

# EXPERT KNOWLEDGE, DEMOCRATIC ACCOUNTABILITY, AND THE UNITARY EXECUTIVE

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## INTRODUCTION

Proponents of the “unitary executive” theory hold that “all federal officers exercising executive power must be subject to the direct control of the President.”<sup>1</sup> But how, as a constitutional matter, should such presidential

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1. Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1158 (1992). Several commentators have shown that the unitary executive theory is not supported by founding era practices. See, e.g., Jed Handelsman Shugerman, *The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity*, 171 U. PA. L. REV. 753 (2023); Christine Kexel Chabot, *Interring the Unitary Executive*, 98 NOTRE DAME L. REV. 129 (2022); Peter M. Shane, *The Originalist Myth of the Unitary Executive*, 19 U. PA. J. CONST. L. 323 (2016). Other commentators have shown that the theory is unpersuasive on functionalist grounds. See, e.g., Heidi Kitrosser, *Scientific Integrity: The Perils and Promise of White House Administration*, 79 FORDHAM L. REV. 2395, 2404–05 (2011). But the Supreme Court has clearly embraced some version of the unitary executive theory in recent years. See, e.g., *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2191 (2020) (“the ‘executive power’—all of it—is ‘vested in a President’”).

control be defined, and how should it be effectuated? Unitarians are not united. Kevin H. Rhodes and Professor Steven G. Calabresi identify at least three distinct versions of the theory, which reflect a diversity of responses to those questions. The strongest or most aggressive version (which may also find the least support in the relevant jurisprudence)<sup>2</sup> holds that the President may “supplant any discretionary executive action taken by a subordinate with which he disagrees, notwithstanding any statute that attempts to vest discretionary executive power only in the subordinate.”<sup>3</sup> In other words, Congress may have assigned a specific task or decision to another official, but the President is constitutionally empowered to substitute their own judgment for the subordinate’s. A weaker version holds that the President may not supplant another official, but that they may “nullify or veto [the subordinate official’s] exercises of discretionary power.”<sup>4</sup> The President cannot act in the subordinate’s place, but the President can require the subordinate to reconsider their positions. A third version, which appears to be the most modest, at least as a formal matter, holds “that the President has unlimited power to remove at will any principal officers (and perhaps certain inferior officers) who exercise executive power.”<sup>5</sup> In other words, the President can neither nullify their subordinates’ decisions nor substitute their judgment for that of their subordinate; but at least with respect to those the President appoints,<sup>6</sup> the President can replace them with others until they find

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2. The Constitution leaves to Congress the task of establishing the offices and agencies of the executive branch, and, as Chief Justice William Howard Taft recognized in *Myers v. United States*, the Constitution grants broad discretion to Congress not only with respect to the establishment of such offices and agencies, but also with respect to “the determination of their functions and jurisdiction, the prescribing of reasonable and relevant qualifications and rules of eligibility of appointees, and the fixing of the term for which they are to be appointed and their compensation—all except as otherwise provided by the Constitution.” 272 U.S. 52, 129 (1926); see also *The President & Acct. Offs.*, 1 Op. Att’y Gen. 624, 625–26 (1823) (“If the laws . . . require a particular officer by name to perform a duty, not only is that officer bound to perform it, but no other officer can perform it without a violation of the law; and were the President to perform it, he would not only be not taking care that the laws were faithfully executed, but he would be violating them himself. The constitution assigns to Congress the power of designating the duties of particular officers: the President is only required to take care that they execute them *faithfully*. . . . He is not to perform the duty, but to see that the officer assigned by law performs his duty *faithfully*—that is, *honestly*: not with perfect correctness of judgment, but *honestly*.” (emphasis added)).

3. Calabresi & Rhodes, *supra* note 1, at 1166.

4. *Id.*

5. *Id.*; see also Jerry L. Mashaw, *Governmental Practice and Presidential Direction: Lessons from the Antebellum Republic?*, 45 WILLAMETTE L. REV. 659, 692 (2009) (discussing Henry Clay’s response to President Andrew Jackson’s removal of Treasury Secretary William J. Duane for failing to exercise his statutory discretion with respect to federal funds deposited in the Bank of the United States according to the President’s directive); LEONARD D. WHITE, *THE JACKSONIANS: A STUDY IN ADMINISTRATIVE HISTORY, 1829-1861*, at 251–83 (1954) (discussing President Jackson’s removal and replacement of Treasury Secretary Duane).

6. See U.S. CONST. art. II, § 2, cl. 2. The removal power is not mentioned in the Constitution, but it has been inferred from the appointment power, and it applies to government employees who are “officers of the United States,” but not to civil service employees. *But see* Jennifer L. Mascott, *Who Are “Officers of the United States”?*, 70 STAN. L. REV. 443, 561 (2018); see also Erich Wagner, *Trump Has Endorsed a Plan to Purge the Civil Service of ‘Rogue Bureaucrats,’* GOV’T EXEC. (July 27, 2022),

someone willing to do their bidding.<sup>7</sup> This version may seem to be the most modest because the President's formal power is purely remedial (and does not itself undo any decision already made), but it may well be the most potent as a practical matter. Indeed, the removal power is often considered a proxy for actual supervision and control, based on the assumption that most executive branch officials will ordinarily choose to follow the President's wishes rather than risk forfeiting their positions, without regard to whatever degree of independent decision-making authority Congress has given to them.<sup>8</sup>

Although much of the Supreme Court's recent jurisprudence has addressed the constitutional significance and necessity of the removal power,<sup>9</sup> the U.S.

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<https://www.govexec.com/workforce/2022/07/trump-endorsed-plan-purge-civil-service-rogue-bureaucrats/375028/> [<https://perma.cc/74CF-EMFC>] (describing efforts to limit civil service protections); *Opinion of Attorney General Akerman on the Civil Service Commission*, N.Y. TIMES (Sept. 8, 1871), <https://timesmachine.nytimes.com/timesmachine/1871/09/08/78773216.html> [<https://perma.cc/EJ7W-XPQB>]; H. JEFFERSON POWELL, CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL DECISION 56–66 (2008) (discussing opinion of Attorney General Amos Tappan Akerman). Professor David Driesen has suggested that the Court's present reading of the removal power is inconsistent with the rule of law and defeats the practical operation of the Appointments Clause by inhibiting Senate-confirmed officials from faithfully executing the law. David M. Driesen, *Appointment and Removal*, 74 ADMIN. L. REV. 421, 471 (2022). Professor Driesen has also demonstrated that the Court's current reading is contrary to the position taken by Justice Joseph Story. See David M. Driesen, *Does A Removal Power Exist?: Joseph Story and Selective Living Originalism* (Aug. 21, 2023) (available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4541820](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4541820) [<https://perma.cc/ESK9-37JP>]).

7. The classic example, of course, is President Jackson's removal of Treasury Secretary Duane and his appointment of the more complaisant Roger B. Taney to take Duane's place. See, e.g., ARTHUR M. SCHLESINGER, JR., THE AGE OF JACKSON 97–102 (1945); WHITE, *supra* note 5; Mashaw, *supra* note 5. The third version of the theory might qualify as the most theoretically modest version if we assume, consistent with the controlling jurisprudence, that Congress is constitutionally authorized to create some principal officer positions that are not subject to the President's at-will removal power. See *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2191–92 (2020) (Roberts, C.J.) (noting exceptions for multimember agencies and officers with certain limited duties). If the President could remove the members of the Federal Reserve at will (or, indeed, the members of any multimember agency to which Congress has granted some degree of independence from the President), for example, it would be difficult to maintain even the theoretical weakness of the third version. It would make little difference whether the President could formally dictate the agency's decision or accomplish the same result by removing all of the agency's members and replacing them with others who would follow his instructions. In addition, most principal officers do not enjoy “for-cause” removal protection. See, e.g., *Seila L.*, 140 S. Ct. at 2192, 2197–2201 (noting default rule that the President has constitutional authority to remove officers of the United States at will, subject to exceptions for members of certain multimember commissions and “inferior” officers).

8. See, e.g., Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205 (2014).

9. See, e.g., *United States v. Arthrex*, 141 S. Ct. 1970 (2021) (holding that the statutory scheme relating to administrative patent judges was unconstitutional because the judges, who made final decisions on behalf of the United States, were not appointed by the President with the advice and consent of the Senate and were not freely removable); *Collins v. Yellen*, 141 S. Ct. 1761 (2021) (finding that the design of the Federal Housing Finance Agency was unconstitutional because it was headed by a single administrator who exercised executive authority and was not freely removable); *Seila L.*, 140 S. Ct. at 2201 (deciding that the design of the Consumer Financial Protection Bureau was unconstitutional because it was led by a

Department of Justice's Office of Legal Counsel (OLC) has often championed the version of the unitary executive theory that claims that the President may substitute their will for the judgment of subordinate officials, regardless of Congress's expressed determination that a particular kind of decision should be made by a named subordinate official; OLC has also emphasized that the President must have absolute control over the dissemination of government information to Congress and the public.<sup>10</sup> From the viewpoint of institutional design, that version seems the most troublesome, especially when Congress has specifically mandated that an action should be taken, based in whole or in part on expert knowledge, by a particular official with relevant expertise.<sup>11</sup> And it is particularly

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single administrator who exercised "significant executive authority" and was not freely removable); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010) (concluding that the design of the Public Company Accounting Oversight Board (PCAOB), a component of the U.S. Securities and Exchange Commission (SEC), was unconstitutional because the members of the SEC and the PCAOB were not freely removable, and two levels of "for cause" removal protection interfered with the President's discharge of their constitutional responsibilities). The U.S. Department of Justice's Office of Legal Counsel has noted that even a "for cause" removal power logically implies some degree of presidential supervision. *See* Extending Regul. Rev. Under Exec. Order 12866 to Indep. Regul. Agencies, 43 Op. O.L.C., slip op. at 2 (Oct. 8, 2019). Most of the Court's earlier cases were less restrictive. For example, in *Bowsher v. Synar*, 478 U.S. 714, 724 (1986), Chief Justice Warren E. Burger described Chief Justice Taft's opinion in *Myers v. United States*, 272 U.S. 52 (1925), as holding that Congress may not constitutionally "draw to itself, or to either branch of it, the power to remove [an executive official] or the right to participate in the exercise of that power," and further noted that the Court had distinguished *Myers* in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), on the ground that although Congress had limited the President's removal power in the statute at issue in the later case, it had not drawn the power to itself. *Bowsher*, 478 U.S. at 724–25. In *Seila Law*, 140 S. Ct. 2183, however, Chief Justice Roberts recharacterized the leading cases as mere exceptions to a contrary general rule:

Our precedents have recognized only two exceptions to the President's unrestricted removal power. In *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), we held that Congress could create expert agencies led by a group of principal officers removable . . . only for good cause. And in *United States v. Perkins*, 116 U.S. 483 (1886), and *Morrison v. Olson*, 487 U.S. 654 (1988), we held that Congress could provide tenure protections to certain inferior officers with narrowly defined duties.

