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Account Me In: Agencies in Quest of Accountability

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INTRODUCTION

Not long after taking office, Lisa Jackson, appointed by President Obama as Administrator of the Environmental Protection Agency ("EPA") revamped the evaluation procedure for the EPA's Integrated Risk Information System ("IRIS") database.[1] The database was an initiative undertaken by the EPA to improve the

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[1] The EPA's website explains that:

> The Integrated Risk Information System (IRIS) is a human health assessment program that evaluates quantitative and qualitative risk information on effects that may result from exposure to environmental contaminants. IRIS was initially developed for EPA staff in response to a growing demand for consistent information on substances for use in risk assessments, decision-making, and regulatory activities. The information in IRIS is intended for those without extensive training in toxicology, but with some knowledge of health sciences.

Integrated Risk Information System (IRIS), U.S. ENVTL. PROT. AGENCY, http://cfpub.epa.gov/ncea/iris/index.cfm (last visited Jan. 30, 2011).

scientific accuracy and the quality of information available on risks associated with certain chemicals; it is used, for example, when the EPA determines whether to establish air and water quality standards regulating certain chemicals.[2] IRIS assessments are neither rules nor adjudications; rather, they are background materials later used in making rules. Therefore, they are invisible to the Administrative Procedure Act ("APA").[3] The procedures surrounding the IRIS database—as with everything related to the project—were designed by the EPA and are not mandated by law.[4]

In spite of this potential freedom to choose any or no accountability mechanisms, the procedure the EPA adopted for IRIS—from the start of the system—included extensive steps of review, and numerous opportunities for input and checks by external actors.[5] The additional procedures put in place by Administrator Jackson aimed at achieving a process that is "more transparent and timely, and . . . will ensure the highest level of scientific integrity."[6]

The adopted process exposed the EPA's suggestions to external peer review, in addition to notice and comment, by using the same process required for informal rulemaking under the APA;[7] it also subjected these suggestions to review by the Office of Information and Regulatory Affairs ("OIRA") in the White House's Office of Management and Budget ("OMB"), which is required for significant rules.[8] Most of these elements were part of the IRIS

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[2] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-440, CHEMICAL ASSESSMENTS: LOW PRODUCTIVITY AND NEW INTERAGENCY REVIEW PROCESS LIMIT THE USEFULNESS AND CREDIBILITY OF EPA'S INTEGRATED RISK INFORMATION SYSTEM, 6–8 (2008), *available at* http://www.gao.gov/new.items/d08440.pdf.

[3] Administrative Procedure Act, 5 U.S.C.A. §§ 551–559 (West 2010).

[4] U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 2, at 10.

[5] *See infra* Part III.B (describing these procedures in detail).

[6] Memorandum from Lisa P. Jackson, Administrator, Envtl. Prot. Agency, New Process for Development of Integrated Risk Information System Health Assessments, 1–2 (May 21, 2009), *available at* http://www.epa.gov/iris/pdfs/IRIS_PROCESS_MEMO.5.21.09.PDF.

[7] *See* Administrative Procedure Act, 5 U.S.C.A. § 553 (West 2010).

[8] *See* Exec. Order No. 12,866 § 6, 3 C.F.R. 638 (1994), *reprinted in* 5 U.S.C. § 601 app. at 557–61 (1994). For a discussion of the regulatory review of

system from the start; in one form or another, the agency voluntarily chose to expose its decisions to extensive scrutiny from various outside parties.

Similarly, as part of the reform of the Internal Revenue Service ("IRS") after 1998, Commissioner Rossotti and the IRS staff worked hard to increase the agency's responsiveness and transparency. The agency put substantial efforts into making the Internal Revenue Manual more accessible, as discussed more extensively in Part III.C. It invested in improving customer service and, consequently, the number of calls answered rose dramatically, and the quality of the IRS' response received very positive reviews.[9] Improvement in service was required under the 1998 legislation reforming the IRS.[10] However, Congress had previously passed other reforms requiring improvements in customer service—for example taxpayer rights provisions in the 1980s—but without sincere agency commitment and agency initiated efforts, those had limited effect.[11] This time, the agency was committed to improving customer service and put in place changes increasing transparency and responsiveness.

Finally, before the courts started requiring that agencies answer each comment submitted to them, and before agencies took the spirit of the Freedom of Information Act seriously, the FDA, under the direction of its Chief Counsel, Peter Baron Hutt, adopted procedures that involved responding to comments submitted to it and an approach to transparency that involved making as much

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rules, see Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1075–82 (1986) and John D. Graham et al., *Managing the Regulatory State: The Experience of the Bush Administration*, 33 FORDHAM URB. L.J. 953, 960–75 (2006).

[9] CHARLES O. ROSSOTTI, MANY UNHAPPY RETURNS: ONE MAN'S QUEST TO TURN AROUND THE MOST UNPOPULAR ORGANIZATION IN AMERICA 134–36 (2005); Hal G. Rainey & James Thompson, *Leadership and the Transformation of a Major Institution: Charles Rossotti and the Internal Revenue Service*, 66 PUB. ADMIN. REV. 596, 599–600 (2006).

[10] *See* Internal Revenue Service Restructuring and Reform Act of 1998, Pub. Law 105-206, July 22, 1998, *available at* http://www.gpo.gov:80/fdsys/pkg/PLAW-105publ206/pdf/PLAW-105publ206.pdf.

[11] ROSSOTTI, *supra* note 9, at 129–30.

information as possible publicly available.[12]

Often, we assume that agencies are the villains in the "accountability game," the quest to be accountable. Much of the literature about accountability sees agencies as obstacles. It is often taken for granted that agencies will avoid accountability as much as they can, and that pressure to accept accountability will be required as a matter of course. Other scholars, in response, emphasize the multiple and conflicting pressures for accountability placed on agencies, and see them as victims of too much accountability. This approach sees agencies as merely passive actors in this area, subjected to accountability mechanisms against their will and with no real control or influence on their accountability environment.

While there is much truth to both perspectives, they each miss an important part of the picture. As the examples above suggest, agencies are not always the enemies of accountability. Nor are they always helpless, passive pawns, crushed under the oppressive weight of accountability. Agencies can also be autonomous and important actors in the accountability game, creating new forms of accountability, or accepting and adapting pre-existing forms. They often willingly join in and strive to be accountable. They may well invest substantial efforts in increasing their accountability.

Not all agencies do this all the time, and not all agencies do it well. But in today's administrative environment, agencies need accountability, and being sophisticated actors, they work at achieving it. Their efforts happen for a number of reasons—internal and external—and not just because of cost/benefit considerations.

This Article examines such actions by agencies and addresses the reasons they take the actions they do. Following this introduction, the article proceeds in four parts. Part I provides the background, reviewing current literature and demonstrating the tendency to place agencies in either the villain or the victim camp, as well as discussing the very few studies that focus on agencies' own contribution to the accountability regime surrounding them. Part II reiterates that agencies seek accountability and addresses

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[12] *See infra* Part III.A.

possible explanations for such behavior. The explanations highlighted are rational choice (agencies seek to be accountable because the costs of not being accountable are too high), power of ideas, and internalization of the idea that accountability is part of the administrative agents' mission. Part III provides a small number of more detailed case studies of agencies which sought to increase their accountability, and includes examples from the FDA, the IRS, and the EPA. This discussion shows that the phenomenon is a real and common one, and provides empirical support for the explanations addressed in Part II for this behavior. Finally, Part IV discusses implications for theory and practice of accountability in the administrative state.

I. BACKGROUND: ACCOUNTABILITY IN THE ADMINISTRATIVE STATE

Accountability of administrative agencies is an ongoing concern in the administrative state. Agencies exercise tremendous power and engage in numerous activities.[13] Not surprisingly, controlling them has been a constant preoccupation of scholars, politicians, and citizens, and an extensive literature discussing

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[13] *See, e.g.*, KENNETH J. MEIER, POLITICS AND THE BUREAUCRACY: POLICYMAKING IN THE FOURTH BRANCH OF GOVERNMENT 2 (3d ed. 1992):

> Today's citizens awake in the morning to breakfasts of bacon and eggs, both certified as fit for consumption by the United States Department of Agriculture (although the Department of Health and Human Services would urge you to eat a breakfast lower in cholesterol). Breakfast is rudely interrupted by a phone call; the cost of phone service is determined by a state regulatory commission. When our citizens drive to work, their cars' emissions are controlled by a catalytic converter mandated by the Environmental Protection Agency. The cars have seat belts, padded dashboards, collapsible steering columns and air bags required by the National Highway Traffic Safety Administration. When our citizens stop for gasoline, they pay a price that is partly determined by the energy policies (or a lack thereof) administered by the Department of Energy. To take their minds off the bureaucracies regulating their lives, the bureaucratic citizens turn on their radios. Each radio station is licensed by the Federal Communications Commission, and all advertising is subject to the rules and regulations of the Federal Trade Commission.

accountability exists.[14] This "accountability literature" has covered much ground and taught us much; however, it tends to treat the accountability environment the agencies face as something that agencies either manipulate to achieve their goals or something to which they are subject. In the terms mentioned above, it tends to treat agencies as either villains or victims.[15]

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[14] Here is a small sample of studies with the word "accountability" or "accountable" in the title from the last thirty years: ROBERT D. BEHN, RETHINKING DEMOCRATIC ACCOUNTABILITY (2001); PATRICIA DAY & RUDOLPH KLEIN, ACCOUNTABILITIES: FIVE PUBLIC SERVICES (1987); PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS AND EXPERIENCES (Michael W. Dowdle ed. 2006); BRENT FISSE & JOHN BRAITHWAITE, CORPORATIONS, CRIME AND ACCOUNTABILITY (1993); WILLIAM T. GORMLEY, JR. & STEVEN J. BALLA, BUREAUCRACY AND DEMOCRACY: ACCOUNTABILITY AND PERFORMANCE (2d ed. 2004); CAROL HARLOW, ACCOUNTABILITY IN THE EUROPEAN UNION (2002); Giandomenico Majone, *Independence vs. Accountability: Non-Majoritarian Institutions and Democratic Government in Europe* (European Univ. Inst., Working Paper No. 3, 1994); BERYL A. RADIN, THE ACCOUNTABLE JUGGLER (2002); Edward Rubin, *The Myth of Non-Bureaucratic Accountability and the Anti-Administrative Impulse*, *in* PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS AND EXPERIENCES, *supra*, at 52; Robert S. Gilmour & Laura S. Jensen, *Reinventing Government Accountability: Public Functions, Privatization, and the Meaning of "State Action,"* 58 PUB. ADMIN. REV. 247 (1998); Jonathan G. S. Koppell, *Pathologies of Accountability: ICANN and the Challenge of "Multiple Accountabilities Disorder,"* 65 PUB. ADMIN. REV. 94 (2005); Peter J. May, *Regulatory Regimes and Accountability*, 1 REG. & GOVERNANCE 8 (2007); Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461 (2003); Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161 (1995); Edward P. Weber, *The Question of Accountability in Historical Perspective: From Jackson to Contemporary Grassroots Ecosystem Management*, 31 ADMIN. & SOC'Y 451 (1999); William F. West, *Formal Procedures, Informal Processes, Accountability, and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis*, 64 PUB. ADMIN. REV. 66 (2004). These are not, of course, the only ones and do not really cover all the studies about accountability that do not use the term in the title.

[15] This terminology is inspired by, though it is not directly drawing on, Julian Le Grand's classification of the way those drawing and operating the welfare state are viewed. *See* Julian Le Grand, *Knights, Knaves or Pawns? Human Behavior and Social Policy*, 26 J. SOC. POL'Y 149, 153–60 (1992) (describing how loss of faith in the welfare state led to seeing the officials

A. Agencies as the Villains

Much of the writing about agencies today portrays them as the enemy, or the villain, of the accountability story. There are several varieties of this approach. The most neutral one, the one least hostile to agencies, explains the need for accountability as a principal-agent problem: Congress created agencies to do its bidding. Agencies may have their own interests and prefer to follow their own preferences[16] (or the preferences of the industries they are captured by)[17] rather than follow the wishes of Congress.

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administering it as "knaves" instead of "knights" and the people drawing benefits as "knaves" instead of "pawns").

[16] *See, e.g.*, J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 TEX. L. REV. 1443 (2003) (utilizing an empirical study of ESA to undermine the traditional principal agency relationship between Congress and government agencies); John D. DiIulio, Jr., *Principled Agents: The Cultural Bases of Behavior in a Federal Government Bureaucracy*, 4 J. PUB. ADMIN. RES. & THEORY 277 (1994) (critiquing the principal agent model of bureaucratic behavior from the perspective of the Federal Bureau of Prisons); Matthew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 248–49 (1987) [hereinafter McCubbins, *Administrative Procedures*] (advocating "oversight" and "administrative procedures" as a means to control bureaucratic decisions); Matthew D. McCubbins et al., *Structure and Process, Policy and Politics: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 432–33 (1989) [hereinafter McCubbins, *Structure and Process*] (identifying and analyzing the problem of effective political control of an agency).

[17] *See, e.g.*, STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT 18–22 (2008); Tim Bartley & Marc Schneiberg, *Rationality and Institutional Contingency: The Varying Politics of Economic Regulation in the Fire Insurance Industry*, 45 SOC. PERSP. 47, 47 (2002) (proposing that government agencies act according to their connected industries as a result of being "defined" by those industries); Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda. Toward a Synthesis*, 6 J.L. ECON. & ORG 167 (1990) (striving "to fit public interest characterizations into the social science literature to make them operationally usable and testable"); James T. O'Reilly, *Losing Deference in the FDA's Second Century: Judicial Review, Politics, and a Diminished Legacy of Expertise*, 93 CORNELL L. REV. 939 (2008) [hereinafter O'Reilly, *Losing Deference*] (identifiying the diminished deference to the FDA as a result of the Bush administration's policital control of the agency); Sidney A. Shapiro

Without accountability, agencies would be free to go their own ways and ignore Congress. Under this theory, scholars of the administrative state should address mechanisms of oversight over agencies, examine them, evaluate them, and suggest improvements.[18]

A more extreme version of the agencies as villains narrative focuses, instead, on examples of agency abuse and misconduct and uses that to demonstrate that agencies, whenever they can, make

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& Rena Steinzor, *Capture, Accountability, and Regulatory Metrics*, 86 TEX. L. REV. 1741, 1742 (2008) (advocating the use of the internet to hold agencies accountable for their failures and successes).

[18] Some of this literature focuses on Congressional oversight. *See, e.g.*, B. DAN WOOD & RICHARD W. WATERMAN, BUREAUCRATIC DYNAMICS: THE ROLE OF BUREAUCRACY IN A DEMOCRACY 33–35 (1994) (seeking to dispel the "myth" of unresponsive bureaucracy while suggesting additional Congressional oversight); Sidney A. Shapiro & Robert L. Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 DUKE L.J. 819, 825–29 (1988) (analyzing the trend toward Congressional control); Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765, 766 (1983) (amending the regulatory approach by "incorporating the legislature" into the process). Some of it examines oversight by the president. *See, e.g.*, STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 4 (Yale Univ. Press 2008) (advocating for executive oversight by arguing against the constitutionality of Congress' efforts to insulate executive control with government agencies); DAVID E. LEWIS, PRESIDENTS AND THE POLITICS OF AGENCY DESIGN: POLITICAL INSULATION IN THE UNITED STATES GOVERNMENT BUREAUCRACY 1946–1997, 26–28 (Stanford Univ. Press 2003) (arguing that the agency model is a product of politics and an irrational plan for administration); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246, 2248–50, 2277–82 (2001) (supporting the concept of presidential control over regulatory agencies to achieve positive objectives). Some of it focuses on the courts. *See, e.g.*, Jeffrey S. Lubbers, *The Transformation of the U.S. Rulemaking Process—For Better or Worse*, 34 OHIO N.U. L. REV. 469, 473–77 (2008) [hereinafter Lubbers, *The Transformation*] (criticizing both Congress and the President and emphasizing the role of the courts based on the diminishing activity during the note and comment period); McCubbins, *Administrative Procedures*, *supra* note 16, at 243; Gregory L. Ogden, *Analysis of Three Current Trends in Administrative Law: Reducing Administrative Delay, Expanding Public Participation, and Increasing Agency Accountability*, 7 PEPP. L. REV. 553, 556–79 (1979–1980).

themselves as unaccountable as possible and actively avoid the control mechanisms put in place by others. Many of these studies therefore suggest increased controls or improved enforcement of existing controls.

For example, in a number of recent studies, scholars have demonstrated that agencies avoid some of the procedures put in place by the APA. In a very recent article, Michael Kolber demonstrated that the FDA tended to use the procedure known as "direct final rulemaking," in which an agency publishes a rule without going through the notice and comment process beforehand,[19] not as it was intended, i.e., for non-controversial rules where notice and comment is a waste of time,[20] but instead for rules expected to be controversial.[21] These findings about the FDA are also reflected in an article by Lars Noah criticizing that agency for cavalierly ignoring legal and statutory requirements[22] (even though Noah acknowledges that these "subversive" actions are part of the reason the agency has done "fairly well" in protecting the public health in the face of limited resources,

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[19] For a general discussion of direct final rulemaking, see Ronald M. Levin, *Direct Final Rulemaking*, 64 GEO. WASH. L. REV. 1 (1995) (detailing the history and analyzing the strengths of direct final rulemaking), and Ronald M. Levin, *More on Direct Final Rulemaking: Streamlining, Not Corner-Cutting*, 51 ADMIN. L. REV. 757 (1999) [hereinafter Levin, *More on Direct Final Rulemaking*] (defending direct final rulemaking and emphasizing the necessity for restraint instead of abandonment). In a critical vein, see Lars Noah, *Doubts About Direct Final Rulemaking*, 51 ADMIN. L. REV. 401 (1999) (arguing that the procedure of direct final rulemaking is invalid under existing law).

