

Presidential Administration and the Accountability Illusion

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For over a decade, the Supreme Court has upended executive-branch structures that insulated administrative agencies from the White House. Judges and scholars justify this project in part by claiming that presidential control over administration boosts agencies' accountability to the American people. Yet, despite the importance of "the people" as this endeavor's asserted beneficiaries, public attitudes concerning this foundational claim are unknown.

This Article puts this claimed connection to the test. Grounded in a set of novel experiments involving over five thousand participants, it presents the first evidence of Americans' views regarding whether greater presidential authority over agencies enhances accountability to people like them. These experiments reveal that people presented with an agency over which the President possesses the authority to appoint decision-makers, remove them for any reason, or review the agency's proposed regulations are no more likely to perceive the agency as accountable than are people presented with a politically insulated agency.

Whereas prominent judges and scholars claim that these presidential-control mechanisms—*i.e.*, appointment, removal, and review authority—bolster agencies' accountability to the people, the people do not agree. In a politically divided country, Americans do not experience presidential power over agencies as fostering accountability. This finding challenges the ongoing judicial project of tethering agencies to the President for the supposed benefit of the American people.

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- INTRODUCTION 2
- I. THE PRESIDENTIAL ACCOUNTABILITY CLAIM..... 6
 - A. Presidential Preeminence..... 6
 - B. Critiques and Alternatives 19
 - C. Probing the Public’s Views 26
- II. RESEARCH DESIGN 27
 - A. Agency Decision-Making Vignettes..... 28
 - B. Treatment Conditions..... 30
 - C. Sample Construction..... 37
- III. ACCOUNTABILITY EXPERIMENTS..... 38
 - A. Study 1: Presidential Administration Does Not Increase Perceived Accountability..... 38
 - B. Study 2: Agency Independence Does Not Increase Perceived Accountability, But Compares Favorably to Presidential Administration 44
- IV. IMPLICATIONS 49
 - A. Retire the Presidential Accountability Claim..... 51
 - B. Move Beyond Partisan Explanations..... 52
 - C. Emphasize Structures that Truly Engender Accountability 54
- CONCLUSION 55
- APPENDIX..... 57

INTRODUCTION

Administrative agencies are increasingly under the President’s thumb. Agency leaders that once possessed statutory protections limiting the White House’s ability to fire them now serve at the pleasure of the President.¹ Where politically insulated

¹ See *Collins v. Yellen*, 141 S. Ct. 1761 (2021); *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 514 (2010); see also *Constitutionality of the Commissioner of Social Security’s Tenure Protection*, 45 Op. O.L.C. 1 (July 8, 2021) (arguing that a for-cause limitation on the President’s ability to remove the Social Security administrator is unconstitutional, which led President Biden to remove that individual without providing cause); *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022) (holding that removal restrictions for SEC administrative law judges are unconstitutional), *aff’d on other grounds*, 603 U.S. __ (2024) (affirming the circuit court’s holding that the SEC’s pursuing civil penalties for securities fraud

administrative law judges once made final decisions, the Supreme Court now places that authority with presidential appointees in some agencies.² Even greater presidential control over agencies is potentially on the horizon. Scholars call for independent agencies to submit proposed regulations to a White House office, which will approve them only if—in the office’s judgment—their benefits exceed costs.³ The Heritage Foundation’s “Project 2025” blueprint for the next conservative presidential administration proposes eliminating merit-based job protections for tens of thousands of civil servants and placing them under the President’s control.⁴ Vice presidential nominee J.D. Vance would go even further, proposing to “fire every single mid-level bureaucrat, every civil servant in the administrative state” and “replace them with our people”—meaning presidential personnel.⁵

Judges, scholars, and political leaders involved in the project of mooring agencies to the White House often invoke the aphorism that greater presidential control makes agencies more accountable to the American people.⁶ For instance, the Supreme Court invokes a “duty to ensure that the executive branch is overseen by a President accountable to the people.”⁷ According to the Court, bolstering presidential control over agencies ensures that “the President remains responsible for the exercise of executive power—and through him, the exercise of executive power remains accountable to the people.”⁸ Justices of all ideological stripes agree that presidential control increases agencies’ accountability to the public.⁹ Indeed, eight current

before agency adjudicators is unconstitutional, without reaching the question of whether these adjudicators’ removal protections are constitutional)).

² See *U.S. v. Arthrex*, 141 S. Ct. 1970, 1976 (2021); *Lucia v. SEC*, 138 S. Ct. 2044 (2018).

³ See Richard J. Pierce, Jr., *An Expanded Version of OIRA Can Ensure Democratic Accountability in the Administrative State*, 21 *GEO. J.L. & PUB. POL’Y* 451, 455 (2023) (“Many scholars and former OIRA heads have urged the President to expand the scope of OIRA’s responsibilities to include review of major rules issued by ... the ‘independent’ agencies. ... The case for such an expansion has become stronger over time.”).

⁴ See HERITAGE FOUNDATION, *PROJECT 2025: MANDATE FOR LEADERSHIP* 23 (2023); see also *id.* at 71 (arguing that merit protections “insulate civil servants from accountability”); E.J. FAGAN, *THE THINKERS: THE RISE OF PARTISAN THINK TANKS AND THE POLARIZATION OF AMERICAN POLITICS* 46 (2024) (providing evidence of Heritage’s unmatched influence in the Trump administration). The proposal would reinstate Schedule F, an executive order in effect during the final months of the Trump administration. Exec. Order No. 13,957, 3 C.F.R. § 466 (2021).

⁵ Erich Wagner, *Here’s how Trump’s new vice presidential pick stacks up on federal workforce issues*, *GOV. EXEC.*, July 15, 2024, <https://www.govexec.com/management/2024/07/heres-now-trumps-new-vice-presidential-pick-stacks-federal-workforce-issues/398056/>.

⁶ See *infra* Part I.A.

⁷ *Seila Law*, 140 S. Ct. at 2207.

⁸ *Arthrex*, 141 S. Ct. at 1988.

⁹ See, e.g., *Arthrex*, 141 S. Ct. at 1989 (Gorsuch, J., concurring) (“Without presidential responsibility there can be no democratic accountability for executive action.”); *Kisor v. Wilkie*, 139 S. Ct. 2400, 2413 (2019) (Kagan, J.) (asserting that agencies possess “political accountability because they are subject to the supervision of the President, who in turn answers to the public”); *Dep’t of Transp. v.*

Supreme Court justices have endorsed this idea.¹⁰ So have many prominent scholars.¹¹

When legal elites make this claim, they tend to do so uncritically. They do not interrogate the claim’s herculean assumptions concerning how presidential power is experienced in a politically divided country.¹² Neither do they consider alternative mechanisms that people may favor to hold agencies accountable.¹³ Most significantly—and notwithstanding the many assertions regarding “the people” and “the national will” that the claim’s proponents make¹⁴—regular people’s views on the subject remain a mystery.

That oversight is conspicuous. Ordinary citizens’ views ought to be a central element in legal elites’ project of rendering agencies more accountable to the American people. That is not because regular people have some cognitive advantage in assessing whether a theory of accountability is epistemically “correct.” Instead, knowledge of their beliefs on the subject is vital because accountability claims purport to advance their interests. If Americans believe that people like them can hold agencies to account through the President, that belief would suggest that the claim has value. A contrary finding would cast doubt on it. Either way, evidence on this question would enable the judicial and scholarly discourse to move beyond mere pronouncements. In a discussion dominated by elite lawyers concerning how to yoke

Ass’n of Am. Railroads, 575 U.S. 43, 91 (2015) (Thomas, J., concurring) (asserting that executive power that lies beyond the President’s control constitutes “a vast and unaccountable administrative apparatus”).

¹⁰ Those eight jurists are Chief Justice Roberts and Justices Alito, Barrett, Gorsuch, Kagan, Kavanaugh, Sotomayor, and Thomas. *See, e.g., Arthrex*, 141 S. Ct. at 1988 (Roberts, C.J., joined in relevant part by Barrett, Alito, and Kavanaugh, JJ.); *Seila Law*, 140 S. Ct. at 2207 (Roberts, C.J., joined in relevant part by Thomas, Alito, Gorsuch, and Kavanaugh, JJ.); *Kisor*, 139 S. Ct. at 2413 (Kagan, J., joined by Ginsburg, Breyer, and Sotomayor, JJ.). The ninth—and most junior—justice, Ketanji Brown Jackson, has not yet participated in a decision in which the claim could be apposite. For a comprehensive accounting of recent Supreme Court opinions endorsing the claim, see *infra* Part I.A.

¹¹ *See, e.g.,* Aditya Bamzai & Saikrishna Prakash, *The Executive Power of Removal*, 136 HARV. L. REV. 1756 (2023) (asserting that, if unitary executive theory is rejected, “Congress can ... transform the executive branch into a perpetual and unaccountable bureaucratic machine”); Lawrence Lessig & Cass Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 2 (1994) (arguing that a “strongly unitary executive can promote ... accountability”).

¹² Other assumptions concern voters’ knowledge of the President’s activities and the electoral incentives facing presidential candidates to appeal to subnational, and often narrow, groups of voters. *See supra* Part I.B.i (identifying these assumptions); Nicholas Stephanopoulos, *Accountability Claims in Constitutional Law*, 112 NW. U.L. REV. 989, 1010-13 (2018) (arguing that several of these assumptions are erroneous).

¹³ *See infra* Part I.B.ii (introducing alternatives).

¹⁴ *See infra* Part I.A.

government to the people, the views of the people—the asserted beneficiaries of these measures—would be invaluable.

This Article offers the first evidence concerning the extent to which people accept the leading judicial view that greater presidential influence enhances agencies’ accountability to them. It presents the results of two original, large-scale experiments involving nearly fifty-four hundred participants. Each participant is randomly assigned to consider one of fifteen vignettes describing a policy decision facing an agency. Some vignettes state that the agency contains design features that encourage presidential influence, namely, presidential appointment, removal at-will by the President, and White House review of proposed regulations. Other vignettes do not discuss the topic or describe an agency with structures designed to insulate the agency from the President. After reading their vignette, participants must rate the extent to which they consider the agency “accountable ... to people like you.” If participants randomly assigned to a vignette with a presidential control mechanism provide higher accountability ratings than participants who read an otherwise identical vignette without this mechanism, that finding would indicate that people perceive presidential control to bolster accountability.¹⁵

The Article proceeds in four parts. Part I describes this project’s stakes, highlighting how deeply entrenched the claimed connection between presidential control and agency accountability is on the bench and in the academy. (For brevity, I refer to the proposition that greater presidential influence over agencies engenders accountability, first to the President and ultimately to the American people, as the *presidential accountability claim*.¹⁶) Part I then describes the major critiques of this claim and presents an original typology of alternative conceptions of accountability. Tying these subjects together, this Part contends that assessing the claim against its alternatives requires understanding the extent to which presidential control mechanisms connect to people’s perceptions of agency accountability.

Part II presents the research design for the experiments used to undertake this assessment. Part III reports the results. Notably, the experiments reveal no positive connection between perceived accountability and several key presidential control mechanisms. In fact, participants assigned to some vignettes with features that facilitate presidential administration tend to perceive the agency as *less* accountable

¹⁵ Crucially, this research design does not provide a definition of “accountability” to participants. By not guiding participants to a particular definition, the aim is to understand what features ordinary people associate with the term, pursuant to whatever understanding of the concept they hold. See *infra* note 147 and accompanying text.

¹⁶ See Jodi Short and Jed Shugerman, *Major Questions about Presidentialism*, 65 BOSTON COLLEGE L. REV. 511, 521 (2024) (introducing this term).

than participants assigned to a control condition. Taken together, these findings directly challenge the presidential accountability claim.

Part IV discusses the implications of these findings. Most notably, these results should push the Supreme Court to retire the presidential accountability claim. This Part then discusses the interplay between people’s partisan allegiances and their beliefs regarding whether presidential control bolsters agency accountability. It concludes with a call for the Supreme Court to adopt an evidence-based approach to its structural-constitutional jurisprudence.

I. THE PRESIDENTIAL ACCOUNTABILITY CLAIM

This Part begins by detailing how the presidential accountability claim dominates other positive accounts of agency accountability. In so doing, Part I.A pays particular attention to how the Supreme Court marshals the claim to invalidate laws designed to insulate agencies from the White House. Part I.B identifies faulty assumptions on which the claim rests and highlights several alternative—and largely overlooked—mechanisms to bolster agencies’ accountability. Part I.C argues that, given these stakes, knowing whether ordinary people perceive presidential control as enhancing agencies’ accountability to them is vital to assessing the claim’s value relative to its alternatives.

A. Presidential Preeminence

The presidential accountability claim is ubiquitous in separation-of-powers law and scholarship. In the academy, a group of influential scholars has undertaken a decades-long project to, in Daniel Walters’ characterization, “fortify the President’s power within the administrative state in the name of increased agency accountability.”¹⁷ That project appears to have borne fruit within the judiciary. Most notably, eight current Supreme Court justices have written or signed onto opinions that endorse the claim.¹⁸ Several of these opinions have been highly consequential, disrupting settled features of administrative agencies in recent years.¹⁹ The following list of recent assertions from the Court or its members writing separately is illustrative.²⁰

¹⁷ Daniel E. Walters, *The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State*, 132 YALE L.J. 1, 72 (2022). *See also infra* notes 35-34 (discussing scholars that support this position).

¹⁸ *See supra* note 10.

¹⁹ *See supra* notes 7-10 (providing examples).

²⁰ Other judicial opinions allude to the claim, without stating it directly. *See, e.g.*, *Biden v. Nebraska*, 143 S. Ct. 2355, 2385 (2023) (Kagan, J. dissenting) (“Congress authorized the [student loan] forgiveness plan; the Secretary put it in place; and the President would have been accountable for its success or failure. But this Court today decides that some 40 million Americans will not receive the benefits the plan provides.”).

- “[A]gencies ... have political accountability, because they are subject to the supervision of the President, who in turn answers to the public.”²¹
- “[The Court has a] duty to ensure that the executive branch is overseen by a President accountable to the people.”²²
- “[If the President lacked] the authority to remove those who assist him in carrying out his duties ... the President could not be held fully accountable.”²³
- “In this way, [by authorizing a presidential appointee to review administrative law judges’ decisions,] the President remains responsible for the exercise of executive power—and through him, the exercise of executive power remains accountable to the people.”²⁴
- “To ensure accountability for the exercise of executive power ... the Framers ... lodged full responsibility for the executive power in the President ... who is elected by and accountable to the people.”²⁵
- “[An agency’s decision] has the virtue of political accountability, for [the agency] is responsible to the President, and the President is responsible to—and can be held to account by—the American public.”²⁶
- “Presidential control of agencies ... helps maintain democratic accountability and thereby ensure the people’s liberty.”²⁷

²¹ *Kisor*, 139 S. Ct. at 2413 (Kagan, J.).

²² *Seila Law*, 140 S. Ct. at 2207 (Roberts, C.J.); *see also id.* at 2205 (“[T]he Framers made the President the most democratic and politically accountable official in Government. Only the President (along with the Vice President) is elected by the entire Nation. And the President’s political accountability is enhanced by the solitary nature of the Executive Branch.”).

²³ *Free Enter. Fund*, 561 U.S. at 514 (Roberts, C.J.); *see also id.* at 497 (“The diffusion of power carries with it a diffusion of accountability.”)

²⁴ *Arthrex*, 141 S. Ct. at 1988 (Roberts, C.J.).

²⁵ *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 5 (D.C. Cir. 2016) (Kavanaugh, J.), *reh’g en banc granted*, order vacated (Feb. 16, 2017), on *reh’g en banc*, 881 F.3d 75 (D.C. Cir. 2018), abrogated by *Seila Law*, 140 S. Ct. 2183; *see also* *PHH Corp.*, 881 F.3d 75, 187 (D.C. Cir. 2018), abrogated by *Seila Law*, 140 S. Ct. 2183 (Kavanaugh, J., dissenting) (“The basic constitutional concern with independent agencies is that the agencies are unchecked by the President, the official who is [inter alia] most accountable to the people.”); *id.* (Kavanaugh, J. dissenting) (“[T]he Framers concentrated executive power in a single President on the condition that the President would be nationally elected and nationally accountable.”).

²⁶ *Nat’l Fed’n of Indep. Bus. v. Occupational Safety & Health Admin.*, 595 U.S. 109, 138 (2022) (Breyer, J., dissenting). Although Justice Breyer no longer serves on the Court, Justices Sotomayor and Kagan joined his dissent.

²⁷ *In re Aiken Cnty.*, 645 F.3d 428, 440 (D.C. Cir. 2011) (Kavanaugh, J., concurring).

The presidential accountability claim also features in canonical administrative and structural-constitutional cases.²⁸ For instance, in his celebrated concurrence in *Youngstown Sheet & Tube Company v. Sawyer*—influential for delimiting the boundary between presidential and congressional authority—Justice Robert Jackson asserted that “[e]xecutive power has the advantage of concentration in a single head in whose choice the whole Nation has a part.”²⁹ Further, in *Chevron v. Natural Resources Defense Council*—which, until 2024, was for decades the judiciary’s lodestar in assessing agencies’ interpretations of their governing statutes and which Justices Elena Kagan, Sonia Sotomayor, and Ketanji Brown Jackson still favor³⁰—the Court explains that deference to agencies is appropriate in part based on the presidential accountability claim.³¹

Originalist scholars accredit the presidential accountability claim as historically grounded.³² According to Steven Calabresi and Saikrishna Prakash, “the Constitution’s clauses relating to the President were drafted and ratified ... [in part] to establish one individual accountable for the administration of federal law.”³³ That

²⁸ See, e.g., *Printz v. United States*, 521 U.S. 898, 922–23 (1997) (“The insistence of the Framers upon unity in the Federal Executive—to ensure both vigor and accountability—is well known.”); *Clinton v. Jones*, 520 U.S. 681, 712–13 (1997) (Breyer, J., concurring in the judgment) (“The Founders ... consciously decid[ed] to vest Executive authority in one person ... thereby facilitating accountability.”); *Sierra Club v. Costle*, 657 F.2d 298, 405 (D.C. Cir. 1981) (“[T]he Founders chose to risk the potential for tyranny inherent in placing power in one person, in order to gain the advantages of accountability fixed on a single source.”).

²⁹ 343 U.S. 579, 653 (1952) (Jackson, J., concurring).

