

On Peter Shane’s Engaged Excellence

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I am so very honored to contribute to this celebration of Peter Shane’s life and work to date. (I stress the words “to date”—he still has much to do!) Two words leap to mind when I think of Peter’s scholarship: “excellent” and “engaged.” Peter’s decades of academic writing—as well as his writing for broader audiences and his advocacy work—are deeply grounded both in scholarly research and analysis, as well as an acute concern for the law’s real-world impact. In this celebratory Essay, I focus on an aspect of Peter’s work that has been especially influential to me: his discussions, over multiple decades, of unitary executive theory.

Since I began writing about unitary executive theory in the mid-aughts, I have been deeply influenced by Peter’s work on the subject. Unitary executive theorists maintain that the President must control all discretionary activity within the executive branch.¹ Although unity was embraced by Chief Justice Taft and a majority of the Supreme Court in 1926 in *Myers v. United States*,² the Court soon shifted course, distinguishing *Myers* in subsequent cases and suggesting that Congress retained substantial, though not unlimited, leeway to protect administrative officials from political pressure.³ Over the past several decades, however, the modern conservative legal movement has embraced and promoted unitary executive theory with increasing success.⁴ Once the subject of a now famous but lone dissent by Justice Scalia in *Morrison v. Olson* in 1988,⁵ unitary executive theory is now warmly received by a majority of the Supreme Court.⁶ Indeed, the Roberts Court invalidated a for-cause removal restriction for

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¹ See, e.g., Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1158, 1166 (1992); Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 58 (1994) [hereinafter Calabresi, *Some Normative Arguments*].

² See *Myers v. United States*, 272 U.S. 52, 52–55 (1926); see also Robert Post, *Tension in the Unitary Executive: How Taft Constructed the Epochal Opinion of Myers v. United States*, 45 J. SUP. CT. HIST. 167, 167 (2020) (noting that “Taft is the only person ever to have served as both president of the United States and as chief justice of the Supreme Court,” and that this “unique confluence of roles is evident in *Myers*”).

³ See *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 628–29 (1935); *Morrison v. Olson*, 487 U.S. 654, 689–91 (1988).

⁴ See, e.g., PETER M. SHANE, *DEMOCRACY’S CHIEF EXECUTIVE* (forthcoming May 2022) (manuscript at 5–7) [hereinafter SHANE, *DEMOCRACY*]. See generally Stephen I. Vladeck, *The Imperial Presidency’s Enablers: Why Executive Power Grows Unchecked*, 100 FOREIGN AFFS. 195 (2021).

⁵ *Morrison*, 487 U.S. at 697–734 (Scalia, J., dissenting).

⁶ See *infra* notes 7–9. See generally Vladeck, *supra* note 4.

the first time in 2010,⁷ and invalidated two more in 2020⁸ and 2021.⁹ Just how far the Roberts Court will go in future cases—that is, how much they will restrict Congress’ ability to limit politicization in the administrative state—remains to be seen.

Peter has been writing about unitary executive theory for most of its modern history. Indeed, he first published an article considering Congress’ power to constrain presidential control over the administrative state in 1987,¹⁰ the year before *Morrison v. Olson* was decided.¹¹ The article, *Conventionalism in Constitutional Interpretation and the Place of Administrative Agencies*, considers presidential control of agencies as one of a few examples of constitutional questions that can best be answered through a “conventionalist approach”—one that “most obviously reflects the conventional meaning of the document’s language and its conventionally understood implications.”¹² From this perspective, Peter observes that the Necessary and Proper Clause—which empowers Congress to make laws to carry into execution its own enumerated powers, and those held by the federal government, “or [by] any Department or Officer thereof,” seems “to yield a natural answer” to questions regarding Congress’ power to impose some limits on presidential control in the administrative state.¹³ In particular, the clause authorizes Congress to pass statutes requiring “the President to show ‘cause’ before removing an agency head from office,” or otherwise limiting the reach of the President’s oversight powers.¹⁴ “In connection with removals,” Peter cites a “plausibly relevant textual limitation on this [congressional] power” in the President’s obligation “to take care that the laws be faithfully executed.”¹⁵ He concludes, however, that the President’s constitutional obligation remains “unimpaired” “so long as [the President] can discharge any officer who is not faithfully executing the laws—that is, discharge ‘for cause.’”¹⁶ Of course, Peter acknowledges, the fact that the conventional interpretation is “plausible” does not mean that it will yield

⁷ *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 484 (2010).

⁸ *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2191–92 (2020).

⁹ *Collins v. Yellen*, 141 S. Ct. 1761, 1770 (2021).

¹⁰ See generally Peter M. Shane, *Conventionalism in Constitutional Interpretation and the Place of Administrative Agencies*, 36 AM. U. L. REV. 573 (1987). This is the first article on the topic that I found by performing a Westlaw search for all articles authored by Peter.