[20] The point of direct final rulemaking is to do away with notice and comment in cases where there will be no comments submitted because the rule is non-controversial. *See* Levin, *More on Direct Final Rulemaking*, *supra* note 19, at 758–60. For further discussion of the waste of time resulting from use of notice and comment in certain cases, see Dorit Rubinstein Reiss, *Tailored Participation: Modernizing the APA Rulemaking Procedures*, 12 N.Y.U. J. LEGIS. & PUB. POL'Y 321 (2009) [hereinafter Reiss, *Tailored Participation*].

[21] Michael Strauss Kolber, Direct Final Rulemaking in the FDA: Lessons from the First Decade 4, 23 (June 8, 2008) (unpublished manuscript) (on file with author), *available at* http://ssrn.com/abstract=1121550.

[22] Lars Noah, *The Little Agency that Could (Act with Indifference to Constitutional and Statutory Strictures)*, 93 CORNELL L. REV. 901, 903–05 (2008).

controversial issues, lack of leadership, and problematic legislative directives).[23] In a similar vein, Kristine Hickman, in a recent article, demonstrated that the Treasury does not follow the APA notice and comment rulemaking procedures in over 40 percent of its rulemakings.[24]

Likewise, Ashutosh Bhagwat demonstrated that the Federal Communications Commission ("FCC") for a decade labeled its actions in relation to tariffs "enforcement policy" rather than acknowledging it was rulemaking.[25] Using the Chaney doctrine,[26] it was therefore able to avoid judicial review until the D.C. Circuit finally called it on the issue.[27]

Other studies used analysis rather than empirical methods to make the same points. For example, one writer claims that "government has no sense of accountability."[28] Dobkin, focusing on the Immigration and Naturalization Services, sees agencies as lacking accountability by acting behind the scenes, which leads to "lawlessness."[29]

These are the type of studies that resonate most powerfully outside the academic community, mostly because they reflect stories of abuse that come up in the news and fit the general American tendency to distrust bureaucrats.

For example, in 2007 the Inspector General of the Department of the Interior started expressing concerns about the operations of the Department's Minerals Management Service, an agency that collects government royalties from oil companies drilling on public lands. The Inspector General's initial concern was that since the

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[23] *Id.* at 902–03.

[24] Kristine E. Hickman, *Coloring Outside the Lines: Examining Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 NOTRE DAME L. REV. 1727, 1748–52 (2007).

[25] Ashutosh Bhagwat, *Three-Branch Monte*, 72 NOTRE DAME L. REV. 157, 168–69 (1996).

[26] *See* Heckler v. Chaney, 470 U.S. 821 (1985).

[27] Bhagwat, *supra* note 25, at 169–70.

[28] Malcolm Wallop, *The Centralization of Power and Government Unaccountability*, 4 CORNELL J. L. & PUB. POL'Y 487, 487 (1995).

[29] Donald S. Dobkin, *The Rise of the Administrative State: A Prescription for Lawlessness*, 17 KAN. J.L. & PUB. POL'Y 362, 367, 385 (2008).

Clinton administration, the agency has allowed oil companies to underpay.[30] Later investigations showed a culture of accepting gifts from industry representatives, sexual relationships with representatives from oil and gas companies (and it's not often you find an agency *literally* in bed with the regulated industry), and abuse of alcohol, cocaine, and marijuana in industry-organized parties.[31] While the newspaper reports treated it as a classic example of lack of accountability, it should be remembered that it was an internal administrative control that discovered all this—the Department of the Interior's own Inspector General, Earl E. Devaney—and it was the administrative machine that stepped in to punish the problem agency.[32]

The same department's lack of accountability was severely criticized during the oil spill in the Gulf of Mexico. The agency was criticized for not exercising sufficient oversight over the operations of British Petroleum (BP), the company owning the well that spilled over. Once again, the government—specifically, the Department of the Interior—took corrective steps, and very extreme ones. The agency was substantially reformed, and the reforms included a fundamental restructuring. For example, a royalty-in-kind program subject to many abuses was abolished, an independent Marine Board was ordered to review the agency's inspection program for offshore facilities, and inspections of deepwater operations were ordered.[33]

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[30] *Report Reveals Distrust in Royalties Agency*, WALL ST. J., Sept. 26, 2007, at A19, *available at* http://online.wsj.com/article/SB119077573820539676.html.

[31] Stephen Power, *Federal Oil Officials Accused in Sex and Drugs Scandal*, WALL ST. J., Sept. 11, 2008, at A1, a*vailable at* http://online.wsj.com/article/SB122107135333120223.html; Charlie Savage, *Sex, Drug Use and Graft Cited in Interior Department*, N.Y. TIMES, Sept. 11, 2008, at A1, *available at* http://www.nytimes.com/2008/09/11/washington/11royalty.html?scp=1&sq=department%20interior%20orgies%20drugs&st=cse.

[32] *See* Power, *supra* note 31.

[33] *See Press Release: Salazar Launches Safety and Environmental Protection Reforms to Toughen Oversight of Offshore Oil and Gas Operations*, U.S. DEP'T OF INTERIOR (May 11, 2010), http://www.doi.gov/news/pressreleases/Salazar-Launches-Safety-and-Environmental-Protection-Reforms-to-Toughen-Oversight-of-Offshore-Oil-and-Gas-Operations.cfm (describing the

Scholars are not the only ones adhering to the "agency as accountability villains" story. Politicians regularly attack agencies for their lack of accountability. That, for example, was at the heart of Representative Elliot Levitas' strong promotion of the legislative veto, which would have given Congress control over agency rules. [34] The same view was at the heart of the new and vigorous attempts to reintroduce the "Regulations from the Executive In Need of Scrutiny (REINS) Act" promoted by, for example, Congressman Geoff Davis, that would require all major rules to be approved by a Congressional Joint Resolution before they became operative.[35] In a completely different example Nebraska Democratic Senator Ben Nelson, concerned about money withheld from the University of Nebraska, described it as "unaccountable Federal bureaucrats diverting millions of dollars into agency 'slush funds.'"[36]

In the discussions leading to the enactment of the IRS Restructuring and Reform Act of 1998,[37] Senator Frank Murkowski from Alaska said that "[f]ederal agencies tend to act as if they are a law unto themselves, believing they are accountable to no one. . . . [T]he system was designed to avoid accountability."[38]

The studies of agencies as accountability villains capture an

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reforms).

[34] BARBARA HINKSON CRAIG, CHADHA: THE STORY OF AN EPIC CONSTITUTIONAL STRUGGLE 149–50 (1990); JAMES L. SUNDQUIST, THE DECLINE AND RESURGENCE OF CONGRESS 324, 353 (1981).

[35] See Congressman Davis' personal website at CONGRESSMAN GEOFF DAVIS, http://geoffdavis.house.gov/Legislation/reins.htm (last visited Feb. 24, 2011). The bill itself was presented as H.R. 10 to the 112 Congress. Details can be found at: *H.R. 10– Regulations From the Executive in Need of Security Act of 2011*, OPEN CONGRESS, http://www.opencongress.org/bill/112-h10/show (last visited February 24, 2011).

[36] Ron Nixon, *Not All Earmarks Are Paid in Full, and a Senator Wants to Know Why*, N.Y. TIMES, May 20, 2008, *available at* http://www.nytimes.com/2008/05/20/washington/20earmark.html?_r=1&scp=1&sq=unaccountable%20administrative%20agencies&st=cse.

[37] Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685 (1998).

[38] *IRS Oversight, Hearings Before the Comm. on Fin.*, 105th Cong. 9 (1998) (statement of Sen. Frank S. Murkowski, Alaska).

important part of the truth; abuses occur in the administrative state—some that clearly cannot be justified, such as the behavior of the Minerals Management Service—but others which might be looked upon as making the best of a bad situation. There are times when the only way to get a job done is to bend some rules, given the complex situations that sometimes face agencies. Consider, for example, the FDA's behavior described by Noah, which could be seen as the only way for the agency to actually get its job done in the face of severe financial and staffing constraints.[39] But this is not the whole picture.

B. Agencies as Victims

A completely different view of agency accountability emphasizes the problematic nature of accountability in the American administrative state, focusing on an alleged excess of accountability mechanisms. Scholars who take this view do not deny that there are abuses by agencies.[40] However, they suggest that it is more common to find a well meaning, hard working administration assailed from all sides by demands and accusations, so that simply doing its assigned job becomes extremely difficult.

The more neutral of these studies describe the complexity of the administrative state and address how agencies deal with that complexity. For example, in their study of public administration, Romzek and Dubnick offer a classic typology of accountability—bureaucratic, professional, political, and legal.[41] This well-accepted classification[42] distinguishes between types of accountability on

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[39] Noah, *supra* note 22, at 902–903.

[40] *See, e.g.*, Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1398 (1992) [hereinafter McGarity, *Some Thoughts*].

[41] MELVIN J. DUBNICK & BARBARA S. ROMZEK, AMERICAN PUBLIC ADMINISTRATION: POLITICS AND THE MANAGEMENT OF EXPECTATIONS 77–82 (1991) [hereinafter DUBNICK & ROMZEK, AMERICAN PUBLIC ADMINISTRATION]; Barbara S. Romzek & Melvin J. Dubnick, *Accountability in the Public Sector: Lessons from the Challenger Tragedy*, 47 PUB. ADMIN. REV. 227, 228–29 (1987).

[42] For examples of use, see Mark Bovens, *Public Accountability*, *in* THE OXFORD HANDBOOK OF PUBLIC MANAGEMENT 182, 185 (Edwin Ferlie,

two dimensions: whether the degree of control exercised by the accountability holder is high or low, and whether the source of control is external or internal.

Based on these two dimensions Dubnick and Romzek identify four possible types of accountability.[43] Bureaucratic (also known as hierarchical) accountability refers to a high degree of control exercised within the agency or within the executive branch—by other agencies, the White House, and the President. It is hierarchical in nature. It includes, but is not limited to, relations between lower agency officials and higher agency officials. Professional accountability is internal but involves a low degree of control—it emphasizes professional norms and reputational mechanisms to control experts who require discretion to do their job. Legal accountability involves a high level of control exercised by an external actor; for agencies, this includes control by courts and Congress, through legislation or the budget. Finally, political accountability refers to a low level of control exercised by an external actor—for example, influence or pressure exerted by Congress-members, the media, and interest groups. Agencies face all these forms of accountability simultaneously and have to respond to them. The science of public administration, say Dubnick and Romzek, is the science of managing conflicting expectations.

Similarly, Radin discusses the challenges facing agencies when they try to deal with the accountability apparatus by examining a hypothetical new head of the Department of Health and Human Service and his ability to juggle the conflicting accountability demands he faces in his new job.[44]

Hargrove and Glidewell ask how officials deal with "Impossible Jobs," where the "clients" (e.g., welfare recipients,

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Laurence E. Lynne & Christopher Pollitt eds., 2005); WILLIAM T. GORMLEY JR. & STEVEN J. BALLA, BUREAUCRACY AND DEMOCRACY: ACCOUNTABILITY AND PERFORMANCE 11–12 (2004); BERYL A. RADIN, CHALLENGING THE PERFORMANCE MOVEMENT: ACCOUNTABILITY, COMPLEXITY, AND DEMOCRATIC VALUES 55–56 (2006).

[43] *See* DUBNICK & ROMZEK, AMERICAN PUBLIC ADMINISTRATION, *supra* note 41, at 77–82.

[44] RADIN, THE ACCOUNTABLE JUGGLER, *supra* note 14, at 10–11, 22–24.

prisoners) are not considered very sympathetic, and where there is high conflict among interested constituencies and little confidence in the profession and the agency.[45] There are many other examples.[46]

Other studies go further and argue that the intense accountability pressures agencies face have severe negative repercussions for the administrative state and the public interest. In his study of accountability, Behn suggests that the multiplicity of accountability mechanisms leads agencies to be blamed regardless of what they do, and that this excess blame can lead to a range of negative results—from defensive behavior to despair.[47]

Similarly, Kagan, in his book *Adversarial Legalism*, tracks the problematic effects of the decentralized, multilayered system of government in the United States on making public policy.[48] For example, he describes how the involvement of multiple actors—several federal and state agencies, as well as federal and state courts—made the dredging of the Port of Oakland very slow, much more costly than anticipated, thus costing the city of Oakland jobs and revenues.[49] He acknowledges that adversarial legalism has benefits—making the system more open to new claims and more

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[45] ERWIN C. HARGROVE & JOHN C. GLIDEWELL, IMPOSSIBLE JOBS IN PUBLIC MANAGEMENT 5–8 (1990).

[46] *See, e.g.*, Jerry L. Mashaw, *Accountability and Institutional Design: Some Thoughts on the Grammar of Governance*, *in* PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS AND EXPERIENCES, *supra* note 14, at 115, 120–22; BERNARD ROSEN, HOLDING GOVERNMENT BUREAUCRACIES ACCOUNTABLE 179–204 (3d ed. 1998); Dorit Rubenstein Reiss, *Agency Accountability Strategies After Liberalization: Universal Service in the United Kingdom, France, and Sweden*, 31 L. & POL'Y 111, 113–15 (2009) [hereinafter Reiss, *Agency Accountability*]; Dorit Rubinstein, Regulatory Accountability: Telecommunications and Electricity Agencies in the UK, France and Sweden (2007) (unpublished Ph.D. thesis, University of California, Berkeley) (on file with author).

[47] BEHN, *supra* note 14, at 1–6 (discussing the phenomenon); *id.* at 69–72 (discussing some of the negative impacts).

[48] ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 43 (2001).

[49] To such an extent it became uncertain whether the port would actually be dredged, costing Oakland's port further business. *Id.* at 27–30.

accessible.[50] However, at least when it comes to regulation, Kagan strongly suggests that the costs of adversarial legalism outweigh the potential benefits.[51]

The debate about "ossification" of the rulemaking process is another example of studies warning against the negative effects of excess accountability. In a famous and very strongly written article, Thomas McGarity criticized the complexities added to the rulemaking process as harmful to the functionality of the administrative state.[52] In a subsequent article, he emphasized that it is unrealistic to tie agencies' hands so thoroughly while expecting them to deliver and be effective.[53] He also emphasized that the extensive accountability used undermines the agencies' efforts to protect the public from the harms they were designed to combat.[54] Other scholars expressed similar concerns,[55] though recent empirical studies have cast doubts on the extent to which agency rulemaking is indeed ossified by having too much accountability forced upon them.[56]

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[50] *Id.* at 31–32.

[51] *Id.* at 196–204.

[52] *See* McGarity, *Some Thoughts*, *supra* note 40, at 1448–59.

[53] *See* Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525, 525–26 (1997).

[54] *Id.* at 530–33.

[55] *See generally* Lubbers, *The Transformation*, *supra* note 18, at 474–475; JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY (1990); E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490 (1992); Ronald M. Levine, *More on Direct Final Rulemaking: Streamlining, Not Corner-Cutting*, 51 ADMIN. L. REV. 757 (1999); *see also* Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 62–65 (1995).

[56] *See* Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 932 (2008); William S. Jordan III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere With Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393, 439–40 (2000); Jason Webb Yackee & Susan Webb Yackee, *Administrative Procedures and Bureaucratic Performance: Is Federal Rule-making "Ossified"?*, 20 J. PUB. ADMIN. RES. & THEORY 261, *available at* http://jpart.oxfordjournals.org/cgi/content/abstract/mup011v1.

The common thread that runs through all of these studies is the idea that agencies, subject to extensive accountability mechanisms, are often unfairly blamed for problems not of their own making, serve as politicians and scholars' whipping boys, and have trouble doing their jobs. As with the "agencies as villains" narratives, these studies capture a part of the picture, but ignore another. It is to this missing link I turn now.

C. Agencies as Accountability Initiators

The part of the picture that current literature underemphasizes is the role of agencies as sophisticated actors managing their own accountability environment by creating and adding accountability mechanisms.

Public administration scholars acknowledge agencies acting autonomously in other contexts. For example, Carpenter describes in detail how several agencies created their own autonomous policies and managed to get the legislation they wanted from Congress by building a reputation for competence and for supporting the public interest.[57] A focus on agency action or agency discretion, implicitly acknowledging that agencies have freedom to act, is at the core of most studies of public administration and the problem the "agencies as villains" narrative confronts.[58]

However, these insights have not been applied to the study of accountability—i.e., so far agencies have not been treated as autonomous actors that can create and contribute to their accountability environment.

One paper that stands out as an exception is Elizabeth Magill's

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[57] *See generally* DANIEL P. CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862–1928 (2001).

[58] For some examples of studies that focus on agency discretion, see GARY C. BRYNER, BUREAUCRATIC DISCRETION: LAW AND POLICY IN FEDERAL REGULATORY AGENCIES (Richard A. Brody et al. eds., 1987); JERRY L. MASHAW, BUREAUCRATIC JUSTICE: ADMINISTRATIVE LAW FROM AN INTERNAL PERSPECTIVE 71–72 (1983); Joel D. Aberbach & Bert A. Rockman, *Image IV Revisited: Executive and Political Roles*, 1 GOVERNANCE 1 (1988).

recent study of self-regulation.[59] Magill examines agencies' voluntary adoption of regulations that limit their discretion.[60] She makes an important contribution to the literature by taking a clear, unbiased view of agencies' activities and by emphasizing the agencies' role in creating the regulatory environment they operate in.