³⁰ See *Loper Bright Enterprises v. Raimondo*, 603 U.S. ___, *1–2 (2024) (Kagan, J., joined in relevant part by Sotomayor and Jackson, JJ., dissenting) (arguing that *Chevron* “[f]or 40 years ... served as a cornerstone of administrative law” and “the rule [of *Chevron* deference] is right”).

³¹ 467 U.S. 837, 865 (1984) (While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for [this official] ... to make such policy choices.”); See also *Loper Bright*, at *2 (2024) (Kagan, J., dissenting) (emphasizing the presidential accountability claim in dissenting from the Court’s overturning *Chevron*); Gillian Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1333 (2012) (referring to the *Chevron* doctrine as “[t]he prime embodiment of [the] move to presidential accountability”); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517–18 (justifying *Chevron* because it enables “continuing political accountability [to] be assured, through direct political pressures upon the Executive and through indirect political pressure of congressional oversight”).

³² See STEVEN G. CALABRESI AND CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 3*, 411 (2008); Saikrishna Prakash, *Hail to the Chief Administrator: The Framers and the President’s Administrative Powers*, 102 YALE L.J. 991, 1006–7 (1993).

³³ Steven Calabresi and Saikrishna Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 603 (1994)

“unitary executive was said to be necessary to ensure accountability for all exercises of executive power,” Professor Calabresi asserts.³⁴

Other prominent scholars also endorse the presidential accountability claim. In her landmark 2001 article *Presidential Administration*, then-Professor Kagan praised a robust presidential role in administration because it “advances political accountability by subjecting the bureaucracy to the control mechanism most open to public examination and most responsive to public opinion.”³⁵ That claim is central to her thesis, asserted repeatedly throughout the article.³⁶ Similarly, Lawrence Lessig and Cass Sunstein believe that a “strongly unitary executive can promote ... accountability,” among other values.³⁷ The list of other scholars reaching a similar conclusion is long and illustrious.³⁸

The inverse of the claim that presidential administration enhances accountability is that its absence diminishes it. That corollary also has wide currency.

³⁴ Steven Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 37 (1994); see also John McGinnis, *Presidential Review as Constitutional Restoration*, 51 DUKE L.J. 901, 933 (2001) (stating that “the president is a politically accountable official and has the legitimacy to make policy-based judgments”).

³⁵ Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2384 (2001).

³⁶ See, e.g., *id.* at 2331 (“Presidential administration promotes accountability.”); *id.* at 2252 (stating that it furthers “the values of accountability and effectiveness”); *id.* at 2384 (stating that presidential involvement “promotes the values of administrative accountability and effectiveness”); *id.* at 2336-37 (stating that, concerning “responsiveness to the general electorate ... which should play an important role in any conception of political accountability and therefore in any structuring of administration, the President holds the comparative advantage.”); *id.* at 2341 (“[E]lectorally accountable institutions most possess the legitimacy that such administration requires.”).

³⁷ Lawrence Lessig & Cass Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 2 (1994); see also Cass Sunstein, *Constitutionalism after the New Deal*, 101 HARV. L. REV. 421, 432 (1987) (“The framers rejected a ‘plural executive’ on the ground that the fragmentation of power would ... attenuate accountability.”).

³⁸ See, e.g., Aditya Bamzai & Saikrishna Prakash, *The Executive Power of Removal*, 136 HARV. L. REV. 1756 (2023) (arguing that, if unitary executive theory is rejected, “Congress can ... transform the executive branch into a perpetual and unaccountable bureaucratic machine”); Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 Ala. L. Rev. 1205, 1257 (2014) (arguing that presidential control over agency heads “promotes[] ... political accountability and the legitimacy of agency choices”); JERRY MASHAW, *GREED, CHAOS AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW* 152 (1997) (presenting the argument that delegation to presidentially-directed agency heads can bolster accountability); Peter Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 597 (1984) (“Whatever arrangements are made, one must remain able to characterize the President as the unitary, politically accountable head of all law-administration.”). Other scholars have described this view as dominant, without necessarily endorsing it. See, e.g., Kathryn Watts, *Rulemaking as Legislating*, 103 GEO. L.J. 1003, 1048-49 (2015); Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV., 1253, 1256 (2009); Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 53 (2006); Lisa Schultz Bressman, *Beyond Accountability*, 78 NYU L. REV. 461, 490 (2003).

For instance, Justice Clarence Thomas decries “independent agencies [that] wield substantial power with no accountability to either the President or the people.”³⁹ Justice Brett Kavanaugh considers independent agencies to be “in considerable tension with our nation’s longstanding belief in accountability, and the Framers’ understanding that one person would be responsible for the executive power.”⁴⁰ Justice Antonin Scalia went even further, asserting that independent agencies are “specifically designed *not* to ... share the President’s accountability to the people.”⁴¹ Once again, prominent scholars sound similar notes.⁴²

The claim’s proponents emphasize three presidential powers that, in their view, bolster presidential control and thus accountability: (1) the ability of the President, or the President’s agents, to appoint decision-makers; (2) the authority to remove those decision-makers for any reason; and (3) ex-ante White House review of proposed regulations. The remainder of this Section spotlights accountability arguments concerning these three authorities.

³⁹ *Seila Law*, 140 S. Ct. at 2212 (Thomas, J., concurring in part and dissenting in part).

⁴⁰ Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 MINN. L. REV. 1454, 1472 (2009); *see also Aiken Cnty.*, 645 F.3d at 442 (Kavanaugh, J., concurring) (“[I]ndependent agencies are democratically unaccountable—neither elected by the people or supervised in their day-to-day activities by the elected President.”).

⁴¹ *Freytag v. Comm’r of Internal Revenue*, 501 U.S. 868, 916 (1991) (Scalia, J., concurring in part) (emphasis in original; internal quotation and alterations omitted).

⁴² *See, e.g.,* Lessig and Sunstein, *supra* note 37, at 4 (arguing that post-New Deal limitations on the President’s power “compromised” the framers’ “basic commitments” to, inter alia, “political accountability [and] a degree of centralization in government”); Sunstein *supra* note 37, at 500 (similar).

i. Appointments

During the past few years, the Supreme Court has adopted a more expansive view of the set of government employees whom the Constitution requires to be politically appointed—with the presidential accountability claim providing intellectual ballast for this shift. Most recently, the Court in *United States v. Arthrex* considered whether administrative patent judges are principal officers, whom the Appointments Clause requires to be nominated by the President and confirmed by the Senate, or inferior officers, whom the Clause permits to be appointed by others, including the head of the relevant department, as in *Arthrex*.⁴³ The Court held that, because administrative patent judges issue final decisions, they should be classified as principal officers.⁴⁴ As a solution, the Court provided the Patent Office’s director with the authority to review the judges’ decisions, making the judges non-final decision-makers and thus properly appointed inferior officers.⁴⁵

Arthrex was grounded largely in the presidential accountability claim, with the Court asserting that “[a]ssigning the nomination power to the President guarantees accountability for the appointees’ actions.”⁴⁶ That is because, the Court explained, the powers that myriad officers across the executive branch wield “acquire[] their legitimacy and accountability to the public through ‘a clear and effective chain of command’ down from the President, on whom all the people vote.”⁴⁷ James Madison, the Court reminded readers, endorsed this “great principle of unity and responsibility in the Executive department,” by which “the chain of dependence [will] be preserved” and all executive-branch officers “will depend, as they ought, on the President, and the President on the community.”⁴⁸ By subjecting administrative patent judges to the discretionary review of the Patent Office’s director—and the director to the review of higher-level political appointees and, ultimately, to the President and voters—this chain of dependence is restored. Thus, the *Arthrex* Court concluded, “the exercise of executive power remains accountable to the people.”⁴⁹

⁴³ 141 S. Ct. 1970, 1976 (2021).

⁴⁴ *Id.* at 1985.

⁴⁵ *Id.* at 1986.

⁴⁶ *Id.* at 1979 (emphasis omitted). The Court did not mean merely that appointees would be accountable to the President, but also that they ultimately would be accountable to the public. *See id.* (explaining that this accountability for appointees’ decisions rests on the fact that “the ‘blame of a bad nomination would fall upon the president singly and absolutely’”) (quoting Alexander Hamilton, *The Federalist* No. 77, 517 (J. Cooke ed. 1961)).

⁴⁷ *Id.* (quoting *Free Enter. Fund*, 461 U.S. at 498).

⁴⁸ *Id.* (quoting 1 ANNALS OF CONG. 499 (1789)).

⁴⁹ *Id.* at 1988. Parts I and II of Chief Justice Roberts’ three-part opinion in *Arthrex* serves as the opinion of the Court. The quotations cited *supra* notes 43-48 and accompanying text all are located in Part I of the Roberts opinion. The quotation cited in the text accompanying this footnote is located

Writing in concurrence, Justice Neil Gorsuch advanced a more absolutist position. “Without presidential responsibility there can be no democratic accountability for executive action,” he asserted.⁵⁰ In Justice Gorsuch’s view, presidential administration is not merely a source of democratic accountability; it is the only source.

Arthrex joins a line of judicial opinions invoking accountability as justification for political control over appointments to a wide variety of entities, including the U.S. Tax Court,⁵¹ the federal government’s fiscal control board for Puerto Rico,⁵² and a military tribunal.⁵³ The best-known non-majority opinion that makes the claim is Justice Scalia’s dissent in *Morrison v. Olson*.⁵⁴ That case confronted the Court with a statute that authorizes a specialized court, pursuant to the Attorney General’s

in the conclusion of the Roberts opinion, after Parts I-III. Because this statement located outside of Parts I-III summarizes claims that appear only in Part I, I consider it part of the majority opinion. Justice Thomas’s dissent presents a subtle twist on the Court’s accountability claims. For Justice Thomas, “the accountability feature of the Appointments Clause was not about accountability for specific *decisions* made by inferior officers, but rather accountability for a bad nomination.” *Id.* at 2010 (Thomas, J., dissenting) (internal quotation omitted; emphasis in original). Regardless, Justice Thomas agrees, the clause “provides a direct line of accountability for any poorly performing officers back to the actor who selected them.” *Id.* (quoting Jennifer Mascott, *Who Are “Officers of the United States,”* 70 STAN. L. REV. 443, 447 (2018)).

⁵⁰ *Id.* at 1989 (Gorsuch, J., concurring in part and dissenting in part). Justice Gorsuch also built upon Madison’s chain of dependence, writing, “by breaking the chain of dependence, the statutory scheme denies individuals the right to be subjected only to *lawful* exercises of executive power that can ultimately be controlled by a President accountable to the supreme body, namely ... the people.” *Id.* at 1990 (Gorsuch, J., concurring in part and dissenting in part) (internal quotation omitted, emphasis in original).

⁵¹ See *Freytag*, 501 U.S. at 884 (stating that the Clause’s limitations on who may appoint both principal and inferior officers “ensure[s] that those who wielded [the appointment power] were accountable to political force and the will of the people”); *id.* at 907 (Scalia, J., concurring in part) (asserting that heads of departments, whom the Appointments Clause authorizes to appoint inferior officers “are directly answerable to the President, who is responsible to his constituency for their appointments”).

⁵² See *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1663 (2020) (“[T]he Appointments Clause ... at least in part seeks to advance democratic accountability.”).

⁵³ See *Edmond v. United States*, 520 U.S. 651, 660 (1997) (“declaring that the political branches’ responsibility for appointments of principal officers “was designed to ensure public accountability for both the making of a bad appointment and the rejection of a good one”); *id.* at 663 (asserting that the purpose of the Appointments Clause is “to preserve political accountability”).

⁵⁴ 487 U.S. 654, 697 (1988) (Scalia, J., dissenting). For examples of the dissent’s (later) noteworthiness, see, e.g., Kevin Stack, *The Story of Morrison v. Olson: The Independent Counsel and Independent Agencies in Watergate’s Wake*, in *PRESIDENTIAL POWER STORIES*, Christopher H. Schroeder and Curtis A. Bradley, eds. 2009, at 436 (referring to it as one of Justice Scalia’s “most well-known opinions”); Nick Bravin, *Is Morrison v. Olson Still Good Law?, The Court’s New Appointments Clause Jurisprudence*, 98 COLUM. L. REV. 1103, 1106 (1998) (“In the decade since *Morrison v. Olson* was decided, nearly every float in the parade of horrors predicted by Justice Scalia has come to pass.”).

request, to appoint an independent counsel to investigate high-level executive branch officials.⁵⁵ In a solitary dissent, Justice Scalia argued that this scheme violates the Appointments Clause.⁵⁶ He grounded his opposition to the independent counsel statute on that official’s perceived lack of democratic accountability, envisioning politically “hostile” judges appointing as independent counsel “an old foe of the President.”⁵⁷ Under that scenario, “there would be no one accountable to the public to whom the blame could be assigned.” That situation would contravene the Founders’ intent “when they established a single Chief Executive accountable to the people.”⁵⁸

Taking up Justice Scalia’s torch, Justices Thomas and Gorsuch argued in a 2018 concurrence that “by specifying only a limited number of actors who can appoint inferior officers without Senate confirmation, the Appointments Clause maintains clear lines of accountability—encouraging good appointments and giving the public someone to blame for bad ones.”⁵⁹ Justice Alito summarized this logic in a 2015 concurrence, asserting that the Appointments Clause “ensures that those who exercise the power of the United States are accountable to the President, who himself is accountable to the people.”⁶⁰ Writing separately in that same case, Justice Thomas criticized the Court in the past for permitting structures that, in his view, unconstitutionally insulate government entities from presidential control. That permission, Justice Thomas asserts, empowers “a vast and unaccountable administrative apparatus.”⁶¹

Among scholars, Jennifer Mascott is the leading contemporary voice connecting the appointment power to accountability.⁶² Analyzing the historical record, Professor Mascott concludes that the Framers intended the Appointments Clause to be “a safeguard against the diffusion of accountability.”⁶³ She argues that adopting this founding-era understanding today “would help to bring about greater democratic accountability by making it clearer that department heads are responsible at every step of the way for properly managing their agencies in the best interest of

⁵⁵ Id. at 659-63.

⁵⁶ Id. at 697 (Scalia, J., dissenting).

⁵⁷ Id. at 731.

⁵⁸ Id.

⁵⁹ *Lucia v. Securities & Exchange Commission*, 138 S. Ct. 2044, 2056 (2018) (Thomas, J., concurring).

⁶⁰ *Department of Transportation v. Association of American Railroads*, 575 U.S. 43, 63 (2015) (Alito, J., concurring).

⁶¹ Id. at 91 (Thomas, J., concurring).

⁶² See Mascott, *supra* note 49.

⁶³ Id. at 558 (internal quotation omitted).

the public.”⁶⁴ Her thesis has found a particularly receptive audience with Justice Thomas.⁶⁵

ii. Removal

Courts also claim that for-cause removal protections stymie governmental accountability. A signature feature of agency independence,⁶⁶ these provisions limit political leaders’ ability to remove agency heads. Typically, removal protections prohibit the President from firing an agency head except in cases of “inefficiency, neglect of duty, or malfeasance in office,” or similar language.⁶⁷ Although the precise scope of these exceptions is contested,⁶⁸ there is broad agreement that removal protection is a crucial feature of agency independence and its absence an important mechanism for presidential control.⁶⁹

For generations, courts did not challenge removal protections.⁷⁰ *Free Enterprise Fund v. Public Company Accounting Oversight Board* disrupted this status quo in 2010.⁷¹ In that case, the Court struck down a statute authorizing the

⁶⁴ *Id.* at 564.

⁶⁵ *See Arthrex*, 141 S. Ct. at 2010 (Thomas, J., dissenting) (citing Professor Mascott); *Lucia*, 138 S. Ct. at 2056 (Thomas, J., concurring) (same); *Ortiz v. United States*, 138 S. Ct. 2165, 2186 (2018) (Thomas, J., concurring) (same); *NLRB v. SW Gen., Inc.*, 580 U.S. 288, 314 (2017) (Thomas, J., concurring) (same). Professor Mascott’s article also has been cited in lower federal courts across the country. *See, e.g., United States v. Donziger*, 38 F.4th 290, 296 n.2 (2d Cir. 2022); *Turner v. Howell*, 2023 WL 6509490, at *9, *11 (W.D. Va. Oct. 5, 2023); *Bradshaw v. Berryhill*, 372 F. Supp. 3d 349, 363 (E.D.N.C. 2019).

⁶⁶ *See* Kirti Datla and Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 772 (2013) (noting that “[i]ndependent agencies are almost always defined as agencies with a for-cause removal provision,” and challenging this definition); Rao, *supra* note 38, at 1208 (arguing that the presence or absence of removal protections separates independent agencies from those subject to presidential control).

⁶⁷ Datla and Revesz, *supra* note, at 772.

⁶⁸ *See* Jane Manners and Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1, 12-18 (2021) (summarizing the debate over the contours of these exceptions); *id.* at 67-68 (arguing for a narrow reading of the exceptions).

⁶⁹ *See, e.g., Rao, supra* note 66, at 1208 (presenting a strong version of this claim); Datla and Revesz, *supra* note 66, at 786-89 (offering a weaker version, in which removal protection is one of several indicia of agency independence).

⁷⁰ *See Humphrey’s Executor v. United States*, 295 U.S. 602, 630 (1935) (reasoning that an agency with this feature “was created by Congress as a means of carrying into operation legislative and judicial powers, and as an agency of the legislative and judicial departments”); *but see Myers v. United States*, 272 U.S. 52, 117 (1926) (holding that for agencies performing core executive functions, the President must possess some “power of removing those for whom he can not continue to be responsible”).

⁷¹ 561 U.S. 477 (2010). Other cases between *Humphrey’s Executor* and *Free Enterprise* also involved removal protections. The Court decided these cases narrowly or on other grounds, without disrupting the application of *Humphrey’s Executor* to Congress-created entities in the executive

SEC to remove Public Company Accounting Oversight Board members only for cause.⁷² By convention, SEC commissioners are also considered to have removal protection.⁷³ In other words, SEC commissioners can only remove Board members for cause and, in turn, the President can only remove SEC commissioners for cause. The Court reasoned that this double layer of removal protection insulating Board members from presidential control unconstitutionally intrudes on the President's Article II powers.⁷⁴

The *Free Enterprise Fund* Court's objections to the Oversight Board's removal protections center around the supposed disruption of the accountability chain connecting agencies to the public through the President.⁷⁵ The statute's "diffusion of power carries with it a diffusion of accountability," the Court asserted.⁷⁶ That diffusion contravenes the Constitution's requirement, in the Court's view, that public accountability for government decisions run through the President alone.⁷⁷ "The Constitution that makes the President accountable to the people for executing the laws also gives him the power to do so," including "the authority to remove those who assist him," the Court asserted.⁷⁸ "Without such power, the President could not be held fully accountable."⁷⁹ By the Court's reasoning, public accountability via the President and presidential removal authority are intimately linked—and both are constitutionally required.⁸⁰

Although *Free Enterprise Fund*'s holding was limited to the double layer of removal protection at issue in that case, the Court's accountability-based logic

branch with similar features as the Federal Trade Commission. *See, e.g.*, *Bowsher v. Synar*, 478 U.S. 714 (1986) (declaring unconstitutional a statute authorizing a legislative-branch official, removable for-cause by Congress, to perform executive functions).