*Id.* at 2192.

10. *See, e.g.*, Statute Limiting the President's Auth. to Supervise the Dir. of the Ctrs. for Disease Control in the Distrib. of an AIDS Pamphlet, 12 Op. O.L.C. 47 (1988).

11. *See* Elizabeth Anderson, *The Epistemology of Democracy*, EPISTEME, June 2006, at 10 ("[W]e . . . judge the success of democratic institutions according to criteria that are (partially) external to the decision-making process: do the pollution laws enacted actually reduce pollution to acceptable levels, at acceptable cost? . . . Whether the law succeeds in solving the problem for which it was drafted depends on its external consequences—not, or not simply, on the fairness of the procedure by which it was enacted."); Aileen Kavanagh, *Participation and Judicial Review: A Reply to Jeremy Waldron*, 22 LAW & PHIL. 451, 482–83 (2003) (arguing that as much as we value process and the ideal of democratic participation, at the end of the day we also want a government that works; the participation value does not displace the "instrumental condition of good government"); *see also* Andrei Marmor, Book Review, 112 ETHICS 410 (2002) (discussing the complexity, and possible inconsistencies, of Professor Jeremy Waldron's views). *But see* Bernard Crick, *The Challenge for Today in ACTIVE CITIZENSHIP: WHAT COULD IT ACHIEVE AND HOW?* 16, 24 (Bernard Crick & Andrew Lockyer eds., 2010) ("Leaders of all parties [in the United Kingdom] now genuinely declaim the need to increase public participation and yet they don't welcome real variations in local and regional

troublesome when the President and their close political associates can surreptitiously inject themselves into the expert decision-making process and substitute their judgments for those of the designated experts, thereby disguising their political or personal preferences as expert judgments.

To the greatest extent possible, it is important for Congress and the public to understand what parts of a problem are scientific or technical and what parts involve policy choices.<sup>12</sup> It is also important that Congress and the public have regular access to the expert knowledge that is necessary both for Congress to legislate and for citizens to evaluate the soundness of the policy choices that Congress and the executive make.<sup>13</sup> Citizen access to expert government information is essential to the concept of limited, democratic

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practices, unless politically they have to, as in Scottish and Welsh devolution; and these are seen in England as unwelcome exceptions not as incitements to emulation.”); CAROLE PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY 111 (1970) (“When the problem of participation and its role in democratic theory is placed in a wider context than that provided by the contemporary theory of democracy, and the relevant empirical material is related to the theoretical issues, it becomes clear that neither the demands for more participation, nor the theory of participatory democracy itself, are based, as is so frequently claimed, on dangerous illusions or on an outmoded and unrealistic theoretical foundation. We can still have a modern, viable theory of democracy which retains the notion of participation at its heart.”); Carole Pateman, *APSA Presidential Address: Participatory Democracy Revisited*, PERSPS. ON POL., Mar. 2012, at 15 (“[The] Schumpeterian conception of ‘democracy’ . . . sees citizens as merely consumers in another guise. In a privatized social and political context in the twenty-first century, [Schumpeterian] consumer-citizens need to be extra vigilant and to monitor providers; they require information, to be consulted, and occasionally to debate with their fellow consumer-citizens about the services they are offered. In contrast, the conception of citizenship embodied in participatory democratic theory is that citizens are not at all like consumers. Citizens have the right to public provision, the right to participate in decision-making about their collective life and to live within authority structures that make such participation possible. However, this alternative view of democracy is now being overshadowed.”).

12. See Barry Sullivan, *When the Environment Is Other People: An Essay on Science, Culture, and the Authoritative Allocation of Values*, 69 NOTRE DAME L. REV. 597 (1994). Congress and the public should also have an accurate understanding of the limitations of scientific knowledge. See, e.g., BRUNO LATOUR, *THE PASTEURIZATION OF FRANCE* (1993); PHILIP KITCHER, *THE ADVANCEMENT OF SCIENCE: SCIENCE WITHOUT LEGEND, OBJECTIVITY WITHOUT ILLUSIONS* (1993); see also Ari Schulman, *Why Many Americans Turned on Anthony Fauci*, N.Y. TIMES (Aug. 30, 2022), <https://www.nytimes.com/2022/08/30/opinion/why-anthony-faucis-covid-legacy-is-a-failure.html> [<https://perma.cc/D7MX-WMNM>] (“Dr. Fauci toed a perilous line by invoking the scientific method as justification for the inconsistencies. This suggested that because science is all about change, scientists’ mistakes aren’t really failures . . . . It was this that became so destructive to trust: the idea that science is a force that demands things of the public yet relieves leaders of accountability.”). The limitations of science are real, but they have often been exaggerated or distorted for political purposes. See, e.g., Bruno Latour, *Why Has Critique Run Out of Steam?: From Matters of Fact to Matters of Concern*, 30 CRITICAL INQUIRY 225 (2004); see also Stephan Lewandowsky, Naomi Oreskes, James S. Risbey, Ben R. Newell & Michael Smithson, *Seepage: Climate Change Denial and Its Effect on the Scientific Community*, GLOB. ENV’T CHANGE, July 2015, at 1.

13. Congress enacted the Freedom of Information Act, 5 U.S.C. § 552, in 1966 to ensure that citizens would have access to all the government information that safely could be shared with them, thereby overturning the prior access regime, which had made access to government information depend not on any determination of legal rights, but “upon the favorable exercise of official grace.” HAROLD L. CROSS, *THE PEOPLE’S RIGHT TO KNOW: LEGAL ACCESS TO PUBLIC RECORDS AND PROCEEDINGS* 197 (1953); see also Barry Sullivan, *Executive Secrecy: Congress, the People, and the Courts*, 72 EMORY L.J. 1301 (2023).

government. In *New York Times v. United States*,<sup>14</sup> Justice Potter Stewart wrote that, “the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government.”<sup>15</sup> Given the explosive growth of presidential power in the past seventy years,<sup>16</sup> what was thought necessary with respect to monitoring presidential power in the areas of national defense and international relations might now be deemed necessary with respect to any number of presidential powers.<sup>17</sup> Moreover, when Congress has specifically assigned to expert government officials the task of informing Congress and the public about matters relating to their expertise, it is even more important, contrary to OLC’s view of executive power, that the information be communicated to Congress and the public without political or partisan filtering. Otherwise, neither Congress nor the public can perform their respective legislative and oversight roles.<sup>18</sup>

This Essay will begin by considering several recent OLC opinions that illustrate OLC’s aggressive view of executive power. Second, the Essay will review several examples of executive actions that seemingly incarnate that view. Third, the Essay will briefly discuss two sets of recommendations for improving the intellectual integrity of government science. Fourth, the Essay will consider how it might be constitutionally possible to ensure that Congress and the public have access to the scientific and technical information they need. A brief conclusion follows.

### I. SOME RELEVANT OLC OPINIONS

In recent times, OLC has taken an expansive view of presidential power. In 1988, for example, OLC argued that Congress had exceeded its constitutional authority by enacting legislation that required the Director of the Centers for Disease Control (CDC) to “distribute[] without necessary

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14. 403 U.S. 713 (1971).

15. *Id.* at 728 (Stewart, J., concurring).

16. *See e.g.*, GARRY WILLS, *BOMB POWER: THE MODERN PRESIDENCY AND THE NATIONAL SECURITY STATE* (2010); William P. Marshall, *Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters*, 88 B.U. L. REV. 505 (2008).

17. *See, e.g.*, Barry Sullivan, *Reforming the Office of Legal Counsel*, 35 NOTRE DAME J.L., ETHICS & PUB. POL’Y 723, 730–33 (2021) (discussing the modern aggrandizement of presidential power).

18. *See, e.g.*, Barry Sullivan, *FOIA and the First Amendment: Representative Democracy and the People’s Elusive “Right to Know,”* 72 MD. L. REV. 1, 5–6 (2012) (noting President James Madison’s view that citizens should be “consulted between elections continually” as “partners in government”); *see also* Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820) in 10 THE WRITINGS OF THOMAS JEFFERSON 161 (Paul Leicester Ford ed., 1899) (“I know no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion by education. This is the true corrective of abuses of constitutional power.”).

clearance of the content by any official, organization or office, an AIDS mailer to every American household.”<sup>19</sup> According to OLC,

[t]he separation of powers *requires* that the President have ultimate control over subordinate officials who perform purely executive functions and assist him in the performance of his constitutional responsibilities. This power includes the right to supervise and review the work of such subordinate officials, *including reports issued either to the public or to Congress.*<sup>20</sup>

Significantly, OLC added that “it matters not at all 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.”<sup>21</sup> In other words, the President must have control over the content of all communications with Congress and the public, and Congress is powerless to provide otherwise.