¹¹ That article—*Conventionalism in Constitutional Interpretation and the Place of Administrative Agencies*—does not use the term “unitary executive,” as it would not become a common part of the legal world’s lexicon for a few more years. A Westlaw search for “unitary executive theory” yields no secondary source results until 1987, and just a single one for that year. There were zero listings for 1988, five for 1989, two for 1990, and seven for 1991.

¹² Shane, *supra* note 10, at 582.

¹³ *Id.* at 586 (quoting U.S. CONST. art. I, § 8, cl. 18).

¹⁴ *Id.* at 586–87.

¹⁵ *Id.* at 586.

¹⁶ *Id.*

“fair, effective, accountable government operation.”¹⁷ However, he sees “no compelling evidence” that conventionalism is less likely to yield such results than are “more controversial and elaborate normative interpretive approaches.”¹⁸ Crucially, the answers derived from conventionalism “leave substantial discretion over institutional design to Congress and the President, to whom the subtler arguments about fairness, effectiveness, and accountability may more profitably be addressed.”¹⁹

In this very early foray into the world of presidential administration scholarship, Peter laid the groundwork for future work—scholarship that would prove among the most insightful interventions in debates over what would become known widely as unitary executive theory.²⁰ There are multiple dimensions to this body of Peter’s work, including compelling textual and historical analyses.²¹ Yet what I have always most appreciated about Peter’s work in this area is his careful parsing of the constitutional value of accountability, and accountability’s relationship to unitary executive theory. In *Conventionalism in Constitutional Interpretation*, he suggested that an approach favoring checks and balances might serve accountability at least as well as unity serves it.²² In the years since, he has developed this idea in profound and important ways that are attentive to history and theory, as well as to contemporaneous manifestations of unity in the Reagan Administration and in subsequent administrations.²³

The concept of accountability is central to debates over the unitary executive, as unity advocates insist not only that text and history are on their side, but that unity is essential to the constitutional value of accountability.²⁴ When the president controls all discretionary decision-making in the executive branch, they argue, voters have a clear object of blame or reward at the ballot box.²⁵ More so, given the President’s high visibility and his status as the only nationally elected figure in American politics, unity advocates deem him

¹⁷ *Id.* at 588.

¹⁸ Shane, *supra* note 10, at 588.

¹⁹ *Id.*

²⁰ See SHANE, DEMOCRACY, *supra* note 4 (manuscript at xii–xiii) (noting that unitary executive theory “was not ‘explicitly named and consciously promoted until the 1980s’” (quoting GRAHAM G. DODDS, THE UNITARY PRESIDENCY 12 (2020))).

²¹ See, e.g., *id.* at ix–xiv; Peter M. Shane, *The Originalist Myth of the Unitary Executive*, 19 U. PA. J. CONST. L. 323, 325–26, 329–30, 344, 352–62 (2016).

²² Shane, *supra* note 10, at 593–99.

²³ See generally SHANE, DEMOCRACY, *supra* note 4.

²⁴ *Id.* at 8.

²⁵ See, e.g., Calabresi, *Some Normative Arguments*, *supra* note 1, at 35–37, 45, 59, 65–66; Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 97–99 (1994); Saikrishna Bangalore Prakash, Note, *Hail to the Chief Administrator: The Framers and the President’s Administrative Powers*, 102 YALE L.J. 991, 998–99, 1012–15 (1993).

uniquely accountable, relative not only to unelected bureaucrats but to members of Congress.²⁶

From early in the scholarly unitary executive debates, Peter has been among a core group of scholars who have exposed major weaknesses in unity advocates' understanding of accountability. As I summarized in my 2009 article, *The Accountable Executive*:

Peter Shane . . . cites problems with [unity advocates' simplistic vision of accountability]. First, Shane notes that the Founders, not anticipating the administrative state and the rise of executive policymaking, did not envision presidential accountability "for the policy content of administrative decisions." Rather, the Founders saw presidential accountability as "*managerial accountability*"; the focus was on competence and integrity, not policy, as the criterion for judging administration. Second, if constitutional principles do mandate accountability for policymaking in the modern administrative state, this goal may not be furthered by centralizing all discretionary decisionmaking in the President. If political accountability means accountability to the national majority, then presidential elections are too blunt an instrument to achieve it. The President faces the national electorate at most twice, and because each voter casts but a single vote for President based on any one of thousands of issues and concerns, presidential elections cannot foster meaningful accountability for policymaking. If political accountability means accountability to some objective conception of the public interest, or to those parties most directly affected by decisions, there similarly is little reason to deem the blunt instrument of presidential elections well equipped to achieve that goal. Hierarchical presidential control also does not necessarily foster key elements of accountability—including dialogue and transparency—and may deter them through politically motivated secrecy and intimidation.²⁷

In his forthcoming book, a review copy of which I was lucky enough to read, Peter incorporates more recent lessons into his critique. He notes that the first term of George W. Bush and the entire presidency of Donald Trump give lie to the notion that the President necessarily represents a national popular vote majority.²⁸ Apart from the anti-democratic nature of the electoral college, Peter observes that the Trump Administration also demonstrated "the feasibility—and

²⁶ See Heidi Kitrosser, *The Accountable Executive*, 93 MINN. L. REV. 1741, 1747–48 & nn.28–32 (2009) (summarizing these arguments and their sources).