⁷² 561 U.S. 492.

⁷³ *See id.* at 487 (noting that the "parties agree" with this characterization); *Datla and Revesz, supra* note 66, at 789 (stating that the SEC, although lacking a for-cause removal statute, is "thought to possess such protection").

⁷⁴ 561 U.S. at 495.

⁷⁵ *See Aziz Z. Huq and Jon D. Michaels, The Cycles of Separation-of-Powers Jurisprudence*, 346, 385-86 (2016) (asserting that the decision "incorporated ... ex post democratic accountability directly into the jurisprudence").

⁷⁶ *Free Enterprise Fund*, 561 U.S. at 497.

⁷⁷ *Id.* at 498 ("Without a clear and effective chain of command, the public cannot [identify who bears responsibility]... . That is why the Framers sought to ensure that ... 'the chain of dependence be preserved; the lowest officers, the middle grade, and the highest will depend ... on the President, and the President on the community.'") (quoting 1 *Annals of Cong.*, at 499 (James Madison)).

⁷⁸ *Id.* at 513.

⁷⁹ *Id.* at 514.

⁸⁰ *See Aziz Z. Huq, Removal as a Political Question*, 65 *STAN. L. REV.* 1, 18 (2013) (arguing that "*Free Enterprise Fund*'s fundamental logic [is] that there is a tight nexus between constitutionally mandated democratic accountability and presidential removal authority").

arguably should apply to other restrictions on the President’s removal authority.⁸¹ Indeed, prominent jurists have taken on that project—with accountability as their emphasis. Justices Thomas and Gorsuch charge that the removal protections blessed by the Court in *Humphrey’s Executor* “subvert[] political accountability.”⁸² Justice Kavanaugh critiques that decision across his judicial opinions and scholarly writings, charging that it authorized agencies divorced “from presidential control and thus from democratic accountability.”⁸³ Similarly, for D.C. Circuit Judge Neomi Rao, removal-protected administrative law judges lack “the essential democratic

⁸¹ See *Free Enterprise Fund*, 561 U.S. at 549 (Breyer, J., dissenting) (arguing that the Court’s holding is “overly broad,” and thus that the Court “must either narrow its rule arbitrarily [or] ... leave in place a broader rule of decision applicable to many other ‘inferior officers’ as well”); Neomi Rao, *A Modest Proposal: Abolishing Agency Independence in Free Enterprise Fund v. PCAOB*, 79 FORDHAM L. REV. 2541 (2011) (“By emphasizing the importance of presidential control and accountability through the removal power, the Court calls into question the constitutionality of the ordinary first layer or agency independence.”).

⁸² *Seila Law*, 140 S. Ct. at 2219 (Thomas and Gorsuch, JJ., concurring in part); see also *Collins*, 141 S. Ct. at 1797 (Gorsuch, J., concurring in part) (“In the case of a removal defect, a wholly unaccountable government agent asserts ... power. ... The chain of dependence between those who govern and those who endow them with power is broken.”). Although the majority opinion in *Seila Law* does not explicitly connect the President’s removal authority to accountability, it comes close. See *Seila Law*, 140 S. Ct. at 2203 (“The [CFPB] Director is neither elected by the people nor meaningfully controlled (through the threat of removal) by someone who is.”); *id.* (asserting that the CFPB’s structure empowers “a single individual accountable to no one” and thus holding that the CFPB director’s for-cause removal protection is unconstitutional).

⁸³ *Aiken Cnty.*, 645 F.3d at 441 (Kavanaugh, J., concurring); see also *id.* at 440 (“Presidential control ... helps maintain democratic accountability.”); *PHH Corp.*, 881 F.3d at 177 (Kavanaugh, J., dissenting) (arguing that executive agencies “are accountable to the President ... [who] in turn is accountable to the people” in part because “those agency heads are removable at will by the President”); Kavanaugh, *supra* note 40, at 1471 (asserting that agencies have “questionable effectiveness and accountability” where the President “exercises minimal control [over agency leaders] and can fire them only for cause”).

Justice Kavanaugh’s critique of for-cause removal protections as weakening presidential accountability predates the *Free Enterprise Fund* Court’s decision. Dissenting from the D.C. Circuit’s earlier opinion in that case, then-Judge Kavanaugh argued:

If the President were stripped of plenary removal power over, say, the Secretary of Defense or the Attorney General, then the President no longer could fully control and be accountable for the exercise of executive power, as the Constitution demands. In other words, if Congress could unduly limit the President’s ability to remove executive officers, the result would be a fragmented, inefficient, and unaccountable Executive Branch that the President would lack power to fully direct and supervise.

Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 537 F.3d 667, 691 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), *aff’d in part, rev’d in part and remanded*, 561 U.S. 477 (2010).

accountability that follows from being removable at will.”⁸⁴ High-profile legal scholars agree.⁸⁵

iii. White House Review

Review of proposed regulations by the Office of Information & Regulatory Affairs (OIRA), a subunit of the White House Office of Management & Budget, is justified as bolstering public accountability in the regulatory process. Although the details vary by presidential administration, OIRA review’s basic framework requires executive agencies to submit “significant” proposed and final rules to OIRA before publication.⁸⁶ For a rule that OIRA deems “economically significant,” the office conducts a cost-benefit analysis to ensure that the rule’s expected benefits exceed estimated costs.⁸⁷ OIRA may also circulate the rule to other White House offices or executive branch agencies for their review.⁸⁸ Beneath this technocratic veneer, this review helps ensure that executive agencies’ regulations align with the President’s views and priorities.⁸⁹

The claimed purpose of these efforts is to increase agencies’ accountability via the President as an elected agent of the people.⁹⁰ From the beginning, proponents of White House regulatory review pitched the mechanism as accountability-enhancing. The preamble to the 1981 executive order that first empowered OIRA to conduct cost-benefit analysis justified the practice as, *inter alia*, “increas[ing] agency accountability for regulatory actions [and] provid[ing] for presidential oversight of

⁸⁴ *Fleming v. Dep’t of Agric.*, 987 F.3d 1093, 1122 (D.C. Cir. 2021) (Rao, J., concurring); *see also id.* (“[A] double layer of independence [for removal-protected ALJs] ... undermines the democratic accountability promoted by vesting all executive power in the President.”). It also breaks the “chain of dependence [that] promotes democratic accountability by ensuring the President is “a single object for the jealousy and watchfulness of the people.” *Id.* at 1113 (quoting Alexander Hamilton, *The Federalist* No. 70); *see also* Rao, *supra* note 66, at 1257 (“[R]emoval may ... promote certain administrative goals such as political accountability.”).

⁸⁵ *See, e.g.*, Bamzai and Prakash, *supra* note 38, at 1762 (arguing that adopting the view of critics of three recent removal cases—*Free Enterprise Fund*, *Seila Law*, and *Collins*—would “transform the executive branch into a perpetual and unaccountable bureaucracy machine”); LAURENCE TRIBE, 1 AMERICAN CONSTITUTIONAL LAW 684 (3d ed. 2000) (expressing concern, without going as far as others cited in this Section, that “a ‘for cause’ limitation on removal that renders political supervision impossible appears troubling from an accountability perspective”).

⁸⁶ Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993).

⁸⁷ *Id.*

⁸⁸ *See* Taylor Riccard, et al., *Office of Management and Budget (OMB): An Overview*, CRS REPORT, June 22, 2023, at 19, <https://crsreports.congress.gov/product/pdf/RS/RS21665/7>.

⁸⁹ *See id.* (“OIRA reviews the content of each rule to ensure that it is consistent with the President’s policy preferences.”).

⁹⁰ *See* Walters, *supra* note 17, at 81 (“[T]he growth of the administrative presidency ... aims to make the President the lodestar for the democratic accountability of the administrative state.”).

the regulatory process.”⁹¹ Five years later, Christopher DeMuth and Douglas Ginsburg—both former OIRA administrators under President Ronald Reagan—highlighted the “president’s politically accountable role” in regulatory review as an advantage of OIRA review.⁹² DeMuth and Ginsburg claimed that, unlike judicial review of regulations, OIRA review “places responsibility in a more politically accountable individual.”⁹³

Writing roughly contemporaneously, Cass Sunstein—who would succeed DeMuth and Ginsburg decades later as President Barack Obama’s OIRA administrator—agreed. According to Professor Sunstein, the “institutional goal” of OIRA review “is to promote electoral accountability and coordination by ensuring that regulatory policy is overseen by people close to the President.”⁹⁴ Sunstein favored White House regulatory review “for reasons of accountability – quite apart from the substantive results it reaches.”⁹⁵ Many other legal academics across the ideological spectrum also extol OIRA review as promoting accountability.⁹⁶

Although courts have not evaluated the legality of OIRA review specifically, they do endorse, on accountability grounds, a presidential role in crafting regulations. For instance, in *Sierra Club v. Costle*—a canonical administrative-law case decided two months after President Reagan’s executive order mandating OIRA review—the D.C. Circuit approved of agencies’ “consider[ation]” of the President’s “contributions to policymaking.”⁹⁷ That presidential involvement is justified because “the executive power under our Constitution ... rests exclusively with the President ... in order to gain the advantages of accountability fixed on a single source.”⁹⁸

⁹¹ Exec. Order No. 12,291, pmb., 46 Fed. Reg. 13,193 (Feb. 17, 1981).

⁹² Christopher DeMuth and Douglas Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1081 (1986).

⁹³ *Id.*

⁹⁴ Cass Sunstein, *Changing Conceptions of Administration*, 1987 BYU L. REV. 927, 939.

⁹⁵ Sunstein, *supra* note 37, at 462.

⁹⁶ *See, e.g.*, Caroline Cecot, *Deregulatory Cost-Benefit Analysis and Regulatory Stability*, 68 DUKE L.J. 1593, 1601 (2019) (“When carefully conducted, [cost-benefit analysis] promotes transparency and accountability, efficient and predictable policies, and targeted retrospective review.”); Kagan, *supra* note 35, at 2383-84 (asserting that White House review of proposed regulations “promotes the values of administrative accountability and effectiveness”); McGinnis, *supra* note 34, 942 (arguing that an “advantage[]” of OIRA review is that experts’ analyses “ultimately would be assessed in political terms because of the president’s politically accountable role,” and “plac[ing] responsibility in [this] ... politically accountable individual” will produce policies that are more politically durable).

⁹⁷ *Sierra Club*, 657 F.2d at 405.

⁹⁸ *Id.* *See also United States Telecom Ass’n v. FCC*, 855 F.3d 381, 413 (D.C. Cir. 2017) (Brown, J., dissenting) (arguing that the “President may attempt to shape an agency’s deliberations ... ensuring the exercise of executive Power is consistent with the publicly-accountable executive,” provided that the President does not violate other accountability-promoting laws in so doing).

B. Critiques and Alternatives

For all its popularity among jurists and scholars, the presidential accountability claim is not the only plausible model of agency accountability. This section begins by highlighting several ways in which the claim is premised on unrealistic assumptions. It then identifies several other means of enhancing agencies' accountability. By cutting through the conceptual haze around the term "accountability," this section sets the table for the analysis to come. With the claim's shortcomings readily apparent and competing conceptions of accountability waiting in the wings, an empirical assessment of whether presidential involvement actually bolsters agencies' perceived accountability is needed.

i. *Cracks in the Façade*

The presidential accountability claim is premised on three questionable assumptions. *First*, the claim assumes that elections encourage accountability to the American people. Several features of presidential elections call this assumption into question.⁹⁹ For one, the fact that presidents are chosen via Electoral College vote—with 48 states apportioning all of their electors on a winner-take-all basis—encourages presidential candidates to appeal to a slim plurality of voters in states with a bare majority of electors.¹⁰⁰ Consequently, presidential candidates have scant reason to look beyond voters in a few key swing states. Electoral College malapportionment—which led to the inauguration of candidates who lost the popular vote twice this century—also challenges the President's supposed electoral responsiveness to the American people.¹⁰¹ The outsized role that primary voters and donors play in presidential campaigns also casts doubt on the President's supposed majoritarian responsiveness.¹⁰²

Second, once in office, presidents exhibit limited responsiveness to public preferences. When Americans in different income brackets evince distinct views on public policy, government decisions reflect wealthy Americans' views but display virtually no connection to low- or middle-income citizens' opinions.¹⁰³ Political

⁹⁹ See Peter Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161, 197-202 (1995) (challenging this claim).

¹⁰⁰ See Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217, 1233-34 (2006)

¹⁰¹ See *Gray v. Sanders*, 372 U.S. 368, 378 (1963) (noting the Electoral College's "inherent numerical inequality").

¹⁰² See Martin Gilens and Benjamin Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSPS. ON POL. 564, 576 (2014); Douglas Kriner and Andrew Reeves, *The Electoral College and Presidential Particularism*, 94 B.U. L. REV. 741, 745-46 (2014); Cynthia Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 997 (1997).

¹⁰³ Martin Gilens, *Inequality and Democratic Responsiveness*, 69 PUB. OP. Q. 778, 778 (2005).

scientists James Druckman and Lawrence Jacobs' research in presidential archives reveals that "presidents make policy by largely ignoring the views of most citizens in favor of affluent and well-connected political insiders."¹⁰⁴ In so doing, they "treat the public as pliable, priming it to focus on personality traits and often ignoring it on policies that fail to become salient."¹⁰⁵ Moreover, presidents often pursue parochial, even unpopular, measures to reward supporters or court swing voters.¹⁰⁶ Further, any electoral imperative to appeal even to narrow subsets of voters arguably evaporates for a second-term President. For all these reasons, it is unsurprising that presidents do not appear to track the median voter's preferences.¹⁰⁷ What's more, even if the proverbial "median voter" were elected President, that outcome would place many Americans' opinions far from the President's positions.¹⁰⁸

Third, the presidential accountability claim presumes that ordinary people can at least credibly threaten to reward or sanction presidents for their actions. This assumption is also subject to challenge. With people's opinions of the President being largely stable and predictable based on their party, there is little evidence that voters hold presidents accountable in this way.¹⁰⁹ Indeed, when voters encounter negative information about a political ally or positive information about an opponent, they often engage in motivated reasoning, massaging that information to fit their existing beliefs rather than updating their priors and rewarding or punishing the relevant actor.¹¹⁰

¹⁰⁴ JAMES DRUCKMAN AND LAWRENCE JACOBS, WHO GOVERNS?, PRESIDENTS, PUBLIC OPINION, AND MANIPULATION (2015).

¹⁰⁵ *Id.*; see also B. DAN WOOD, THE MYTH OF PRESIDENTIAL REPRESENTATION xi (2009) (finding that "presidents typically behave as partisan rather than centrist representatives" and "have consistently adopted a strategy of attempting to persuade those near the political center toward their own positions, rather than altering their own positions toward the median voter").

¹⁰⁶ See DOUGLAS KRINER AND ANDREW REEVES, THE PARTICULARISTIC PRESIDENT 17-18 (2015); Nzelibe, *supra* note 100, at 1240-42; Jonathan Macey, *Confrontation or Cooperation for Mutual Gain?*, 57 L. & CONTEMP. PROBS. 45, 50 (1994).

¹⁰⁷ See Matthew Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 83 (2008).

¹⁰⁸ See William Jacoby, *Is There a Culture War?, Conflicting Value Structures in American Public Opinion*, 108 AM. POL. SCI. REV. 754, 767 (2014) (concluding from a large-scale survey that Americans exhibit "widely distributed, almost diametrically opposing views about which values are important and which are not").

¹⁰⁹ See Frank Newport and Lydia Saad, *Presidential Job Approval*, 85 PUB. OP. Q. 223, 234-35 (2021).

¹¹⁰ Kathleen Donovan, et al., *Motivated Reasoning, Public Opinion, and Presidential Approval*, 42 POL. BEHAVIOR 1201, 1213 (2020). Indeed, the gap in presidential approval for people who share the President's partisan identity versus those that do not is larger than ever: partisan gaps of eighty percentage points have become the norm this century, compared to thirty-point gaps a generation ago. *Id.* at 1208; see also Gary Jacobson, *Partisan Polarization in Presidential Support*, 30 CONGRESS & THE PRESIDENCY 1, 5 (2003).

ii. *Competing Conceptions of Accountability*

Conceptual imprecision pervades judges and scholars' claims concerning agency accountability.¹¹¹ Judicial opinions wax poetic on the importance of agency accountability or their proposed method of augmenting it, but do not spend much ink interrogating the concept.¹¹² Likewise, legal scholars rarely define the term.¹¹³ Instead, academics sometimes deploy the “protean,” “chameleon-like” concept as a catch-all phrase for “many loosely defined political desiderata.”¹¹⁴ Where accountability is defined, those definitions tend to emphasize either an obligation to justify one's actions or the prospect of an external actor meting out rewards or sanctions as a consequence of one's actions.¹¹⁵ When judges and scholars invoke accountability, they often pair the term with concepts like democratic responsiveness, suggesting that they mean accountability through elections.¹¹⁶

¹¹¹ See Thomas Schillemans and Mark Bovens, *The Challenge of Multiple Accountability: Does Redundancy Lead to Overload?*, in MELVIN DUBNICK AND H. GEORGE FREDERICKSON, EDs., ACCOUNTABLE GOVERNANCE 4 (2011) (“Much of the academic literature on accountability is rather disconnected ... The result of this disjointed accountability talk is that accountability seems to be an ever-expanding concept.”); RICHARD MULGAN, HOLDING POWER TO ACCOUNT: ACCOUNTABILITY IN MODERN DEMOCRACIES ix (2003) (“[U]nlike other core democratic values ... accountability has not yet had time to accumulate a substantial tradition of academic analysis, ... [with] little agreement, or even common ground of disagreement, over the [term's] general nature.”).

¹¹² See Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2091 (2005) (“[A]ccountability is not a coherent concept but a fashionable term that judges and scholars are invoking whenever they have a position which favors elected officials in some way.”); Shane, *supra* note 99, at 196 (“[M]ost of the ‘unitary executive’ literature ... gives little sustained attention to what ‘accountability’ means.”).