Another OLC opinion responded to a 2004 Congressional Research Service (CRS) memorandum, which concluded that senior U.S. Department of Health and Human Services (HHS) officials could not legally “prevent or prohibit their officers or employees . . . from presenting information to . . . [Congress] concerning relevant public policy issues.”<sup>22</sup> OLC stated

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19. Statute Limiting the President’s Auth. to Supervise the Dir. of the Ctrs. for Disease Control in the Distrib. of an AIDS Pamphlet, 12 Op. O.L.C. 47, 47 (1988). At the time, HIV/AIDS was the subject of widespread fear and misinformation; reliable information about the disease was desperately needed. *See, e.g.*, Am. Bar Ass’n, AIDS Coordinating Comm., AIDS, The Legal Issues: Discussion Draft of the American Bar Association AIDS Coordinating Committee (August 1988); AIDS AND THE LAW: A GUIDE FOR THE PUBLIC (Harlon Dalton, Scott Burris & the Yale AIDS Law Project eds., 1987). One might argue that Congress should have identified more precisely the type of information to be included in the mailer, perhaps specifying information concerning the transmission, effects, and therapies relating to AIDS. *See, e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935) (Cardozo, J., concurring) (criticizing Congress for granting an agency “uncanalized” discretion, while opining that Congress could have given the Executive “[c]hoice, though within limits”). No such language was included in the AIDS mailer legislation, but the legislative history suggests that that was what was envisioned. *See* 133 CONG. REC. 14290–91 (statement of Sen. Lawton Chiles, Chairman, Sen. Budget Comm.) (noting that the pamphlet will contain “what is known about the disease, and how to prevent its spread”); S. REP. NO. 100-48, at 85 (1987) (noting that the pamphlet would inform the “public about what is now known about AIDS and what individuals can do to prevent the further spread of the disease”). But OLC’s objection was far less nuanced than Justice Cardozo’s critique in *Schechter Poultry*. The Reagan administration had long been reluctant to address the AIDS epidemic. *See* Karen Tumulty, *Nancy Reagan’s Real Role in the AIDS Crisis*, ATLANTIC (Apr. 12, 2021), <https://www.theatlantic.com/politics/archive/2021/04/full-story-nancy-reagan-and-aids-crisis/618552/> [<https://perma.cc/62FH-SXVH>].

20. Statute Limiting the President’s Auth. to Supervise the Dir. of the Ctrs. for Disease Control in the Distrib. of an AIDS Pamphlet, 12 Op. O.L.C. 47, 57 (1988) (alterations in original) (quoting Constitutionality of Statute Requiring Exec. Agency to Rep. Directly to Cong., 6 Op. O.L.C. 632, 633 (1982)).

21. *Id.*

22. Auth. of Agency Offs. to Prohibit Emps. from Providing Info. to Cong., 28 Op. O.L.C. 79, 79 (2004) (replying to Memorandum for Hon. Charles Rangel, House Comm. on Ways and Means, from Jack Maskell, Legis. Att’y, Am. L. Div., Cong. Rsch. Serv. (Apr. 26, 2004)).

that, “HHS officials do indeed have such authority.”<sup>23</sup> Apparently acting on the assumption that all such information is classified or privileged, OLC stated that “Congress may not bypass the procedures the President establishes to authorize the disclosure to Congress of classified and other privileged information by vesting lower-level employees with a right to disclose such information to Congress without authorization.”<sup>24</sup> In other words, Congress cannot subpoena the most expert and knowledgeable officials, but must be satisfied with testimony from those whom the executive cares to produce.

In 2008, OLC interpreted section 802(e)(1) of the Implementing Recommendations of the 9/11 Commission Act of 2007,<sup>25</sup> which required the Chief Privacy Officer (CPO) of the U.S. Department of Homeland Security (DHS) to submit reports “directly to the Congress . . . without any prior comment or amendment by . . . any other officer of the Department or the Office of Management and Budget.”<sup>26</sup> Specifically, OLC considered whether this section should be understood “to prohibit DHS and OMB personnel from reviewing, commenting upon, or amending the CPO’s [section 802] reports and, if so, whether such prohibitions are constitutional.”<sup>27</sup> Invoking the principle of constitutional avoidance, OLC concluded that the section should not be construed “to prohibit DHS or OMB officials” from reviewing the reports before they are “finalized and transmitted to Congress”<sup>28</sup> or to prohibit such officials “from commenting upon a draft CPO report where the CPO is permitted to, and in fact does, transmit to Congress a final report that does not reflect [their] comments or amendments.”<sup>29</sup> However, OLC concluded that the statutory language “must yield to the extent [its] application would interfere with the President’s constitutional authority to comment upon or amend . . . a CPO report before the report is transmitted to Congress.”<sup>30</sup> Otherwise, it would be impossible for the President “to ensure that a single officer’s or department’s communications to Congress do not conflict with the President’s policy program or legal obligations, and also do not compromise constitutionally privileged information or otherwise undermine the President’s ability to exercise his constitutional authority.”<sup>31</sup> According to OLC, the President or department head “must have the authority to direct subordinates . . . to ‘make

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23. *Id.*

24. *Id.* at 80.

25. 6 U.S.C. § 142(e)(1).

26. *See* Constitutionality of the Direct Reporting Requirement in Section 802(e)(1) of the Implementing Recommendations of the 9/11 Comm’n Act of 2007, 32 Op. O.L.C. 27, 27 (2008).

27. *See id.*

28. *Id.* at 31.

29. *Id.* at 46.

30. *Id.* at 28.

31. *Id.* at 43. OLC’s concern with the possibility that a department’s communications might interfere with “the President’s policy program or legal obligations” seemingly assumes a congruence between the President’s policy choices and legal obligations that may not exist. *Id.* Indeed, the President’s policy choices may be inconsistent with governing law, as when President Trump, contrary to clearly applicable governing law, sought to alter the National Weather Service’s scientific judgments. *See infra* notes 50–59 and accompanying text.



whatever modifications are deemed necessary' to prevent the unauthorized disclosure in those reports of sensitive law enforcement or executive privileged information."<sup>32</sup> OLC has, therefore, "consistently advised that the President's ability to protect against the unauthorized disclosure of information *potentially protected* by executive privilege may not be restricted by statute."<sup>33</sup> Finally, OLC emphasized that the CPO was "a subordinate officer accountable . . . ultimately to the President" and invested "with a broad range of policymaking and operational authority."<sup>34</sup>

The implications of OLC's current view<sup>35</sup>—that the President has a monopoly on executive branch communication and a constitutionally absolute amendatory authority over all matters of executive branch concern, no matter how technical the subject matter or how important it may be for Congress or the public to receive the best available information and analysis unfiltered by the President's personal or political interests—are enormous. First, OLC's theory suggests that Congress may not authorize a specific executive branch official to communicate uncensored public health information to Congress or the public, let alone contradict a President who might choose, for whatever reason, to mislead the public about a deadly disease. The danger that presidential misinformation poses is particularly grave when the President passes off the misinformation as the considered judgment of government experts. But the President, who may eventually be impeached or suffer electoral defeat (if the President is eligible for reelection and the electorate elevates the matter over others), may not be contradicted.<sup>36</sup> Second, OLC's theory seems inconsistent with the fact that Congress's primary role is to legislate, which necessarily requires access to the best available information. Particularly when the Court is insisting on greater specificity in legislation, it would be ironic, to say the least, for the Court to

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32. See Constitutionality of the Direct Reporting Requirement in Section 802(e)(1) of the Implementing Recommendations of the 9/11 Comm'n Act of 2007, 32 Op. O.L.C. 27, 44 (2008).

33. *Id.* (emphasis added).

34. *Id.* at 39. Admittedly, the disputed provision might be seen to implicate the President's foreign affairs powers. See, e.g., LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 35–45 (2d ed. 1996). It is worth noting that OLC made many of the same objections to the Inspector General Act. See *infra* Part IV.

35. The U.S. Department of Justice has not always taken such an aggressive view of presidential power. See, e.g., Presidential Auth. to Direct Dep'ts & Agencies to Withhold Expenditures from Appropriations Made, 1 Op. O.L.C. Supp. 12, 12 (1937) ("Several opinions of the Attorneys General have pointed out that, when a statutory duty devolves primarily upon an officer other than the President, the latter's sole obligation is to see that the officer performs such duty or to replace him."). As Attorney General Homer Stillé Cummings further noted, the President is free to "endeavor to accomplish the desired ends [by requesting or directing] the heads of the departments and agencies to attempt to effect such savings as may be possible without violation of or interference with the proper performance of any duty prescribed by law." *Id.* at 16.

36. Practically speaking, presidential accountability may belong to the category of useful fictions. See, e.g., Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1266 (2009).

accept OLC's assertions with respect to congressional access to information.<sup>37</sup>

## II. EXECUTIVE BRANCH PRACTICE

Like his predecessors, President Donald Trump resisted congressional oversight.<sup>38</sup> During his first two years as President, the Republicans controlled both Houses of Congress, and OLC helpfully opined that minority members have no right to conduct oversight.<sup>39</sup> After the Democrats regained control of the House in 2019, President Trump prohibited certain subordinates, notably including those who were most knowledgeable about the COVID-19 pandemic, from testifying before House committees.<sup>40</sup> But President Trump, who had long been accused of waging a “war on science,”<sup>41</sup> did more than simply deny Congress access to those officials who knew the most about this unprecedented public health emergency. He also sought to dominate the U.S. Food and Drug Administration (FDA) and the CDC.<sup>42</sup> For example, the White House drafted the CDC's COVID testing guidelines (rather than leaving that task to the CDC),<sup>43</sup> and President Trump pushed

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37. See, e.g., *West Virginia v. Env't Prot. Agency*, 142 S. Ct. 2587 (2022) (major questions doctrine); *Nev. Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721 (2003) (clear statement rule).

38. See, e.g., Michael D. Bopp, Thomas G. Hungar & Chantalle Carles Schropp, *How President Trump's Tangles with Committees Have Weakened Congress's Investigative Powers*, 37 J.L. & POL. 1, 2 (2021).

39. See Auth. of Individual Members of Cong. to Conduct Oversight of the Exec. Branch, 41 Op. O.L.C. 1, 1 (2017) (asserting that the executive accommodates “congressional requests for information only . . . from a committee, subcommittee, or chairman authorized to conduct oversight”).

40. See, e.g., David Lim, *White House Blocked FDA Commissioner from Testifying to House Panel*, POLITICO (Sept. 18, 2020, 4:07 PM), <https://www.politico.com/news/2020/09/18/white-house-blocked-fda-hahn-417831> [<https://perma.cc/4Y9F-NJKV>] (noting that the White House prevented the U.S. Food and Drug Administration (FDA) Commissioner from testifying about the government's pandemic response); Matthew Daly, *Democrats Say White House Blocking CDC Head From Testifying*, PBS NEWS HOUR (July 17, 2020, 6:09 PM), <https://www.pbs.org/newshour/politics/democrats-say-white-house-blocking-cdc-head-from-testifying> [<https://perma.cc/9LRQ-GJ3J>] (noting that the White House had prevented the CDC Director from testifying about reopening the schools); Juliegrace Brufke, *White House Prohibits Coronavirus Task Force Members from Testifying Before Congress in May*, HILL (May 4, 2020, 3:30 PM), <https://thehill.com/homenews/administration/496016-white-house-prohibits-coronavirus-task-force-members-from-testifying/> [<https://perma.cc/E83N-QLMB>] (noting that President Trump had ordered Task Force members not to testify and urged other officials to limit their appearances).