²⁷ *Id.* at 1749–50 (footnotes omitted) (first citing Peter M. Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 596, 613–14 (1989); then citing Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161, 197–209 (1995) [hereinafter Shane, *Political*]; and then citing Peter M. Shane, *Presidents, Pardons, and Prosecutors: Legal Accountability and the Separation of Powers*, 11 YALE L. & POL'Y REV. 361, 400 (1993)).

²⁸ SHANE, DEMOCRACY, *supra* note 4 (manuscript at 29).

from its point of view, the desirability—of a policy strategy catering entirely to the most ideologically committed base of a single political party.”²⁹

Peter’s work on accountability demonstrates his engaged excellence. The work is excellent in the depth of its research, its analytical clarity and brilliance, and its intellectual honesty. It is also deeply engaged in the real world. The very choice of topic is attuned to some of the most important issues of the day, then and now, and Peter’s arguments respond both to ongoing scholarly and judicial debates and to contemporary events in the political branches.³⁰

The highly engaged nature of Peter’s scholarly work is especially well-illustrated by his invoking of contemporary executive branch developments to illustrate that presidential control can undermine accountability by shielding information from the public.³¹ I drew extensively on one of his examples in *The Accountable Executive*, where I cited Peter’s work from the mid-1990s, in which he “offered a stark example of White House oversight during the [George H.W.] Bush administration that combined formal presidential control with evasion of public scrutiny.”³² The example was the “President’s Council on Competitiveness that operated out of the White House without formal legislative sanction.”³³ Peter wrote of it:

First, it was the conclusion of the most extensive journalistic study of the Council that it intervened in “dozens of unpublished controversies over important federal regulations, leaving what vice presidential aides call ‘no fingerprints’ on the results of its interventions.” The White House’s efforts to avoid public disclosure of its oversight activity took multiple forms: resisting FOIA disclosure of documents belonging to President Reagan’s Task Force on Regulatory Relief on the ground that the Task Force (and by implication, the Council) was not a covered “agency”; resisting Congressional access to information about the Council beyond published fact sheets and the testimony of individuals who did not participate in Council deliberations; keeping decisions at staff level to shield them from the greater publicity that would likely follow cabinet level involvement. Intriguingly, only one Council decision—pressuring EPA on pollution permit modifications—ever escalated to actual presidential involvement; the usual, albeit tacit, rule was to avoid appeals to the President wherever possible. It would not seem unrealistic that behind this approach lay a desire to buffer the President from criticism for

²⁹ *Id.* (manuscript at 29–30). Peter Shane elaborates that “the combination of gerrymandered congressional districts, voter suppression, dark money-driven campaign financing, and the electoral college has produced an electoral system in which the president need not have a genuinely national perspective either to win election or to govern.” *Id.*

³⁰ *See generally id.*

³¹ *Id.* (manuscript at 84).

³² Kitrosser, *supra* note 26, at 1766.

³³ *Id.* (citing Shane, *Political*, *supra* note 27, at 172–73).

Council policies, especially given a campaign promise to be the “environmental president.”³⁴

Believe it or not, I usually try to avoid using long block quotes, but I made exceptions here and in *The Accountable Executive* because Peter’s quoted points are so very important. Whereas his first long quote reflects his taking seriously the meaning of accountability and raising the crucial point that presidential control can undermine rather than reinforce it, the second illustrates Peter’s knack for applying theory to practice. In his voluminous work, Peter has, of course, invoked many other examples to demonstrate how presidential administration can enable secrecy and thwart accountability.³⁵