¹¹³ See Staszewski, *supra* note 38, at 1257 (noting that “legal scholars have devoted surprisingly little attention” to the term's meaning); Jane Schacter, *Ely and the Idea of Democracy*, 57 STAN. L. REV. 737, 755 (2004) (“Accountability ... has gotten a fairly easy pass in the legal scholarship on democracy and constitutionalism.”).

¹¹⁴ Schillemans and Bovens, *supra* note 111, at 4 (“Accountability’ is used as a synonym for many loosely defined political desiderata, such as transparency, equity, democracy, efficiency, responsiveness, responsibility, and integrity.”); Jerry Mashaw, *Structuring a Dense Complexity: Accountability and the Project of Administrative Law*, 5 ISSUES IN LEGAL SCHOLARSHIP 1, 15 (2005) (“Accountability is a protean concept, a placeholder for multiple contemporary anxieties.”); Amanda Sinclair, *The Chameleon of Accountability: Forms and Discourses*, 20 ACCT. ORG. & SOC. 219 (1995) (referring to the term as “chameleon-like”).

¹¹⁵ See, e.g., Michael Sant'Ambrogio and Glen Staszewski, *Democratizing Rule Development*, 98 WASH U.L. REV. 793, 803 (2021); Dorathea Greiling and Katharina Spraul, *Accountability and the Challenges of Information Disclosure*, 34 PUB. ADMIN. Q. 338, 340 (2010); Mark Bovens, *Analysing and Assessing Accountability: A Conceptual Framework*, 3 EUR. L.J. 447, 450 (2007); Rubin, *supra* note 112, at 2073; Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 509 (2002); Jennifer Lerner and Philip Tetlock, *Accounting for the Effects of Accountability*, 125 PSYCHOL. BULL. 255, 255 (1999).

¹¹⁶ A bibliography of sources making this claim would be prolix. For some examples, see, e.g., *Arthrex*, 141 S. Ct. at 1976 (claiming that agencies “acquire[] their legitimacy and accountability to the public through ‘a clear and effective chain of command’ down from the President, on whom all the

As discussed in Part I.A, judicial discourse concerning agency accountability focuses nearly myopically on presidential administration. As such, it overlooks other channels by which agencies may be held accountable.¹¹⁷ I highlight five alternative or complementary mechanisms for buttressing agencies' accountability.

First, Congress-as-lawmaker offers a potent form of accountability for agency decisions.¹¹⁸ After all, Congress arguably has a stronger democratic connection than the presidency. Among those lawmakers that seek reelection, all members of the House and one-third of senators face their voters every two years. Unlike the term-limited President,¹¹⁹ members of Congress can serve indefinitely, maintaining their electoral incentives. Assembling majorities in both chambers of Congress, as well as either the President's support or a congressional supermajority to override a presidential veto, is no easy feat. If any government action can be characterized as responsive to a national will, therefore, it arguably is congressional enactments—not unilateral presidential actions.¹²⁰

people vote.”); *Seila Law*, 140 S. Ct. at 2203 (“The [CFPB] Director is neither elected by the people nor meaningfully controlled (through the threat of removal) by someone who is.”); *Chevron*, 467 U.S. at 865 (“While agencies are not directly accountable to the people,” , “the Chief Executive is, and it is entirely appropriate for the political branch of the Government to make such policy choices.”); Kagan, *supra* note 35, at 2384 (“Presidential administration ... advances political accountability by subjecting the bureaucracy to the control mechanism most open to public examination and most responsive to public opinion.”); MASHAW, *supra* note 28, at 152 (positing that delegations to politically appointed agency officials are “a devise for improving the responsiveness of government to the desires of the general election ... [because] issues of national scope and the candidates' positions on those issues are the essence of presidential politics”); Calabresi, *supra* note 34, at 65 (“The minute some portion of the executive is cut free from the President ... it tends to become swallowed up by ... state and local pressures.”); Peter Strauss & Cass Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 190 (1986) (“[T]he President ... [is] uniquely well-situated to design regulatory policy in a way that is responsive to the interests of the public as a whole. Agency officials, by contrast, are only indirectly accountable.”).

¹¹⁷ See Huq, *supra* note 80, at 53 (noting “plural avenues ... through which public preferences influence bureaucratic actions”). Another conception of accountability emphasizes reason-giving, rather than public responsiveness, as fostering accountability. See *supra* note 115 and accompanying text.

¹¹⁸ See Randolph May, *Defining Deference Down: Independent Agencies and Chevron Deference*, 58 ADMIN. L. REV. 429, 449 (2006) (“Like the President, Congress is politically accountable to the people.”).

¹¹⁹ U.S. CONST. Amd. 22.

¹²⁰ See Shane, *supra* note 99, at 200 (“If bureaucratic accountability to elected politicians is to be used as a structural mechanism aimed at achieving direct responsiveness to public opinion, it would probably make more sense to intensify the influence that Congress ... has over the agencies.”). Curiously, courts often overlook this point. Judges that trumpet Congress's democratic bona fides when promoting textualism or a strict non-delegation doctrine sometimes go silent in separation-of-powers cases, jilting Congress in favor of the President as the supposedly most accountable branch. See, e.g., ANTONIN SCALIA AND BRYAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 397 (2012) (“The sovereign will is made known to us by legislative enactment. And it is made known in no other way.”) (internal quotation omitted).

Further, the legislative process is relatively transparent, with hearings, floor debates, and voting records all publicly accessible. That transparency arguably is a precondition to accountability.¹²¹ After all, an individual kept in the dark cannot evaluate the reasons for a decision or determine whether to reward or sanction the decision-maker. By crafting laws largely in the open, Congress fosters accountability to a greater extent than the more secretive White House.¹²²

It follows that courts that justify striking down laws limiting the President's influence based on a desire to bolster accountability have lost the plot.¹²³ After all, an accountable Congress enacted every law that insulates agencies from the President. And if a durable national majority opposes those laws, an accountable Congress could repeal them. For courts to invalidate those laws because they supposedly inhibit accountability is, the argument goes, exactly backward; they are, in fact, the product of an accountable institution.¹²⁴

Second, Congress-as-overseer can inject an additional dose of accountability into agencies.¹²⁵ Congressional committees hold hundreds of oversight hearings

¹²¹ See Jennifer Shkabatur, *Transparency With(out) Accountability: Open Government in the United States*, 31 YALE L. & POL'Y REV. 79, 83 (2012); Adam Samaha, *Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, 53 UCLA L. REV. 909, 917 (2006).

¹²² See Bijal Shah, *The President's Fourth Branch?*, 92 FORDHAM L. REV. 499, 541 (2023) (discussing how Congress may be more "democratically legitimate" and more "accountable to criteria," like transparency. "that result in good policy"); see also Heidi Kitrosser, *The Accountable Executive*, 93 MINN. L. REV. 1741, 1741 (2009) (discussing the presidency's relative lack of transparency vis-à-vis Congress).

¹²³ Notably, some of the same judges and commentators who valorize presidential control as enhancing accountability when critiquing independence-promoting agency structures also favor a strong nondelegation doctrine as facilitating accountability by compelling Congress to more "tightly control[]" agencies. Justin Walker, *The Kavanaugh Court and the Schechter-to-Chevron Spectrum: How the New Supreme Court Will Make the Administrative State More Democratically Accountable*, 95 IND. L.J. 923, 926-27 (2020); see also *Nat'l Fed'n of Indep. Bus.*, 595 U.S. at 125 (Gorsuch, J., concurring) ("The nondelegation doctrine ensures democratic accountability by preventing Congress from intentionally delegating its legislative powers to unelected officials."); *Gundy v. United States*, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting) (arguing that nondelegation enables "[t]he people ... [to] know, without ambiguity, whom to hold accountable for the laws they would have to follow"); ("The nondelegation doctrine ensure democratic accountability by preventing Congress from intentionally delegating its legislative power to unelected officials.").

¹²⁴ A weaker version of this argument is that both political branches enhance agencies' accountability, and thus the judicial invalidation of a law enacted by an accountable Congress to structure an agency because the law supposedly inhibits an accountable President's ability to influence that agency is, in Professor Huq's phrase, merely "to shuffle around accountability without increasing its net quantum." Huq, *supra* note 80, at 55.

¹²⁵ Cf. Blake Emerson, *Liberty and Democracy Through the Administrative State: A Critique of the Roberts Court's Political Theory*, 73 HASTINGS L.J. 371, 416 (2022) ("It would increase overall democratic legitimacy to tie agencies more closely to congressional preferences than to a president whose democratic credentials are comparatively weaker.").

concerning agencies each year.¹²⁶ Empirical evidence shows that these hearings can be consequential in shifting agency behavior.¹²⁷ Today's congressional committees tend to be broadly representative of the chamber's preferences, in contradistinction to the long-ago committees of ideological outliers.¹²⁸ Accordingly, even when Congress cannot hold agencies accountable via new legislation, oversight offers a measure of accountability to the legislative branch and, ultimately, to voters.¹²⁹

Third, administrative procedures can enhance agencies' accountability to the American people.¹³⁰ Progressive-era scholars argued that public involvement in agency decision-making engenders accountability.¹³¹ Today, a procedural superstructure facilitates public involvement in administration. The Administrative Procedure Act (APA) of 1946 establishes a notice-and-comment procedure for agency rulemakings; agencies must notice any proposed rule in the Federal Register and "give interested persons an opportunity to participate in the rule making" via written submissions.¹³² Advisory committees, meetings with stakeholders, listening sessions, and the like provide additional means for the interested public to influence agencies.¹³³ For Professors Anya Bernstein and Cristina Rodríguez, those contacts add up to "more diverse, frequent, and interactive relationships with the publics and situations [that agencies] regulate than elections could provide."¹³⁴ Those

¹²⁶ Brian D. Feinstein, *Congress in the Administrative State*, 95 WASH. U.L. REV. 1189, 1197 (2018).

¹²⁷ *Id.* at 1194 (reporting that oversight hearings are associated with changed agency behavior for approximately one-fifth of hearing subjects).

¹²⁸ See Brian D. Feinstein, *Congress Is An It: A New View of Legislative History*, EMORY L.J. (forthcoming 2024), at *23-30.

¹²⁹ See Laura Dolbow, *Agency Adherence to Legislative History*, 70 ADMIN. L. REV. 569, 628 (2018) ("Congressional oversight can be a powerful tool ... to promote political accountability").

¹³⁰ See *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 393 (D.C. Cir. 2017) (Brown., J., dissenting) (referring to notice-and-comment requirements and rules limiting agencies' *ex parte* communications as "procedures designed to ensure public accountability").

¹³¹ See Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2081 (2018); see also Christopher Havasy, *Radical Administrative Law*, 77 VAND. L. REV. 647 (2024) (excavating the intellectual history of advocates for greater public participation "to augment the direct democratic accountability of agency policymaking," with particular attention to contexts outside of early-twentieth-century America).

¹³² 5 U.S.C. § 553(c).

¹³³ See Brian D. Feinstein, *Identity-Conscious Administrative Law: Lessons from Financial Regulators*, 90 GEO. WASH. L. REV. 1, 6 (2022) (arguing that structures that elevate underrepresented groups in agency decision-making "can increase democratic accountability"); Brian D. Feinstein and Daniel J. Hemel, *Outside Advisers Inside Agencies*, 108 GEO. L.J. 1139, 1209 (2020) (claiming that agencies' use of advisory committees enhances accountability).

¹³⁴ Anya Bernstein and Cristina Rodríguez, *The Accountable Bureaucrat*, 132 YALE L.J. 3000, 3007 (2023).

interactions “produce accountability” yet are connected to elections “only indirectly, if at all.”¹³⁵

Fourth, providing agencies with multiple principals may optimize accountability. As a descriptive matter, lines on the organizational chart connect agencies not only to Congress and the President, but also to civil society groups, other agencies, and actors within their own agencies via “internal” administrative-law mechanisms.¹³⁶ For some, this approach better advances the goal of agency accountability than would a more parsimonious, hierarchical structure. Most notably, Daniel Walters argues that the existence of “multiple sites at which political actors inside and outside of government” can engage in continued political contestation “enhances democratic accountability.”¹³⁷

Finally, accountability can be served when agencies provide public explanations justifying their decisions.¹³⁸ Consider the judicial hard-look doctrine, which requires agencies to “examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”¹³⁹ In part, that doctrine compels agencies to take public participation seriously because “examin[ing] the relevant data” implies giving due consideration to informed outsiders’ views.¹⁴⁰ According to Professor Glen

¹³⁵ *Id.* at 3004; *See also* Bressman and Vandenberg, *supra* note 38, at 51 arguing that agencies may “better promote political accountability than the White House” because they “better represent public preferences and resist parochial pressures—the asserted aims of political accountability”); Shah, *supra* note 122, at 511 (“[I]f presidential intervention dissuades agencies from soliciting public participation in rulemaking, such presidentialism interferes with accountability.”); Blake Emerson, *The Binary Executive*, 132 *YALE L.J. FORUM* 756, 774 (2022) (explaining that Congress enacted the APA “to enhance public accountability”); Sant’Ambrogio and Staszewski, *supra* note 115, at 803 (“[P]ublic engagement with rulemaking enhances the democratic legitimacy and accountability of federal agencies and the regulations they promulgate.”); Shane, *supra* note 99, at 212 (“Virtually every plausible normative version of accountability seems to depend quite strongly on [inter alia] the availability of multiple pressure points within the bureaucracy.”).

¹³⁶ *See* Gillian Metzger and Kevin Stack, *Internal Administrative Law*, 115 *MICH. L. REV.* 1239, 1250 (2017) (asserting that these internal mechanisms perform a “crucial role” in “ensuring administrative accountability”); *see also* Jon Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 *N.Y.U.L. REV.* 227, 235 (2016) (arguing that apportioning administrative power to multiple rivalrous groups, i.e., agency leaders, civil servants, and the broader public, “promote[s] democratic accountability”).

¹³⁷ Walters, *supra* note 17, at 82.

¹³⁸ *See supra* note 115 and accompanying text.

¹³⁹ *See* *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Corp.*, 463 U.S. 29, 43 (1983) (quotation omitted).

¹⁴⁰ *See* Bressman, *supra* note 38, at 529 (arguing that *State Farm’s* “reasoned-decisionmaking requirement ... may promote accountability by ensuring public participation”); Adam Cox and Cristina Rodríguez, *The President and Immigration Law Redux*, 125 *YALE L.J.* 104, 218 (2015) (arguing the procedures that foster public deliberation may increase agencies’ perceived accountability). Benjamin Eidenson offers another interpretation of the Court’s recent applications

Staszewski, this type of reason-giving requirement “promotes accountability by limiting the scope of available discretion and ensuring that public officials provide public-regarding justifications.”¹⁴¹ In turn, officials’ imperative to provide public-regarding reasons arguably boosts government transparency and models deliberative discourse for citizens, further enhancing accountability.¹⁴²

C. Probing the Public’s Views

Notwithstanding the substantial literature on the subject, we know virtually nothing about whether ordinary Americans believe that presidential involvement can increase agencies’ accountability to them. This lack of knowledge is remarkable, because judicial conceptions of accountability emphasize how presidential control yokes agencies to the people. Indeed, references to “the people” are the dominant throughline in many arguments concerning administrative accountability. Despite the centrality of the public to this discourse, however, regular people’s attitudes on the topic are unknown.

That blind spot is glaring. Increase the President’s influence in administration, and one reduces the relative importance of the other accountability mechanisms discussed in Section I.B.¹⁴³ Thus, privileging one posited accountability mechanism over others could produce a government that is *less* accountable to the people. Given these stakes, the Supreme Court’s efforts to boost presidential control based on evidence-free incantations of the presidential accountability claim are imprudent.

Instead, knowledge of whether ordinary Americans perceive presidential control as enhancing agencies’ accountability to them is needed. This evidence would be probative not because regular people are equipped to compare the presidential accountability claim to some Platonic ideal of accountability. Instead, their beliefs are

of arbitrariness review, in which the Court grants agencies broad deference with respect to the substance of regulatory decisions, instead focusing its attention on ensuring that the executive branch marshaled its electorally-derived political accountability in reaching the decision. See Benjamin Eidenson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 YALE L.J. 1748, 1752 (2021). Professor Eidenson’s “accountability-forcing” conception of arbitrary-and-capricious review connects more to the presidential accountability perspective than to this alternative conception of accountability.

¹⁴¹ Staszewski, *supra* note 38, at 1278.

¹⁴² *Id.* at 1280-83; see also Rubin, *supra* note 112, at 2119 (referring to this form of accountability as fundamental to the administrative state); Nina Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1130 (2010) (“Requiring greater transparency in the agency decision-making process may not only increase accountability for agency action, but also help to deter inappropriate presidential influence.”); Mark Fenster, *Some Opacity about Transparency*, 91 IOWA L. REV. 885 (2006) (considering transparency and accountability to be closely linked).

¹⁴³ See Huq, *supra* note 80, at 52 (“Augmenting presidential control promotes some kinds of accountability while simultaneously undermining others.”).

important because they are the ultimate object of the presidential accountability claim. If regular people do not perceive greater presidential control as enhancing agencies' accountability to them—the claim's purported aim—that notional finding would call the claim's validity into question. To begin to assess the claim, the next Part describes the research design of a set of experiments to shed light on popular perceptions of agency accountability.

II. RESEARCH DESIGN

To examine the extent to which people associate presidential administration with accountability, I conduct a series of preregistered between-subjects online experiments.¹⁴⁴ In brief, each participant reads a vignette concerning a decision that an agency faces. Each vignette includes a description of a proposed policy, short arguments for and against it, the identity of the President at the time, and structural features of the agency making the decision.¹⁴⁵ That final item constitutes the key manipulation, with participants randomly assigned to learn that the agency contains a design feature associated with presidential influence, insulation from the President, or a control condition devoid of information concerning the President's role. After reading their vignette and completing three attention checks interspersed throughout it, participants rate the extent to which they believe the agency's decision-making process is “accountable ... to people like you.”¹⁴⁶

Importantly, the experiments do not define accountability for participants.¹⁴⁷ Participants may believe that presidential control effectuates this value. Alternatively, they may instead—consciously or not—adopt another view of what it

¹⁴⁴ For preregistration information, see *AsPredicted, Popular Perceptions of Presidential Administration*, <https://aspredicted.org/65kt7.pdf>. These experiments received an exemption from the University of Pennsylvania's Institutional Review Board (on file with the author).