Many of the limits agencies adopt through self-regulation may be seen as reforms that increase accountability—but not all.[61] And since Magill emphasizes, for most of her discussion, self-regulation activities that were actually embedded in agency rules—which will therefore be enforced by the courts under the Accardi principle[62]—some of the efforts agencies make to increase their accountability are not captured by her discussion, such as the IRIS system mentioned in the introduction to this Article. More importantly, her methodology—an analytical discussion—is dramatically different from the qualitative empirical description based on case studies used in this Article. Also, her explanations for why agencies adopt self-regulation focus mostly on what I describe as "rational choice" explanations, and are therefore more limited than those used here.[63]

This Article adds to the literature by suggesting that agencies also act voluntarily to increase their accountability; moreover, it provides detailed case studies of such behavior. Agencies do so for a number of reasons, including their self-interest, but also due to the power of ideas brought in by appointees from outside the civil service and to the role conception of the civil servants.

One challenge a claim like this faces is how to define accountability. The word "accountability" suffers from overuse and misuse, and scholars have expressed concerns about the term

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[59] *See generally* Elizabeth Magill, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859 (2009).

[60] *Id.* at 861.

[61] *See infra* text accompanying notes 125–32 for examples of reforms that increase accountability.

[62] According to which agencies are bound by their own regulations. Magill, *supra* note 59, at 877–81.

[63] *Id.* at 884–91.

losing its meaning.[64] It has been defined as covering electoral accountability,[65] punishment,[66] or control of one party by another.[67] Very broadly, cognitive psychology scholars see accountability as:

> [an] implicit or explicit expectation that one may be called on to justify one's beliefs, feelings, and actions to others . . . [It] also usually implies that people who do not provide a satisfactory justification for their actions will suffer negative consequences ranging from disdainful looks to loss of one's livelihood, liberty, or even life . . . . Conversely, people who do provide compelling justifications will experience positive consequences . . . .[68]

To solve the problem of defining accountability, I am focusing my discussion on two types of reforms that agencies often adopt: increasing their transparency and increasing their responsiveness to external actors. Increasing transparency is often suggested as a means of increasing accountability[69] and allowing external actors

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[64] BEHN, *supra* note 14, at 2–3; Bovens, *supra* note 42, at 182; Richard Mulgan, *'Accountability': An Ever-Expanding Concept?*, 78 PUB. ADMIN. 555, 555–56 (2000); Melvin J. Dubnick, Professor, Rutgers University–Newark, Seeking Salvation for Accountability, Delivered at 2002 Annual Meeting of the American Political Science Association (Aug. 29–Sept. 1, 2002), *available at* http://mjdubnick.dubnick.net/papers/2002/salv2002.pdf.

[65] *See, e.g.*, KENNETH J. MEIER & LAURENCE J. O'TOOLE, JR., BUREAUCRACY IN A DEMOCRATIC STATE: A GOVERNANCE PERSPECTIVE 12 (2006); DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 102–03 (1993); *see generally* Wallop, *supra* note 28.

[66] BEHN, *supra* note 14, at 3.

[67] *Id.* at 14–16.

[68] Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 PSYCHOL. BULL. 255, 255 (1999). Although developed in relation to studies of individuals, the definition has been used in relation to agencies before. Reiss, *Agency Accountability*, *supra* note 46, at 114 n.1; Mark Seidenfeld, *The Psychology of Accountability and Political Review of Agency Rules*, 51 DUKE L.J. 1059, 1064 n.26 (2001).

[69] Danielle Keats Citron, *Technological Due Process*, 85 WASH. U. L. REV. 1249, 1254 (2008) (grouping transparency with accountability as part of a whole); Christopher Hood, *What Happens When Transparency Meets Blame-Avoidance?*, 9 PUB. MGMT. REV. 191, 192–93 (2007); Koppell, *supra* note 14, at

more of a say increases control, as well as the threat of sanctions.[70] Therefore, reforms in which agencies increase their transparency or the influence of other actors can be taken with some confidence as examples of efforts to increase accountability.

II. AGENCIES WANT TO BE ACCOUNTABLE

If, as I argue, some agencies want to be accountable, the question remains, why? This part of the Article suggests some explanations, which are supported by the case studies detailed in Part III. I will draw on several strands of literature about the administrative state, as well as on general features of agencies, and examine three strong motivators that can create a quest for accountability within an agency. The first focuses on what we may term the "rational choice model"—i.e., efforts by an agency to minimize costs arising out of a successful accusation of lack of accountability, and to maximize the benefits to itself that derive from accountability.[71] However, other explanations are just as persuasive; this Article examines two of those alternative explanations.

One explanation is based on the power of ideas, and specifically upon agencies' acceptance of new ideas about the importance of transparency and participation—ideas drawn from practitioners, consultants, and scholars which have become prevalent in the world of governance. The second is based on agencies' role conception. This explanation claims that in today's world, bureaucrats have internalized the need to be accountable as part of their mission and role conception, and invest in accountability as an integral part of doing their job. In a sense, these explanations overlap, but there is an important difference in

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96 (characterizing transparency as a dimension of accountability); May, *supra* note 14, at 11–12 (characterizing transparency as increasing accountability).

[70] *See generally* West, *supra* note 14 (equating participation with accountability throughout); *see also* Camilla Stivers, *The Listening Bureaucrat: Responsiveness in Public Administration*, 54 PUB. ADMIN. REV. 364, 367 (1994) (stating that responsiveness to the public promotes accountability).

[71] This, for example, is the argument suggested to explain the EPA's behavior in Part III.B.

the "target audience" on which they focus. As the case studies suggest, ideas are frequently brought into an agency through the appointment of outsiders. Peter Hutt came to the FDA from private practice, Richard Merrill from academia, and Charles Rossotti was a businessman before becoming commissioner of the IRS. All three were strongly committed to transparency in a way that the staff may not have been at the time they came in.

However, sometimes separately and sometimes as a response to the reform, ideas can also be internalized by the agency's civil servants, those who run day-to-day operations of the agency. In that case we are talking about role conception. It's not just about the power of the idea itself; the issue becomes the way the civil servant sees her job, a matter of duty rather than ideology. Even before the 1998 reform, several of the IRS staff members were promoting increased transparency; they had, apparently, internalized the ideas of transparency as part of their role. Even more striking, after the reforms introduced by Hutt were implemented, there were some FDA officials who wanted to go further in transparency than he did. Such occurrences seem to reflect a redefinition of the officials' roles in their own minds. All three of these explanations have some applicability to the case studies in Part III.

A. Rational Choice: Agencies Want to be Accountable to Maximize Benefits and Minimize Harm

The rational choice paradigm as it applies to agencies sees bureaucrats as self-interested utility maximizers.[72] The classical approach posits that bureaucrats seek to maximize their budget.[73] However, more recent approaches add in bureaucrats' desire to maximize preferred policy outcomes.[74]

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[72] *See, e.g.*, CROLEY, *supra* note 17, at 49; WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 36–38 (1st paperback prtg. 2007). *See generally* Richard A. Posner, *The Behavior of Administrative Agencies*, 1 J. LEGAL STUD. 305 (1972).

[73] NISKANEN, *supra* note 72, at 40–41.

[74] Sean Gailmard & John W. Patty, *Slackers and Zealots: Civil Service, Policy Discretion, and Bureaucratic Expertise*, 51 AM. J. POL. SCI. 873, 874

While there has been substantial criticism of rational choice theory as not empirically grounded and in tension with the realities of the administrative state,[75] in the context of accountability, there is some indication in the case studies and in current literature that agencies do act to increase their accountability because of a cost-benefit analysis.

In the last decades governments have suffered from a legitimacy crisis.[76] Trust in government has been dropping substantially.[77] The perception of a legitimacy crisis easily leads to increased pressure on agencies to be accountable and more and more efforts are put into holding them accountable. The large amount of literature on accountability in the last decades[78] demonstrates how important the issue has become. In a sense, the administrative state today is the administrative state under attack.[79] In this environment, agencies pay a very high price for an accusation of lack of accountability that sticks. All the agencies

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(2007); Michael M. Ting, *The "Power of the Purse" and Its Implications for Bureaucratic Policy-Making*, 106 PUB. CHOICE 243, 245 (2001). Much of the literature also focuses on the political side of the equation, examining efforts by political branches to control the administration, treating bureaucrats as having no say in the design of institutions. *See, e.g.*, John D. Huber & Charles R. Shipan, *The Costs of Control: Legislators, Agencies, and Transaction Costs*, 25 LEGIS. STUD. Q. 25, 25–27 (2000); B. Dan Wood & John Bohte, *Political Transaction Costs and the Politics of Administrative Design*, 66 J. POL. 176, 179–182 (2004).

[75] *See, e.g.*, DONALD P. GREEN & IAN SHAPIRO, PATHOLOGIES OF RATIONAL CHOICE THEORY: A CRITIQUE OF APPLICATIONS IN POLITICAL SCIENCE, 34–46 (1994); RUTH HOOGLAND DEHOOG, CONTRACTING OUT FOR HUMAN SERVICES 21 (1984); Gary J. Miller & Terry M. Moe, *Bureaucrats, Legislators, and the Size of Government*, 77 AM. POL. SCI. REV. 297 (1983); Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, 57 LAW & CONTEMP. PROBS. 1, 1–2 (1994); Diane Vaughan, *Rational Choice, Situated Action, and the Social Control of Organizations*, 32 LAW & SOC'Y REV. 23, 26–27 (1998).

[76] THEODORE J. LOWI, THE END OF LIBERALISM: IDEOLOGY, POLICY AND THE CRISIS OF PUBLIC AUTHORITY 167–69 (1969). MICHAEL W. DOWDLE, *Public Accountability: conceptual, Historical, and Epistemic Mappings* in PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS AND EXPERIENCES 1,1 (Michael W. Dowdle ed., 2006).

[77] Kenneth P. Ruscio, *Trust, Democracy, and Public Management: A Theoretical Argument*, 6 J. PUB. ADMIN. RES. & THEORY 461, 462 (1996).

[78] *See supra* note 14.

[79] Rubin, *supra* note 14, at 74–75.

described in Part III were agencies under attack, and there are indications that they tried to increase accountability to reduce pressure and prevent negative consequences. Claims of lack of accountability are often raised to justify demands to reform agencies, cut their budget, change the governing legislation, or other adverse consequences. For example, the IRS's reorganization of 1998 was motivated at least in part by complaints that the IRS was not sufficiently accountable to Congress.[80] Agencies naturally want to avoid such consequences. At the very least, not being accountable can mean another actor will add accountability mechanisms, and as demonstrated in Part I.C, agencies already face a plethora of them; these demands add work and take up resources that can be used elsewhere; what sane bureaucrat would want more of them imposed from the outside?[81] No wonder, then, that administrators and agencies want to demonstrate that they are accountable and do not fall into the category of "evil," unaccountable bureaucrats.

This is the main argument Magill uses in her article; she describes agency self-regulation as motivated by a rational desire to increase the benefits to the agency.[82] The reasons she suggests include giving agency heads the ability to control lower officials to whom they delegate authority;[83] clarifying the problem internally and helping bureaucrats explain their decisions;[84] publicizing an agency's policy and offering stronger commitment;[85] limiting future changes of policy following a change of administration;[86] protecting agency autonomy against intervention from political

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[80] *See generally* NAT'L COMM'N ON RESTRUCTURING THE INTERNAL REVENUE SERV., A VISION FOR A NEW IRS (1997).

[81] *See* BEHN, *supra* note 14, at 14–15. Behn gives the example of the rules adopted by government procurement officials, observed by scholar Steven Kelman to add complexity to the process to avoid legal protest or political challenges. *See id.* at 15.

[82] Magill, *supra* note 59, at 884–91.

[83] *Id.* at 884–86.

[84] *Id.* at 887.

[85] *Id.*

[86] *Id.* at 888.

actors;[87] and increasing production of collective goods as information and reputation.[88]

Some of these reasons apply to agency measures increasing accountability. Increased accountability can limit the illicit power of any one actor by forcing the agency to make the basis of its decisions clear, and thus protect agencies against political interference. In addition, it may make it harder to change existing policy; may provide the higher ranks of the agency with more information about what the rest of the agency is doing; and may increase its reputation.

B. Pantouflage:[89] The Power of Ideas and the Role of Political Appointees

However, on its own, the cost/benefit argument is insufficient, for two reasons. First, a strong cost/benefit argument can also be made that suggests agencies should want to avoid accountability and not add to the already existing complicated system they face, an argument commonly made.[90] That's one of the arguments the "agencies as villains" story draws on. For example, one of Paul Light's interviewees said about the desire of Presidential administrations for a strong inspector general: "Everybody wants a strong IG operation until it starts investigating them. The administration may start out thinking they want junkyard dogs and

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[87] *Id.* at 889.

[88] *Id.* at 890–91.

[89] The term Pantouflage is taken from studies of French public administration and refers to the prevalent practice of the senior elite trained in the most prestigious schools moving back and forth between the public and private sectors. Luc Rouban, *The Administrative and Political Elites*, *in* PASCAL PERRINEAU & LUC ROUBAN, POLITICS IN FRANCE AND EUROPE 121, 132 (2009). The United States parallel is that one way to maintain connections and flow of ideas between the private and public sector is through personnel exchange, appointing people with previous private sector background to senior positions in the public service. This is somewhat similar to the United States concept of "revolving door."

[90] *See* McCubbins, *Administrative Procedures*, *supra* note 16, at 248–49; *see also* BEHN, *supra* note 14, at 15; Dobkin, *supra* note 29, at 379–82; Hood, *supra* note 69, at 192.

what they end up getting is French poodles."[91]

Second, while a rational choice explanation may explain *why* an agency chooses to work toward increased accountability, it says nothing about the choice of method. Nor does it explain the level of commitment some agencies show to the accountability endeavor. In a world in which government agencies have limited resources—what has been referred to by some as a period of austerity[92]—some agencies devote substantial portions of their scarce resources to accountability. There is clearly more going on here than mere protection of self-interest; a more nuanced explanation would appear to be needed.

One such explanation is the power of ideas. As demonstrated by B. Guy Peters, current ideas about governance draw on several extremely important traditions, many of which are connected to accountability.[93] Scholars have demonstrated that ideas can have strong influence on the behavior of organizations.[94] In the case of

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[91] PAUL CHARLES LIGHT, MONITORING GOVERNMENT: INSPECTORS GENERAL AND THE SEARCH FOR ACCOUNTABILITY 102 (1993).

[92] Paul Pierson, *From Expansion to Austerity: The New Politics of Taxing and Spending*, *in* SEEKING THE CENTER: POLITICS AND POLICYMAKING AT THE NEW CENTURY 54, 76–77 (Martin A. Levin et al. eds., 2001); Paul Pierson, *Coping with Permanent Austerity: Welfare State Restructuring in Affluent Democracies*, *in* THE NEW POLITICS OF THE WELFARE STATE, 410, 423–25 (Paul Pierson ed., 2001); Richard J. Pierce, Jr., *Judicial Review of Agency Actions in a Period of Diminishing Agency Resources*, 49 ADMIN. L. REV. 61, 65–67 (1997) [hereinafter Pierce, *Judicial Review*].

[93] *See* B. GUY PETERS, THE FUTURE OF GOVERNING 16–22 (2001) (demonstrating that among the ideas that shape governance in today's world are participation and market-based ideas, including ideas of transparency).

[94] *See, e.g.*, MARK BLYTH, GREAT TRANSFORMATIONS: ECONOMIC IDEAS AND INSTITUTIONAL CHANGE IN THE TWENTIETH CENTURY 20–27 (2002) (reviewing the literature on the power of ideas); JOHN D. CAMPBELL, INSTITUTIONAL CHANGE AND GLOBALIZATION 17–23 (2004) (citing additional sources therein); John L. Campbell, *Institutional Analysis and the Role of Ideas in Political Economy*, *in* THE RISE OF NEOLIBERALISM AND INSTITUTIONAL ANALYSIS 159, 175–77 (John L. Campbell & Ove K. Pedersen eds., 2001); John L. Campbell, *Institutional Analysis and the Role of Ideas in Political Economy*, 27 THEORY & SOC'Y 377 (1998); George Kateb, *Ideology and Storytelling*, 69 SOC. RES. 321, 321–23 (2002) (observing that ideas are powerful enough to lead people to do horrible things under totalitarian regimes); Robert C. Lieberman,

agencies, ideas can also be translated into actual pressures and changes through politicians, interest groups, and the administrators' epistemic community, including those that write about agencies.

One set of ideas which greatly influences the behavior of agencies draws upon market ideology and private sector reforms.[95] An argument made by supporters of these ideas is that traditional hierarchical mechanisms of accountability do not work very well; they argue that market style mechanisms can provide better accountability and achieve better results.[96] Whether or not, as an empirical matter, market-style reforms do in fact improve accountability—and there is doubt about that claim[97]—the idea

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Ideas, Institutions, and Political Order: Explaining Political Change, 96 AM. POL. SCI. REV. 697, 699–700 (2003).

[95] For example, reforms attempting to introduce ideas current in the private sector—such as competition, privatization, incentive-based approaches—into the public sector. *See, e.g.*, JOHN E. CHUBB & TERRY M. MOE, POLITICS, MARKETS, AND AMERICA'S SCHOOLS (1990); PETERS, *supra* note 93, at 22–30; Isabel M. Bjork & Catherine R. Connors, *Free Markets and Their Umpires: The Appeal of the U.S. Regulatory Model*, 22 WORLD POL'Y J. 51, 51 (2005); David Levi-Faur, *The Global Diffusion of Regulatory Capitalism*, 598 ANNALS AM. ACAD. POL. & SOC. SCI. 12 (2005); David Levi-Faur, *Regulatory Capitalism: The Dynamics of Change beyond Telecoms and Electricity*, 19 GOVERNANCE 497 (2006).

[96] *See* BEHN, *supra* note 14, at 37–38; Bjork & Connors, *supra* note 95, at 52–53; Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1314–27 (2003); Michael Trebilcock & Edward M. Iacobucci, *Privatization and Accountability*, 116 HARV. L. REV. 1422, 1422–24.

