statement while also recognizing that some insulation of expertise from politics is essential if government is, indeed, to benefit from expertise. At minimum, such benefits require judicial deference to legislative judgments to protect career professionals with disciplinary expertise from politically motivated firings. Such judicial restraint would prevent the Court from actively undermining the very accountability that it pledges to protect when it invokes unitary executive theory.

The accountability-based need to protect civil servants also bolsters the case against the Court's imposing an expansive new definition of "officers" on the political branches. Such expansion would shrink the realm of non-officer positions, including the civil service. In light of *PCAOB*, it would also threaten Congress' ability to provide robust removal protections, including dual layers of for-cause restrictions, for such experts.[117] Accountability concerns thus counsel against the radical suggestion of Justices Thomas and Gorsuch—made in concurrence in the 2018 case of *Lucia v. Securities and Exchange Commission*—that the Court should broaden its definition of federal officers to include anyone who performs "an ongoing, statutory duty – no matter how important or significant the duty."[118] Similarly, the Court should give Congress wide berth to determine whether a given position entails "significant authority" and thus constitutes an officer role under the Court's current criterion. In *Lucia*, the Court stretched that criterion's application to cover SEC administrative law judges (ALJs), despite the fact that the SEC's commissioners maintained the discretion to review all ALJ decisions.[119] Like Justices Sotomayor and Ginsburg in dissent, I believe that *Lucia* was wrongly decided, and that Congress should have ample discretion to create non-officer employees who "investigate[], advise[], or recommend[], but who [have] no power to issue binding policies, execute the laws, or finally

116. *Id.* at 499.

117. *See* Lucia v. SEC, 138 S. Ct. 2044, 2061–62 (2018) (Breyer, J., dissenting).

118. *Id.* at 2056-57 (Thomas, J., concurring).

119. *See id.* at 2065-67 (Sotomayor, J., dissenting) (arguing that "one requisite component of 'significant authority' is the ability to make final, binding decisions on behalf of the Government," and that the ALJs did not exercise such authority).

resolve adjudicatory questions."[120] Nonetheless, the Court can staunch *Lucia*'s damage to government accountability by distinguishing it in future cases. This can be done quite readily in many instances, given the *Lucia* majority's emphasis on what it called the ALJs' "last-word capacity"—that is, the finality of those ALJ decisions that the SEC declines to review.[121] The *Lucia* Court also stressed the ALJs' ability to make evidentiary rulings and otherwise to "critically shape the administrative record" for agency or judicial review.[122]

Second, the accountability-based reasons for judicial deference to legislative tenure protections extend beyond the civil service. The Court should defer to such protections for all whose roles involve knowledge production. This includes government scientists, economists, and other disciplinary experts. It also includes those whose roles entail internal oversight using professional investigative or auditing norms, such as Inspectors General. At minimum, when such persons do not exercise binding authority beyond the ability to gather and report on information, Congress should have wide discretion to protect them from termination without cause. Acknowledging the restraints imposed by *PCAOB* with respect to officers, the Court should defer at least to congressional choices to create single-layer for-cause protections for officers who fill such roles and should defer more broadly still in the case of non-officer employees.

The Court can permit such protections without overruling precedent. In the case of inferior officers whose appointment Congress placed outside of the senatorial consent process, the case law plainly leaves room for single-layer for-cause protections.[123] Even where principal officers, or inferior officers nominated by the President and appointed with senatorial consent are at issue, precedent permits single-layer for-cause protection for public knowledge producers who exercise no binding authority beyond gathering and reporting information. For example, in distinguishing *Humprey's Executor* from subsequent cases, the *Seila* Court stressed both the FTC's multi-member, bi-partisan, and expertise-driven nature, and the fact that its primary tasks involved issuing reports and recommendations to the legislature and the judiciary.[124] And *Humphrey's Executor* should be

120. *Id.* at 2066 (Sotomayor, J., dissenting).
121. *Id.* at 2054.
122. *Lucia*, 138 S. Ct. at 2053.
123. *See, e.g.,* U.S. v. Perkins, 116 U.S. 483, 485 (1886).
124. Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2198 (2020).

deemed equally applicable to cases involving reporting duties that are internally focused rather than judicially or legislatively directed. Reports made to or from within an agency impose no greater burden on that agency than do consultations directed toward the other branches, so long as the agency is not forced to make binding decisions in response. Furthermore, the accountability-based need to protect the independence of knowledge production is all the greater when it entails internal investigations or analyses. Such protection can deter the President or his appointees from manipulating the very information against which any actions that they do take can be judged.