41. See Barry Sullivan & Christine Kexel Chabot, *The Science of Administrative Change*, 52 CONN. L. REV. 1, 4 (2020).

42. See Barry Sullivan, *Lessons of the Plague Years*, 54 LOY. U. CHI. L.J. 15, 114 (2023) (“Perhaps the most serious damage he did, however, was to the credibility of the government's public health agencies. He bullied them, manipulated them, and treated them—at times very publicly—as if their main function were to do what was necessary to secure his re-election, as opposed to doing what the public health required.”).

43. See Helen Branswell & Kate Sheridan, *New Covid-19 Testing Guidelines, Crafted at the White House, Alarm Public Health Experts*, STAT (Aug. 26, 2020), <https://www.statnews.com/2020/08/26/new-covid19-testing-guidelines-crafted-at-white-house-alarm-public-health-experts/> [<https://perma.cc/Y6DC-NJ8L>] (discussing the White House's drafting of guidelines without input from the CDC).

HHS Secretary Alex Azar to approve drugs that the FDA had not vetted.<sup>44</sup> He also bullied the FDA to cut corners and make vaccines available in time to influence the 2020 election, and he even threatened to give the necessary approval himself.<sup>45</sup> In other words, the President would have certified that the vaccines were “safe, pure, and potent,” notwithstanding the relevant experts’ refusal to provide that certification.<sup>46</sup> He personally announced the CDC’s mask-wearing recommendation, but he emphasized at the same time that it was just a “recommendation,” and that he would not follow it.<sup>47</sup> In addition, political operatives without scientific training were empowered to rewrite the highly trusted Mortality and Morbidity Weekly Report (MMWR) to create a rosier picture than the available data justified.<sup>48</sup> That takeover of the MMWR was particularly problematic because of its surreptitious nature: readers thought that they were reading unfiltered expert analysis when that was not the case.<sup>49</sup>

Another example of President Trump’s assault on expertise, which Professor Stephen Skowronek and his coauthors have described as being “so absurd as to defy satire,”<sup>50</sup> involved Hurricane Dorian. On September 1, 2019, President Trump tweeted that Hurricane Dorian would hit Alabama; but that was not what the evidence suggested, and the National Weather Service Forecast Office in Birmingham (NWS Birmingham) sought to

44. Sullivan, *supra* note 42, at 114.

45. *Id.* at 91–92, 114.

46. See 42 U.S.C. § 262. Because vaccines are biologics, the relevant standard is “safe, pure, and potent,” rather than “safe and effective,” the standard applicable to drugs. See Jordan Paradise, *Reassessing Safety for Nanotechnology Combination Products: What Do Biosimilars Add to Regulatory Challenges for the FDA?*, 56 ST. LOUIS U. L.J. 465, 478–85, 490–93 (2012); U.S. Food & Drug Admin., *Frequently Asked Questions About Therapeutic Biological Products*, <https://www.fda.gov/drugs/therapeutic-biologics-applications-bla/frequently-asked-questions-about-therapeutic-biological-products> [https://perma.cc/62YC-GSZQ] (July 7, 2015). In this case, the approval would be for an emergency use authorization. See 21 U.S.C. § 360bbb; *Emergency Use Authorization for Vaccines Explained*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/vaccines-blood-biologics/vaccines/emergency-use-authorization-vaccines-explained> [https://perma.cc/QJR8-DRS8] (Nov. 20, 2020).

47. *Face Coverings Recommended, but Trump Says He Won’t Wear One*, AP NEWS (Apr. 4, 2020, 12:27 AM), <https://apnews.com/article/health-donald-trump-ap-top-news-virus-outbreak-understanding-the-outbreak-227fa2d005b3923157b9eb736c12e6c5> [https://perma.cc/C5QD-PTP7].

48. These activities were first reported in 2020. See, e.g., Dan Diamond, *Trump Officials Interfered with CDC Reports on Covid-19*, POLITICO (Sept. 11, 2020, 10:25 PM), <https://www.politico.com/news/2020/09/11/exclusive-trump-officials-interfered-with-cdc-reports-on-covid-19-412809> [https://perma.cc/545Y-UC8Q]. The facts were later confirmed by a House Subcommittee investigation. See STAFF OF H. SELECT SUBCOMM. ON THE CORONAVIRUS CRISIS, 117TH CONG., “IT WAS COMPROMISED”: THE TRUMP ADMINISTRATION’S UNPRECEDENTED CAMPAIGN TO CONTROL CDC AND POLITICIZE PUBLIC HEALTH DURING THE CORONAVIRUS CRISIS (2022), <https://coronavirus-democrats-oversight.house.gov/sites/democrats.coronavirus.house.gov/files/2022.10.17%20The%20Trump%20Administration%E2%80%99s%20Unprecedented%20Campaign%20to%20Control%20CDC%20and%20Politice%20Public%20Health%20During%20the%20Coronavirus%20Crisis.pdf> [https://perma.cc/49XR-69RW].

49. Sullivan, *supra* note 42, at 114.

50. STEPHEN SKOWRONEK, JOHN A. DEARBORN & DESMOND KING, PHANTOMS OF A BELEAGUERED REPUBLIC: THE DEEP STATE AND THE UNITARY EXECUTIVE 103 (2021).

reassure the public by quickly tweeting that the weather system would not affect the state.<sup>51</sup> On September 4, President Trump renewed his claim, which he purported to prove with a clumsily altered weather map.<sup>52</sup> President Trump also allegedly told Acting White House Chief of Staff Mick Mulvaney “to fix the contradiction in his favor.”<sup>53</sup> The Weather Service is part of the National Oceanic and Atmospheric Administration (NOAA), a division of the U.S. Department of Commerce; under the relevant statute, “[t]he Secretary of Commerce [is responsible for] forecasting [the] weather.”<sup>54</sup> Mulvaney contacted U.S. Secretary of Commerce Wilbur Ross, who allegedly “responded with a demand that the [U.S. Department of Commerce] political staff rebut the forecasters’ correction”<sup>55</sup>—an apparent violation of the agency’s prohibition against “ask[ing] or direct[ing] Federal scientists . . . to suppress or alter scientific findings.”<sup>56</sup> “NOAA [then] issued an unsigned statement, spearheaded by top officials from the Commerce Department, . . . directly criticizing the Birmingham NWS and implying that their tweet had been inaccurate . . .”<sup>57</sup> Although NOAA’s acting administrator told a meeting of weather forecasters that there was “no pressure to change the way [they] communicate or forecast risk,” he privately told an agency scientist who complained about the politicization of science in the agency that the scientist had “no idea how hard [he was] fighting to keep politics out of science.”<sup>58</sup> Finally, “an anonymous senior administration official suggested that ‘the [NWS Birmingham’s] Twitter post . . . had been motivated by a desire to embarrass the president.’”<sup>59</sup>

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51. See Madeleine Carlisle, *Newly-Released NOAA Emails Show Anger and Confusion Around Trump’s ‘Doctored’ Hurricane Dorian Map*, TIME (Feb. 1, 2020, 3:54 PM), <https://time.com/5775953/trump-dorian-alabama-sharpiagate-noaa/> [<https://perma.cc/XR7C-RLU2>].

52. See *id.* The episode was soon dubbed “Sharpiegate.” See, e.g., Martin Pengelly, ‘Sharpiegate’: Trump Insists Dorian Was Forecast to ‘Hit or Graze’ Alabama, GUARDIAN (Sept. 5, 2019, 11:25 AM), <https://www.theguardian.com/us-news/2019/sep/05/trump-hurricane-dorian-alabama-map-sharpiagate> [<https://perma.cc/YJ5T-AY3R>].

53. SKOWRONEK ET AL., *supra* note 50, at 104.

54. 15 U.S.C. § 313. The Secretary of Commerce is also responsible for conducting the decennial census. 13 U.S.C. § 141(a); see also *Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2576 (2019) (finding that Secretary of Commerce Wilbur L. Ross, Jr.’s stated reason for reinstating the citizenship question on the 2020 census was pretextual).

55. SKOWRONEK ET AL., *supra* note 50 at 104.

56. *Id.* at 105.

57. *Id.* at 104.

58. *Id.* at 105. Many experts, including former and current NOAA officials, soon criticized NOAA’s unsigned statement. See Carlisle, *supra* note 51.

59. SKOWRONEK ET AL., *supra* note 50, at 104. President Trump also sought to exercise control over specific prosecutorial decisions. See PETER BAKER & SUSAN GLASSER, *THE DIVIDER: TRUMP IN THE WHITE HOUSE, 2017-2021*, at 310 (2022); Michael S. Schmidt & Maggie Haberman, *Trump Wanted to Order Justice Dept. to Prosecute Comey and Clinton*, N.Y. TIMES (Nov. 20, 2018), <https://www.nytimes.com/2018/11/20/us/politics/president-trump-justice-department.html> [<https://perma.cc/J3ZM-MRYD>]; Eli Watkins, *Donald Trump Laments He’s ‘Not Supposed’ to Influence DOJ, FBI*, CNN (Nov. 3, 2017, 9:37 AM), <https://www.cnn.com/2017/11/02/politics/donald-trump-justice-department-fbi> [<https://perma.cc/WYN4-P2BR>]. The relationship between the President and the U.S. Department of Justice’s prosecutorial function is a subject on which Congress could legislate but has not done so. See, e.g., Bruce A. Green & Rebecca Roiphe, *Can the President Control the Department*

These examples from the Trump administration are instructive, but the problem neither began nor ended with that administration.<sup>60</sup> As one study notes, “the Trump administration’s violations of scientific integrity are largely a continuation and escalation of patterns built up over the past seven decades as science and the growing federal science apparatus increasingly came into conflict with political, economic, and ideological interests.”<sup>61</sup> Similarly, Professor Holly Doremus has observed that the George W. Bush administration also surreptitiously edited scientific documents and was accused of waging a “War on Science.”<sup>62</sup> Among other things, Bush administration officials (like their counterparts in the Trump administration) intervened at an early stage of the decision-making process, which facilitated their efforts to confuse and conflate questions of scientific judgment and policy choices.<sup>63</sup> Subsequently, Obama administration officials overruled the FDA’s scientific judgment as to the availability of emergency contraceptives,<sup>64</sup> and President Joseph R. Biden, Jr. announced a plan to give