[97] For those raising concerns about the effect of market style reforms on accountability, see Carol Harlow, *Public Service, Market Ideology, and Citizenship*, *in* PUBLIC SERVICES AND CITIZENSHIP IN EUROPEAN LAW (Mark Freedland & Silvana Sciarra eds., 1998), GREG PALAST ET AL., DEMOCRACY AND REGULATION: HOW THE PUBLIC CAN GOVERN ESSENTIAL SERVICES 20–22 (2003) (describing British and Indian transactions in which review and comment or other public review processes were insufficient and thus unnecessarily costly), and Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1260–63 (2003). On the other hand, there is also a substantial literature supporting the claim. *See e.g.*, STEVEN K. VOGEL, FREER MARKETS, MORE RULES 17–21 (1996) (incorporating market forces considerations into a state institutions framework); Scott Furlong, *Political Influences on the Bureaucracy—the Bureaucracy Speaks*, 8 J. PUB.

exists and is powerful, and this belief in the efficacy of the market can easily drive public servants to try to increase their own accountability through methods that aim at exploiting the reputed advantages of the market. Agencies whose work is not easily privatized or which cannot really compete with the market's reputed price discipline may emphasize, instead, more achievable benefits such as increased information and transparency.[98]

Many times people appointed to lead agencies have come in with a strong belief in transparency.[99] In the cases described in this Article, the appointment of Peter Hutt as Chief Counsel of the FDA, with his belief in transparency, directly influenced the reforms adopted. In that case, the politically appointed commissioner was also onboard. In the case of the IRS, Commissioner Rossotti's belief in the need for reform and his continued belief in transparency also advanced the reform.

Yet another set of important ideas that influence modern agencies relate to increasing public participation and the role of citizens in government.[100] Substantial amounts of scholarship have promoted the idea of giving citizens more opportunities to participate, often suggesting new and original modes of doing so.[101] Practical experiments in participatory government have been

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ADMIN. RES. & THEORY 39, 48–50 (1998).

[98] See COSMO GRAHAM, REGULATING PUBLIC UTILITIES: A CONSTITUTIONAL APPROACH (2000), for an example of the regulatory agencies in England trying to increase their legitimacy through transparency.

[99] *See generally* WOOD & WATERMAN, *supra* note 18; *see also* Furlong, *supra* note 97, at 39.

[100] PETERS, *supra* note 93, at 50–64.

[101] *See, e.g.*, 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS § II (1998); JOHN GASTIL, BY POPULAR DEMAND: REVITALIZING REPRESENTATIVE DEMOCRACY THROUGH DELIBERATIVE ELECTIONS (2000); PAUL HIRST, ASSOCIATIVE DEMOCRACY: NEW FORMS OF ECONOMIC AND SOCIAL GOVERNANCE 15–43 (1994); ETHAN LEIB, DELIBERATIVE DEMOCRACY IN AMERICA: A PROPOSAL FOR A POPULAR BRANCH OF GOVERNMENT (2004); Sherry R. Arnstein, *A Ladder of Citizen Participation*, 35 J. AM. INST. PLANNERS 216 (1969); Ned Crosby et al., *Citizens Panels: A New Approach to Citizen Participation*, 46 PUB. ADMIN. REV. 170 (1986); Frank Fischer, *Citizen Participation and the Democratization of Policy Expertise: From Theoretical Inquiry to Practical Cases*, 26 POL'Y SCI. 165 (1993); Judith E. Innes & David E. Booher, *Reframing Public Participation: Strategies for the 21st Century*, 5

conducted.[102] The effect of this may have been much greater on agencies than on Congress or the President. Much attention has been given to efforts to increase participation in agency proceedings.[103] Just as with market ideology, a good deal of

PLAN. THEORY & PRAC. 419 (2004); Lyn Kathlene & John A. Martin, *Enhancing Citizen Participation: Panel Designs, Perspectives, and Policy Formation*, 10 J. POL'Y ANALYSIS & MGMT. 46 (1991); Jennifer Nou, *Regulating the Rulemakers: A Proposal for Deliberative Cost-Benefit Analysis*, 26 YALE L. & POL'Y REV. 601 (2008); Ortwin Renn et al., *Public Participation in Decision Making: A Three-Step Procedure*, 26 POL'Y SCI. 189 (1993); Nancy Roberts, *Public Deliberation in an Age of Direct Citizen Participation*, 34 AM. REV. PUB. ADMIN. 315 (2004).

[102] *See* JAMES L. CREIGHTON, THE PUBLIC PARTICIPATION HANDBOOK: MAKING BETTER DECISIONS THROUGH CITIZEN INVOLVEMENT 18–20 (2005); Ned Crosby, *Citizens Juries: One Solution for Difficult Environmental Questions*, *in* FAIRNESS AND COMPETITION IN CITIZEN PARTICIPATION: EVALUATING MODELS FOR ENVIRONMENTAL DISCOURSE 157–87 (Ortwin Renn et al. eds., 1995); Peter C. Deienel & Ortwin Renn, *Planning Cells: A Gate to "Fractal" Mediation*, *in* FAIRNESS AND COMPETITION IN CITIZEN PARTICIPATION: EVALUATING MODELS FOR ENVIRONMENTAL DISCOURSE, *supra*, at 117–40 (Ortwin Renn et al. eds., 1995); Archon Fung & Erik Olin Wright, *Thinking About Empowered Participatory Governance*, *in* DEEPENING DEMOCRACY: INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE 4–5 (Archon Fung & Erik Olin Wright eds., 2003); Gastil, *supra* note 101; Carolyn M. Hendriks, *Consensus Conferences and Planning Cells: Lay Citizen Deliberations*, *in* THE DELIBERATIVE DEMOCRACY HANDBOOK: STRATEGIES FOR EFFECTIVE CIVIC ENGAGEMENT IN THE 21ST CENTURY 80–110 (John Gastil & Peter Levine eds., 2005); Carolyn J. Lukensmeyer et al., *A Town Meeting for the Twenty-First Century*, *in* THE DELIBERATIVE DEMOCRACY HANDBOOK: STRATEGIES FOR EFFECTIVE CIVIC ENGAGEMENT IN THE 21ST CENTURY, *supra*, at 154–63; Edward C. Weeks, *The Practice of Deliberative Democracy: Results from Four Large-Scale Trials*, 60 Pub. Admin. Rev. 360 (2000).

[103] *See, e.g.*, CAROLYN J. LUKENSMEYER & LARS HASSELBLAD TORRES, PUBLIC DELIBERATION: A MANAGER'S GUIDE TO CITIZEN ENGAGEMENT (2006), *available at* http://www.businessofgovernment.org/sites/default/files/LukensmeyerReport.pdf; Roger C. Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525 (1972); Archon Fung, *Varieties of Participation in Complex Government*, 66 PUB. ADMIN. REV. (SPECIAL ISSUE) 66 (2006); Ernest Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359, 361 (1972); Ogden, *supra* note 18, at 559–67; David Schlosberg et al., *Democracy and E-Rulemaking: Web-Based Technologies, Participation, and the Potential for Deliberation*, 4 J.

criticism has been directed towards these efforts. Quite a lot of this criticism has been directed at the methods, mostly in relation to inherent inequalities in the ability to participate and influence,[104] but there has also been discussion of the inappropriateness of participation to certain administrative decisions.[105] Even so, the influence on bureaucrats has been substantial. These ideas enter the bureaucratic consciousness through training and scholarship, as well as pressure from political appointees to the agency and from the White House.

In the cases discussed below in Part III, Hutt's belief in input led him to raise the importance of comments by requiring the FDA to respond to each comment it received. The desire to increase input evidenced by both the EPA staff and commissioners directly relates to the style of reforms that were adopted there. At the IRS, the Taxpayer Advocacy Panel directly increased the role of private citizens—hopefully representative of "the public"—in decision-making. In all three cases, the reforms aimed at increasing stakeholder participation.

INFO. TECH. & POL. 37 (2007) *available at* http://people.umass.edu/stu/doc/JITP4-1_Democracy.pdf.

[104] *See generally* JEFFERY M. BERRY & CLYDE WILCOX, THE INTEREST GROUP SOCIETY (5th ed. 2009); SIDNEY VERBA & NORMAN H. NIE, PARTICIPATION IN AMERICA: POLITICAL DEMOCRACY AND SOCIAL EQUALITY (Harper & Row 1972); Marissa Martino Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?*, 8 J. PUB. ADMIN. RES. & THEORY 245 (1998); Janet Newman et al., *Public Participation and Collaborative Governance*, 33 J. SOC. POL'Y 203 (2004); Thomas E. Engram, Liberty, Equality and Fairness: A Study of Citizen Participation in Federal Agency Rulemaking (April 16, 2008) (unpublised Ph.D. dissertation, Georgia State University), *available at* http://digitalarchive.gsu.edu/political_science_diss/4/.

[105] Cary Coglianese, *Is Consensus an Appropriate Basis for Regulatory Policy?*, *in* ENVIRONMENTAL CONTRACTS: COMPARATIVE APPROACHES TO REGUALTORY INNOVATION IN THE UNITED STATES AND EUROPE (Eric W. Orts & Kurt Deketelaere eds., 2001) [hereinafter Coglianese, *Is Consensus an Appropriate Basis*]; Reiss, *Tailored Participation*, *supra* note 20, at 345–46; Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173 (1997).

C. Role Definition: Bureaucrats Expand Their Commitment to Mission to Include a Commitment to Accountability

An important theme that emerges from the public administration literature is bureaucrats' involvement in policy making[106] and bureaucrats' strong commitment to the mission of their particular agency.[107] Challenging the rational choice view of the self-interested bureaucrat, a whole line of public administration studies have suggested that many of those going into the public service do so because they are motivated to participate in the making of policy and in achieving policy goals, creating a better world.[108] The most recent line of public administration studies addressing this, starting in the 1990s, coined the term "Public Service Motivation."[109] This line of literature used empirical

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[106] ABERBACH & ROCKMAN, *supra* note 58, at 8.

[107] *See* ANTHONY DOWNS, INSIDE BUREAUCRACY 26–84 (Waveland Press 1994) (1966); KENNETH A. SHEPSLE & MARK S. BONCHEK, ANALYZING POLITICS: RATIONALITY, BEHAVIOR, AND INSTITUTIONS 347–48 (1997); J. Jonathan Bender et al., *Stacking the Deck: Bureaucratic Missions and Policy Design*, 81 AM. POL. SCI. REV. 873 (1987); Gene Brewer et al., *Individual Conceptions of Public Service Motivation*, 60 PUB. ADMIN. REV. 254, 255 (2000) [hereinafter Brewer et al., *Individual Conceptions*]; James L. Perry, *Antecedents of Public Service Motivation*, 7 J. PUB. ADMIN. RES. & THEORY 181 (1997); James L. Perry, *Measuring Public Service Motivation: An Assessment of Construct Reliability and Validity*, 6 J. PUB. ADMIN. RES. & THEORY 5, 5–6 (1996) [hereinafter Perry, *Measuring Public Service Motivation*]; Bradley E. Wright, *Public-Sector Work Motivation: A Review of the Current Literature and a Revised Conceptual Model*, 11 J. PUB. ADMIN. RES. & THEORY 559 (2001). Not all civil servants are devoted to the mission, even under theories that acknowledge that some are, *see* DOWNS, *supra*, at 83, and such devotion does not always have positive consequences, for example strong bureaucratic loyalty to one mission may motivate administrators to resist certain changes and tasks. *See* Brewer et al, *Individual Conceptions*, *supra* note 107, at 261.

[108] *See* JANET V. DENHARDT & ROBERT B. DENHARDT, THE NEW PUBLIC SERVICE: SERVING, NOT STEERING 3–4 (expanded ed. 2007); John DiIulio, *Principled Agents: The Cultural Bases of Behavior in a Federal Government Bureaucracy*, 4 J. PUB. ADMIN. RES. & THEORY 277, 281–82 (1994).

[109] *See* Gene A. Brewer & Sally Coleman Selden, *Whistle Blowers in the Federal Civil Service: New Evidence of the Public Service Ethic*, 8 J. PUB. ADMIN. RES. & THEORY 413, 415–19 (1998); Donald P. Moynihan & Sanjay K. Pandey, *The Role of Organizations in Fostering Public Service Motivation*, 67

survey data in an attempt to compare the attitudes and motives of public servants to those of business executives. It consistently showed that high level civil servants were more likely to be motivated by the mission and the public interest than were their private sector counterparts.[110] Not only that, but the studies provide evidence that suggests that public servants are more motivated by intrinsic job satisfaction and the opportunity to provide service and less motivated by financial rewards than their private sector counterparts;[111] that they are more strongly motivated when they feel their mission is important;[112] and their devotion to the public interest is not limited to their jobs, as they also volunteer more outside their professional life in terms of both money and time.[113] Needless to say, this is a general description and does not describe all civil servants; at least one study classified public servants according to their motivation and found some variety.[114] But the trend is clear, and perhaps not surprising—after all, in the United States, high level public servants usually have a graduate degree,[115]

PUB. ADMIN. REV. 40, 41 (2007); James L. Perry & Lois Recascino Wise, *The Motivational Bases of Public Service*, 50 PUB. ADMIN. REV. 367, 368 (1990).

[110] *See* Brewer & Selden, *supra* note 109, at 429–33; Philip E. Crewson, *Public-service Motivation: Building Empirical Evidence of Incidence and Effect*, 7 J. PUB. ADMIN. RES. & THEORY, 499, 500, 512 (1997); Perry, *Measuring Public Service Motivation*, *supra* note 107, at 6–9, 20–21; Perry & Wise, *supra* note 109, at 369-70. One limitation of this literature is that it focuses almost completely on the upper levels of the civil service, i.e. people in management positions, and therefore will not tell you much about the motivation of your mail carrier or customs official; however, the kind of accountability mechanisms discussed here are usually created at the policy-making level, as the case studies demonstrate. Thus, the high-level population that this literature describes is exactly the right one to study for the purposes of the present Article.

[111] *See* Crewson, *supra* note 110, at 504; Bradley E. Wright, *Public Service and Motivation: Does Mission Matter?*, 67 PUB. ADMIN. REV. 54, 54 (2007) [hereinafter Wright, *Public Service and Motivation*].

[112] *See* Wright, *Public Service and Motivation*, *supra* note 111, at 60.

[113] *See* David J. Houston, *''Walking the Walk'' of Public Service Motivation: Public Employees and Charitable Gifts of Time, Blood, and Money*, 16 J. PUB. ADMIN. RES. & THEORY 67, 73 (2005).

[114] *See* Brewer et al., *Individual Conceptions*, *supra* note 107, at 255.

[115] B. GUY PETERS, THE POLITICS OF BUREAUCRACY: A COMPARATIVE PERSPECTIVE 93–94 (Routledge 5th ed. 2001)(1978). Though less of them come

but compared to private sector employees they are paid less[116] and certainly enjoy less prestige than managers in private businesses[117] or equivalent level civil servants in other countries.[118] They face jobs that are typically very challenging and have relatively less power than elected officials. Why would anyone take on such work unless he/she cared deeply about it and the interests it serves?

In today's world, where accountability is such a strong word, it is no wonder that certain civil servants accept commitment to accountability as part of their mission, as the case studies in Part III reflect. Agencies believe they should be accountable, not just because they buy into ideas of transparency and participation, but because it's part of their role definition: as they view it, one aspect of doing a good job is to be accountable.[119] Accordingly, they are willing to make efforts and act in ways that will promote accountability. Furthermore, at least one study demonstrated that reforms in the public sector could increase the level of public service motivation, including reforms aimed at increasing accountability.[120]

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from Ivy League institutions. *Id.* at 116–17. The Fact Book of the Federal Office of Personnel Management for 2007 found that since 2000 over sixty percent had graduate degrees and less than ten percent were not college graduates. U.S. OFFICE OF PERS. MGMT., FEDERAL CIVILIAN WORKFORCE STATISTICS: THE FACT BOOK 73 (2007 ed.), *available at* http://www.opm.gov/feddata/factbook/2007/2007FACTBOOK.pdf. *See also* Gregory B. Lewis & Sue A. Frank, *Who Wants to Work for the Government?*, 62 PUB. ADMIN. REV. 395, 400 (2002) ("[B]etter educated Americans were more likely than others to work for the government.").

[116] HAL G. RAINEY, UNDERSTANDING AND MANAGING PUBLIC ORGANIZATIONS 239 (3d ed. 2003); Laura I. Langbein & Gregory B. Lewis, *Pay, Productivity, and the Public Sector: The Case of Electrical Engineers*, 8 J. PUB. ADMIN. RES. & THEORY 391, 391–92, 409 (1998).

[117] RAINEY, *supra* note 116, at 327; B. Guy Peters, *Searching for a Role: The Civil Service in American Democracy*, 14 INT'L POL. SCI. REV. 373, 383 (1993).

[118] Joel D. Aberbach & Bert A. Rockman, *What Has Happened to the U.S. Senior Civil Service?*, 8 BROOKINGS REV. 35, 35 (1990).

[119] James H. Svara, *The Myth of the Dichotomy: Complementarity of Politics and Administration in the Past and Future of Public Administration*, 61 PUB. ADMIN. REV. 176, 179 (2001).

[120] *See generally* Moynihan & Pandey, *supra* note 109.

In other words, civil servants—bureaucrats—are strongly motivated to serve the public interest; they will begin to actively seek increases in transparency and/or responsiveness if and when they perceive that the public interest calls for that kind of reform. In a reality that emphasizes accountability, we can expect civil servants to internalize the idea that accountability is an integral part of their mission, one that is completely necessary if their job is to be done well.