¹⁴⁵ Experimental work employing a similar framework is an emerging research area in administrative law scholarship. *See, e.g.*, Kevin Tobia, Daniel E. Walters, and Brian Slocum, *Major Questions, Common Sense?*, 97 S. CAL. L. REV. __ (forthcoming); Brian D. Feinstein, *Legitimizing Agencies*, 91 U. CHI. L. REV. 919 (2024); EDWARD STIGLITZ, *THE REASONING STATE* 189-242 (2022); Cary Coglianesse and Kristin Firth, *Separation of Powers Legitimacy: An Empirical Inquiry into Norms about Executive Power*, 164 PENN. L. REV. 1869 (2016); Edward Stiglitz, *Cost-Benefit Analysis and Public Sector Trust*, 24 SUP. CT. ECON. REV. 169 (2016).

¹⁴⁶ These ratings are arrayed on a seven-point scale, with each point along the scale including a plain-text description: 1- very unaccountable, 2- somewhat unaccountable, 3- slightly unaccountable, 4- neither unaccountable nor accountable, 5- slightly accountable, 6- somewhat accountable, and 7- very accountable. The use of this bipolar ordinal scale—meaning, a scale that ranges from “very unaccountable” to “very accountable” rather than from “not accountable” to “very accountable”—avoids priming participants regarding which end of the scale is favored, and thus mitigates against acquiescence bias. *See* Stefanie Stantcheva, *How to Run Surveys: A Guide to Creating Your Own Identifying Variation and Revealing the Invisible*, NBER Working Paper 30527, at 21 (2023).

¹⁴⁷ Incidentally, judges and legal scholars tend not to define or expand upon the concept either. *See supra* notes 112-114 and accompanying text.

means for an agency to be accountable.¹⁴⁸ Or perhaps they simply attribute outcomes with which they agree to an accountable agency and those which they oppose to be the work of one that has gone rogue. By not steering participants to a particular definition, this research design uncovers what features ordinary people associate with the term under whatever conception of accountability they hold.

This Part presents the details of this research design. It begins with an overview of the policy decisions described in the vignettes. The Part then presents the randomly assigned presidential influence and insulation conditions that are the heart of this research design. It concludes with information on participant recruitment, participant demographics, and the use of attention checks to gauge engagement.

A. Agency Decision-Making Vignettes

All participants read one of two vignettes concerning a proposed policy that, according to the vignette, is under consideration at the Office of Comptroller of the Currency (OCC), which regulates national banks and some other financial institutions. The *fair access vignette* concerns a proposed rule that would require banks to assess loan applications based on borrower characteristics rather than the industry in which the borrower operates. The vignette explains that the proposal is intended to prohibit some banks' practice of "denying loans to gun manufacturers, oil companies, and other businesses operating in industries that those banks don't like." In other words, it would disallow banks from "making lending decisions based on their own views about what industries are good or bad." The vignette, which is grounded in an actual policy proposal,¹⁴⁹ also includes a summary of the principal arguments for and against the measure.

The *climate banking vignette* discusses a proposal to "help limit pollution" by "strengthening limits on lending for banks that finance high-polluting businesses" and "relaxing these limits for otherwise similar banks that do not."¹⁵⁰ Again, the

¹⁴⁸ See *supra* Part I.B.ii (identifying several leading alternatives).

¹⁴⁹ The OCC announced a version of the fair access rule in the waning days of the Trump administration. OCC News Release, *OCC Finalizes Rules Requiring Large Banks to Provide Fair Access to Bank Services, Capital, and Credit*, Jan. 14, 2021, <https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-8.html>. The agency "paused publication" of the rule at the start of the Biden administration, in effect rescinding the final rule. OCC News Release, *OCC Puts Hold on Fair Access Rule*, Jan. 28, 2021, <https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-14.html>.

¹⁵⁰ The text of the climate banking vignette is:

The Office of Comptroller of the Currency (OCC) is a federal agency that sets policies that many banks must follow regarding their lending practices.

[Appointment Condition] [No Appointment Condition] [Removal Condition] [No Removal Condition]

vignette also summarizes the main arguments supporting and opposing the proposal. As with the fair access vignette, the climate banking vignette is loosely based on an actual proposal.¹⁵¹

The OCC is a particularly appropriate setting for these experiments because independent agencies, including the OCC as a functional matter,¹⁵² are the central locus for contestation over presidential control of the administrative state.¹⁵³ Further, within the category of independent agencies, financial regulators like the OCC have emerged as ground zero for these disputes. Autonomy from the White House is a hallmark for financial regulators.¹⁵⁴ Unsurprisingly, then, most recent litigation

[Four years ago, during the Trump administration] [Two years ago, during the Biden Administration], the OCC considered changing its rules to help limit pollution. Specifically, it considered strengthening limits on lending for banks that finance high-polluting businesses, and relaxing these limits for otherwise similar banks that do not. Supporters of this proposal argued that it would reduce climate change, which presents a long-term threat to banks and the economy overall. Opponents argued that trying to limit pollution would distract the OCC from its main job of making sure banks operate safely and soundly.

[Review Condition] [No Review Condition]

¹⁵¹ See Jeremy Kress, *Banking's Climate Conundrum*, 59 AM. BUS. L.J. 679, 718-24 (2022) (reviewing proposed elevated risk weights for climate-sensitive loans in setting bank capital requirements).

¹⁵² Although formally part of the Treasury Department, 31 U.S.C. § 307, the OCC operates with a striking degree of independence. See 12 U.S.C. § 1(b)(1) (“The Secretary of the Treasury may not delay or prevent the issuance of any rule or the promulgation of any regulation by the Comptroller of the Currency, and may not intervene in any matter or proceeding ... unless otherwise specifically provided by law.”); 31 U.S.C. § 321(c) (“Duties and powers of [Treasury personnel] ... are vested in the Secretary except duties and powers ... of [inter alia] the Comptroller of the Currency.”); 44 U.S.C. § 3502(5) (including the OCC on a list of independent agencies); Executive Order 12,866, 58 Fed. Reg. 51,735 (proclaiming that agencies on this list are exempt from OIRA review); 12 U.S.C. § 16 (self-funding the OCC from chartering and examination fees); 12 U.S.C. § 250 (authorizing the OCC to bypass the White House and submit reports and the like directly to Congress); 12 U.S.C. § 2 (authorizing removal prior to the end of a Comptroller’s fixed five-year term only “upon reasons to be communicated by [the President] to the Senate”). See also Datla and Revesz, *supra* note 66, at 769 (listing many of these features as common indicia of agency independence).

¹⁵³ See Short and Shugerman, *supra* note 16, at 525 (observing that “unitary executive theory was revived as a check against ... the power of independent agencies”); see also Part I.A, *supra* (reviewing judges and legal scholars’ involvement in this project); Andrew Restuccia and Jess Bravin, *Why Trump’s Drastic Plan to Slash the Government Could Succeed*, WALL ST. J., Oct. 30, 2023, <https://www.wsj.com/politics/elections/why-trumps-drastic-plan-to-slash-the-government-could-succeed-6828ccbe> (reporting on a presidential candidate’s aim to “eliminate the independence of key federal agencies”).

¹⁵⁴ See Stavros Gadinis, *From Independence to Politics in Financial Regulation*, 101 CALIF. L. REV. 327, 338 (2013) (“Financial regulation has traditionally constituted one of independent agencies’ primary domains.”); Lisa Schultz Bressman and Robert Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 602 (2010) (referring to “financial policy” as “a context where independent agencies long have dominated”).

challenging features of independent agencies as usurping the President's constitutional powers involves financial regulators.¹⁵⁵

B. Treatment Conditions

The critical manipulation in these experiments concerns what information participants view about the President's role in the OCC. This section presents these conditions.

i. Presidential Influence Conditions

By random assignment, some participants view a vignette stating that (1) the President appointed the decision-maker; (2) the President may remove this official for any reason, including if the President disagrees with the official's decisions; (3) the agency must send policy proposals to the White House for its review, or (4) all of the above. The first of these conditions is included because the President's authority to appoint agency officials is a key component of presidential administration.¹⁵⁶ Accordingly, some participants who read the fair access vignette are randomly assigned to a condition that emphasizes that the President selects the relevant agency decision-maker and, in making these selections, chooses individuals who share the President's views and priorities. Specifically, this condition adds the following text to the vignette:

Appointment Condition: *OCC policy is made by political appointees whom President Biden selected, with the Senate's advice and consent. When considering whom to nominate for these positions, the President makes sure that the people chosen share his views.*

The power to remove agency officials at will is another major arrow in presidential administration's quiver.¹⁵⁷ I assess the extent to which participants

¹⁵⁵ See, e.g., *Consumer Fin. Prot. Bureau v. Cmty. Fin. Serv. Ass'n*, No. 22-448 (2023) (challenging aspects of the CFPB's structure); *Jarkesy v. SEC*, 603 U.S. __ (2024) (SEC); *Collins*, 141 S. Ct. 1761 (FHFA); *Seila Law*, 140 S. Ct. 2183 (CFPB); *Lucia*, 138 S. Ct. 2044 (SEC); *Free Enter. Fund*, 561 U.S. 477 (Public Company Accounting Oversight Board).

¹⁵⁶ See *supra* notes 43-65 and accompanying text. For many appointments, the President must obtain the Senate's advice and consent. See U.S. CONST., art. II, § 2, cl. 2 (requiring Senate confirmation for principal officers). As of 2020, approximately two-thirds of presidential appointments require Senate confirmation. See Office of Pers. Mgmt., Plum Data, <https://www.opm.gov/about-us/open-government/plum-reporting/plum-data/> (dataset used for author's calculation).

¹⁵⁷ See *supra* notes 66-85 and accompanying text.

associate the President’s ability to dismiss agency decision-makers with the agency’s accountability via the following condition.

Removal Condition: *OCC policy is made by agency officials whom President Biden may fire at any time and for any reason, including if he disagrees with their decisions.*

The mandate that executive agencies submit proposed rules that are economically significant to OIRA is also considered an important lever for presidential control over those agencies.¹⁵⁸ The following condition describes this situation.

Review Condition: *Before it [adopts a proposal], the OCC must send the proposal to the White House for its review. White House officials will allow the OCC to adopt the proposal only if President Biden’s aides determine that its benefits would exceed its costs.*

Finally, some participants view a vignette that aggregates these three conditions. I label this combined condition the *Full Presidential Influence Condition*.

To examine the extent to which learning of presidential involvement in the OCC’s decision affects participants’ views, I compare responses from participants who read a vignette with one of these four treatment conditions with responses from other participants who were randomly assigned to read a vignette containing an active control condition. This active control condition omits any mention of presidential influence and instead focuses on anodyne features of the agency.¹⁵⁹

¹⁵⁸ See *supra* notes 86-98 and accompanying text.

¹⁵⁹ Active control conditions replace the treatment conditions’ text with other text. In this way, they differ from “passive control” conditions, which simply omit the treatment text. That the active control condition is approximately the same length as the previous two treatment conditions means that participants that may favor longer conditions regardless of the content of those conditions—e.g., because they subconsciously consider vignette length to be a proxy for the thoroughness of the agency’s decision-making process—will not bias the results.

Table 1 displays the text of the fair access vignette with the *Full Presidential Influence* condition side-by-side with the text of this vignette with the control condition. Differences among these conditions appear in italics.¹⁶⁰

¹⁶⁰ The corresponding information concerning the climate banking vignette appears *supra* note 150.

Table 1: Full Influence Condition & Control Condition, Fair Access Vignettes

Full Pres. Influence Condition	Active Control Condition
<p>The Office of Comptroller of the Currency (OCC) is a federal agency that sets policies that many banks must follow regarding their lending practices.</p> <p><i>OCC policy is made by political appointees whom President Biden selects, with the Senate's advice and consent. When considering whom to nominate for these positions, the President makes sure that the people chosen share his views. The President may fire these officials at any time and for any reason, including if he disagrees with their decisions.</i></p> <p>Earlier this year, the OCC noticed that some banks were denying loans to gun manufacturers, oil companies, and other businesses operating in industries that the banks did not like. The OCC is considering a proposal to ban this practice.</p> <p>The proposed policy would require banks to decide whether a law-abiding business qualifies for a loan based only on the strength of that business. The proposal would prohibit banks from making lending decisions based on their own views about what industries are good or bad.</p> <p>Supporters of the proposal argue that it would prevent banks from politicizing access to loans. Opponents argue that banks should have the freedom to decide for themselves to whom they want to lend money, without government interference.</p> <p>The OCC is currently weighing these arguments. It has not yet decided whether to adopt the proposal as policy.</p> <p><i>Before it does so, it must send the proposal to the White House for its review. White House officials will allow the OCC to adopt the proposal only if President Biden's aides determine that its benefits would exceed its costs.</i></p>	<p>The Office of Comptroller of the Currency (OCC) is a federal agency that sets policies that many banks must follow regarding their lending practices.</p> <p><i>The OCC's headquarters is located at 400 7th Street SW, Washington, D.C., in a building constructed in 1969. The OCC's functions are split among ten divisions. It has branch offices throughout the country.</i></p> <p><i>One of the OCC's jobs is to write new regulations. Regulations are rules issued by government agencies that have the force of law. They are published in the Code of Federal Regulations.</i></p> <p>Earlier this year, the OCC noticed that some banks were denying loans to gun manufacturers, oil companies, and other businesses operating in industries that the banks did not like. The OCC is considering a proposal to ban this practice.</p> <p>The proposed policy would require banks to decide whether a law-abiding business qualifies for a loan based only on the strength of that business. The proposal would prohibit banks from making lending decisions based on their own views about what industries are good or bad.</p> <p>Supporters of the proposal argue that it would prevent banks from politicizing access to loans. Opponents argue that banks should have the freedom to decide for themselves to whom they want to lend money, without government interference.</p> <p>The OCC is currently weighing these arguments. It has not yet decided whether to adopt the proposal as policy.</p>

ii. Insulation Conditions

Other participants are randomly assigned to a condition describing a mechanism that insulates agency decision-making from presidential influence. These insulation conditions provide a comparator for the presidential influence conditions and enable testing of the alternative hypothesis that shielding an agency from presidential influence boosts perceived accountability.¹⁶¹

Participants assigned to one of the insulation conditions read the same basic description of the proposed policy as above, along with one of four conditions discussing measures that insulate agency decisions from presidential influence. *First*, a *No Presidential Appointment* condition envisions civil servants—whom the President had no role in hiring and who were not selected based on their political views—as the decision-makers. Participants who are randomly assigned to this condition view the following text.

No Appt. Condition: *OCC policy is made by civil servants, whom President Biden had no role in hiring. When choosing whom to hire, the OCC cannot consider job candidates' political views.*

Second, the inverse of the *Removal* condition involves agency officials whom the President has limited ability to fire and thus are relatively insulated from presidential control.¹⁶² In other words,

No Removal Condition: *OCC policy is made by agency officials whom President Biden may only fire for wrongdoing or neglect of their duties. He cannot fire these officials simply because he disagrees with their decisions.*

Third, some agencies are not subject to OIRA cost-benefit analysis.¹⁶³ This exemption reduces the White House's relative influence over these agencies.¹⁶⁴ To

¹⁶¹ See Shah, *supra* note 122, at 503 (envisioning accountability to the “values ... [of] impartiality and expertise,” where President-driven “[p]oliticized appointments and removal ... reduce administrative accountability”).

¹⁶² See *supra* notes 66-68 and accompanying text.

¹⁶³ See 44 U.S.C. § 3502(5) (listing independent agencies); Executive Order 12,866, 58 Fed. Reg. 51,735 (exempting the listed agencies from OIRA review).

¹⁶⁴ See *supra* notes 86-98 and accompanying text.

test the effect of this feature on participants' views regarding agency accountability, another group of participants is randomly assigned to read the following condition.

No Review Condition: *Before it does so, the OCC must determine whether the proposal's benefits would exceed its costs. Only after it makes this determination may it adopt the proposal. It is not required to seek approval from President Biden or other White House officials.*

Fourth, a Full Insulation Condition combines these three conditions. This condition states that civil servants, whom the President did not appoint and can only remove in limited circumstances, make OCC policy, and that the OCC, not the White House, must perform cost-benefit analysis before finalizing a proposed policy.

iii. Trump/Biden Conditions

Presidential administration is an abstract concept. The identity of the individual serving as President helps ground it in reality. When people evaluate presidential involvement in a decision, their views on the specific individual involved presumably influence their judgments. In this study's fair access vignettes, all of the presidential influence conditions identify Joe Biden as the President. This language raises the concern that participants may respond based on their views of President Biden and his appointees rather than their views of presidential appointment generally.

For the fair access vignettes, the solution is to construct a sample of participants split evenly between Biden and Trump voters in the 2020 presidential election. Doing so allows for separate analysis of Biden and Trump voters. Further, with the sample evenly split, any bias for or against President Biden by, respectively, Biden and Trump voters presumably will net out.

The design of the climate banking vignettes goes a step further. Like the fair access vignettes, the sample for the climate banking vignettes is evenly divided between Biden and Trump voters. In addition to that feature, half of all participants for the climate banking vignettes are randomly assigned to learn that OCC considered this policy "[f]our years ago, during the Trump administration." The other half learn that OCC's consideration occurred "[t]wo years ago, during the Biden administration." For those participants who view a treatment condition, other

language in their assigned vignette further reinforces the Trump or Biden administration’s involvement.¹⁶⁵

This research design allows for the collection of data concerning four groups: Trump voters who view a vignette concerning the Trump administration, Trump voters who view a Biden administration vignette, Biden voters who view a Trump vignette, and Biden voters who view a Biden vignette. Data on all four of these combinations enables more fine-grained analysis. For instance, one can assess the extent to which partisan alignment between participants and the President drives support for presidential administration. One can also examine whether this level of support is symmetrical, viz. whether Biden voters viewing a Biden vignette evince similar support for presidential administration as Trump voters viewing a Trump vignette.

* * *

By way of summary, Table 2 identifies the vignettes and conditions included in this research design.

Table 2: Vignettes and Conditions

	Fair Access Vignette		Climate Banking Vignette	
<i>President Conditions:</i>	Biden	Trump	Biden	Trump
<i>Treatment & Control Conditions</i>				
Full Pres. Influence	✓		✓	✓
Appointment	✓			
Removal	✓			
WH Review	✓			
Full Insulation	✓		✓	✓
No Appointment	✓			
No Removal	✓			
No WH Review	✓			
Active Control	✓		✓	✓

¹⁶⁵ For instance, participants assigned to a climate banking vignette with the *Appointment* condition and the statement that Donald Trump served as President at the time read that “OCC policy is made by political appointees whom President Trump selected, with the Senate’s advice and consent.”