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*of Justice?*, 70 ALA. L. REV. 1, 75 (2018) (“The history and policy strongly suggest that, as a general matter, the Attorney General and subordinate prosecutors may not accept direction from the President but must make the ultimate decisions about how to conduct individual investigations and prosecutions, even at the risk of being fired for disobeying the President.”). The President’s “take care” responsibility presumably extends to the setting of general prosecutorial priorities, but it makes no sense, as a matter of institutional design, for the President to be empowered to make individual prosecutorial decisions, especially those involving political opponents or associates. *See, e.g.*, PETER M. SHANE, DEMOCRACY’S CHIEF EXECUTIVE 45–51 (2022). *But see* Memorandum from Bill Barr to Rod Rosenstein, Deputy Att’y Gen., and Steve Engel, Assistant Att’y Gen. (June 8, 2018), <https://int.nyt.com/data/documenthelper/549-june-2018-barr-memo-to-doj-mue/b4c05e39318dd2d136b3/optimized/full.pdf> [<https://perma.cc/ZFD5-MUKM>] (discussing Special Counsel Robert S. Mueller’s “Obstruction” Theory) (“The illimitable nature of the President’s law enforcement discretion stems not just from the Constitution’s plenary grant of those powers to the President, but also from the ‘unitary’ character of the Executive branch itself. Because the President alone constitutes the Executive branch, the President cannot ‘recuse’ himself.”). In the aftermath of the Watergate scandals, there were several proposals to grant some degree of formal, legal independence to the U.S. Department of Justice. *See, e.g.*, Sullivan, *supra* note 17, at 738–40.

60. *See* Emily Berman & Jacob Carter, *Policy Analysis: Scientific Integrity in Federal Policymaking Under Past and Present Administrations*, J. SCI. POL. & GOVERN., Sept. 2018, [https://www.sciencepolicyjournal.org/uploads/5/4/3/4/5434385/berman\\_emily\\_\\_carter\\_jacob.pdf](https://www.sciencepolicyjournal.org/uploads/5/4/3/4/5434385/berman_emily__carter_jacob.pdf) [<https://perma.cc/JV2Q-FX55>] (reviewing history of policymaking and science from the Eisenhower to Trump administrations).

61. *Id.* at 2.

62. Holly Doremus, *Scientific and Political Integrity in Environmental Policy*, 86 TEX. L. REV. 1601, 1603–13 (2008).

63. *Id.* at 1604; *see also id.* at 1641 (“The key to enhancing political integrity is to enforce stronger role separation between career scientists, who should be encouraged and enabled to provide their best independent assessments of the facts, and political appointees, who should be required to take political responsibility for the choices they make among available policy options. [The George W. Bush] Administration has observed essentially no boundaries between politics and science, and there is no guarantee that the next administration will be any different in that respect.”).

64. *See* Gardiner Harris, *Plan to Widen Availability of Morning-After Pill Is Rejected*, N.Y. TIMES (Dec. 7, 2011), <https://www.nytimes.com/2011/12/08/health/policy/sebelius-overrules-fda-on-freer-sale-of-emergency-contraceptives.html> [<https://perma.cc/T85H-5L6Z>] (“Although [HHS Secretary] Sebelius had the legal authority to overrule the F.D.A., no health secretary had ever publicly done so, an F.D.A. spokeswoman said.”).

booster shots to every vaccinated person, despite the inability of agency scientists to justify such a broadscale rollout on scientific grounds.<sup>65</sup> In fact, scientists in both the FDA and CDC had voted against recommending universal boosters,<sup>66</sup> and two senior officials, who reportedly took early retirement to protest the administration's disregard for evidence-based decision-making,<sup>67</sup> later published a paper (with seventeen coauthors) showing that the data did not support such a move.<sup>68</sup> In December 2021, as the nation faced a new surge of the virus, President Biden told David Muir of ABC News that, "I wish I had thought about ordering [500 million at-home tests] two months ago."<sup>69</sup> In fact, a group of experts had urged him to do just that.<sup>70</sup>

As a matter of institutional design, it makes little sense to say that the President should be absolutely empowered to suppress information of possibly existential importance, let alone communicate disinformation to Congress and the public. To whatever extent the likely path of a hurricane

65. See Peter Nicholas, *How Delta Beat Biden*, ATLANTIC (Sept. 8, 2021), <https://www.theatlantic.com/politics/archive/2021/09/how-delta-beat-biden-covid-pandemic/620003/> [<https://perma.cc/CE7K-APWZ>].

66. See Michael D. Shear & Benjamin Mueller, *Biden Promised to Follow the Science, but Sometimes, He Gets Ahead of the Experts.*, N.Y. TIMES (Sept. 24, 2021), <https://www.nytimes.com/2021/09/24/us/politics/biden-science-boosters-vaccine.html> [<https://perma.cc/3WDN-QD5V>].

67. Philip R. Krause, Thomas R. Fleming, Richard Peto, Ira M. Longini, J. Peter Figueroa, Jonathan A.C. Sterne, Alejandro Cravioto, Helen Rees, Julian P.T. Higgins, Isabelle Boutron, Hongchao Pan, Marion F. Gruber, Narendra Arora, Fatema Kazi, Rogerio Gaspar, Soumya Swaminathan, Michael J. Ryan & Ana-Maria Henao-Restrepo, *Considerations in Boosting COVID-19 Vaccine Immune Responses*, 398 LANCET 1377 (2021), [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(21\)02046-8/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(21)02046-8/fulltext) [<https://perma.cc/YQU4-9NKV>] (discussing the benefits and risks of a COVID-19 booster shot); see, e.g., Nicholas, *supra* note 65 (explaining that many officials believed a booster shot could not be rushed); Sarah Oweremohle, *Biden's Top-Down Booster Plan Sparks Anger at FDA*, POLITICO (Aug. 31, 2021, 6:04 PM), <https://www.politico.com/news/2021/08/31/biden-booster-plan-fda-508149> [<https://perma.cc/3JBW-J2R8>] ("The Biden administration's decisions over when to administer coronavirus vaccine boosters are triggering turmoil within the [FDA], frustrating regulators and sparking fear that political pressures will once again override the agency's expertise . . . . Many outside experts, and some within the agency, see uncomfortable similarities between the Biden team's top-down booster plan and former President Donald Trump's attempts to goad FDA into accelerating its initial authorization process for Covid-19 vaccines and push through unproven virus treatments.").

68. Krause et al., *supra* note 67.

69. Ben Gittleson, *White House Defends Biden's Handling of COVID Tests After David Muir Interview*, ABC NEWS (Dec. 23, 2021, 6:17 PM), <https://abcnews.go.com/Politics/white-house-defends-bidens-handling-covid-tests-david/story> [<https://perma.cc/D7M8-R8N7>].

70. See *National Routine Testing Strategy: Supply and Demand Analysis and Proposed Regulatory Solutions*, COVID COLLABORATIVE (Oct. 2021), <https://drive.google.com/file/d/1Inp4fjOnjDw2RlmVZxKA5kkCGc4CR1kT/view> [<https://perma.cc/8PA6-4SNP>] ("Every American Household To Receive Free Rapid Tests for the Holidays/New Year[.]"); see also MARK MCCLELLAN, CAITLIN RIVERS & CHRISTINA SILCOX, DUKE UNIV. MARGOLIS CTR. FOR HEALTH POL'Y, LEGISLATIVE AND REGULATORY STEPS FOR A NATIONAL COVID-19 TESTING STRATEGY (2020), [https://healthpolicy.duke.edu/sites/default/files/2020-08/COVID%20testing%20legislative%20recs%208-6%20correction\\_WITH%20COVER%20V2%208-6-2020.pdf](https://healthpolicy.duke.edu/sites/default/files/2020-08/COVID%20testing%20legislative%20recs%208-6%20correction_WITH%20COVER%20V2%208-6-2020.pdf) [<https://perma.cc/W8NM-8KRR>] (emphasizing the need for increased testing on a national scale).

or the etiology of a deadly disease may be ascertained, it seems obvious that such information (together with its relevant epistemological limitations) should be communicated to the public. Indeed, it is difficult to argue that the founders' conferral of "the executive power" on the President means that the President may direct the National Weather Service to lie about the projected course of a hurricane or direct public health experts to tell Congress and the public what the President wants Congress and the public to believe about a pandemic, rather than what the best available evidence and expert analysis suggest.<sup>71</sup> It cannot be that the founders intended for the President to be so empowered to deceive,<sup>72</sup> or for such deception to be tolerated, with impeachment as the only possible remedy.<sup>73</sup> Of course, the President cannot be stopped from speaking. The President's First Amendment rights are at least as robust as everyone else's. Indeed, the President's voice is greatly amplified simply by virtue of the President's official position.<sup>74</sup> Moreover, many citizens may choose to follow the President's advice on matters of expert knowledge, rather than that of genuine experts. That proved to be true many times during the Trump administration, and it may be an unavoidable feature of the American presidency in our time. On the other hand, it is

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71. The fact that the Secretary of Commerce is statutorily responsible for forecasting the weather (and conducting the census) suggests that Congress might need to take a hard look at these allocations of statutory authority.

72. See, e.g., Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 125 (1994) ("The framers' support for a strong unitary executive cannot be understood apart from the limited powers they gave to the executive, nor apart from their need to create an executive *strong enough* to counteract overreaching legislatures."); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 (1952) (Jackson, J., concurring) ("The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image.")

73. See U.S. CONST. art. I, § 2; *id.* art. II, § 4; FRANK O. BOWMAN III, *HIGH CRIMES AND MISDEMEANORS: A HISTORY OF IMPEACHMENT FOR THE AGE OF TRUMP* 296 (2019) ("[T]he Founders wrote and ratified a flexible standard for impeachable conduct and delegated the choice of how to apply it to the most democratic, politically accountable branch of the national government."). But the founders did not anticipate the rise of political parties or the effect that that development would have on the operation of the separation of powers. See, e.g., Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2313 (2006); ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS* 314 (1941). The institutionalized checks and balances envisioned by the founders may prove inadequate when one party controls the presidency and at least one House of Congress. That is certainly the case under conditions of high political polarization and high intraparty cohesion, and it may apply to impeachment as well as to other congressional functions. See RACHAEL BADE & KAROUN DEMIRJIAN, *UNCHECKED: THE UNTOLD STORY BEHIND CONGRESS'S BOTCHED IMPEACHMENTS OF DONALD TRUMP* (2022).