Some support for the idea that bureaucrats internalize the need for increased transparency and responsiveness comes from a recent survey of bureaucrats' attitudes to e-rulemaking conducted by Jeffrey Lubbers, a renowned expert on rulemaking. Aside from his empirical findings, Lubbers reports on the comments made about e-rulemaking, many of which were positive. Among the positive aspects bureaucrats emphasized were the improvement rulemaking creates in the ability of the public to participate and the transparency of the process.[121] Here are some examples from his responses:

> *E-rulemaking is the obvious choice for encouraging public comment and allowing easy access to records from anywhere and without risking the loss of original hard copies.*
>
> *With more people using the Internet, it seems the right way to conduct rulemaking and promises to reach more folks who don't read the Federal Register.*
>
> *In addition to reaching older members of society, making the process available online makes it more likely we will reach members of Generation X and the Millennium Generation . . . .*
>
> *E-rulemaking is better at letting the public know what the agencies are doing than it is at providing thoughtful input*

[121] *See* Jeffrey S. Lubbers, *A Survey of Federal Agency Rulemakers' Attitudes About E-Rulemaking*, 62 ADMIN. L. REV. 451, 471 (2010).

> *into the decisions themselves.*
>
> *[M]aking agency rulemaking more accessible to the public . . .*
>
> *Makes it much easier for the public to see the comments . . . .*[122]

There were, of course, also negative comments,[123] but the reason given for the positive comments—the increase of access—supports the claim that many bureaucrats had internalized the need for public access and accountability.

The level of resources and efforts devoted to accountability that I have described in the case studies below may or may not truly indicate an internalization of a desire for accountability by agency staffs. However, officials of the agencies repeatedly express the view that the observed actions demonstrate exactly that. Hutt strongly emphasized how the FDA officials internalized the need for transparency, to a degree where he felt obliged to say "stop," refusing the publication of trade secrets related to new drug applications because of the negative policy consequences that would have resulted. In speaking to the IRS's officials, they too say many of the staff, especially at the higher levels, internalized the need to increase transparency.[124] In neither case did I conduct a thorough investigation of the staff to see whether they have, indeed, internalized the norms; but that is the impression of important, well informed observers and it is supported by the efforts devoted to increasing accountability.

III. CASE STUDIES OF AGENCIES SEEKING ACCOUNTABILITY

Through several case studies, this section develops an argument that agencies seek out ways to be accountable. Showing

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[122] *Id.* at 471–72.

[123] *See id.* at 472–74.

[124] Telephone Interview with IRS Official (under promise of confidentiality) (June 24, 2009).

that agencies are willing to add accountability mechanisms is not hard. Examples are legion. To use a major one, the APA exempts matters "relating to agency management or personnel or to public property, loans, grants, benefits, or contracts" from rulemaking procedures.[125] On its face, this would mean agencies providing government benefits are not required to go through notice and comment. However, again and again, government agencies dispersing benefits adopted the notice and comment requirements in their own regulations, without any legal obligation—even though such adoption subjects them to possible criticism and facilitates judicial review.[126] The Department of Labor adopted notice and comment procedures when implementing the Comprehensive Employment and Training Act, saying:

> It is the policy of the Secretary of Labor, that in applying the rulemaking provisions of the Administrative Procedure Act (5 U.S.C. 553), the exemption therein for matters relating to public property, loans, grants, benefits or contracts shall not be relied upon as a reason for not complying with the notice and public participation requirements thereof . . . .[127]

Other examples cited by Lubbers in his book on rulemaking include the Department of Transportation, the Department of Housing and Urban Development, the Department of Defense, the Department of Health and Human Services, the Department of Agriculture, and the Small Business Administration.[128] As Part III.A documents, a self-initiated elaboration and deepening of the elements of notice and comment was a substantial part of the reform of the FDA procedures in the 1970s. Courts treat deviations from these regulations as if they were violations of the notice and comment procedures in the APA;[129] accordingly, an agency

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[125] Administrative Procedure Act, 5 U.S.C.A. § 553(a)(2) (West 2010).

[126] JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 62 (4th ed. 2006) [hereinafter LUBBERS, A GUIDE].

[127] 29 C.F.R. § 2.7 (1979).

[128] *See* LUBBERS, A GUIDE, *supra* note 126, at 63 n.60.

[129] *See, e.g.*, Rodway v. U.S. Dep't. of Agric., 514 F.2d 809 (D.C. Cir. 1975); *see also* LUBBERS, A GUIDE, *supra* note 128, at 63 n.61.

adopting them is at risk of having its work overturned on procedural grounds or because of not responding to comments—incurring an increased risk of sanctions.

In another example, before engaging in the rulemaking that was the subject of the famous Vermont Yankee case,[130] the Atomic Energy Commission (as it was then called) voluntarily adopted adversarial proceedings, including cross-examinations, even though those added to the length of proceedings.[131]

Taking this further, Elizabeth Magill demonstrated that agencies often engage in self-regulation, regulation limiting their discretion, providing many examples.[132]

A few of these were:

> [T]he Social Security Administration's "grid" regulations, which succeeded in turning the question of whether a party is disabled into a series of (more) objective questions.[133]
>
> [T]he Food and Drug Administration's decision to provide notice and invite comment on its "guidance documents" even though the APA would not have required it.[134]

In the following case studies, I track in more detail some examples of increased accountability, focusing on three agencies, in chronological order of the efforts described. The FDA reformed its procedures to increase transparency and participation in the 1970s, and provides an early case study of such behavior. Since at least the 1980s, the EPA has been experimenting with new ideas to increase its accountability. Finally, the IRS, widely held up for years as an example of complete non-accountability,[135] has been working for over ten years on increasing its transparency and

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[130] Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519 (1978).

[131] Gillian E. Metzger, *The Story of Vermont Yankee*, *in* ADMINISTRATIVE LAW STORIES 124, 134–35 (Peter L. Strauss ed., 2006).

[132] Magill, *supra* note 59, at 866–69.

[133] *Id.* at 867.

[134] *Id.* at 868.

[135] Wm. Brian Henning, *Reforming the IRS: The Effectiveness of the Internal Revenue Service Restructuring and Reform Act of 1998*, 82 MARQ. L. REV. 405, 405–06, 427 (1999); Joseph J. Thorndike, *Reforming the Internal Revenue Service: A Comparative History*, 53 ADMIN. L. REV. 717, 769 (2001).

responsiveness to the general public.

The history of these agencies shows the persistent phenomenon of agencies seeking to increase their accountability, covering as it does a span of time that begins in the 1970s (for the FDA cases) and continues through the 1980s (with the EPA's efforts) up to the present (with the FDA and the EPA's later efforts and the IRS's actions). When considering the significance of the following three case studies, we should note that the subjects of the studies are all large and important agencies. The IRS is a mammoth agency with over 100,000 employees spread throughout the country, and its actions affect the lives of almost every citizen and resident. The FDA and the EPA likewise work in areas that directly affect the quality of life of most citizens of the United States, regulating, between them, food, air quality, water quality, medicine, and other areas. These are bodies whose actions have great effect upon United States public policy.

A. The Efforts of the FDA to Increase its Accountability

In the 1960s and 1970s dramatic procedural changes were imposed on agencies. In 1966 Congress adopted the Freedom of Information Act ("FOIA") requiring that governmental information be made public unless it fit into one of the exceptions in the Act.[136] In the 1970s, the D.C. Circuit required that agencies respond to the major issues raised in comments[137] and emphasized that the basis of a decision must be clearly explained.[138] But even as the D.C.

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[136] Today it is codified as 5 U.S.C. § 552.

[137] *See* Natural Res. Def. Council v. U.S. Nuclear Regulatory Comm'n, 547 F.2d 633, 646 (D.C. Cir. 1976):

> An agency need not respond to frivolous or repetitive comment it receives. However, where apparently significant information has been brought to its attention, or substantial issues of policy or gaps in its reasoning raised, the statement of basis and purpose must indicate why the agency decided the criticisms were invalid.

See also Portland Cement Ass'n v. Rucklehause, 486 F.2d 375, 394 (D.C. Cir. 1973).

[138] *See* Kennecott Copper Corp. v. Envtl. Prot. Agency, 462 F.2d 846, 849–50 (D.C. Cir. 1972).

Circuit started its quest to control rulemaking,[139] certain agencies started adopting similar requirements on their own, increasing their accountability voluntarily. This section describes one such story, that of the FDA, and examines two sets of efforts: the FDA's work to increase its transparency by internalizing the values in the FOIA[140] and the FDA's procedural reform, both of which occurred during the same time period (early to mid 1970s) and reflected the same spirit of increasing transparency and participation.

1. Efforts to Increase Implementation of FOIA

Criticisms of the weakness of FOIA implementation were common in the early 1970s for agencies generally, and the FDA was no exception; several specific criticisms of it were made.[141] Historically, the FDA, like other agencies, produced minimal compliance, releasing information only sparsely and reluctantly. This was a defense mechanism against criticism: "[I]f the public doesn't get information, they have a difficult time objecting to what FDA does."[142] That changed in 1972.

When Peter Barton Hutt was appointed as Chief Counsel for the FDA in 1971**,** the importance of improving the agency's transparency was impressed on him both by his predecessor, William H. Goodrich, and by the then Commissioner, Charles C. Edwards. The mandate fit in with Hutt's own philosophy. Hutt

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[139] *See, e.g.*, Reuel E. Schiller, *Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 ADMIN. L. REV. 1139, 1155–66 (2001) (citing examples).

[140] Administrative Procedure Act, 5 U.S.C.A. § 552 (West 2010).

[141] *See* Jeremy R. T. Lewis, *FOIA and the Emergence of Federal Information Policy in the 1980s and 1990s*, *in* HANDBOOK OF PUBLIC INFORMATION SYSTEMS 41, 42 (G. David Garson ed., 2000); Ralph Nader, *New Opportunities for Open Government: The 1974 Amendments to the Freedom of Information Act and the Federal Advisory Committee Act*, 25 AM. U. L. REV. 1, 3–4 (1975); Kenneth D. Salomon & Lawrence H. Wechsler, *Freedom of Information Act: A Critical Review*, 38 GEO. WASH. L. REV. 150, 155–56, 159–60, 163 (1969–1970); Ralph Nader, *Freedom from Information: The Act and the Agencies*, 5 HARV. C.R.-C.L. L. REV. 1, 2 (1970).

[142] Telephone Interview with Peter Barton Hutt, formerly Chief Counsel, FDA, currently Senior Counsel, Covington & Burling LLP (June 20, 2009).

viewed transparency as an important accountability mechanism, one that should be put in place:

> My personal philosophy is that full disclosure to the public is the essence of democracy. . . . if the public doesn't understand what's going on in government, government can hide all forms of mischief and injustice. Whereas if everything is made public government has someone looking over their shoulder—sunlight kills a lot of issues.[143]

His first weeks on the job were devoted to determining how the FDA should comply with FOIA in a way that would increase its transparency.[144] He used his substantial discretion in implementing the mandate he received to create a solid framework, categorizing each document and creating a set of rules regarding its disclosure. He met every Friday with a team consisting of the FDA Commissioner and other senior officials in the FDA, keeping them informed and on board, and providing them a chance for input into the process. While the work was Hutt's, the policy was endorsed and supported by the agency's heads, all of whom at least accepted, if not actually endorsed, the need for increased transparency. Richard Merrill, Hutt's successor as Chief Counsel, explained that, "Hutt did the major job of convincing the main people in the agency—the ones I refer to as our client—people responsible for substantive programs."[145]

The result was a proposed rule published in the *Federal Register* on May 5, 1972.[146] The rule spread over ten of the *Register's* small-print, three-column pages, and included substantial details. In the preamble to the rule, the Commissioner, signing the proposed rule, expressed his commitment to FOIA's basic premise that "public disclosure should be the rule rather than the exception."[147]

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[143] *Id.*

[144] *Id.*

[145] Telephone Interview with Richard A. Merrill, formerly Chief Counsel, FDA, currently Professor of Law, Emeritus, Virginia Law School (July 7, 2009).

[146] Public Information, 37 Fed. Reg. 9128 (May 5, 1972).

[147] *Id.*

That does not mean every piece of information the agency had was disclosed. The most notable exception was in relation to New Drug Applications ("NDAs"), and information containing trade secrets submitted with them. When submitting an application to license a new drug, a company has to submit substantial amounts of information to demonstrate the drug's safety and efficacy,[148] much of which it would not want its competitors to know. Trade secret confidentiality is preserved under at least three legal sources: Section 552(b)(4) of FOIA (permitting confidentiality),[149] the Trade Secrets Act (prohibiting disclosure of trade secrets by federal officials),[150] and section 331(j) of the Food, Drug, and Cosmetic Act (prohibiting the revealing of trade secrets to anyone outside the department other than the courts or Congress).[151] Hutt decided that the strong prohibitions on disclosing trade secrets, as well as longstanding agency precedent, supported a restrictive approach to disclosing materials attached to NDAs, under which the supporting materials would remain confidential.[152] However, to

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[148] James M. Beck & Elizabeth D. Azari, *FDA, Off-Label Use, and Informed Consent: Debunking Myths and Misconceptions*, 53 FOOD & DRUG L.J. 71, 75–76 (1998).

[149] Administrative Procedure Act, 5 U.S.C.A. § 552(b)(4) (West 2010) ("This section does not apply to matters that are . . . trade secrets and commercial or financial information obtained from a person and privileged or confidential.").

[150] Trade Secrets Act, 18 U.S.C.A. § 1905 (West 2010):

> Whoever, being an officer or employee of the United States or of any department or agency thereof, . . . publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties . . . which information concerns or relates to the trade secrets . . . shall be fined under this title, or imprisoned not more than one year, or both; and shall be removed from office or employment.

[151] Food, Drug, and Cosmetic Act, 21 U.S.C.A. § 331(j) (West 2010):

> The following acts and the causing thereof are prohibited; . . . revealing, other than to the Secretary or officers or employees of the Department, or to the courts when relevant in any judicial proceeding under this chapter, any information acquired . . . concerning any method or process which as a trade secret is entitled to protection . . . .

[152] Telephone Interview with Peter Barton Hutt, *supra* note 142.

preserve the public's right to know and in the interest of transparency, the agency published summaries of the reasoning and materials behind a decision—a Summary of Basis of Approval ("SBA").[153] This decision was arrived at through a consultation between Hutt and Richard Crout, head of the Bureau of Drugs, in which Crout agreed that the SBA was a reasonable compromise between protecting trade secrets and assuring transparency. It was criticized by industry members who saw the SBA as disclosing too much information[154] and by consumer interest groups for not providing enough information.[155] But it was clearly an effort by the agency to go beyond its previous practices and increase its transparency beyond what was mandated under FOIA, as the agency interpreted it.

It took over two years to finalize the FDA's public information rule (which is not unusual—a recent study found that the average time for rules from notice to final rule is 2.2 years[156]), and during that time the agency received 667 letters, including 68 substantive comments to the rule (which the final regulation answered in

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[153] *Id.*; Robert M. Halperin, *FDA Disclosure of Safety and Effectiveness Data: A Legal and Policy Analysis*, 1979 DUKE L.J. 286, 287 n.9 (1979).

[154] Halperin, *supra* note 153, at 287; James T. O'Reilly, *Implications of International Drug Approval Systems on Confidentiality of Business Secrets in the U.S. Pharmaceutical Industry*, 53 FOOD & DRUG L.J. 123, 128–31 (1998).

[155] Judith Axler Turner, *Consumer, Report/FDA Pursues Historic Role Amid Public, Industry Pressures*, 1975 NAT'L J. REPS 250, Feb. 15, 1975, at 250, 254 (on file with author). For a more recent example of the same criticism, a known consumer rights advocate on health matters, Dr. Sidney Wolfe, a member of the consumer watchdog group Public Citizen, said in response to the FDA's creation of a task force to increase transparency in 2009:

> For something like 36 years, through litigation and every other means, we have been trying to expand access to data on drug safety and efficacy . . . To make access to clinical trial data [happen] much sooner is a great idea for the public, for everyone that's involved. . . . It's anti-scientific and anti-intellectual to have these important data secret.

Steven Reinberg, *FDA to Study Ways to Be More Open with Public*, BLOOMBERG BUSINESS WEEK (June 2, 2009, 4:00 PM), http://www.businessweek.com/lifestyle/content/healthday/627708.html; *see also* Halperin, *supra* note 153, at 287.

[156] West, *supra* note 14, at 69.

detail).[157] However, the change in policy was implemented immediately, without waiting for the regulations to be finalized, although it was changed somewhat as a result of the comments received.[158]

The regulations that the FDA promulgated between 1972 and 1974 had a dramatic impact on the FDA's FOIA practice: before the regulations, the FDA granted only about 10 percent of FOIA requests submitted to it; after them, it granted about 98 percent.[159] The agency seemed to have internalized and bought into the new and expansive approach to transparency. In fact, Hutt describes how agency staff wanted to go further than he thought appropriate on certain issues:

> [Agency staff] . . . feel conflicted on safety and effectiveness data. They get so much criticism for not releasing it from people who don't understand that that's confidential trade secret, and they want to just release it—and get rid of the criticism. But you have to understand the consequences—releasing all trade secrets will destroy the American pharmaceutical industry. [160]

The goal of this increased transparency, as stated by Peter Hutt, was to increase public scrutiny of the FDA's actions with a view to allowing the public to prevent abuses. Critics continued to challenge the FDA on grounds that it still has not done enough;[161] but the agency, in this case, acted with the goal of increasing accountability. Nor was this the last time the FDA acted to increase its transparency, though the later examples are beyond the scope of this project.[162]

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[157] Public Information, 39 Fed. Reg. 44602 (December 24, 1974).

[158] Telephone Interview with Peter Barton Hutt, *supra* note 142.

[159] Halperin, *supra* note 153, at 286.

[160] Telephone Interview with Peter Barton Hutt, *supra* note 142.