As Table 2 shows, participants who view a fair access vignette are randomly assigned to any one of the aforementioned treatment (or control) conditions. All participants who view a fair access vignette read that the OCC considered the policy during the Biden administration. For the climate banking vignette, participants can only be randomly assigned to the *Full Presidential Influence* condition, *Full Insulation* condition, or control condition. Half of participants viewing this vignette learn that the episode occurred during the Biden administration, the other half learn that it occurred during the Trump administration, by random assignment.

C. Sample Construction

A power analysis shows that a sample size of approximately 350 participants per condition is needed to provide sufficient power to detect a relatively small population effect size.¹⁶⁶ Given the likelihood that some individuals will fail at least one of the three attention checks, I set the recruitment target at 450 participants per condition. With 15 discrete experimental conditions and each participant reading a single vignette in this between-subjects research design, a pool of at least 6,750 participants is needed.

Participants were obtained via Prolific, an online recruitment platform.¹⁶⁷ They completed a three-minute survey and were compensated approximately \$1.¹⁶⁸ Among the 6,996 individuals recruited for this study, 5,387 (77.0 percent) passed all

¹⁶⁶ G*Power statistical software reports that detecting a modest effect size corresponding to Cohen's $d = 0.16$ (at 80% power, $\alpha = 0.10$, one-tailed difference of means test) requires a sample size of 353 per group. See Franz Faul, et al., *G*Power 3: A Flexible Statistical Power Analysis Program for the Social, Behavioral, and Biomedical Sciences*, 39 BEHAVIOR RESEARCH METHODS 175 (2007) (introducing the latest version of G*Power software); see also Jacob Cohen, *A Power Primer*, 112 PSYCH. BULLETIN 155, 157 (1992) (labeling an effect size of 0.20 in a mean difference test as "small"); accord Feinstein, *supra* note 145 (finding that exposing participants to a condition stating that an administrative agency utilized apolitical expertise in making a decision is associated with a statistically significant increase in participants' perceived legitimacy of that agency, where, for this expertise condition versus a control condition, Cohen's $d = 0.19$ across three agency vignettes).

¹⁶⁷ For the advantages of platforms like Prolific, see, e.g., Eyal Peer, et al., *Data Quality of Platforms and Panels for Online Behavioral Research*, 54 BEHAVIOR RES. METHODS 1643 (2022) (finding that Prolific's users are more diverse and exhibit greater attention, comprehension, and reliability compared to users of competing recruitment platforms); Alexander Coppock, *Generalizing from Survey Experiments Conducted on Mechanical Turk: A Replication Approach*, 7 POL. SCI. RES. METHODS 613, 613-14 (2019) (stating that online platforms tend to produce similar results as do samples that are nationally representative); Adam Berinsky, Gregory Huber, and Gabriel Lenz, *Evaluating Online Labor Markets for Experimental Research: Amazon.com's Mechanical Turk*, 20 POL. ANALYSIS 351, 352 (2012) (stating that online platforms like Prolific tend to provide more nationally representative samples than does recruiting participants in-person).

¹⁶⁸ That payment is equivalent to a pro rata hourly rate of \$20, which exceeds the rate found to foster attentive participation. See Adriana Robertson and Albert Yoon, *You Get What You Pay For: An Empirical Examination of the Use of MTurk in Legal Scholarship*, 72 VAND. L. REV. 1633, 1666 (2019). To recruit a sufficient number of Trump voters, some participants received slightly more than \$1.00. The survey was administered using Qualtrics.

three attention checks and were thus included in the analysis.¹⁶⁹ Appendix Table A1 reports demographic features of this sample.

III. ACCOUNTABILITY EXPERIMENTS

This Part assesses the extent to which agency design structures that facilitate or hinder presidential influence affect ordinary people’s perceptions of whether those agencies are accountable to people like them. It begins by examining the potential connection between several core features of presidential administration and perceived accountability. It then pivots to investigate the inverse set of claims: that greater insulation from presidential control is associated with decreased perceptions of accountability.

A. Study 1: Presidential Administration Does Not Increase Perceived Accountability

Study 1 compares perceptions of an agency’s accountability for participants randomly assigned to read a vignette emphasizing the President’s role in the agency versus participants who did not receive this information. After reading their vignette and completing several attention checks, participants rated their perception of the agency’s accountability on a seven-point Likert scale.

i. Main Results

Table 3 provides the first window into these scores. It reports the mean and median accountability scores for participants who view the Full Presidential Influence condition—that is, a combination of the appointment, removal, and review conditions—compared to participants who view the control condition.

¹⁶⁹ Two of these attention checks require participants to recall basic aspects of the vignette. For instance, the climate banking vignette includes the question “What problem does the proposal seek to address?” Participants must select “pollution” from a list of four subjects. The third attention check, common to both vignettes, is an instructional manipulation check. This check involves a paragraph of text followed by a question; buried in the paragraph is an instruction to ignore the subsequent question and simply check a particular response. Specifically:

Research shows that people’s state of mind affects their views about government decisions. Accordingly, we are interested in understanding your state of mind. Specifically, we want to determine whether you take the time to read directions. Please ignore the question below and instead select “all of the above” as your answer. Yes, that’s right: ignore the question and just check “all of the above.”

Which of the following best describes how you are currently feeling? (a) Content, (b) Alert, (c) Distracted, (d) All of the above

See Tobias Gummer, et al., *Using Instructed Response Items as Attention Checks in Web Surveys: Properties and Implementation*, 50 SOC. METHODS & RES. 238, 239 (2021)

Table 3: Accountability Scores: Full Presidential Influence & Control Conditions

Vignette	Condition	N	How accountable is the OCC to people like you? (1 = very unaccountable; 7 = very accountable)	
			Mean (Std. Dev.)	Median (Med. Abs. Dev.)
Both	Full Pres. Influence	1,110	3.43 (2.03)	3 (1.82)
	Active Control	1,111	3.82 (2.00)	4 (1.76)
Fair Access	Full Pres. Influence	361	3.56 (2.03)	3 (1.80)
	Active Control	355	4.14 (2.05)	4 (1.76)
Climate Banking	Full Pres. Influence	749	3.36 (2.03)	3 (1.82)
	Active Control	756	3.67 (2.00)	4 (1.75)

Climate banking vignettes include *Full Pres. Influence* condition + Biden admin. (n = 363), *Full Pres. Influence* + Trump admin. (n = 386), active control condition + Biden admin (n = 378), and active control condition + Trump admin (n = 378). “Both” refers to all fair access and climate banking vignettes that include either the *Full Pres. Influence* or active control condition.

Remarkably, the table shows that participants who view the Full Presidential Influence condition tend to assign lower accountability scores than those who view the active control condition. Across vignettes, the median score for participants in the former group is a full point lower than for the latter group.¹⁷⁰ On a seven-point scale where two-thirds of responses fall within a four-point range,¹⁷¹ that one-point difference is substantial.

Concerning mean scores, participants who are exposed to the Full Presidential Influence condition rate the agency’s accountability 0.398 points lower than participants who view the control condition. That difference in means is statistically significant at conventionally accepted levels.¹⁷² Statistically significant differences

¹⁷⁰ This difference in medians is statistically significant. From a nonparametric equality-of-medians test, $\chi^2 = 12.858$, $p < 0.001$.

¹⁷¹ For participants that view one of these two conditions, the mean score is 3.63 and the standard deviation is 2.02.

¹⁷² SE = 0.085, $t(2200) = -4.659$, $p < 0.001$. All differences in means reported in the Article are calculated via two-tailed Welch’s t-tests.

also persist when one examines the fair-access and climate-banking vignettes separately.¹⁷³ The differences in the distributions of scores assigned by participants who viewed the Full Presidential Influence condition versus the control condition are also statistically significant.¹⁷⁴ These relatively lower means, medians, and distributions for the *Full Presidential Influence* condition show precisely the opposite of what the presidential accountability claim predicts.

ii. Components of Presidential Administration

Thus far, this section has shown that people do not perceive presidential powers concerning appointment, removal, and regulatory review *in combination* to boost accountability. Indeed, the evidence points in the opposite direction: these mechanisms reduce perceived accountability. But what about when each power is considered separately? After all, the possibility exists that aggregating multiple mechanisms into a single condition cancels out any cross-cutting effects that individual mechanisms may have. To address this possibility, I randomly assign other participants to view different versions of the fair access vignette, each with a single presidential control mechanism.

Figure 1 shows the mean accountability scores for participants who read a fair access vignette with the appointment, removal, *or* review conditions. For comparison, the figure also includes the *Full Presidential Influence* and control conditions.

¹⁷³ For the fair access vignette, mean accountability scores assigned by participants that read the *Full Presidential Influence* condition are 0.584 points lower than the scores for those that read the control condition (SE = 0.152, $t(716) = -3.848$, $p < 0.001$). For the climate banking vignettes, the scores from participants that read *Full Presidential Influence* are 0.313 points lower (SE = 0.103, $t(1502) = -3.036$, $p = 0.002$).

¹⁷⁴ A Wilcoxon rank-sum test reveals that the former distribution is markedly lower than the latter. (In other words, it is shifted left compared to the latter. For both vignettes combined, $z = -3.329$, $p < 0.001$. For the fair access vignette, $z = -3.765$, $p < 0.001$. For the climate banking vignette, $z = -3.299$, $p = 0.001$).

Throughout this Part, I report both the results of (parametric) t-tests for differences in means and (non-parametric) Wilcoxon rank-sum tests for differences in distributions. I do so because reporting means concerning a seven-point scale assumes that participants view the scale as an interval variable, viz. they must see the difference between, say, 5 and 6 as equivalent to the distance between 6 and 7. The alternative is that participants consider the scale to be ordinal. In other words, a score of 7 indicates greater accountability than a 6, which in turn conveys greater accountability than a 5, but the differences between these scores are not necessarily equal. Under this alternative, reporting medians may be more appropriate than means. Further, and again under this alternative, the rank-sum test would be the appropriate test for whether differences in the distributions of scores for the *Full Presidential Influence* versus the control condition are statistically significant. I am agnostic between these alternatives, and thus report the results of both tests.

Figure 1: Perceived Accountability – Presidential Influence Conditions vs. Control Condition

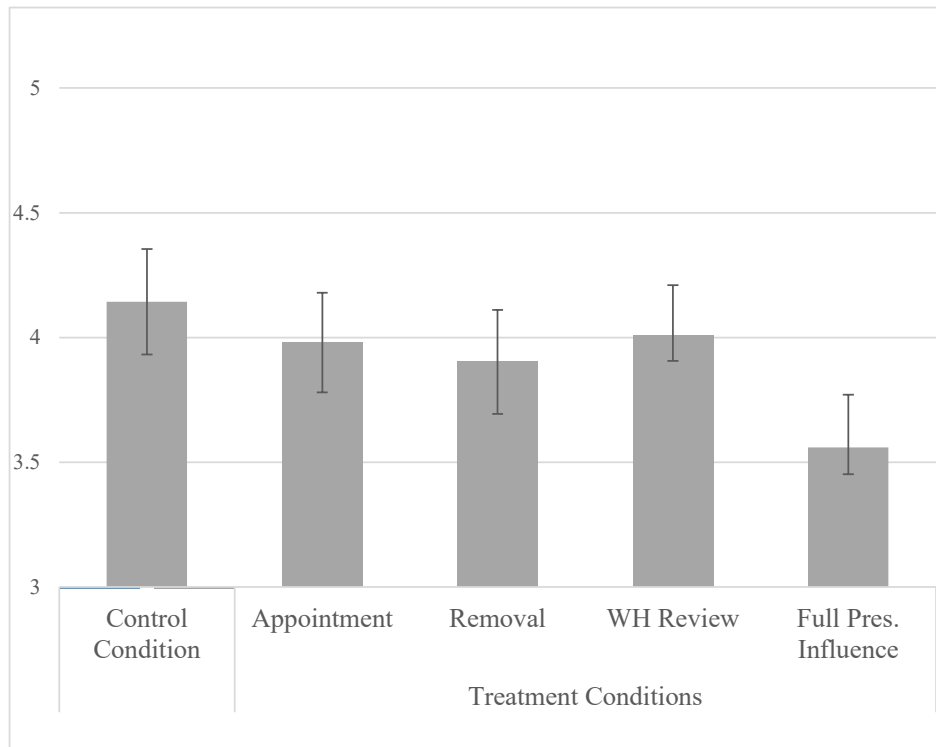


Figure shows participants' mean accountability scores on a 1-7 scale. *See supra* note 146 (providing these descriptions). Bars denote estimated difference in means. Whiskers identify 95 percent confidence intervals. Observations: Control = 355, *Appointment* = 353, *Removal* = 339, *Review* = 358, *Full Pres. Influence* = 335.

As the overlapping 95 percent confidence intervals in the figure show, one cannot reject the null hypothesis that the mean accountability scores for participants who view the appointment, removal, or review conditions are indistinguishable from the score for participants who view the control condition.¹⁷⁵ These conditions also have the same median (four) across the board. Further, one cannot reject the null hypothesis that their distributions are equivalent.¹⁷⁶

¹⁷⁵ Compared to the control condition, the difference of means (*b*) for the *Appointment* condition is -0.164 (*SE* = 0.148, *t*(705) = -1.103, *p* = 0.271; for *Removal*, *b* = -0.241, *SE* = 0.151, *t*(694) = -1.103, *p* = 0.271; and for *White House Review*, *b* = -0.135, *SE* = 0.148, *t*(717) = -0.916, *p* = 0.360.

¹⁷⁶ I reach this conclusion in two ways. First, via a series of pairwise Wilcoxon rank-sum tests (Mann-Whitney *U* tests) with the following results: appointments vs. control condition, *z* = -1.192, *p* = 0.233; removal vs. control, *z* = -1.665, *p* = 0.098; and review vs. control, *z* = 1.022, *p* = 0.307. Second, a Kruskal-Wallis test with accountability score as the ordinal dependent variable and the condition that each participant viewed as the independent variable also yields null results ($\chi^2 = 2.921$, *p* = 0.393).

iii. Partisan Dynamics

In light of these results, a natural next question is whether participants' views of the *current* President influence their responses. After all, partisan congruence with the incumbent administration sways people on a host of issues.¹⁷⁷ Accordingly, participants' opinions of the incumbent President may drive their assessments of an agency's decision—irrespective of the substance of the decision or the procedures that the agency used to reach it. If that is the case, then these null results may mask cross-cutting partisan effects, viz. that Democrats consider agencies to be highly accountable, and Republicans consider them to be highly *unaccountable*, during Democratic administrations, and vice versa.

The climate banking vignettes allow for testing this possibility. Recall that, by random assignment, approximately half of the participants viewing these vignettes learned that the agency made its decision during the Biden administration. In addition, those participants who viewed a treatment condition learned that President Biden exerted influence over the agency, e.g., via appointments, the power to remove, or White House regulatory review. All other participants who viewed a climate banking vignette were presented with identical information concerning President Trump.

This aspect of the climate banking vignettes' research design enables separate analysis for each type of voter (Biden or Trump) presented with a vignette set in each presidential administration. Figure 2 displays differences in mean accountability score for participants that view the *Full Presidential Influence* condition versus the control condition, reported separately for each of these subgroups.

¹⁷⁷ See Atif Mian, Amir Sufi, and Nasim Khoshkhoh, *Partisan Bias, Economic Expectations, and Household Spending*, 105 REV. ECON. & STAT. 493, 493 (2023) (reporting that “partisan bias exerts a significant influence on survey measures of economic expectations”); John Bullock and Gabriel Lenz, *Partisan Bias in Surveys*, 22 ANN. REV. POL. SCI. 325, 326 (2019) (discussing similar findings on other subjects).

Figure 2: Differences in Perceived Accountability – Full Presidential Influence vs. Control Condition, by Partisan Alignment

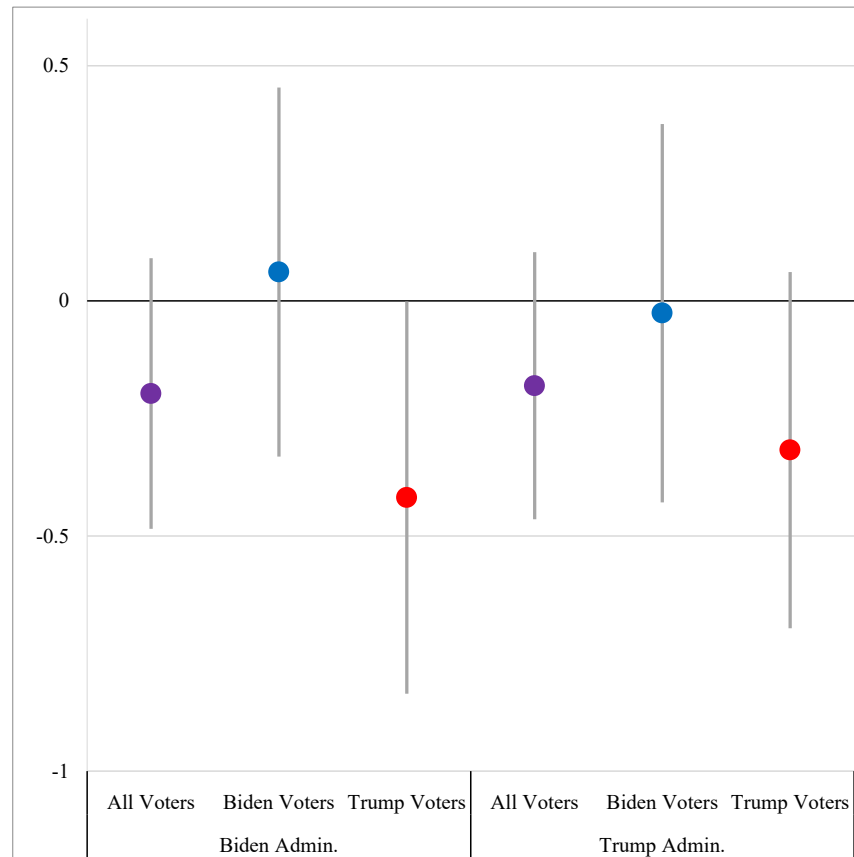


Figure shows the difference in mean accountability scores for participants that view the *Full Pres. Influence* versus the active control condition. Scores are on a 1-7 scale, with textual descriptions of each category visible to participants. *See supra* note 146. Points denote estimated difference in means. Lines show 95 percent confidence intervals. For ease of interpretation, participants who voted for Joe Biden in 2020 appear in blue, those who voted for Donald Trump are in red, and aggregates of the two categories are in purple.