Peter’s work on the unitary executive and accountability has been enormously influential to me. I have sought to build on it in my own writing on the topic, and to follow Peter’s model of melding theory and practice. For example, drawing on Peter’s and some other scholars’ work on the theory and constitutional history of accountability, I have argued that the constitutional value of accountability can be broken into two parts: formal and substantive.³⁶ Formal accountability means that “the public and the other branches must have means to respond to presidential misdeeds,” such as elections and impeachment.³⁷ Substantive accountability is a prerequisite to the meaningful exercise of formal accountability.³⁸ It means that “the public and other branches must have mechanisms to discover and assess [any presidential] misdeeds in the first place.”³⁹ Substantive accountability thus “permits, even demands, flexibility for political and legal actors to experiment with measures that enable the people and other branches to discover and respond to executive wrongdoing.”⁴⁰ Building on the historical analyses of Peter and others, I have also demonstrated that unity advocates not only misread the relevant history—especially frequently cited episodes such as the choice by members of the Constitutional Convention to eschew a presidential advisory council and the First Congress’s so-called “Decision of 1789”—but that these errors are intertwined with their enervated conception of accountability.⁴¹ Finally, I have followed Peter’s lead in drawing from contemporary examples—including those cited by Peter—to illustrate the many ways in which presidential control

³⁴ Shane, *Political*, *supra* note 27, at 172–73. This excerpt was quoted in Kitrosser, *supra* note 26, at 1766.

³⁵ See generally SHANE, *DEMOCRACY*, *supra* note 4.

³⁶ Heidi Kitrosser, *Presidential Administration: How Implementing Unitary Executive Theory Can Undermine Accountability*, ADMIN. & REG. L. NEWS, Spring 2015, at 4, 5 [hereinafter Kitrosser, *Presidential*].

³⁷ HEIDI KITROSSER, *RECLAIMING ACCOUNTABILITY: TRANSPARENCY, EXECUTIVE POWER, AND THE U.S. CONSTITUTION* 15 (2015).

³⁸ *Id.* at 15–17.

³⁹ *Id.* at 15.

⁴⁰ *Id.*

⁴¹ *Id.* at 145–61.

can undermine transparency and accountability.⁴² To be clear, the point is not that unity invariably diminishes accountability. As I have put it elsewhere, “the mundane reality is that presidential administration sometimes advances accountability, sometimes does not advance it, and sometimes deeply undermines it.”⁴³ The point, rather, is that concerns over accountability in no way justify a categorical judicial mandate.⁴⁴ Rather, they raise questions that the political branches are free to address through legislation.⁴⁵ As Peter put it in his very first foray into the topic in 1987, institutional design arguments “about fairness, effectiveness, and accountability” are “more profitably . . . addressed” to “Congress and the President” than to courts.⁴⁶

Peter’s engaged excellence comes across not only in his scholarship, but in his writings for broader audiences, as well as his work as a practitioner and an advocate. Indeed, his scholarship on the presidency is enriched by the time that he spent early in his career as an attorney-adviser in the Justice Department’s Office of Legal Counsel.⁴⁷ Peter also serves on the Board of Directors of the American Constitution Society.⁴⁸ He also writes regularly for broader audiences. In particular, he has written many magazine columns, first for *The Atlantic* and now for *Washington Monthly*, on matters of constitutional law, especially presidential power.⁴⁹ In one of his recent columns, he introduces readers to unitary executive theory and its deep connections to the modern conservative legal movement.⁵⁰ He also laments that the Biden Administration may have little choice but to embrace some aspects of unity, given recent Supreme Court decisions and the groundwork laid by past administrations.⁵¹

I conclude by noting that Peter’s decades of work speak not only to his excellence and his engagement for their own sake, but to his basic decency. Evident throughout all of Peter’s work and service is his deep concern for the state of the country, today and in the future. Not coincidentally, Peter is also renowned for his humility, kindness, and sense of humor. As someone who first met Peter when I was a young(ish) academic, thrilled and intimidated to make his acquaintance, I will never forget how impressed I was with his generosity and down-to-earth nature. “What a mensch!” I thought, and I still think the same.

⁴² *Id.* at 172–95.

⁴³ Kitrosser, *Presidential*, *supra* note 36, at 4.

⁴⁴ *Id.* at 7.

⁴⁵ *Id.*

⁴⁶ Shane, *supra* note 10, at 588.

⁴⁷ Peter M. Shane, OHIO ST. UNIV. MORITZ COLL. OF L., <http://moritzlaw.osu.edu/peter-m-shane> [<https://perma.cc/P8N7-SLJB>].

⁴⁸ *Id.*

⁴⁹ See Peter M. Shane, ATLANTIC, <https://www.theatlantic.com/author/peter-m-shane/> [<https://perma.cc/L5WD-XMKJ>]; Peter M. Shane, WASH. MONTHLY, <https://washingtonmonthly.com/author/peter-m-shane/> [<https://perma.cc/ZX8V-8P4X>].

⁵⁰ Peter M. Shane, *The (Necessary) Perils of Biden’s Unitary Presidency*, WASH. MONTHLY (July 23, 2021), <https://washingtonmonthly.com/2021/07/23/the-necessary-perils-of-bidens-unitary-presidency/> [<https://perma.cc/9S7T-TBJE>].

⁵¹ *Id.*

In a world filled with too many big egos and too little goodness, Peter is a model for us all.