[161] *E.g.*, Louis P. Garrison, Jr. et al., *Assessing A Structured, Quantitative Health Outcomes Approach To Drug Risk-Benefit Analysis*, 26 HEALTH AFFAIRS 684, 685 (2007).

[162] More recently, the agency created a task force dedicated to increasing its transparency and a "transparency blog" dedicated to following the agency's efforts to increase its transparency and allowing the public to comment. *See About This Blog*, FDA TRANSPARENCY BLOG (Nov. 10, 2008), http://fda

2. Procedural Reform

Today's administrative law is marked by complex procedures and substantial demands on agencies. To avoid having their decisions labeled "arbitrary and capricious,"[163] agencies must explain their actions in the "concise general statement" demanded by the APA[164] and must respond to the comments they received.[165] In fact, in today's world, the multitude of requirements for explanations by agencies are criticized more often than not.[166] But there was a time when the requirement of explaining an agency's action was new and exciting. So when the FDA adopted a set of procedural regulations that required extensive information to be provided in a rule's preamble, it was ahead of its time in imposing these requirements on itself to increase its accountability.

The background to the procedural reform was a period of divided government, with President Richard Nixon in the White House until 1974, followed by Gerald Ford, both Republicans facing a Democratic Congress.[167] The democrats in Congress were wary of the FDA, and kept a close eye on it, repeatedly criticizing

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transparencyblog.fda.gov/about-this-blog.html.

[163] Administrative Procedure Act, 5 U.S.C.A. § 706(2)(A) (West 2010).

[164] Administrative Procedure Act, 5 U.S.C.A. § 553(c) (West 2010).

[165] MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS?: JUDICIAL CONTROL OF ADMINISTRATION 47–48 (1988); Ronald M. Levin, *Scope-of-Review Doctrine Restated: An Administrative Law Section Report*, 38 ADMIN. L. REV. 239, 263 (1986); R. Shep Melnick, *Administrative Law and Bureaucratic Reality*, 44 ADMIN. L. REV. 245, 246–47 (1992).

[166] SHAPIRO, *supra* note 165, at 47–48; Melnick, *supra* note 165, at 246–47; Pierce, *Seven Ways to Deossify Agency Rulemaking*, *supra* note 55, at 68–69.

[167] In 1971–1973, the House of Representatives members were split between 255 Democrats and 180 Republicans and the Senate had 54 Democrats and 44 Republicans (and one conservative and one independent); in 1973–1975 there were 242 Democrats and 192 Republicans in the House, and 56 Democrats and 42 Republicans in the Senate (and one conservative and one independent). *House History*, OFFICE OF THE CLERK OF THE U.S. HOUSE OF REPRESENTATIVES, http://clerk.house.gov/art_history/house_history/index.html (last visited Feb. 5, 2011) (giving House membership); *Party Division in the Senate, 1789–Present*, U.S. SENATE, http://senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm (last visited Feb. 5, 2011) (giving Senate membership).

its actions and demanding explanations from officials.[168] In an effort to increase the agency's legitimacy and reduce Congress' concerns, Hutt undertook to reform the agency's procedures,[169] implementing what were innovations at the time, though these rules would later become a staple of administrative law.

The change was perhaps most extreme in relation to rulemaking. Like many other agencies, the FDA initially used adjudications as its main mode of decision-making. However, as the agency's authority was expanded by Congress, mounting pressures of workload made this inefficient, and the agency increased its use of rulemaking in the early 1960s.[170] One of Hutt's major projects was to guide the implementation of the change to an agency that works primarily through rulemaking.[171] This change fit with the general trend towards increased rulemaking in the 1960s–1970s,[172] fueled in part by concerns about the administrative state's accountability—rulemaking was seen as more "sleek, efficient and fair" compared to the slowness, uncertainty, and potential arbitrariness inherent to agency adjudication.[173]

However, rulemaking as the FDA implemented it did not look like rulemaking as today's administrative scholars describe it.[174] Instead, rulemaking included a short notice including the proposed regulation (and the other minimal information required by the APA),[175] and after the comments had been submitted, the agency would publish the final rule with a statement that "having considered the comments, I [i.e., the commissioner] hereby

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[168] Telephone Interview with Peter Barton Hutt, *supra* note 142.

[169] *Id.*

[170] *See* Schiller, *supra* note 139, at 1148–49.

[171] Telephone Interview with Peter Barton Hutt, *supra* note 142.

[172] *See* Schiller, *supra* note 139, at 1145–52.

[173] *Id.* at 1140–41; *see also* Pierce, *Seven Ways to Deossify Agency Rulemaking*, *supra* note 55, at 59 (elaborating on the benefits of agency rulemaking).

[174] Though it probably looked more like the process anticipated and designed by the drafters of the APA. *See* Schiller, *supra* note 139, at 1159.

[175] *See* Administrative Procedure Act, 5 U.S.C.A. § 553(b) (West 2010) (requiring time, place and nature of public rulemaking proceedings, if any, reference to legal authority for the rule, either terms of rule or description of subjects and issues involved).

promulgate the final regulation."[176]

Under the same rationale of increasing transparency to increase agency accountability and reduce abuses, Hutt implemented two related innovations. First, he required the agency to have a detailed preamble both in the proposed rule[177] and in the final rule.[178] The preamble would have to include:

> [A] summary first paragraph describing the substance of the document in easily understandable terms, . . . (vii) supplementary information about the regulation in the body of the preamble that contains references to prior notices relating to the same matter and a summary of each type of comment submitted on the proposal and the Commissioner's conclusions with respect to each. The preamble is to contain a thorough and comprehensible explanation of the reasons for the Commissioner's decision on each issue.[179]

In short, it called for a great deal of information to be produced by the agency.

The reform was not universally welcomed by agency staff: "People at FDA were at first blush horrified," but Hutt was not deterred. "[This] was a form of transparency. We told the American public, 'this is why we are doing it.'"[180] The courts' first steps into requiring explanation, occurring at the time, assisted Hutt, and his successor Merrill, to convince the agency that the steps were necessary.[181]

In addition, the preamble was to include the commissioner's response to the comments submitted, as described in the regulation above, preempting the demands the courts would later apply to the FDA. That is not to say that the agency always responded to comments to the satisfaction of commentators and/or the courts. In

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[176] Telephone Interview with Peter Barton Hutt, *supra* note 142.

[177] 21 C.F.R. § 10.40(b)(vii).

[178] *Id.* § 10.40(c)(3).

[179] *Id.*

[180] Telephone Interview with Peter Barton Hutt, *supra* note 142.

[181] Telephone Interview with Richard A. Merrill, *supra* note 145.

the *Nova Scotia* case, for example,[182] the court criticized the FDA's commissioner for not responding to certain issues raised directly by the Bureau of Commercial Fisheries of the Department of the Interior.[183] But the agency took steps to increase its accountability, even though that added substantial work and at the same time increased the risk that its actions would be challenged.

B. The EPA Works at Being Accountable

Like the FDA, the EPA engaged in many efforts to increase its accountability. And just as with the FDA, this Article will focus on only a small sample of these behaviors. The laws governing the EPA were designed to promote accountability through the "fire alarm" approach discussed by the trio of scholars collectively known as "McNollgast." When using a fire alarm approach Congress creates accountability mechanisms that allow private citizens to take action to challenge or block agency deviation from Congressional mandates, rather than having only "top-down" oversight.[184] Many of the statutes delegating power to the EPA include provisions for citizen lawsuits.[185] One source estimated that in the 1980s, about 80 percent of the EPA's rules were subject to litigation, and described the EPA as "embattled and embroiled in litigation, threats of litigation and expressions of general dissatisfaction on the part of all of its outside constituencies—industry, environmentalists, and state government."[186]

In an effort to reduce the dissatisfaction with its programs and

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[182] *See generally* United States v. Nova Scotia Food Products Corp., 568 F.2d 240 (2d Cir. 1977).

[183] *Id.* at 248.

[184] Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 173–76 (1984).

[185] For example, the Clean Water Act provision allowing anyone who is or might be affected by violation of the act's provision to sue a violator. *See* Clean Water Act, 33 U.S.C.A. § 1365 (West 2010). The Clean Air Act has a similar citizen suit provision. *See* Clean Water Act, 42 U.S.C.A. § 7604 (West 2010).

[186] Deborah S. Dalton, *Negotiated Rulemaking Changes EPA Culture*, *in* FEDERAL ADMINISTRATIVE DISPUTE RESOLUTION DESKBOOK 135, 146 (Marshall J. Breger et al. eds., 2001).

to increase its legitimacy, the EPA has engaged in many efforts to increase its accountability by increasing its transparency and the opportunities for public participation, sometimes through its own initiatives and sometimes following political prodding. Since at least the 1980s, the EPA has made substantial efforts to engage the public in dialogue and increase the input of stakeholders. It expresses commitment to accountability in the reports describing its performance and measuring goal achievements. For example, the agency says in its 2008 "Performance and Accountability Report"[187] that the report "demonstrates EPA's commitment to be held accountable for results."[188] In its "Framework for Implementing EPA's Public Involvement Program,"[189] the EPA explained that its goal is "to have excellent public involvement become an integral part of EPA's culture, thus improving all of the Agency's decision making."[190]

Many examples can be provided, but this Article will describe just three in chronological order: adoption of negotiated rulemaking, the development of the IRIS system, and the 2001 online dialogue.

1. Negotiated Rulemaking

Starting in 1983 the EPA voluntarily conducted a pilot program of negotiated rulemaking procedures following a recommendation by the Administrative Conference of the United States; it was one of the first agencies to do so.[191] The Negotiated Rulemaking Act[192]

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[187] U.S. ENVTL. PROT. AGENCY, PERFORMANCE AND ACCOUNTABILITY REPORT (2008), *available at* http://www.epa.gov/planandbudget/archive.html.

[188] *Id.* at 2.

[189] U.S. ENVTL. PROT. AGENCY, FRAMEWORK FOR IMPLEMENTING EPA'S PUBLIC INVOLVEMENT POLICY (May 2003), *available at* http://www.epa.gov/publicinvolvement/policy2003/framework.pdf.

[190] *Id.* at 1.

[191] Siobhan Mee, *Negotiated Rulemaking and Combined Sewer Overflows (CSOs): Consensus Saves Ossification?*, 25 B.C. ENVTL. AFF. L. REV. 213, 232 (1997) (suggesting EPA was the first). But see Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1263 (1997) [hereinafter Coglianese, *Assessing Consensus*] (demonstrating the FAA was the first, with the EPA and a few other agencies

was only enacted in 1990, at least partly drawing on the EPA's experience.[193] The EPA chose negotiated rulemaking in an effort to reduce the adversarial nature of the regular rulemaking process and especially the litigation that accompanies it, but the choice also reflects the increasing acceptance of negotiation as a form of decision making in the environmental context.[194]

Two initial negotiations on nonconformance penalties under the Clean Air Act and the criteria for emergency pesticide handling successfully ended in a consensus that was used in issuing the Notice of Proposed Rulemaking.[195] Participants expressed satisfaction with the process.[196] This initial success spurred the agency to engage in further negotiated rulemaking.

The EPA engaged in a very systematic effort, creating a project staff that was devoted to identifying appropriate rules for negotiated rulemaking, monitoring and evaluating facilitators, and generally improving the process.[197] Since 1990, the project's role was redefined to include general conflict resolution mechanisms.[198]

By 2000, the EPA had conducted twenty-one negotiated rulemakings, more than other agencies, on a wide range of topics.[199] It engaged in many more evaluations to see whether certain rulemakings were appropriate for negotiated rulemaking.[200] While the evaluation of negotiated rulemaking is mixed,[201] the

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shortly following).

[192] Negotiated Rulemaking Act, 5 U.S.C. § 561 (West 2010).

[193] Mee, *supra* note 191, at 216.

[194] Daniel J. Fiorino & Chris Kirtz, *Breaking Down Walls: Negotiated Rulemaking at EPA*, 4 TEMP. ENVTL. L. & TECH. J. 29, 29 (1985).

[195] *Id.*

[196] *Id.* at 30.

[197] Dalton, *supra* note 186, at 135, 146–49.

[198] *Id.* at 151–52.

[199] *Id.* at 135. For some descriptions, *see id.* at 135–46.

[200] *Id.* at 151.

[201] *Compare* Dalton, *supra* note 186, at 149; Philip J. Harter, *Assessing the Assessors: The Actual Performance of Negotiated Rulemaking*, 9 N.Y.U. ENVTL. L.J. 32, 33 (2000) [hereinafter Harter, *Assessing the Assessors*]; Philip J. Harter, *Fear of Commitment: An Affliction of Adolescents*, 46 DUKE L.J. 1389, 1421–22, 1422 n.117 (1997); Cornelius M. Kerwin & Scott R. Furlong, *Time and Rulemaking: An Empirical Test of Theory*, 2 J. PUB. ADMIN. RES. & THEORY

EPA made a clear effort to engage stakeholders in its decision making.

2. The Integrated Risk Information System Database

The EPA's Integrated Risk Information System database (IRIS) is, as described at the beginning of this paper, a database including assessment of the risks involved with various chemicals. IRIS was adopted by the EPA in 1985, but the major efforts at reforming its procedures started in the mid 1990s.[202]

After a 1997 review process, the EPA introduced several changes which included, for example, creating a hotline for users, publishing an annual agenda specific to IRIS assessments in the *Federal Register,* publishing external peer review drafts of IRIS assessments on its website and considering public comments on the drafts.[203] In 2004 the agency also added, at the request of the Office of Management and Budget in the White House ("OMB"), a process that allows OMB and other federal agencies to review and comment on assessments; OMB involvement increased over the years.[204] Adding the OMB process was controversial and critics attacked it on several grounds. It was seen as adding a political element to what should be a professional endeavor.[205] It was seen as an effort by the Bush administration to add delays to the assessment process, as part of a pro-business agenda, since the assessment process is a first step in regulating a given chemical. However, allowing the OMB to review the EPA documents

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113, 122–24 (1992) (giving positive evaluations), *with* Coglianese, *Assessing Consensus*, *supra* note 191, at 1309–10 (asserting that negotiated rulemaking is not shorter and has no less litigation than regular rulemaking); *id.* at 1281–1304 (analyzing the data). *See also* Cary Coglianese, *Assessing the Advocacy of Negotiated Rulemaking: A Response to Philip Harter*, 9 N.Y.U. ENVTL. L.J. 386, 405–27 (2000-2001) (offering a much more pessimistic assessment) [hereinafter Coglianese, *Assessing the Advocacy*].

[202] U.S. Gov't Accountability Office, *supra* note 2, at 6–10.

[203] *Id.* (taken almost, though not completely, verbatim from the report).

[204] *Id.* at 12, 22–23.

[205] *E.g.*, OMB WATCH, OMB INTERFERES IN IRIS ASSESSMENTS OF TOXIC CHEMICALS: QUESTIONS AND ANSWERS (May 2008), http://ombwatch.org/files/regs/PDFs/IRISfactsheet.pdf.

increases accountability in two ways: it provides another layer of inter-executive branch review, that is, another layer of bureaucratic accountability, and since OMB is subject to presidential control, this procedure tends to strengthen the President's control over other agencies. Since the President is the only official in the executive branch directly elected, strengthening his control over the administrative state strengthens political control over the professional civil service, thus strengthening at least one type of accountability.

By 2007, the IRIS assessment process involved the following stages:[206]

1. Before assessing a substance, the EPA would ask the public and other federal agencies or interested parties for nominations.
2. The EPA would list which of the nominated substances would be assessed, and publish that list in their annual agenda, at the same time soliciting scientific information about the listed substances, both from the public and other federal agencies.
3. The EPA would also do its own literature search and create a literature review.
4. The EPA would do a quantitative toxological review.
5. OMB would review the toxological report and distribute it to other agencies for comment. According to the General Accountability Office ("GAO") report, "OMB informs EPA when EPA has adequately addressed interagency comments."[207]
6. The EPA would publish the results of the toxicological review and convene a public meeting of external peer reviewers.

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[206] This description is based on a combination of the GAO report 08-440, *see* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 2, at 13, and a descriptive article from the non profit OMB Watch that makes a clear distinction between the process as it was before the 2008 reform described below and the post-2008 process. *See White House Gains Influence in Toxic Chemical Assessments*, OMB WATCH (April 15, 2008), http://www.ombwatch.org/node/3642.

[207] U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 2, at 13.

7. After external review, the EPA would revise the assessment as necessary.
8. A second OMB review would then be conducted, with OMB again disseminating the information to other agencies.
9. Finally, the EPA would post the assessment on its website.

In 2008 this process was strongly criticized by the GAO as too long and inefficient, but it certainly has substantial accountability built in, most of which was voluntarily taken on by the agency (though adding the OMB review seemed to be due to political pressure).[208]

On April 10, 2008, the EPA changed its process, adding several steps. The new steps substantially increased OMB's role in the process as well as the opportunity for public comment. For example, at the selection phase, in addition to asking the public for nominations of chemicals, the EPA was required to consult with OMB after receiving nominations to determine which of the substances nominated it would evaluate. Before creating its toxological review, the EPA would prepare a qualitative assessment of the chemical, including potential health risk, susceptible populations, and potential uncertainties. This assessment would then be open to comments from the public and OMB (which would provide the assessment to other agencies). In addition, if another agency demonstrated the chemical to be critical to its mission, that agency could require further study of the substance.[209] In other words, the process, while adding to the delay criticized by the GAO, allowed for increased accountability of the process towards the OMB and other agencies as well as increased opportunities for public input.

In May 2009, the EPA's administrator revised the process once again, announcing the change in a memo to top EPA officials that was also published on the agency's website.[210] The goal of the new process was to streamline and simplify the review process. OMB

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[208] *Id.* at 3–5.

[209] *White House Gains Influence in Toxic Chemical Assessments*, *supra* note 206.