The figure provides no support for the presidential accountability claim and limited support for the notion that partisan dynamics drive agencies' perceived accountability. Concerning the presidential accountability claim, with the 95 percent confidence intervals crossing zero for all but one subgroup, we cannot reject the null hypothesis that there is no relationship between presidential administration and perceived accountability for most subgroups.¹⁷⁸ Partisan dynamics do not appear to crowd out any effect of presidential influence on perceived accountability.

¹⁷⁸ An unreported analysis of the differences in the distributions of scores separately for each subgroup reinforces this null finding. Wilcoxon rank-sum tests for each of the subgroups in Figure 2 produce

B. Study 2: Agency Independence Does Not Increase Perceived Accountability, But Compares Favorably to Presidential Administration

The presidential accountability claim holds that greater White House involvement in agencies boosts their perceived accountability. The inverse of the claim is that greater *insulation* from the President *reduces* accountability. Study 2 tests this assertion. As before, study participants read a vignette involving an agency decision-making process. Some participants are randomly assigned a vignette with information indicating that the agency is shielded from presidential influence. Mirroring the treatment conditions in Study 1, these conditions are labeled *No Appointment*, *No Removal*, and *No White House Review*, plus a *Full Insulation Condition* that combines all three. This section presents the results of Study 2.

i. Main Results

Table 4 reports topline results: the mean and median accountability scores for participants who read the Full Insulation condition compared to the scores for participants who view the control condition.

either null results or results that are statistically significant at conventionally accepted levels but directionally contrary to the presidential accountability claim.

Regression analysis confirms this finding. In models regressing accountability scores on a three-way interaction (*Full Pres. Influence Condition * President Trump * Trump Voter*) and all of its component parts, the only coefficient estimate that achieves statistical significance corresponds to Trump voters that view a vignette set during the Biden administration. In other words, only these Trump voters viewing a Biden-era vignette are more likely to see presidential influence detracting from perceived accountability. Specifically, for a model that adds a 3-way interaction term and its component parts to Model 5 in Appendix Table A2, the coefficient estimate $\beta_{Full Pres. Influence Cond * Trump voter} = -0.448$, $SE = 0.261$, $p = 0.087$. For the other combinations of conditions, p -values range from 0.206 to 0.756.

Table 4: Accountability Scores: Full Insulation & Control Condition

Vignette	Condition	N	How accountable is the OCC to people like you? (1 = very unaccountable; 7 = very accountable)	
			Mean (Std. Dev.)	Median (Med. Abs. Dev.)
Both	Full Insulation	1,093	3.67 (2.00)	4 (1.76)
	Active Control	1,111	3.82 (2.00)	4 (1.76)
Fair Access	Full Insulation	339	3.85 (2.00)	4 (1.74)
	Active Control	355	4.14 (2.05)	4 (1.76)
Climate Banking	Full Insulation	754	3.59 (1.99)	4 (1.74)
	Active Control	756	3.67 (1.96)	4 (1.75)

Climate banking vignettes include *Full Insulation* condition + Biden admin. (n = 393), *Full Insulation* + Trump admin. (n = 361), active control condition + Biden admin (n = 378), and active control condition + Trump admin (n = 378). “Both” refers to all fair access and climate banking vignettes that include either the *Full Insulation* or active control condition.

As the table shows, participants who view the Full Insulation condition assign lower accountability scores to the agency’s decision-making process than do participants who view the control condition.¹⁷⁹ That statistically significant difference is surprising. Recall that participants who view the Full Presidential Influence condition also assign lower accountability scores than do participants who view the control condition.¹⁸⁰

How can people both perceive that the President’s influence lowers accountability *and* insulation from the President also lowers accountability? One possibility is that when people are compelled to consider how policies are developed—whether with presidential influence or by civil servants acting independently of the White House—they focus on the downsides regardless of which approach to

¹⁷⁹ The difference in means is -0.156 (SE = 0.085, $t(2203) = -1.831$, $p = 0.067$; equality of medians test: $\chi^2 = 4.253$, $p = 0.039$; and rank-sum test: $z = -1.920$, $p = 0.055$.

¹⁸⁰ See *supra* notes 170-172 (reporting these differences).

policymaking they view. That possibility calls to mind the quotation, apocryphally attributed to Otto von Bismarck, that “laws are like sausages” in that “it is better not to see them being made.”¹⁸¹

Importantly, the difference in accountability scores for participants who view the Full Insulation condition (in this section) versus the control condition is much larger than the difference for participants who view the *Full Presidential Influence* condition versus the control condition (in the previous section). Essentially, *the decrease in perceived accountability associated with learning that the White House possesses appointment, removal, and review authorities is over 2.5 times larger than the decrease associated with learning that the agency is insulated from these sources of presidential influence.*¹⁸²

¹⁸¹ See Steven Luxenberg, *A Likely Story ... And That's Precisely the Problem*, WASH. POST, Apr. 17, 2005, <https://www.washingtonpost.com/archive/opinions/2005/04/17/a-likely-story-and-thats-precisely-the-problem/b024d6c7-2deb-4dd3-a06b-9008b06930d4/> (providing this quotation).

Another possibility is that, by encouraging participants to focus their attention on the President's influence (or lack thereof), information in these treatment conditions “crowded out” other information within participants' memories that they would have otherwise considered when evaluating the agency's accountability to people like them. See Timothy Wilson, et al., *Focalism: A Source of Durability Bias in Affective Forecasting*, 78 J. PERSONALITY & SOC. PSYCH. 821, 822 (2000) (referring to this phenomenon as “focalism,” a cognitive bias under which people place undue weight on accessible information). In this telling, the crowded-out information—e.g., greater explanation of the policy's benefits—would have boosted participants' accountability scores above some baseline. That the experiments instead focused participants' attention on information concerning the president's relative influence over the agency therefore led to lower accountability scores.

The fact that the treatment conditions are compared to an active control condition that contains *other information*, however, should militate against this possibility. After all, it is unclear why information about an agency's relative susceptibility to presidential influence would trigger focalism to a greater extent than would information in the active control condition. Nonetheless, one cannot rule out this possibility. To account for the possibility that focalism lowers accountability scores for all conditions relative to the active control condition, the next section compares presidential influence treatment conditions directly to insulation conditions (i.e., without reference to the active control condition). See Figure 3, *infra*.

¹⁸² See *supra* notes 165, 179 (reporting that these respective differences of means are 0.398 and 0.156).

ii. Components of Agency Insulation

Next, I examine how individual elements of agency insulation from the White House affect perceived accountability. To do so, I randomly assign new groups of participants to view different versions of the fair access vignette, each with a different insulation condition: *No Appointment*, *No Removal*, or *No White House Review*. For all three insulation conditions, one cannot reject the null hypothesis that accountability scores are no different for participants who view the insulation condition than for those who view the control condition.¹⁸³

How do these insulation conditions compare to the previous components of presidential administration? Is there an appreciable difference in accountability scores for participants who view an insulation condition versus the corresponding presidential influence condition (e.g., *No Appointment* vs. *Appointment*)?

Here, the answer is a qualified yes. Specifically:

- Learning that the President did not appoint the relevant agency decision-maker is associated with a mean accountability score that is 0.30 points higher than the mean score provided by participants who read that the President appointed that individual.¹⁸⁴ This difference in means is statistically significant at the $p < 0.05$ level.
- Learning that the President can only remove this official for-cause is associated with a 0.25-point higher accountability score, on average, compared to the scores assigned by participants viewing that the President can remove the official at-will.¹⁸⁵ This difference is significant at $p < 0.10$.
- One cannot reject the null hypothesis that cost-benefit analysis undertaken by White House personnel versus cost-benefit analysis by agency employees has no connection to accountability scores.¹⁸⁶

¹⁸³ For *No Appointment* versus the control condition, the difference of means is 0.135 (SE = 0.152, $t(272) = 0.893$, $p = 0.372$). The same null result obtains concerning differences in distributions; rank-sum test z -score = -0.707, $p = 0.497$. For *No Removal* versus the control condition, the difference of means is -0.007 (SE = 0.151, $t(676) = 0.044$, $p = 0.965$); rank-sum test z -score = 0.096, $p = 0.923$. For *No Review* versus the control condition, the difference of means is -0.052 (SE = 0.152, $t(690) = -0.344$, $p = 0.731$); rank-sum test z -score = 0.460, $p = 0.656$.

¹⁸⁴ SE = 0.148, $t(659) = 2.016$, $p = 0.044$. Further, the distribution of scores for those viewing *No Appointment* is right-shifted compared to those viewing *Appointment*. Rank-sum test z -score = 1.984, $p = 0.047$.

¹⁸⁵ SE = 0.150, $t(659) = 1.684$, $p = 0.093$. Rank-sum test z -score = 1.676, $p = 0.094$.

¹⁸⁶ $b = 0.077$, SE = 0.148, $t(696) = 0.519$, $p = 0.604$. Rank-sum test z -score = 0.591, $p = 0.591$.

For another perspective on these differences, Figure 3 displays the differences in mean accountability scores for participants assigned to each insulation condition minus the scores for the corresponding presidential influence condition. For example, the point corresponding to “No Appt. vs. Appt.” signifies that the difference in mean accountability score for participants who viewed the No Appointment condition is 0.30 points higher than the mean score for participants who viewed the *Appointment* condition.

Figure 3: Differences in Perceived Accountability – Insulation Condition vs. Presidential Influence Condition

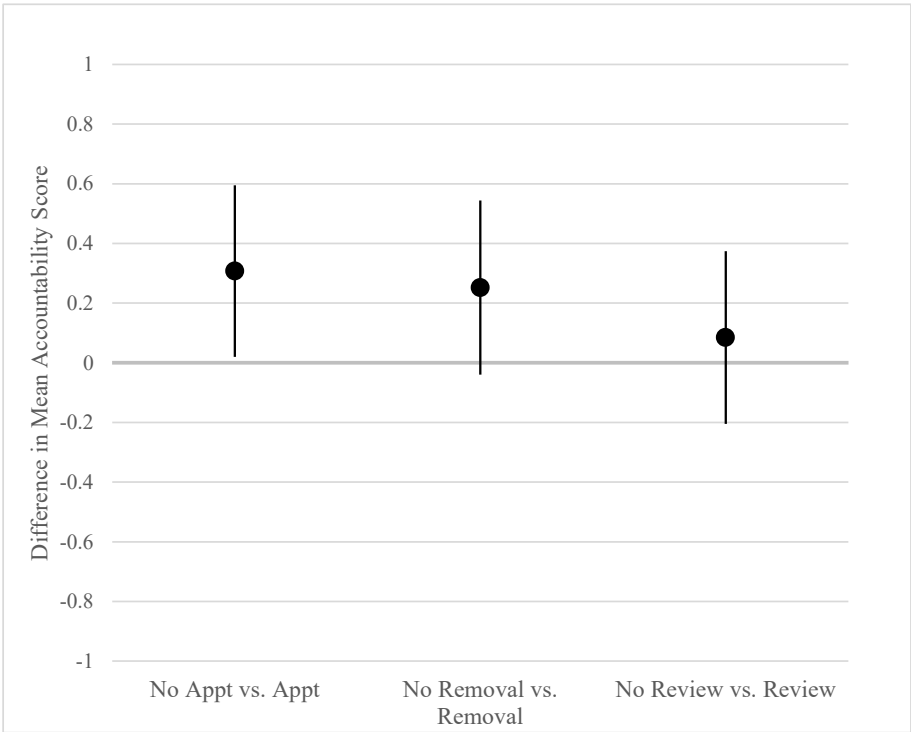


Figure shows the difference between the mean accountability scores for participants who viewed the fair access vignette with the listed insulation condition minus the scores for participants who viewed the fair access vignette with the listed presidential influence condition. Scores are on a 1-7 scale, with textual descriptions of each category visible to participants. *See supra* note 146. Points denote estimated difference in means. Bars identify 95 percent confidence intervals.

As Figure 3 shows, mean accountability scores are higher for participants who viewed the *No Appointment Condition* than for those who viewed the *Appointment Condition*; higher for *No Removal* than for *Removal*; and higher for *No Review* than for *Review*. Although these differences are statistically significant at $p < 0.05$ only for the *No Appointment* versus *Appointment* comparison, the point estimates are positive

across the board. Thus, the weight of the evidence suggests that people consider insulated agencies to be *more* accountable than agencies subject to presidential influence.

iii. Partisan Dynamics

As in Study 1, this study also examines whether participants' opinions on the specific President mentioned in the vignette affect their perceptions of agency accountability. To do so, approximately half of the participants who view a climate banking vignette are randomly assigned to read that the episode occurred during the Trump administration; the others read that it happened during the Biden administration. With a sample of participants constructed to include equal numbers of Trump and Biden voters, it is possible to conduct separate analyses concerning the climate banking vignette for every combination of Trump/Biden voter and Trump/Biden presidential administration.

These analyses yield null results across the board. We cannot reject the null hypothesis that agency insulation has no connection with perceived accountability for (1) Biden voters who read a Biden administration vignette, (2) Trump voters who read a Biden vignette, (3) Biden voters who read a Trump vignette, or (4) Trump voters that read a Trump vignette.¹⁸⁷

IV. IMPLICATIONS

The headline from these experiments is that, for ordinary Americans, the knowledge that the President possesses a suite of authorities to influence agency decisions is not associated with perceiving the agency as more accountable.¹⁸⁸

¹⁸⁷ For Biden voters viewing a Biden administration vignette, the difference of means is 0.269 (SE = 0.195, $t(395) = 1.381$, $p = 0.168$); rank-sum test $z = 1.252$, $p = 0.211$. For Trump voters viewing a Biden administration vignette, the difference in means is -0.217 (SE = 0.218, $t(356) = -0.992$); rank-sum test $z = -1.091$, $p = 0.275$. For Biden voters viewing a Trump administration vignette, the difference in means is -0.271 (SE = 0.196, $t(375) = -1.381$, $p = 0.168$); rank-sum test $z = -1.411$, $p = 0.158$. For Trump voters viewing a Trump administration vignette, the difference in means is -0.171 (SE = 0.206, $t(372) = -0.829$, $p = 0.408$); rank-sum test $z = -0.843$, $p = 0.400$.

These results provide some *suggestive* evidence of a positive relationship between agency independence and mean perceived accountability for Biden voters viewing a Biden administration vignette, and of a negative relationship for Biden voters viewing a Trump administration vignette. Although these results at least approach conventionally accepted levels of statistical significance—in both cases, the p -value is 0.168—they nonetheless fall considerably short. Accordingly, one should proceed with caution in drawing inferences.

Regression analysis confirms these results. In models regressing accountability scores on a three-way interaction (*Full Insulation Condition * President Trump * Trump Voter*) and all of its component parts, none of the coefficient estimates corresponding to these four groups of participants reached conventionally accepted levels of statistical significance. Results obtained by adding this 3-way interaction and its component parts to Model 5 in Appendix Table A2.

¹⁸⁸ See *supra* Part III.A.i.

Multivariate regression models, reported in the Appendix, confirm this finding.¹⁸⁹ That presidential influence clearly does not boost perceived accountability—and in some models actually appears to reduce it—directly challenges the prevailing view among many judges and scholars.

Several additional findings add nuance to this headline. For one, insulation from the President does not appear to increase accountability either. Instead, some analyses show that learning that the President’s appointment, removal, and review powers are limited is also associated with lower accountability.¹⁹⁰

Importantly, this finding concerning insulation from the President is model-dependent.¹⁹¹ Even in those analyses where it reaches conventionally accepted levels of statistical significance, the effect size is modest compared to the effect of presidential control on perceived accountability.¹⁹² Knowledge of presidential influence reduces perceived accountability much more—2.5 times more—than does knowledge of agency insulation from the White House.¹⁹³ Further, when specific structures are compared head-to-head, e.g., the *Appointment vs. No Appointment* conditions, insulation trumps presidential control; features of agency independence are associated with greater perceived accountability compared with features of presidential administration.¹⁹⁴

Finally, partisan effects are minimal. Participants’ presidential vote choice generally does not influence their perception of how mechanisms for presidential influence or insulation affect agency accountability.¹⁹⁵ To be clear, the President’s supporters consider agencies to be more accountable than do the President’s opponents.¹⁹⁶ However, that is a direct effect; it is not mediated through the treatment conditions. In other words, knowing that, for instance, the President appointed the agency decision-maker does not move the needle.

¹⁸⁹ Across eight model specifications that regress perceived accountability on all treatment variables as covariates, the coefficient estimate for the *Full Presidential Influence* condition is negative and statistically significant. By contrast, estimates concerning the other treatment conditions mostly fall far short of conventionally accepted levels of statistical significance.

¹⁹⁰ See *supra* Part III.B.i.

¹⁹¹ See Appendix Table A2 (reporting lack of statistically significant coefficient estimates for *Full Insulation* in multivariate regression models).

¹⁹² See *supra* Part III.B.i.

¹⁹³ See *supra* note 182.

¹⁹⁴ See *supra* Part III.B.

¹⁹⁵ See *supra* Part III.A.iii, III.B.iii.

¹⁹⁶ See Appendix Table A2 (regressing perceived accountability on, inter alia, whether (1) the participant voted for President Trump, (2) whether the vignette identifies Trump as president, and (3) an interaction between the two, and reporting large and statistically significant estimates for these covariates).

This Part explores several implications of these findings. Section IV.A argues that this evidence should motivate courts to abandon the presidential accountability claim. Section IV.B explores the counterintuitive non-effects concerning partisan dynamics. Section IV.C encourages scholars to pursue additional experimental designs to better understand what administrative structures boost perceived accountability. To construct a more accountable administrative state, this section concludes with a call for policymakers to adopt an evidence-based approach to institutional design.

A. Retire the Presidential Accountability Claim

In light of these results, judges should banish the presidential accountability claim when deciding whether to invalidate structures that promote agency independence. Ordinarily, mere disagreement between judges and members of the public concerning a positive claim is no reason to discount that claim. In this case, however, the claim is that a particular mechanism, among many possibilities, increases agencies' accountability to the American people. That the American people disagree should give the claim's proponents serious pause.

Interring the presidential accountability claim could spark a sea change in the Court's separation-of-powers jurisprudence. No longer could judges rely on the positive claim that the presidency is "the most democratic and politically accountable official in Government," as the *Seila Law* Court asserted.¹⁹⁷ In case after case, courts have invoked this claim to support holdings that empower the President and erode agency independence.¹⁹⁸ These holdings deserve reconsideration.