74. See Barry Sullivan, *The Irish Constitution: Some Reflections from Abroad*, in *THE IRISH CONSTITUTION: GOVERNANCE AND VALUES* 1, 31 (Oran Doyle & Eoin Carolan eds., 2008) ("Very often, the head of government is also (formally or functionally) the head of her party and thus wields the additional influence that party leadership provides. The executive leader also enjoys a degree of visibility that no mere parliamentarian could hope to achieve. The President, the Prime Minister, or the Taoiseach makes news whenever she chooses to do so. In a world obsessed by celebrity, the chief executive has the additional advantage of being the celebrity-in-chief.")

essential that citizens have access to the best available expert analysis, unfiltered by partisan politics.

### III. DELIVERING ACCURATE INFORMATION

As Professor Emily Berman and Dr. Jacob Carter have observed, “science is rarely the only factor in the policymaking process. Policy decisions are informed in various degrees by scientific factors, social judgment, and political sentiment.”<sup>75</sup> Thus, “clarifying which aspects of [a] decision are matters of science and which are matters of policy is essential to avoid both the politicization of science and the scientization of policy.”<sup>76</sup>

In May 2019, the University of California, Irvine School of Law’s Center for Land, Environment, and Natural Resources and the Center for Science and Democracy at the Union of Concerned Scientists convened a group of experts to “explore potential safeguards to protect scientific research and its use in federal policymaking.”<sup>77</sup> That meeting resulted in several proposals, including the important (if controversial) recommendation that “barriers [be placed] between political appointees who view their mission as the single-minded advancement of the President’s policy agenda and career employees charged with providing scientific advice or analysis.”<sup>78</sup> The group further recommended that Congress establish a “firewall between agency scientists and political staff/external interest groups” and insure against editing or censoring research findings for nonscientific reasons, directing the dissemination of false or misleading scientific information, and retaliating or discriminating against researchers for developing or disseminating scientific information that they reasonably believe to be accurate and valid.<sup>79</sup>

A task force that President Biden created in 2021 also has produced a series of recommendations. Not surprisingly, the task force was concerned with countering political “interference . . . in the conduct, management, communication, and use of science”<sup>80</sup> and with “navigat[ing] the interface between science and policy, . . . between scientific (and technical) research and policy-related decision-making.”<sup>81</sup> Policymaking depends on science, but it also “requires consideration of factors beyond scientific data alone. *Difficulties arise when the distinctions between research and*

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75. Berman & Carter, *supra* note 60, at 3.

76. *Id.*; cf. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 499 (2010) (“One can have a government that functions without being ruled by functionaries, and a government that benefits from expertise without being ruled by experts.”).

77. Melissa L. Kelly, Genna Reed, Gretchen T. Goldman & Jacob M. Carter, Comment, *Safeguarding Against Distortions of Scientific Research in Federal Policymaking*, 51 ENV’T. L. REP. 10014 (2021), <https://www.law.uci.edu/centers/cleanr/news-pdfs/elr-defense-of-science.pdf> [<https://perma.cc/7Q5K-7C88>].

78. *Id.* at 10018.

79. *Id.* at 10019–20.

80. SCI. INTEGRITY FAST-TRACK ACTION COMM. OF THE NAT’L SCI. AND TECH. COUNCIL, PROTECTING THE INTEGRITY OF GOV’T SCI. 9 (2022).

81. *Id.* at 11.



*decision-making are unclear, poorly understood, or ignored.*<sup>82</sup> In addition, “[i]mproving transparency of scientific research and policy decision-making processes can also provide a means of ensuring that robust research and decision-making processes were followed and to demonstrate the range of factors that contributed to a policy decision.”<sup>83</sup>

Significantly, the task force also recommended that “[a]gencies should make available to the public the scientific or technological findings or conclusions considered or relied upon in policy decisions (*to the extent that release is not restricted*).”<sup>84</sup> That kind of transparency “can improve the ability to assess the degree to which relevant science is taken into account and make more visible those instances in which it is not.”<sup>85</sup> Finally, with respect to the dissemination of scientific information, the task force stated:

When scientific information from the government is suppressed, distorted, or politically influenced, the lack of information—or worse, the misinformation that is shared—can impede the equitable delivery of . . . programs and undermine public trust. At a time when the public has access to numerous streams of sometimes conflicting information, open, clear, and trustworthy scientific communications have never been more important.<sup>86</sup>

Both studies identified similar concerns: transparency and the need to separate scientific considerations from other relevant, legitimate factors. Whether legislation to address these issues could command bipartisan support, given the toxic politics of the day, is certainly open to question. Indeed, the question whether any degree of deference should be given to scientific and other expert knowledge has been a major flashpoint in those toxic politics.<sup>87</sup> Theoretically, the objectives identified by both studies might be accomplished without legislation, but they would require supportive agency cultures and the good faith of agency political leaders, who are often short-termers; such administrative improvements could always be reversed by the next administration in any event. Finally, one might object that the total separation of science and policy, like the total separation of facts and values, is at least difficult, if not impossible. Certainly, science is not wholly objective. During the COVID-19 pandemic, for example, some scientists apparently did not take seriously the possibility of asymptomatic and

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82. *Id.* (emphasis added).

83. *Id.*

84. *Id.* at 13 (emphasis added).

85. *Id.* at 21.

86. *Id.* at 30. Legislation was introduced in both Houses but was not enacted. *See* Scientific Integrity Act, S. 775, 116th Cong. (2019) (prohibiting specified federal employees and any other individuals that fund, conduct, or oversee scientific research from engaging in scientific or research misconduct or manipulating communication of scientific or technical findings); Scientific Integrity Act, H.R. 849, 117th Cong. (2021) (requiring each agency involved in scientific research to (1) adopt and enforce a scientific integrity policy with specified requirements and (2) submit such a policy to the Office of Science and Technology Policy for approval).

87. *See, e.g.*, TOM NICHOLS, THE DEATH OF EXPERTISE: THE CAMPAIGN AGAINST ESTABLISHED KNOWLEDGE AND WHY IT MATTERS (2017).

airborne transmission of the COVID-19 virus, despite mounting evidence of that possibility, because it was contrary to their training and experience—that is, their professional belief system.<sup>88</sup> On the other hand, candor and transparency with respect to the role played by such assumptions and choices could go a long way toward remedying that problem.<sup>89</sup>

#### IV. CONSTITUTIONAL CONSIDERATIONS

The challenge of communicating the best available scientific and technical information and analysis to Congress and the public, particularly in the face of such existential threats as pandemics and natural disasters, is multifaceted. First, the information must be available, and the executive must possess the information. Second, the law must permit and encourage the relevant, knowledgeable government officials to disclose the information. Third, the relevant government officials must be motivated to share the information, even if possibly negative political consequences might result. Fourth, the relevant officials must have some degree of confidence that they will not suffer adverse consequences, such as demotion or loss of employment, if they comply with the law.

We focus here on two central questions. First, to what extent may Congress create agencies or offices within the executive branch that are authorized to collect and verify information that they may then disseminate to Congress or the public? Second, to what extent may Congress provide some form of tenure protection to those so empowered?

With respect to the first question, OLC has repeatedly opined, as in its 1988 AIDS opinion, that Congress cannot delegate to a particular office, such as the Director of the CDC, the final authority to communicate such information.<sup>90</sup> Significantly, OLC has also viewed Congress's creation of

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88. See, e.g., LAWRENCE WRIGHT, *THE PLAGUE YEAR: AMERICA IN THE TIME OF COVID* 41–45, 66–68 (2021); Sullivan, *supra* note 42, at 71–78.

89. Professor Oliver Williamson has proposed a helpful “decision process approach,” which emphasizes the need for transparency when regulators must make decisions under conditions of scientific uncertainty. See Oliver Williamson, *Saccharin: An Economist's View*, in *THE SCIENTIFIC BASIS OF HEALTH AND SAFETY REGULATION* 131, 142 (Robert W. Crandall & Lester B. Lave eds., 1981); see also Sullivan & Chabot, *supra* note 41, at 55–60. The same level of transparency would be useful in illuminating the extent to which scientific conclusions rest on professional assumptions and choices among competing theories and considerations.

90. See Statute Limiting the President's Auth. to Supervise the Dir. of the Ctrs. for Disease Control in the Distrib. of an AIDS Pamphlet, 12 Op. O.L.C. 47 (1988); see also Constitutionality of the Direct Reporting Requirement in Section 802(e)(1) of the Implementing Recommendations of the 9/11 Comm'n Act of 2007, 32 Op. O.L.C. 27, 34 (2008) (“These precedents support the conclusion that statutory reporting requirements cannot constitutionally be applied to interfere with presidential supervision and control of the communications that Executive Branch officers such as the CPO send to Congress.”); Auth. of HUD's Chief Fin. Officer to Submit Final Rep. on Violations of Appropriations L., 28 Op. O.L.C. 248, 251 (2004) (“But it does not necessarily follow that, simply because the 2003 Act charges the HUD CFO, rather than the Secretary of HUD, with the duty to submit final reports on violations, the HUD CFO has independent and unreviewable authority to prepare and submit final reports to the President and Congress without supervision by the Secretary . . . . The need to avoid raising a significant constitutional problem requires that we adopt this interpretation—i.e., that the CFO's duty to prepare and submit final reports under the 2003

Inspectors General,<sup>91</sup> who are also engaged in information-gathering and reporting, as an affront to the separation of powers.<sup>92</sup> The Inspector General Act of 1978<sup>93</sup> is distinguishable in two respects from the statute addressed in the 1988 AIDS opinion, though: first, Inspectors General are charged with informing Congress, rather than the public; and second, the relevant agency head cannot suppress an Inspector General’s report, but the Inspector General must share their report with the agency head, who can add comments.<sup>94</sup> Although OLC was not alone in initially questioning the constitutionality of the Inspector General Act, its legitimacy has become generally accepted, even among some who previously thought otherwise.<sup>95</sup> In addition, OLC’s