[210] Memorandum from Lisa P. Jackson, *supra* note 6.

would now review only at two stages, before and after the input of the expert peer review. The agency announced that it would lead the new process (previously, the process was coordinated and managed by OMB)—the EPA would give the other agencies opportunity to comment and will meet with them, but it intends to have the final say.[211] Other agencies will no longer be able to delay the process to conduct research on "mission critical" chemicals.[212] In addition, all written comments from other agencies and the White House were to be made public.[213]

On the one hand, the agency made substantial efforts to reduce delays, but on the other hand it increased accountability to the public by providing more information on its decision-making process. Generally speaking, throughout all the reforms, the EPA struggled to balance thorough review of the assessment process with efficiency, sometimes leaning more one way, sometimes more the other; but in all cases, it worked hard to increase accountability, primarily by increasing the input of external actors and thus giving them more opportunities to impact the final decision.

3. The Online Dialogue

In 2001, the EPA engaged in an online dialogue to supplement traditional hearings for comment on its "Draft Public Involvement Policy" (PIP) and on ways that it could be implemented.[214] The fact that the EPA conducted such a dialogue at all evidences their search for ways to become more accountable; the content of the dialogue provides additional evidence that the agency was actively

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[211] *Id.* at 4.

[212] *EPA Announces New IRIS Assessment Development Process*, ENVTL. PROT. AGENCY, (May 21, 2009), http://yosemite.epa.gov/opa/admpress.nsf/48f0fa7dd51f9e9885257359003f5342/065e2c61afea0917852575bd0064c9db!OpenDocument.

[213] Memorandum from Lisa P. Jackson, *supra* note 6.

[214] Thomas C. Beierle, RESOURCES FOR THE FUTURE, DEMOCRACY ON-LINE: AN EVALUATION OF THE NATIONAL DIALOGUE ON PUBLIC INVOLVEMENT IN EPA DECISIONS 15 (Jan. 2002), http://www.rff.org/rff/Documents/RFF-RPT-demonline.pdf.

trying to improve its accountability.

The 2001 dialogue involved 1,166 members of the public and substantial numbers of the EPA staff. [215] The process started with the circulation of a draft of the PIP for comments in December 2000.[216] The process was open to anyone, and the EPA engaged in substantial efforts to advertise it. Quoting from Beirle, the author of a report on the dialogue:

> EPA staff sent announcements via EPA mailing lists and listservs and spread the word through personal contacts and mailings to a wide variety of institutions involved in environmental policy, including environmental organizations, state and local governments, small businesses, and tribal groups. Internally, they distributed information to 1,500 EPA staff—including all coordinators of environmental justice, tribal, communications, and community-based environmental protection programs—with a request to pass on information about the Dialogue to their regular contacts. Information Renaissance publicized the Dialogue through information channels it had developed through previous on-line dialogues. Some people who received announcements about the Dialogue forwarded them through their own networks.[217]

About a month before the dialogue, people could register, either as active or passive participants. ("Active" meant one was allowed to both read and post messages, "passive" meant reading privileges only.)[218] There was a dialogue website where the EPA and Information Renaissance posted an electronic briefing book with substantial amounts of materials.[219]

Ten of the EPA's offices held a day of discussion each. Participants could post messages or answer previous messages in a

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[215] *Id.* at 8; Patricia A. Bonner et al., *Bringing the Public and the Government Together Through On-Line Dialogues*, *in* THE DELIBERATIVE DEMOCRACY HANDBOOK: STRATEGIES FOR EFFECTIVE CIVIC ENGAGEMENT IN THE 21ST CENTURY, *supra* note 102, at 146–47.

[216] BEIERLE, *supra* note 214, at 15.

[217] *Id.* at 16.

[218] *Id.* at 17.

[219] *Id.* at 18.

thread.[220] Officials responded to "something [sic] that was relevant to their programs."[221] The material collected was included in the EPA brochures[222] and in a Public Involvement Policy issued in June 2003.[223] A report was prepared after the fact describing the process in detail.[224]

In these three very different examples, the EPA constantly strove to increase input from stakeholders into the process and to increase the transparency of the process. In the IRIS case, at least, the costs of accountability may have outweighed the benefits; but all cases demonstrate the agency's strong commitment to accountability.

C. The IRS Seeks Accountability

In 1998 Congress passed the Internal Revenue Service Restructuring and Reform Act of 1998, substantially changing the regulatory environment of the IRS.[225] One of the goals of the act was to increase the agency's accountability.[226] The reform was passed amid substantial accusations of lack of accountability. In a typical example, Senator Grassley said the IRS:

"[S]eems to be squeezing the little guy to get the money while this set of four witnesses are telling us that the big tax liability is often forgiven. And the cause of this, of course, I think, and it is the basic unfairness is the lack of accountability."[227]

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[220] *Id.* at 17.

[221] Bonner, *supra* note 215, at 147.

[222] *Id.* at n.21; *Online Publication Title List*, U.S. ENVTL. PROT. AGENCY, http://nepis.epa.gov/EPA/html/Pubs/pubtitleOther.htm (last updated Sept. 14, 2010) (providing brochures on public involvement, numbered 233F03005-12, 233F03014).

[223] *Public Involvement Policy of the U.S. Environmental Protection Agency*, ENVTL. PROT. AGENCY, (May 2003), http://www.epa.gov/public involvement/policy2003/finalpolicy.pdf.

[224] BEIERLE, *supra* note 214, at 8.

[225] Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685, *available at* http://www.gpo.gov:80/fdsys/pkg/ PLAW-105publ206/pdf/PLAW-105publ206.pdf.

[226] *E.g.*, Henning, *supra* note 135.

[227] *IRS Oversight*, *supra* note 38 (statement of Sen. Charles E. Grassley,

Similarly, Senator Frank Murkowski from Alaska said: "[W]e agreed that there was no accountability in the IRS. We agreed that the system was designed to avoid accountability."[228] To correct that, among other things, the Act made customer service one of the main goals the IRS should aspire to, and added a variety of accountability mechanisms.[229]

It is of course true that this reform was imposed from the outside by Congress, and had input from some members who were actively hostile to the IRS.[230] However, the IRS Commissioner, Charles O. Rossotti strongly supported reforming the agency and had substantial input into some of the provisions of the Act.[231] Rossotti continued to express commitment to the reform, and under his direction the IRS engaged in substantial efforts to increase its accountability, efforts that continued under Commissioner Shulman.[232] These reforms paralleled and reinforced ongoing efforts of officials inside the IRS, which had begun before the reform, to increase its transparency and responsiveness.[233]

This section will mention two examples: the Taxpayer Advocacy Panel, which allowed a panel of citizens substantial input into the IRS's operations, and the efforts to increase the accuracy and transparency of the IRS policies. This is a shortened description; both efforts deserve a much more detailed treatment, but that is a matter for another article.

Iowa).

[228] *Id.* at 9 (statement of Sen. Frank S. Murkowski, Alaska).

[229] *See* Thorndike, *supra* note 135, at 768. Some of these were quite draconian; for example, the "ten deadly sins" provision decreed that IRS employees will be fired if they violated one of its ten vague provisions (e.g. violating any of the internal Revenue Manual provisions). *See* Rainey & Thompson, *supra* note 9, at 599.

[230] *See* Thorndike, *supra* note 135.

[231] *Id.* at 775–77; Rainey & Thompson, *supra* note 9, at 597.

[232] Telephone Interview with IRS official (under promise of confidentiality) (June 24, 2009).

[233] *Id.*; Telephone Interview with IRS official (under promise of confidentiality) (July 1, 2009); Telephone Interview with Deborah Gascard Wolf, Director of the Office of Privacy, Information Protection and Data Security, IRS (July 14, 2009).

1. Taxpayer Advocacy Panel

In 2002 the Department of the Treasury, together with high IRS officials and the Taxpayer Advocate, Nina Olson, created the Taxpayer Advocacy Panel.[234] The panel is a collection of one hundred volunteer citizens, organized into a number of issue committees, who contribute three hundred hours each to reviewing the IRS activity and offer recommendations for improvements. The reports that come out of this activity include very detailed recommendations by the panel and a response—often detailed—from the relevant IRS official. The response can be adoption of the panel's recommendations,[235] a promise to consider them,[236] or

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[234] *See What We Do*, TAXPAYER ADVOCACY PANEL, http://www.improveirs.org/about-us/ (last visited Jan. 28, 2011) (describing the panel). According to the TAP's first annual report from 2003, it was created when

> [t]he Department of the Treasury, in response to a review of Federal Advisory Committee Act Boards, recommended nation-wide expansion of the Citizen Advocacy Panel established in June 1998, to be renamed the Taxpayer Advocacy Panel (TAP). The Internal Revenue Service (IRS) established a Design Steering Committee comprised of the National Taxpayer Advocate, Executives from Wage & Investment (W&I), Small Business/Self Employed (SB/SE), the Communications and Liaison Office, and National Treasury Employees Union Representatives to design the new Panel.

INTERNAL REVENUE SERV., TAXPAYER ADVOCACY PANEL ANNUAL REPORT ii (Dec. 31, 2003), http://www.improveirs.org/Content/documents/annual%20reports/2003AnnualReport.pdf.

[235] *See, e.g.*, Taxpayer Advocacy Panel Recommendations, http://www.improveirs.org/Content/documents/recommendations/2007-Recommendations_10_29_2009.pdf:

> The Committee recommended and the OTBR [Office of Taxpayer Burden Reduction. D.R.] accepted the recommendations of removing, modifying and/or consolidating lines on the Form 2678 and on the Schedule R (Form 941). The OTBR also accepted the recommendation to make some minor changes to the verbiage on both forms. A major change to the Form 2678 was to have both employer and agent's signature on the Form as opposed to only having the employer's signature as in the past.

[236] *See, e.g., id.* at 7:

> Form 12153 is a critical part of Collection Due Process that begins the

rejection with an explanation.[237]

To give one example, as part of the effort to protect citizens' privacy by reducing the availability of social security numbers, the IRS is working on regulations that will allow issuers of form 1099[238] to only provide some digits of the social security number rather than the entire number. That decision, explained Deborah Wolf, Director of Privacy, Information Protection and Data Security in the IRS, was the result of a recommendation by the Information Reporting Advisory Committee, a committee of the Taxpayer Advocacy Panel.[239] The committee recommended treating the W2 forms provided by employers in a similar fashion, but that requires a change in legislation, which will take longer.[240]

The creation and continuing existence of the Taxpayer Advocacy Panel shows in two ways how the two agencies (the IRS and the Treasury) are actively working to increase their accountability. First, the Treasury Department acted voluntarily to create the panel (with collaboration by the IRS). Second, the IRS regularly engages in dialogue with the panel, with top officials responding to panel recommendations in ways that can include changes in policies in accordance with what the panel has recommended—again, opening themselves to criticisms of their response and to input from stakeholders.

> hearing process when the form is received by Collection. With that in mind, it is important that taxpayers understand the intent of the form, how to complete the form, and when and where to return the form. Your comments and suggestions will help us improve the form to meet these goals.

[237] As was done for one of the recommendations in TAP A07-4066. *See id.* at 8–9.

[238] Form 1099 is used to report withholding of a variety of incomes, including, commonly, interest. INTERNAL REVENUE SERV., INSTRUCTIONS FOR FORM 1099-MISC (2011), *available at* http://www.irs.gov/pub/irs-pdf/i1099msc.pdf.

[239] Telephone Interview with Deborah Gascard Wolf, *supra* note 233.

[240] *Id.*

2. Increasing Transparency and Accuracy of the Internal Revenue Manual

The core of this discussion is the IRS's effort to increase its transparency through making its policies more easily accessible. One of the criticisms raised against the agency in the discussions leading to the 1998 reform was the lack of transparency of its policies, which sometimes had the effect of making life very difficult for citizens who had been accused of non-compliance due to errors.[241] Even before that, the IRS had been working on improving the transparency in its policies and procedures. However, it seems—though the causality is hard to trace—that the criticisms raised during the reform gave the project of increasing transparency an extra push. The IRS expressed a commitment to making the Internal Revenue Manual ("IRM") reflect current policies (not easy for an extremely large agency with an annual deadline) and has taken a series of steps in that direction.[242] The Office of Servicewide Policy, Directives and Electronic Research ("SPDER"), created in 1999, engaged in a series of initiatives to oversee and coordinate transparency, including sending out memoranda reminding staff of the need to make interim guidance available to the public and to train staff accordingly. Guided by SPDER, the IRS units created and implemented internal procedures to post interim guidance memoranda electronically, a process monitored by SPDER.

As a first step, SPDER worked to change the format of the IRM from paper to electronic and to restructure it so that it was organized by processes rather than by the IRS organizational units. The change to an electronic format was crucial to achieve accuracy and accessibility. An electronic format was easier to distribute and review. It was also easier to search, and thus made it easier to find

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[241] *See generally* Henning, *supra* note 135.

[242] The description is taken from the comments of IRS officials to the Taxpayer Advocate's criticisms of their lack of transparency. 1 NAT'L TAXPAYER ADVOCATE SERV., 2006 ANNUAL REPORT TO CONGRESS 24–26 (2006), http://www.irs.gov/pub/irs-utl/2006_arc_vol_1_cover__section_1.pdf. The substance of the descriptions has been acknowledged by the National Taxpayer Advocate. *Id.* at 27.

inconsistencies when searches came up with a variety of results.[243]

Prior to the changes, the IRM was organized by unit, by the title of the office, not by the process in question—which made it easy for office members to update, but hard for people outside the IRS to know their way around. It also made it very easy for inconsistencies to be generated in relation to specific processes and for inconsistencies to persist. This first step presented both an administrative challenge—it was a large reorganization—and an educational challenge: members of the staff had to be convinced that the change was necessary, or at least inevitable. Some resistance was encountered because many employees strongly identified with their particular units.[244]

SPDER also invests substantially in training IRM authors in how to write the manual in a transparent and easy to use way, offering aggressive (though voluntary) training programs.[245] The goal is to write the IRM following information mapping principles, active voice, and plain language.

Another change was a revision of the policy governing disclosure of materials which are intended only for internal use.[246] Prior to the mid 2000s, the agency's policy was not to publish documents if any part of that document was for official use only. SPDER initiated a redaction process whereby paragraphs that are for internal use only are removed from documents, and what remains is published, substantially increasing the amount of publicly available material.[247]

As can be seen from this very short description, substantial efforts were made by the IRS to increase the transparency and accessibility of its policy.

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[243] Telephone Interview with IRS official (under promise of confidentiality) (July 1, 2009); Telephone Interview with IRS official (under promise of confidentiality) (June 24, 2009).

[244] Telephone Interview with IRS official (under promise of confidentiality) (July 1, 2009).

[245] *Id.*

[246] Which may fall under any of a number of exemptions to FOIA. *See* Freedom of Information Act, 5 U.S.C.A. §§ 552(b)(2), (5), (7) (West 2010).

[247] Telephone Interview with IRS official (under promise of confidentiality) (July 1, 2009). A more detailed description of the IRS reforms is in preparation.

IV. IMPLICATIONS AND DISCUSSION

A. What is NOT Implied?

Let's start with what this Article is not intended to imply. I am not saying that the need for external accountability mechanisms is obviated by the discovery that agencies often will be accountable on their own. Most of the efforts to increase accountability described in this Article were undertaken by agencies facing the vast array of accountability mechanisms described in Part I, and their actions were taken in the context of those mechanisms. Further, as the case studies demonstrate, the agencies making these efforts were agencies "under fire"—they were already being subjected to substantial criticism for, among other things, lack of accountability. The IRS already faced the experience of accountability mechanisms added, and massive reorganization imposed, because of accusations of lack of accountability that stuck.[248] It is unclear whether the agencies would have made the same kinds of efforts to be accountable without external accountability pressures, but a strong argument can be made that at least in part their efforts to increase accountability were motivated by the desire to head off more external attempts to do it for them. It does not require evil intent for agencies not to undertake such efforts: agencies have many other tasks besides being accountable, and without strong motivators to invest in accountability, these can easily (and possibly with good reason) take precedence.

Beyond that, even an agency that is strongly committed to accountability because of its sense of mission may not construct accountability mechanisms in ways that are valued by either its political masters or the public in general. Those outside the agency may have different preferences than the agency as to what form the accountability should take, and how it should be structured, and without external mechanisms they may not be able to influence an agency's choice. For example, the EPA's design of the accountability framework surrounding IRIS was strongly criticized by the GAO as damaging to its efficiency, and by OMB Watch as

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[248] *See supra* Part III.C.

inserting a political component into a professional decision.[249] The FDA's decision to summarize and publish information about its decisions on new drug applications was criticized by industry members for providing too much information and harming the industry, and by consumer protection organizations for not providing enough data.[250]

Even if the motivations of the agency are accepted as valid, and an agency strongly buys into the accountability language, it may not be especially well versed in the tools and mechanisms available. An agency may lack expertise and not do a particularly good job of increasing its accountability even if it is extremely professional in other areas. For example, while the IRS has been making efforts to increase the transparency of its policies for several years, the 2006 Taxpayer Advocate Service Annual Report highlighted certain problems, such as internal memos not published.[251] Hutt sees the FDA as working to increase its transparency, but as demonstrated in Part II.A, external observers criticize it for lack of transparency. External direction may be required to help agencies steer their accountability choices.

Finally, as demonstrated by the example of the Minerals Management Service,[252] not all agencies seek accountability—or are accountable—all the time, and to prevent extreme cases of abuses, external mechanisms are crucial.

The other thing I am not asserting in this Article is that efforts by agencies to increase accountability are generally successful. Assessing success of accountability mechanisms requires two complex, challenging inquiries, neither of which I undertake here. The first is a value judgment as to just what a successful accountability mechanism would look like. For example, suppose it is a mechanism that increases input from outside parties; if that proves so effective that it gives stakeholders or citizens full control, is that outcome desirable, or not? Substantial input from

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[249] *See supra* Part III.B.