To be sure, retiring the presidential accountability claim may not be sufficient to alter some of the Court's recent separation-of-powers decisions. The Constitution's text, judicial precedents, and historical practices also play important roles. Nonetheless, revisiting the claim could move the needle on judicial outcomes. With the meaning of constitutional text in dispute and some separation-of-powers precedents under strain, the Court appears to place significant weight on the claim. In the absence of a shared understanding of, say, the Decision of 1789 or *Humphrey's Executor*,¹⁹⁹ support for the presidential accountability claim is one of the few ideas that almost all justices support.²⁰⁰ Remove it, and they would be compelled to grapple

¹⁹⁷ *Seila Law*, 140 S. Ct. at 2205.

¹⁹⁸ *See supra* Part I.A.

¹⁹⁹ Concerning judicial contestation over the meaning of Decision of 1789, compare *Seila Law*, 140 S. Ct. at 2213 (Thomas, J., concurring); with *id.* at 2228 (Kagan, J., dissenting). Concerning judicial debate over the continued applicability of *Humphrey's Executor* as precedent, compare *id.* at 2199; with *id.* at 2211 (Thomas, J., concurring).

²⁰⁰ *See* Emerson, *supra* note 125, at 408 ("Given that the constitutional text alone does not resolve specific questions about issues such as at-will removal, executive democracy buttresses available

with separation-of-powers cases in different ways, perhaps reaching different conclusions.

B. Move Beyond Partisan Explanations

One of this Article's most striking results concerns just how little partisan dynamics affect the relationship between presidential control of agencies and those agencies' perceived accountability. There is scant evidence that the President's supporters view agencies as more accountable when they learn that the President possesses authorities to influence their decisions.²⁰¹ Neither does an agency's independence from the president appear to affect its perceived accountability among the President's supporters or opponents differently.²⁰² These mostly null results suggest that partisanship and affective polarization are not primary drivers of people's views on how presidential control affects agencies' accountability. Given that partisan dynamics permeate so many aspects of people's lives,²⁰³ these results are noteworthy.

Paradoxically, the received wisdom that the United States is split on party lines may temper any partisan effects of presidential control on perceived accountability. Consider that, in early 2024, 56 percent of adults disapproved of President Biden's performance.²⁰⁴ Individuals included in that figure are unlikely to believe that augmenting President Biden's role in administration enhances accountability. But what about President Biden's *supporters*? They may welcome his involvement on policy grounds, thinking that it will produce outcomes they favor,

but contestable textual and structural inferences in favor of heightened presidential power.”); *see also supra* Part I.A (cataloging justices' invocations of the claim).

²⁰¹ Although presidential control exerts a more negative effect for Trump voters than Biden voters during the Biden administration, the same cannot be said for Biden voters during the Trump administration. *See supra* Part III.A.iii.

²⁰² *See supra* Part III.B.iii. The null result for Trump voters viewing a Trump administration vignette is particularly surprising. Arguments that presidential involvement enhances agency accountability often come from the right. *See* Ashraf Ahmed, Lev Menand, and Noah A. Rosenblum, *The Making of Presidential Administration*, 137 HARV. L. REV. 2132 (2024). President Trump in particular undertook efforts to enhance presidential control over the administrative state, to which he often adopted an oppositional posture. *See* Exec. Or. 13,957, 85 Fed. Reg. 67,631 (Oct. 21, 2020) (creating a new civil-service schedule with a greater ability for the White House and political appointees to fire affected civil servants); Gabriel Scheffler and Daniel E. Walters, *The Submerged Administrative State*, 2024 WISC. L. REV. 789, 802 (discussing how “Republican politicians ... accus[e] agency officials of comprising a shadowy ‘Deep State’ intent on thwarting democratic governance”). It appears, however, that Trump voters tend not to share President Trump and other Republican elites' views on presidential administration and accountability.

²⁰³ *See* Shanto Iyengar, et al., *The Origins and Consequences of Affective Polarization in the United States*, 22 AM. REV. POL. SCI. 129, 131-34 (2019).

²⁰⁴ *How (Un)popular Is Joe Biden?*, FIVETHIRTYEIGHT, Jan. 19, 2024, <https://projects.fivethirtyeight.com/biden-approval-rating/>. The figure was similar at the same point in President Trump's term. *Id.* (reporting a 53 disapproval rate).

while simultaneously recognizing that his interventions do not increase the affected agency's accountability to the public. Presumably, some Biden supporters recognize that they live in a divided country, where roughly half of Americans disapprove of a President whom they support.²⁰⁵ Equipped with this knowledge, a Biden supporter could recognize that increasing President Biden's role in administration, while a positive development in terms of effectuating their own preferences, would not increase agencies' accountability to a broad swath of Americans. A similar logic presumably applies to President Trump's supporters.²⁰⁶ Going further, even if one believes that presidential involvement in policy is majoritarian *and* one supports the President, one still may recognize that accountability to a majority of voters is not equivalent to accountability to the American people as a collective.²⁰⁷

To the extent that ordinary Americans are aware of at least some of these dynamics, that recognition may promote skepticism regarding the presidential accountability claim. This skepticism does not require deep knowledge of presidential candidates' campaign strategies or voter behavior. Instead, someone aware that the United States is politically polarized, that presidents devote outsized attention to marginal voters in swing states, or that some of their friends or neighbors are ideologically immovable may intuit that there is something wrong with the claim that presidential administration promotes agencies to be accountable to the general public. Alternatively, even the President's co-partisans may recognize that, with several political institutions performing suboptimally, improving the performance of one (the White House) without altering that of the others could make the political system's overall operation worse, not better.²⁰⁸

In brief, one need not be a dogged opponent of the current president, nor a deep expert on American politics, to realize that there is something wrong with then-Professor Kagan's claim that the presidency's "national constituency" makes its occupant "likely to consider, in setting the direction of administrative policy ... the

²⁰⁵ Some Biden supporters presumably also are aware that the nature of presidential elections can weaken presidents' responsiveness to the median voter or general public. *See supra* note 12 and accompanying text (discussing candidates' imperatives to cater to primary voters, donors, and marginal general-election voters in swing states).

²⁰⁶ *See supra* note 204.

²⁰⁷ *See* Jacob Gersen and Matthew Stephenson, *Over-Accountability*, 6 J. LEGAL ANALYSIS 185, 187 n.6 (2014) ("[D]emocratic accountability creates risks of majoritarian tyranny."); *see also* Walters, *supra* note 17, at 81 n.415 (arguing that accountability-via-majority-rule "borders an explicitly populist idea of presidential accountability," i.e., "the false claim that the President, by virtue of election, represents the whole of the people in a kind of personal way, and therefore has a license to govern at will").

²⁰⁸ *Cf.* R.G. Lipsey and Kelvin Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11 (1957) (terming a similar dynamic in markets the "general theory of the second best")

preferences of the general public rather than merely parochial interests.”²⁰⁹ One simply must recognize that one lives in a politically divided country where concepts like a “national constituency” and “the preferences of the general public” deserve a healthy dose of skepticism.

C. **Emphasize Structures that Truly Engender Accountability**

Having established that presidential involvement in administration is not associated with greater perceived accountability, a natural next question is what measures actually can bolster perceived accountability. The stakes here are considerable. Because the Supreme Court emphasizes accountability in its separation-of-powers jurisprudence, a better understanding of what structures promote that value would assist the Court.

Beyond the courts, a better understanding of how agency structures and processes influence popular perceptions of government could help reverse Americans' declining confidence in their government. Public opinion polls reveal that trust in government is low.²¹⁰ That lack of confidence in government institutions contributes to democratic “backsliding,” in which deep-rooted norms concerning democratic governance erode.²¹¹

In this climate, institutional design offers a path forward. Empirical legal scholars have found that reason-giving requirements bolster people’s trust in decision-makers’ choices and that empowering politically insulated technocrats increases agencies’ perceived legitimacy.²¹² A similar dynamic may be at play concerning accountability. If that is correct, then proponents of tightening or loosening agencies’ connections to the President to bolster agencies’ perceived accountability are looking in the wrong place. Instead, people may associate accountability with rational, good-faith, publicly justified decisions.²¹³ For instance, Bijal Shah conceives of accountability “to the values and expectation ... that agencies promote impartiality and expertise.”²¹⁴ Under this conception, “[p]oliticized appointments and removal ... reduce administrative accountability.”²¹⁵ Others

²⁰⁹ Kagan, *supra* note 35, at 2335.

²¹⁰ See Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 546 (2018).

²¹¹ See Aziz Huq and Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78 (2018).

²¹² See Feinstein, *supra* note 145 (technocratic governance); STIGLITZ, *supra* note 145, at 189-242 (reason-giving requirements).

²¹³ See *supra* note 115 and accompanying text.

²¹⁴ Shah, *supra* note 122, at 503.

²¹⁵ *Id.*

emphasize the importance of transparency to accountability.²¹⁶ Given the institutional presidency's penchant for secrecy, an individual with a transparency-focused conception of accountability arguably would associate greater presidential control with diminished accountability.²¹⁷

Determining *which* agency structures and processes, if any, can bolster agencies' perceived accountability is the clear next step in this research project. There is certainly no shortage of theories. As discussed *supra* Part I.B, these include fidelity to statutory text or purpose as a means of tethering an agency to the democratically elected Congress that authorized the agency's action; the current Congress's ongoing supervision of the agency; facilitating public participation in agency decisions via administrative procedures; and reason-giving by a transparent, expert decision-maker. The hypothetical connection between each of these mechanisms and perceived accountability is capable of empirical assessment. This Article offers a blueprint.

CONCLUSION

Prominent scholars believe that presidential control bolsters agencies' accountability to the public. The Supreme Court topples administrative structures based in part on this claimed connection. Despite its importance, however, proponents of the claim advance it without knowing whether people agree that greater presidential control makes agencies more accountable to them.

That lack of knowledge is not mere scholarly lacuna. The presidential accountability claim purports to center the interests of the American people. Evaluating the claim therefore demands evidence regarding whether regular people—the claim's asserted beneficiaries—consider presidential control to enhance accountability.

This Article presented a series of original experiments that revealed Americans' perceptions of whether presidential control enhances agencies' accountability to them. The results provide no indication that people agree with this claim. Indeed, some analyses evince a *negative* connection between presidential control and perceived accountability.

²¹⁶ See, e.g., Shkabatur, *supra* note 121, at 83 (“The demand for public accountability of administrative agencies is primarily satisfied through regulatory transparency.”); ADRIAN VERMEULE, MECHANISMS OF DEMOCRACY: INSTITUTIONAL DESIGN WRIT SMALL 182 (2007) (“Transparency is necessary for accountability.”); Samaha, *supra* note 121, at 917 (“[P]opular accountability need[s] a system for disclosing information about government.”)

²¹⁷ See Kitrosser, *supra* note 122, at 1741 (positing “a profound bond between unitary executive theory and executive branch secrecy ... lend[ing] itself to relative opacity and information manipulation within the vast resources of the administrative state). Thus, Kitrosser concludes, “[p]olitical or legal accountability in such a scenario is profoundly tainted.” *Id.* at 1769.

This divergence between what legal elites claim strengthens agencies' accountability to the people and what the people themselves believe generates several prescriptions. For legal scholars, it should motivate a turn towards probing whether alternative mechanisms boost agencies' perceived legitimacy. For judges, it counsels in favor of caution. In particular, the Supreme Court ought to pause its ongoing restructuring of the administrative state grounded in part in this questionable theory.

APPENDIX

Table A1 reports demographic characteristics of participants in these experiments.²¹⁸ The sample's composition is broadly similar to the overall U.S. population in terms of age, gender, income, and partisanship.²¹⁹ College-educated individuals are somewhat overrepresented in the sample, and Black and Hispanic participants are underrepresented.²²⁰ By construction, the sample is evenly split between Trump and Biden voters in the 2020 presidential election.

²¹⁸ Information on participants' gender, age, and presidential vote choice obtained from Prolific. After participants read the vignette and provided their accountability score, they answered questions, in random order, concerning their race, ethnicity, party identification, income, and education.

²¹⁹ See Census Bureau, *QuickFacts*, <https://www.census.gov/quickfacts/fact/table/> (information on age, gender, income, and partisanship); Jeffrey M. Jones, *U.S. Party Preferences Evenly Split in 2022 After Shift to GOP*, GALLUP, Jan. 12, 2023, <https://news.gallup.com/poll/467897/party-preferences-evenly-split-2022-shift-gop.aspx> (reporting a 44-45 Democrat-Republican split in 2022). Figures reported in the table for Democrats and Republicans include individuals that report "think[ing] of [themselves] ... as closer to" those respective parties.

²²⁰ See *id.* (reporting that 34.3 percent of Americans over 25 years old possesses a bachelor's degree or higher, 13.6 percent are African American, and 19.1 percent are Hispanic or Latino). The underrepresentation of Black and Hispanic individuals is not as substantial when one compares the sample to registered voters. See John Gramlich, *What the 2020 electorate looks like by party, race and ethnicity, age, education and religion*, PEW RES. CTR., Oct. 26, 2020 (reporting that 11 percent of registered voters are African American and another 11 percent are Hispanic). Given that the sample is comprised of voters in the 2020 presidential election, that is arguably the more appropriate comparator.

Table A1: Descriptive Statistics on Participant Demographics

	Mean (Std. Dev.)	Min., Max.
Age	43.0 (13.71)	21, 94
Female	0.52 (0.50)	0, 1
Black	0.07 (0.25)	0, 1
Hispanic / Latino	0.07 (0.26)	0, 1
Democrat	0.48 (0.50)	0, 1
Republican	0.44 (0.50)	0, 1
Income	< \$30,000: 15.9% \$30-75,000: 40.4% >\$75,000: 43.7	
Education	Some high school: 1.1% H.S. diploma or GED: 35.1% Bachelor's degree: 45.5% Grad. or prof. degree: 18.3%	

Table A2 presents results from multivariate regression models, in which each model regresses participants' accountability scores on their assigned condition.²²¹ Including all treatment effects as covariates in the same models sheds light on the comparative effects of the treatment conditions, each of which was analyzed separately in Part III. Essentially, this multivariate setup allows for head-to-head comparisons of these treatment conditions' relative magnitudes and statistical significance.

Model 1 focuses on participants who viewed the *Full Presidential Influence*, *Full Insulation*, or control condition. (Here, as in all models, the control condition is the omitted category.) Model 2 adds demographic covariates.²²²

²²¹ See *supra* Part IV (discussing this supplemental analysis).

²²² These covariates are: age (ln), female, Black, Hispanic/Latino, Income <\$30k, Income btw \$30k-75k (with >\$75k as the omitted category), highest education = some high school, highest education = high school diploma or GED, and highest education = bachelor's degree (with graduate/professional degree as the omitted category). Random assignment of large numbers of participants to vignettes should eliminate the possibility that omitted variables drive these results. Nonetheless, I include this model to address the concern that demographic differences between participants that view one condition versus those that view another may influence their scores.

Model 3 brings in covariates for each component condition (appointment, removal, etc.). Because only participants who view a fair access vignette are randomly assigned one of these component conditions, this model only includes participants who viewed a fair access vignette. Model 4 adds demographic covariates.

Model 5 builds on Model 1 by adding covariates corresponding to whether the participant voted for President Trump in 2020 (or President Biden as the omitted condition), whether the vignette includes a Trump administration condition (or a Biden condition as the omitted condition), and an interaction term corresponding to Trump voters who viewed a Trump administration condition. Because variation in the presidential administration condition only occurs for participants who view a climate banking vignette, only those participants are included in this model. Model 6 adds demographic covariates.

Table A2: Regression Analysis of Accountability Scores on Treatment Conditions and Participant Demographics

	(1)	(2)	(3)	(4)	(5)	(6)
Full Pres. Influence Condition	-0.311 *** (0.087)	-0.287 ** (0.087)	-0.424 *** (0.115)	-0.431 *** (0.115)	-0.305 ** (0.092)	-0.290 ** (0.092)
Full Insulation Condition	-0.082 (0.085)	-0.069 (0.085)	-0.167 (0.113)	-0.192 † (0.113)	-0.096 (0.089)	-0.074 (0.089)
Appointment	—	—	-0.036 (0.107)	-0.042 (0.106)	—	—
Removal	—	—	-0.111 (0.110)	-0.083 (0.110)	—	—
Review	—	—	-0.011 (0.106)	-0.007 (0.106)	—	—
No Appointment	—	—	0.222 * (0.108)	0.194 † (0.110)	—	—
No Removal	—	—	0.109 (0.107)	0.071 (0.106)	—	—
No Review	—	—	0.059 (0.111)	0.008 (0.112)	—	—
Trump Voter	—	—	—	—	-0.506 *** (0.089)	-0.341 ** (0.111)
Pres. Trump	—	—	—	—	-0.206 * (0.098)	-0.232 * (0.098)
Pres. Trump * Trump Voter	—	—	—	—	0.362 * (0.150)	0.410 ** (0.150)
Demographic Covariates Included?	N	Y	N	Y	N	Y
Vignette Fixed Effects?	Y	Y	N	N	N	N
Included Vignette(s)	Both		Fair Access		Climate Banking	
Observations	2,925	2,925	3,746	3,746	2,236	2,236

Coefficient estimates and robust standard errors (in parentheses) were obtained via ordered logit models. Ordered dependent variable is participants' accountability score on a 1-7 scale. Coefficient estimates for cuts 1-6 not reported. Omitted conditions: active control condition, non-female (includes male, non-binary, and other / prefer not to answer), non-African American, non-Hispanic, income >

\$75,000, educational attainment: grad/professional degree. χ^2 : 17.2(Model 1); 143.0 (Model 2); 29.1 (Model 3); 103.1 (Model 4); 35.8 (Model 5); 126.5 (Model 6). *** signifies $p < 0.001$, ** $p < 0.01$, * $p < 0.05$, † $p < 0.10$.

As Table A2 shows, viewing the *Full Presidential Influence* condition has a negative and statistically significant correlation with accountability scores. That statement holds across model specifications.

One cannot say the same for the other conditions. Although the coefficient estimate for *Full Insulation* is also negatively signed, it achieves conventionally accepted levels of statistical significance only in one out of eight models. The coefficient estimates for the *Appointment*, *Removal*, and *Review* conditions are negatively signed, and the estimates for *No Appointment*, *No Removal*, and *No Review* are positive. In most cases, however, these estimates do not reach conventionally accepted levels of statistical significance. Thus, the sole strong inference from these models is that the full battery of presidential authorities over agencies negatively impacts agencies' perceived accountability.