It is true that Justice Alito, writing for the majority in *Collins v. Yellen*, suggested that "the nature and breadth of an agency's authority is not dispositive in determining whether Congress may limit the President's power to remove its head."[125] Yet Justice Alito addressed only whether a single-headed agency's functions should impact the constitutionality of removal restrictions on that agency head. He did not speak to the relevance of any other officer's duties to the constitutionality of restricting their removal. Furthermore, a future majority could treat his statement as dicta should they conclude, as did Justice Kagan in concurrence, that it was unnecessary to the result in *Collins*.[126]

Finally, accountability concerns warrant substantial deference not only to legislatively mandated tenure protections, but to legislatively prescribed, merit-based hiring schemes to fill knowledge-producing roles. The Constitution specifies that principal officers may be appointed only through presidential nomination and Senate consent and that inferior officers may be appointed in the same manner or through one of three alternative means.[127] As for non-officer employees, "the Appointments Clause cares not a whit about who named them," as the Supreme Court put it in *Lucia*.[128] This issue thus returns us to the distinction between officers of the United States and non-officer federal employees. As we have already seen, judicial deference to reasonable congressional choices in this realm is essential to preserve an expertise-driven civil service with robust tenure protections. Such deference is also necessary to maintain the hiring

125. Collins v. Yellen, 141 S. Ct. 1761, 1784 (2021).

126. *Collins*, 141 S. Ct. at 1800 (Kagan, J., concurring) (concluding that the Court's judgment can be reached through simple application of *Seila*'s holding that "'an agency led by a single [d]irector and vested with significant executive power' comports with the Constitution only if the President can fire the director at will.'").

127. U.S. CONST. art. II, § 2, cl. 2.

128. Lucia v. SEC, 138 S. Ct. 2044, 2051 (2018).

system on which the civil service system rests—one based on credentials and expertise rather than political patronage.

CONCLUSION: ON UNITY AND PROFESSOR DRIESEN'S ANTI-DICTATORSHIP PRINCIPLE

In his excellent and important new book, *The Specter of Dictatorship: Judicial Enabling of Presidential Power*—the very book that inspired the symposium for which I write this piece—Professor Driesen urges courts to give serious consideration to the risks of "democratic decline and the possibility of presidential bad faith" in deciding cases involving presidential power.[129] Driesen surveys conditions associated with democratic decline in Poland, Hungary, and Turkey, and points to parallel developments in the United States. Drawing on these observations, Driesen offers some guidelines for courts. They include "rejecting or limiting the reach of the unitary executive theory."[130]

Driesen fears that the Supreme Court, by increasingly embracing unitary executive theory, is enabling a presidential takeover of the federal bureaucracy – a step consistently taken by chief executives on the road to autocracy. Such takeovers facilitate autocracy in a number of ways. For example, chief executives who seize the reins of prosecution can direct them against political competitors and meddlesome journalists.[131] Executives also can manipulate government largesse to pressure dissenters. For instance, President Erdogan of Turkey has "use[d] government procurement and licensing to punish dissent and put important media assets in friendly hands."[132] And Poland's Jaroslaw Kaczynski has centralized "control over media regulation . . . convert[ing] public broadcasting into a state tool of propaganda."[133]

Throughout this Essay, I have sought to advance two points that complement these insights. First, unitary executive theory undermines, rather than advances government accountability. It does so partly by enabling public knowledge production to be politicized. This point maps onto Driesen's observations, detailing a major means—information control—through which judicially imposed unity enables autocracy. Second, in unpacking the case law and its

129. DRIESEN, THE SPECTER OF DICTATORSHIP supra note 73, at 140.
130. *Id.* at 140.
131. *Id.* at 107.
132. *Id.* at 112.
133. *Id.* at 112.

relationship to knowledge production, I suggest a roadmap by which the Supreme Court can mitigate the threat that its recent precedent poses to government accountability. This goal is in keeping with Driesen's anti-autocracy directive to courts.

Finally, it is important to remember that the Roberts Court, like the Taft Court a century earlier, has consistently grounded its support for unity in democratic theory. It has insisted that by curtailing the legislature's discretion to design tenure protections, it protects democratically accountable governance. It thus should matter very much to the Court that unity can have the opposite effect, as demonstrated by countless domestic examples and still more starkly through comparative experience. These realities, combined with the weak textual and historical cases for unity, constitute sufficient reason for the Court to defer to legislative designs for agency independence going forward. At minimum, the Court should do so wherever its precedent, narrowly defined, allows. Of course, the operative word is should. Whether the Court chooses this path, or whether it so much as acknowledges unity's contribution to democratic decline, remains to be seen.