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Act, like his other duties, is subject to the ordinary supervision of the Secretary, and ultimately of the President through the Secretary.”); Auth. of Agency Offs. to Prohibit Emps. from Providing Info. to Cong., 28 Op. O.L.C. 79, 80–82 (2004) (“The discussion establishes only that the CRS interpretation that the ‘right of disclosure’ statutes prohibit Executive Branch supervision of employee disclosures unconstitutionally limits the ability of the President and his appointees to supervise and control the dissemination of privileged government information.”); Common Legis. Encroachments on Exec. Branch Auth., 13 Op. O.L.C. 248, 254–55 (1989) (concurrent reporting—requiring an agency recommendation or legislative proposal that it transmits to Office of Management and Budget (OMB) or the White House—“may breach the separation of powers by disrupting the chain of command within the executive branch and preventing the President from exercising his constitutionally guaranteed right of supervision and control over executive branch officials”); Auth. of the Special Couns. of the Merit Sys. Prot. Bd. to Litigate and Submit Legis. to Cong., 8 Op. O.L.C. 30, 36 (1984) (concluding that legislation that would require “an Executive Branch officer to submit budget information and legislative recommendations directly to Congress, prior to their being reviewed and cleared by the President or another appropriate reviewing official, would constitute precisely the kind of interference in the affairs of one Branch by a coordinate Branch which the separation of powers is intended to prevent.”). Of course, not all OLC opinions are published or otherwise disclosed to the public. See Jonathan Shaub, *Previously Undisclosed OLC Opinions Illuminate the Growth of Executive Power*, LAWFARE (Sept. 23, 2022, 8:01 AM), <https://www.lawfaremedia.org/article/previously-undisclosed-olc-opinions-illuminate-growth-executive-power> [<https://perma.cc/Z5LP-XFKR>]. See generally Emily Berman, *Weaponizing the Office of Legal Counsel*, 62 B.C. L. REV. 515 (2021); Jonathan David Shaub, *The Executive’s Privilege*, 70 DUKE L.J. 1 (2020).

91. 5 Pub. L. No. 95-452, 92 Stat. 1101 (1978) (codified as amended at 5 U.S.C. app.).

92. Inspector Gen. Legis., 1 Op. O.L.C. 16, 18 (1977). Among other things, the executive has challenged the requirement that the President give reasons for the removal of an Inspector General, but President Barack Obama was found to have satisfied that burden merely by asserting his loss of confidence in the official. See *Walpin v. Corp. for Nat’l & Comm. Servs.*, 630 F.3d 184 (D.C. Cir. 2011).

93. 5 Pub. L. No. 95-452, 92 Stat. 1101 (1978) (codified as amended at 5 U.S.C. app.).

94. Inspector General Act of 1978, 5 U.S.C. App. 3 §§ 2, 3. Like the Director of the CDC, who reports to the Secretary of HHS, see *HHS Organizational Chart*, U.S. DEPT. HEALTH & HUM. SERVS., <https://www.hhs.gov/about/agencies/orgchart/index.html> [<https://perma.cc/T2DF-M6PX>] (Aug. 17, 2023), Inspectors General are subject to the general supervisory authority of the agency head, despite the substantial independence they enjoy in discharging their investigatory and reporting roles. See 5 U.S.C. App. 3 § 3(a).

95. See, e.g., Bob Bauer & Jack Goldsmith, *Inspector General Reform on the Table*, LAWFARE (Oct. 5, 2021), <https://www.lawfareblog.com/inspector-general-reform-table> [<https://perma.cc/6EB8-KTGH>] (noting former Attorney General William Pelham Barr’s apparent change of position). But see Ari Spitzer, *The Constitutionality of For-Cause Removal Protections for Inspectors General*, 45 HARV. J.L. & PUB. POL’Y 1057 (2022) (arguing that for-cause removal provisions are unconstitutional); Bob Bauer & Jack Goldsmith, *Inspector General Reform in the NDAA*, LAWFARE (Dec. 23, 2022), <https://www.lawfareblog.com/inspector-general-reform-ndaa> [<https://perma.cc/J49F-8Z6B>] (commenting on

current position seems inconsistent in principle with several nineteenth century opinions of the Attorney General, which were later expounded upon in an important 1937 opinion by Attorney General Homer Stillé Cummings and reflect a much less aggressive understanding of presidential power.<sup>96</sup>

OLC's current position also seems inconsistent with *Kendall v. United States ex rel. Strong*,<sup>97</sup> on which General Cummings also relied in his 1937 opinion.<sup>98</sup> In *Kendall*, the Court acknowledged the breadth of Congress's discretion with respect to the design of the executive branch:

The executive power is vested in a President; and as far as his powers are derived from the constitution, he is beyond the reach of any other department . . . . But it by no means follows, that every officer in every branch of that department is under the exclusive direction of the President . . . .

There are certain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the President. But it would be an alarming doctrine, that congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the constitution; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President. And this is emphatically the case, where the duty enjoined is of a mere ministerial character.<sup>99</sup>

Chief Justice Roger B. Taney made the point even more emphatically in his dissent:

The office of postmaster general is not created by the constitution; nor are its powers or duties marked out by that instrument. The office was created by act of congress; and wherever congress creates such an office . . . by law, it may unquestionably, by law, limit its powers, and regulate its proceedings; and it may subject it to any supervision or control, executive or judicial, which the wisdom of the legislature may deem right.<sup>100</sup>

Almost 100 years later, the Court took a more expansive (but not necessarily inconsistent) view of executive power in *Myers v. United*

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improved tenure protection provisions incorporated in 2023). Interestingly, neither the majority nor the dissent raised the question of constitutionality in *National Aeronautics & Space Administration v. Federal Labor Relations Authority*, 527 U.S. 229 (1999) (holding that a National Aeronautics and Space Administration (NASA)-Office of Inspector General investigator could be NASA's "representative" despite the degree of independence afforded to the Inspector General for purposes of an employee's union representation rights).

96. These nineteenth century opinions of the Attorney General were collected (together with relevant jurisprudence) in a 1937 opinion by Attorney General Cummings. *See, e.g., Presidential Auth. to Direct Dep'ts & Agencies to Withhold Expenditures from Appropriations Made*, 1 Op. O.L.C. Supp. 12 (1937).

97. 37 U.S. (12 Pet.) 524 (1838).

98. *Presidential Auth. to Direct Dep'ts & Agencies to Withhold Expenditures from Appropriations Made*, 1 Op. O.L.C. Supp. 12 (1937).

99. *Kendall*, 37 U.S. (12 Pet.) at 610.

100. *Id.* at 626 (Taney, C.J., dissenting).

*States*.<sup>101</sup> In an opinion by Chief Justice William Howard Taft, the Court found that Congress had violated the separation of powers by conditioning the President's removal of an executive official on the Senate's approval, thereby limiting the President's control over that official.<sup>102</sup> But even Chief Justice Taft noted that, although

[t]he ordinary duties of officers prescribed by statute come under the general administrative control of the President[,] . . . there may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer's interpretation of his statutory duty in a particular instance.<sup>103</sup>

It seems clear that Congress could create executive offices responsible for providing information to Congress and the public. When Congress mandates that an executive agency undertake an investigation and make a report, it does not create discretion as to whether that act must be performed. The investigation and report may require the exercise of skill and judgment, but the agency has no discretion as to whether to comply with the duty. Nor could the discharge of the duty properly be characterized as taking final action or exercising executive power, "significant" or otherwise, on behalf of the United States.<sup>104</sup> Moreover, even if the exercise somehow could be

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101. 272 U.S. 52 (1926).

102. *See id.* at 161. Although the Chief Justice's rhetoric was broad, subsequent cases emphasized that the main constitutional flaw in *Myers* involved the congressional aggrandizement embodied in the Senate's statutory veto. *See, e.g.,* *Bowsher v. Synar*, 478 U.S. 714, 724 (1986) (explaining that in *Myers*, "Chief Justice Taft . . . declared the statute unconstitutional on the ground that for Congress to 'draw to itself . . . the power to remove or the right to participate in the exercise of that power . . . would be . . . to infringe the constitutional principle of the separation of governmental powers'").

103. *Myers*, 272 U.S. at 135. In his dissent, Justice Oliver Wendell Holmes, Jr. characterized Chief Justice Taft's constitutional arguments as "spiders' webs inadequate to control the dominant facts." *Id.* at 295 (Holmes, J., dissenting). Holmes added, "We have to deal with an office that owes its existence to Congress and that Congress may abolish to-morrow . . . . The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power." *Id.*

104. In *Seila Law LLC v. Consumer Financial Protection Bureau*, the Court held that an "agency led by a single [d]irector and vested with significant executive power" comports with constitutional requirements only if the President can dismiss the director at will. 140 S. Ct. 2183, 2200–01 (2020). Indeed, the *Seila Law* Court used the term "significant executive power" on three separate occasions. *See id.* at 2191–92, 2201, 2211. The Court also has used the qualifier "significant" to state the relevant test in several additional cases dating back to the 1970s. *See, e.g.,* *United States v. Arthrex*, 141 S. Ct. 1970, 1980 (2021); *Lucia v. Sec. & Exch. Comm'n*, 138 S. Ct. 2044, 2051 (2018); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 486 (2010); *Buckley v. Valeo*, 424 U.S. 1, 125–26 (1976) (per curiam). In *Collins v. Yellen*, however, the Court seemingly abandoned the "significant executive power" test in favor of a simple "executive power" test. 141 S. Ct. 1761 (2021). In *Collins*, Justice Alito wrote for the Court 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. The President's removal power serves vital purposes even when the officer subject to removal is not the head of one of the largest and most powerful agencies.

*Id.* at 1784. This shift in terminology did not go unnoticed by Justice Kagan, who wrote in concurrence:

deemed discretionary, it would fall squarely within the exception posited by Chief Justice Taft.

One caveat might be that there should be strict separation between those who do the investigation and reporting and those who utilize that knowledge in making policy. The Supreme Court's recent decision in *U.S. Fish & Wildlife Service v. Sierra Club, Inc.*,<sup>105</sup> which involved a Freedom of Information Act<sup>106</sup> (FOIA) request for agency "biological opinions" or analyses, is instructive. In that case, the analyses were prepared by scientists at two agencies that were charged with evaluating a proposed regulation being considered by a third agency. The decisionmakers at the two designated agencies decided not to approve or forward their scientists' analyses to the third agency but continued to consult with that agency and eventually approved a modified regulation.<sup>107</sup> As a result of those consultations, the original scientific analyses lost salience in terms of the third agency's decision-making process, and the government withheld them from disclosure under the deliberative process privilege of FOIA Exemption 5.<sup>108</sup> Significantly, the Court suggested that more than statutory construction was involved: "This case concerns the deliberative process privilege, which is a form of executive privilege."<sup>109</sup> As the Court noted, documents are "'deliberative' if they [are] prepared to help the agency formulate its position."<sup>110</sup> The U.S. Department of Justice has identified three policy purposes supporting this privilege:

- (1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are finally adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action.<sup>111</sup>

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Remarkably, those words [significant executive power] appear nowhere in today's decision. Instead, the Court appears to take the position that exercising essentially any executive power whatsoever is enough. In terms of explanation, the Court says that it is "not well-suited to weigh the relative importance of the regulatory and enforcement authority of disparate agencies" and that it "do[es] not think that the constitutionality of removal restrictions hinges on such an inquiry."

*Id.* at 1808 (Kagan, J., concurring) (second alteration in original) (citation omitted) (quoting majority opinion). Justice Kagan further noted that the *Collins* Court's pronouncements about the irrelevance of such factors were wholly inconsistent with the careful analyses of those factors that the Court had undertaken in its prior jurisprudence. *Id.* In any event, if Congress were concerned that some classes of information should not be disclosed, it could so provide in the governing legislation.

105. 141 S. Ct. 777 (2021).

106. 5 U.S.C. § 552.

107. 141 S. Ct. at 784.

108. *Id.* at 785. For the text of Exemption 5, see 5 U.S.C. § 552(b)(5).

109. *U.S. Fish & Wildlife*, 141 S. Ct. at 783.

110. *Id.* at 786.

111. *FOIA Guide, 2004 Edition: Exemption 5*, U.S. DEP'T OF JUST., <https://www.justice.gov/archives/oip/foia-guide-2004-edition-exemption-5> [<https://perma.cc/5XAD-ZG7S>] (Dec. 3, 2021).

The possibility of “public confusion” seems a slight justification for keeping important information from the public, and these purposes would have little relevance when the executive is sharing expert knowledge with Congress.

With respect to the second question, whether Congress can provide some form of tenure of position to executive employees who make expert investigations and reports to Congress, an affirmative answer seems consistent with *Kendall* and with the line of cases beginning with *Humphrey’s Executor v. United States*<sup>112</sup> and ending with *Morrison v. Olson*.<sup>113</sup> In *Morrison*, for example, the Court upheld a provision of the independent counsel statute that limited the grounds for removing an “independent counsel” to “good cause, physical disability, mental incapacity, or other condition that substantially impairs the performance of such independent counsel’s duties.”<sup>114</sup> The *Morrison* Court rejected the relevance of any distinction between “purely executive” officials and those who exercise “quasi-legislative” or “quasi-judicial” powers,<sup>115</sup> as well as the argument that “under *Myers*, the President must have absolute discretion to discharge ‘purely’ executive officials at will.”<sup>116</sup> The “real question,” the Court said, was “whether the removal restrictions . . . impede the President’s ability to perform his constitutional duty.”<sup>117</sup>

The Court’s more recent jurisprudence reflects a different approach but does not require a different conclusion. The Court’s recent cases have changed the law, but they have mainly done so by limiting *Humphrey’s Executor* and its progeny to their facts. In *Free Enterprise Fund v. Public Co. Accounting Oversight Board*,<sup>118</sup> its first challenge to the settled jurisprudence, the Court left *Humphrey’s Executor* intact but noted that it involved only one level of “for cause” removal protection, whereas *Free Enterprise* involved two.<sup>119</sup> The Court deemed that difference significant

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112. 295 U.S. 602 (1935). In *Humphrey’s Executor*, which was decided nine years after *Myers*, a unanimous Court characterized the Federal Trade Commission as a “quasi-judicial” and “quasi-legislative” body and upheld a statutory provision prohibiting the removal of a commissioner, except “for inefficiency, neglect of duty, or malfeasance in office.” *Id.* at 623–24; accord *Wiener v. United States*, 357 U.S. 349, 352 (1958) (finding the Foreign Claims Settlement Commission’s organic act silent as to removal, but nonetheless unanimously holding that there was an implied “for cause” limitation on the removal power based on the tribunal’s “quasi-judicial” character).

113. 487 U.S. 654 (1988).

114. *Id.* at 663 (quoting 28 U.S.C. § 596(a)(1)). Under the law then in effect, an independent counsel was appointed by a special court but was removable by the Attorney General. *Id.* at 690–91.

115. *Id.* at 691.

116. *Id.* at 688–89.

117. *Id.* at 691. Justice Antonin Scalia was the sole dissenter in *Morrison*, and his dissent has provided inspiration and momentum to adherents of the unitary executive theory. See Sullivan, *supra* note 17, at 745 n.99. An important threshold question in *Morrison* was whether the independent counsel was a principal or inferior officer, which the Court resolved by looking holistically at the officer’s role, tenure, duties, and jurisdiction. *Morrison*, 487 U.S. at 672–73. In *Edmond v. United States*, 520 U.S. 651, 662 (1997), the Court simply asked whether the putatively “inferior” officer had a “superior.”

118. 561 U.S. 477 (2010).

119. *Id.* at 484.

because the additional level prevented the President from “oversee[ing] the faithfulness of [those] who execute [the laws].”<sup>120</sup> In *Seila Law LLC v. Consumer Financial Protection Bureau*,<sup>121</sup> the Court again distinguished *Humphrey’s Executor*, this time because the earlier case involved a multimember commission, whereas *Seila Law* involved an “agency led by a single [d]irector and vested with significant executive power.”<sup>122</sup> According to Chief Justice Roberts’s majority opinion, *Myers* stands for a core constitutional principle—that the President’s removal power is absolute, subject only to the two narrow exceptions incarnated in *Humphrey’s Executor* and *Morrison*—namely, that Congress may grant “for cause” protections to (a) the members of multimember agencies that perform quasi-legislative and quasi-judicial functions and (b) certain inferior officers with narrowly defined duties.<sup>123</sup> In *Collins v. Yellen*,<sup>124</sup> the Court held that the Federal Housing Finance Authority was unconstitutionally organized because the agency was led by a single administrator who was not removable at will.<sup>125</sup> Finally, in *United States v. Arthrex*,<sup>126</sup> the Court held that the decisions of administrative patent judges, who were not appointed by the President or subject to at-will removal, must be subject to review by officials who are appointed by the President and removable at will.<sup>127</sup>

If we take Chief Justice Roberts at his word, Congress could grant “for cause” removal protection to those responsible for compiling scientific information and reporting it to Congress and the public if the legislation narrowly defined their duties. Indeed, if their duties were defined narrowly enough, these functions might be performed by civil service employees who already enjoy a certain degree of job security.<sup>128</sup> Alternatively, if Congress determined that the work could not properly be performed by individuals with such narrowly defined duties, it could create multimember, commission-style organizations, either within existing entities such as the CDC or the National Institutes of Health or as free-standing entities, to fulfill this function.<sup>129</sup> Finally, the requirement that the President give reasons for

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120. *Id.* In dissent, Justice Stephen G. Breyer questioned why two levels of for-cause removal protections would impact the President’s ability to supervise the relevant officials any more than one level. *See id.* at 525 (Breyer, J., dissenting).

121. 140 S. Ct. 2183 (2020).

122. *Id.* at 2201.

123. *Id.* at 2192.

124. 141 S. Ct. 1761 (2021). The case was indistinguishable from *Seila Law*, as Justice Kagan noted in her concurrence, *id.* at 1800–02 (Kagan, J., concurring), but Justice Alito seemingly ignored *Seila Law*’s reference to agencies that exercise “significant” executive power, thereby extending the earlier case to include the exercise of any executive power. *Id.* at 1800.

125. *Id.* at 1783–84.

126. 141 S. Ct. 1970 (2021).

127. *Id.* at 1985.

128. *But see* Jonathan Swan, Charlie Savage & Maggie Haberman, *Biden Administration Aims to Trump-Proof the Federal Workforce*, N.Y. TIMES (Sept. 15, 2023), <https://www.nytimes.com/2023/09/15/us/politics/trump-biden-schedule-f.html>; *see also* Wagner, *supra* note 6.

129. A multimember, commission-style solution seems cumbersome and overly expensive, as well as unnecessary. Moreover, a profusion of such entities could collectively threaten the



removing such employees, as they must do for Inspectors General, might provide sufficient protection, but only if that requirement were given a more muscular construction than previously has been the case.<sup>130</sup>

#### CONCLUSION

Crediting the OLC opinions, one would have to conclude that the President is constitutionally entitled to insert political operatives into the CDC during a pandemic, task them with secretly rewriting the MMWRs, and let them pass off their work product as if it represented the government's best scientific judgment. The President would also be entitled to order the National Weather Service to report the President's forecast rather than its own. If that were the case, the Constitution truly would be a "suicide pact."<sup>131</sup> But Congress can prevent that from happening. Congress is constitutionally responsible for lawmaking, not the President, and that includes the design of the executive branch. Congress can mandate that information be made available to the public. Congress can also ensure that it has access to the information necessary to fulfill its legislative and oversight responsibilities. For those reasons, there does not seem to be any impediment to Congress's creating offices within the executive branch that are responsible for compiling and reporting the information necessary for Congress and the public to discharge their respective constitutional obligations.

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integrity of the executive branch. *Cf.* *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 855 (1986) ("This is not to say, of course, that if Congress created a phalanx of non-Article III tribunals equipped to handle the entire business of the Article III courts without any Article III supervision or control and without evidence of valid and specific legislative necessities, the fact that the parties had the election to proceed in their forum of choice would necessarily save the scheme from constitutional attack. But this case obviously bears no resemblance to such a scenario." (citation omitted)).

130. *See, e.g., Walpin v. Corp. for Nat'l & Comm. Servs.*, 630 F.3d 184 (D.C. Cir. 2011).

131. *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).