[250] *See supra* Part III.A.

[251] 1 NAT'L TAXPAYER ADVOCATE SERV., 2006 ANNUAL REPORT TO CONGRESS 21 (2006), *available at* http://www.irs.gov/pub/irs-utl/2006_arc_vol_1_cover__section_1.pdf.

[252] *See supra* Part I.A.

stakeholders can be seen as an agency being responsive or as an agency captured; in the matter of public participation, some scholars strongly support extensive participation,[253] others are concerned that it may harm expertise and decision making.[254] As for publication, the benefits and costs of transparency are also debated.[255] If increasing transparency is a good, should agencies provide more information or provide information in a more simplified, easy to access way?

Agreeing on some standardized benchmarks is one challenge to making a scholarly assessment of success at improving accountability; another challenge is presented by the wide range of empirical measurement problems that exist—experimental design and data collection present serious difficulties in real-world situations. For instance, if we agree that public participation and input of citizens into the process is a good, how do we measure whether there actually was input? Do we look at the number of participants and the number of comments they made, as was done in studies evaluating participation in rulemaking?[256] This approach can be challenged on the grounds that "comments" can be nothing but answers checked off on standardized forms, or that merely submitting comments does not mean that any effective input to the process occurred.[257] Or, alternatively, do we look at ways the agency may have changed its views after receipt of the comments? This is another measure some of the same scholars used. Here, we can ask whether "change" is for the better or not—change is not

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[253] *See generally* James S. Fishkin, DEMOCRACY AND DELIBERATION: NEW DIRECTIONS FOR DEMOCRATIC REFORM (1991); LEIB, *supra* note 101; Arnstein, *supra* note 101; Innes & Booher, *supra* note 101.

[254] Coglianese, *Is Consensus an Appropriate Basis for Regulatory Policy?*, *supra* note 105, at 93–113.

[255] *See generally* ARCHON FUNG ET AL., FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY (2007); Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885 (2006); Hood, *supra* note 69.

[256] Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 414–15; Golden, *supra* note 104, at 245–47; West, *supra* note 14, at 66–70.

[257] *See* Reiss, *Tailored Participation*, *supra* note 20, at 331–35; Schlosberg, *supra* note 103.

always justified.[258] A more general reason this Article does not address the question of assessment is that while there is room and need for articles examining the success of efforts at increasing accountability, this article has a different focus.[259] Accordingly, this Article is *not* being presented as evidence that agencies do a good job at being accountable—just that they try.

B. What is Implied?

In this Article I intend to show that agencies are not always the enemy in the "accountability game" and are never just a pawn either. First, as to agencies not being the enemy—as this Article demonstrates, important agencies make substantial efforts to increase their accountability and agency officials often buy into reforms aimed at increasing accountability. Several of the mechanisms later adopted by Congress or the courts were initially tested or adopted by agencies. For example, the FDA adopted a preamble requirement and a requirement of answering comments independent from judicial review; in addition, various agencies experimented with negotiated rulemaking before Congress passed an act that mandated it.

The case studies suggest that a variety of motivations influence agencies to make these efforts. For example, a typical case is that of an agency under attack trying to improve its accountability so as to reduce the severity of the attacks and simultaneously make real improvements in performance. All three agencies that I report on in this Article acted to increase their accountability after being strongly attacked. This would support the view that agencies are

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[258] Several studies have already attempted to analyze the actual impact of comments. *See, e.g.*, Cuéllar, *supra* note 256, at 433–34; Golden, *supra* note 104, at 261; West, *supra* note 14, at 68; Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128 (2006).

[259] *See, e.g.*, Martina Vidovic & Neha Khanna, *Can Voluntary Pollution Prevention Programs Fulfill Their Promises? Further Evidence from the EPA's 33/50 Program*, 53 ENVTL. ECON. & MGMT. 180, 180–83 (2007); Michael R. Greenberg & Justin Hollander, *The Environmental Protection Agency's Brownfields Pilot Program*, 96 AM. J. PUB. HEALTH 277, 277–79 (2006) (indicating how complicated the methodology of evaluating a program is).

unwilling participants in the accountability game. However, the extent of agencies' efforts and their level of innovation suggest that a desire to avoid punishment was not the only thing driving the agencies—a level of commitment to the idea of accountability, and some effect of the ideas of participation and transparency, also exists.

My second major point is that viewing agencies as the "subject" is a mistake. Much of the accountability literature sees agencies as being "acted upon," as primarily responding to accountability mechanisms put in place by others. The famous McNollgast studies address how Congress can shape agencies' environment to assure compliance with Congressional preferences.[260] Studies of judicial review focus on behavior and how courts evaluate agencies,[261] rather than seeing the agency and courts as co-participants in the game, with the agency having substantial power to affect how a court will review it.[262] Agencies are typically sophisticated political actors.[263] They can and do

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[260] McCubbins, *Administrative Procedures*, *supra* note 16, at 243–45; McCubbins, *Structure and Process*, *supra* note 16.

[261] *See, e.g.*, Stephen M. Johnson, *Bringing Deference Back (But For How Long?): Justice Alito*, Chevron, Auer, *and* Chenery *in the Supreme Court's 2006 Term*, 57 CATH. U. L. REV. 1 (2007); Orin S. Kerr, *Shedding Light on* Chevron*: An Empricial Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1 (1998); Nicholas J. Leddy, *Determining Due Deference: Examining When Courts Should Defer to Agency Use of Presidential Signing Statements*, 59 ADMIN. L. REV. 869 (2007); Pierce, *Judicial Review*, *supra* note 92; Thomas O. Sargentich, *The Critique of Active Judicial Review of Administrative Agencies: A Reevaluation*, 49 ADMIN. L. REV. 599 (1997).

[262] With some exceptions—one possible exception is O'Reilly, *Losing Deference*, *supra* note 17, at 949–50, 977–78 (loss of deference to FDA is largely because it became captured by political actors). *But see* David C. Vladeck, *The FDA and Deference Lost: A Self-inflicted Wound or the Product of a Wounded Agency? A Response to Professor O'Reilly*, 93 CORNELL L. REV. 981, 983–85 (2008) (offering an opposing view).

[263] *See, e.g.*, CARPENTER, *supra* note 57, at 19–25; Reiss, *Agency Accountability*, *supra* note 46, at 114–15; Dorit Rubinstein Reiss, *Administrative Agencies as Creators of Administrative Law Norms: Evidence from the UK, France and Sweden*, *in* COMPARATIVE ADMINISTRATIVE LAW 373–74 (Susan Rose-Ackerman & Peter Lindseth eds. 2010) (unpublished copy on file with author); JAMES Q. WILSON, BUREAUCRACY— WHAT GOVERNMENT AGENCIES

influence their accountability environment. Agencies do respond to other actors, but they also tailor their behaviors in ways that will help achieve the best accountability environment they can, given the political and institutional constraints they face.[264] One way agencies can influence their environment is by making efforts of their own to increase their accountability, thus preempting external efforts. This suggests a number of important policy implications for current administrative law and practice.

An important question is how to incentivize agencies to undertake more efforts to increase their accountability—assuming that increased accountability is considered necessary.[265] If accountability is a positive, more accountability is better than less, and we want agencies to be more accountable. But if that is the case, maybe agencies should be rewarded for their efforts at increasing accountability. Lack of incentives may lead agencies to work to improve accountability less often than is desirable. For example, a plausible argument is that the relative rarity of negotiated rulemaking undertaken by agencies can be explained by a lack of incentives. Several studies suggest that even if the participants are satisfied with the process,[266] from the agency's point of view there may not be sufficient incentive, since it still has to go through the regular notice and comment procedures anyway. At any rate, in spite of efforts by the Clinton administration to increase the use of negotiated rulemaking,[267] the number of such

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DO AND WHY THEY DO IT 27–28, 88–89 (1989).

[264] *See* Reiss, *Agency Accountability*, *supra* note 46, at 114–15.

[265] Not at all obvious—as the "Agencies as Victims" literature described in Part I.B demonstrates, a strong claim may be made that there is enough, if not too much, accountability already in the administrative state. However, the claim for more accountability seems to be stronger—and even if we do not think MORE accountability is a positive, *better* accountability may be—more streamlined and efficient tools that achieve the same effects.

[266] Harter, *Assessing the Assessors*, *supra* note 201, at 55–56; Laura I. Langbein & Cornelius M. Kerwin, *Regulatory Negotiation v. Conventional Rulemaking: Claims, Counterclaims and Empirical Evidence*, 10 J. PUB. ADMIN. RES. & THEORY 599, 625–26 (2000). *But see* Cary Coglianese, *Assessing the Advocacy*, *supra* note 201, at 404–06 (challenging the methodological tools and conclusions of these studies).

[267] Harter, *Assessing the Assessors*, *supra* note 201, at 36–37.

rulemakings remains very small.[268] One incentive may be reducing some of the external controls for agencies which engage in their own processes—following the same logic as the EPA's voluntary compliance plans that carry with them the suggestion of reduced enforcement against participants.[269] This will probably require legislation. Another incentive would be to allow agencies brought to court with claims of lack of participation or transparency to present evidence of efforts to increase their accountability and provide a holistic picture of accountability.

One way for a court to deal with a claim of insufficient participation or transparency is to charge the agency with producing a plan for increasing accountability, thus taking advantage of the ability of agencies to create their own accountability mechanisms. That way, the court does not directly dictate new procedures—forbidden under *Vermont Yankee*[270]—but can still address a lack of sufficient procedures. Courts may be less reluctant to allow agencies to use guidelines[271] if the agencies

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[268] Coglianese, *Assessing Consensus*, *supra* note 191, at 1276–77.

[269] *See* Richard N.L. Andrews et al., *Environmental Management Systems: History, Theory, and Implementation Research*, *in* REGULATING FROM THE INSIDE: CAN ENVIRONMENTAL MANAGEMENT SYSTEMS ACHIEVE POLICY GOALS? 32–33, 42–43 (Cary Coglianese & Jennifer Nash eds., 2001).

[270] Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 523–25 (1978).

[271] For example, the D.C. Circuit criticized agencies for using guidance documents instead of rulemaking and avoiding rulemaking in two cases. *See* Gen. Elec. Co. v. E.P.A., 290 F.3d 377, 384–85 (2002) (not addressing what procedures were used in the issuance of the guidance document); Appalachian Power Co. v. E.P.A., 208 F.3d 1015, 1020 (2000):

> The phenomenon we see in this case is familiar. Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in the regulations. One guidance document may yield another and then another and so on. Several words in a regulation may spawn hundreds of pages of text as the agency offers more and more detail regarding what its regulations demand of regulated entities. Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal

present a scheme for making sure those guidelines are transparent and allow for stakeholder input into their making. Guidelines have a number of advantages over rules: they are more flexible, and therefore may be more suitable to fast-changing environments, they do not suffer from the same degree of ossification,[272] and they allow—in fact, mandate—agency deviation in appropriate specific cases. Allowing guidelines an official place under these narrow circumstances is especially useful since the jurisprudence about policy documents versus rules is vague and the criteria to distinguish them are unclear.[273] If an agency created a document that could fall under either category through a process that either closely follows informal rulemaking procedures or goes beyond them and adds substantial accountability guarantees, why invalidate it?

This need for incentives is especially true since one of the challenges any agency head will face is that of competing demands on time; achieving accountability requires time and effort. For example, in the case of the FDA, when confronted with changes in the agency's enabling act along with demands for investigation of alleged misrepresentations of the results of clinical trials, drafting the Medical Device Act of 1976, and a large range of other missions, promoting accountability was not always the first priority.[274] Similarly, updating the Internal Revenue Manual to keep IRS policies transparent may not be the first priority for an official burdened with many other chores. One IRS official explained that it is seen as "record keeping," and often with "so

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> Regulations. With the advent of the Internet, the agency does not need these official publications to ensure widespread circulation; it can inform those affected simply by posting its new guidance or memoranda or policy statement on its web site.

[272] Lubbers, *The Transformation*, *supra* note 18, at 471–72. *See also* Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1480–82 (1992) [hereinafter Strauus, *The Rulemaking Continuum*].

[273] On this difficulty, see Cmty. Nutrition Inst. v. Young, 818 F.2d 943, 946 (D.C. Cir. 1987); Strauss, *The Rulemaking Continuum*, *supra* note 272, at 1476–79. For the negative effects of the difficulty see Richard M. Thomas, *Prosecutorial Discretion and Agency Self-Regulation:* CNI v. Young *and the Aflatoxin Dance*, 44 ADMIN. L. REV. 131, 155 (1992).

[274] Telephone Interview with Richard A. Merrill, *supra* note 145.

many other things to do, if they look at a list of priorities, IRM and updating it falls to the bottom of the list."[275] According some deference to an agency engaged in accountability seeking can help balance those costs and provide an incentive for such behavior.

In addition to creating incentives, acknowledging that agencies engage in increasing accountability can open the door to more systematic study of such activity, as suggested by Magill in the context of self-regulation.[276] Besides providing a promising source of information and thought for researchers trying to understand agency action, it can make a wealth of information more systematically available that will be useful for policy makers in all three branches. If one of the justifications for federalism is experimentation in different forms of democracy to allow innovation and the testing of ideas,[277] the same can be said for experimentation with accountability mechanisms among agencies: a type of "administrative federalism." If agencies are allowed, even encouraged, to experiment, all three branches can benefit.

The branch with the most natural access, and the one already benefitting from such experimentation, is the executive branch. Agencies learn from each other—for example, other agencies emulated the experience of the first agencies with negotiated rulemaking, and OMB incorporated it into an executive order, recommending it to all agencies.[278]

This learning can be made even more systematic if we learn from other countries' experience. For example, in Australia, there is an "Office of Best Practice Regulation" to study how to make regulation better, including increasing its transparency.[279] Another potential international source of inspiration is the Organisation for

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[275] Telephone Interview with IRS official (under promise of confidentiality) (July 1, 2009).

[276] *See* Magill, *supra* note 59, at 860–61.

[277] *See* Akhil Reed Amar, *Five Views of Federalism: "Converse-1983" in Context*, 47 VAND. L. REV. 1229, 1233–36 (1994).

[278] Exec. Order No. 12,866 § 6(a), 3 C.F.R. 638 (1994), *reprinted in* 5 U.S.C. § 601 app. at 557–61 (1994).

[279] *See Office of Best Practice Regulation*, AUSTRALIAN GOV'T, DEP'T FIN. & DEREGULATION, http://www.finance.gov.au/obpr/about/ (last updated July 5, 2010).

Economic Co-operation & Development's (OECD) report comparing best practices across countries.[280]

Similarly, examining accountability mechanisms created by agencies could provide Congress with ideas for new accountability mechanisms and with real-world data as to what worked and what did not, thus facilitating the making of informed decisions when drafting legislation.

Finally, knowledge of agency practices could guide courts as to where to put—and where to avoid—emphasis. If a mechanism were found to have been widely adopted by agencies and seemed to be working, that could justify increased deference.[281]

Just as important, agencies engaging in increasing accountability require training and resources to do so. For example, in an age where transparency is increasing through use of online mechanisms, agencies need training in the use of information technology, and in many cases personnel with new kinds of abilities. Some agencies have already started hiring people with new skills:

> [SPDER] hired a college professor to help with curriculum and the tax forms[,] . . . someone with background in lobbying . . . [, and] an IT person, working on the move to an electronic environment. . . . I would not have thought I would hire them, but as times change we need people with different skills.[282]

But for a variety of reasons, including budgetary constraints, this may not have been enough. These needs must be taken into consideration.

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[280] Cesar Cordova-Novion, *Simple, Effective, Transparent Regulation: Best Practices in OECD Countries*, ORGANISATION FOR ECONOMIC CO-OPERATION & DEVELOPMENT, http://www.oecd.org/dataoecd/5/26/1897852.ppt (last visited Jan. 26, 2011).

[281] I suspect some of the requirements placed on agencies by courts over the years were actually ideas borrowed from existing agency practices, either in or across agencies. But that is a topic for another project and requires further research.

[282] Telephone Interview with IRS official (under promise of confidentiality) (Aug. 3, 2009).

CONCLUSION

This Article suggests that agencies are accountable, and furthermore, that many agencies want to be accountable and make efforts in that direction. It suggests that agencies' efforts to increase their accountability are not sufficiently noticed or acknowledged. In relation to their accountability behavior, agencies are either criticized or pitied in most of the current literature. Both approaches are too simplistic. In terms of criticism, being an administrator in the United States is an exceedingly difficult job. The United States is large and complex, which makes managing any problem difficult. Its political system is decentralized, which adds another layer of complexity—as if managing services or regulation for three hundred million people would not be enough, it needs to be done in a fragmented system with many veto points.[283] And like most modern states, it engages in many different spheres of activities.[284] This already makes an administrator's job hard. In addition, administrators in the United States are everyone's favorite whipping boy and routinely criticized, among other things for their lack of accountability. [285]

This Article suggests that these claims are at least one-sided and ignore an important part of the picture. The accusation that bureaucrats are unaccountable and seek to avoid the public eye is, at best, of limited validity, and at any rate, requires proof before it can be made. In many situations, it is just not true.

The concern about agency victimization and too much accountability also focuses only on part of the picture, treating agencies as lacking control of their environment and ignoring their contribution to the accountability reality.

This Article is an attempt to give a fuller picture. Agencies also contribute to their accountability environment, by acting, at times, as "accountability entrepreneurs" and at other times as accountability brokers.

Does that mean we do not need to worry about agency

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[283] KAGAN, *supra* note 48 at 42.

[284] *See* MEIER, *supra* note 13, at 2–5.

[285] *See* examples *supra* Part I.A.

accountability? Unfortunately no. First, efforts by agencies to be accountable may not be effective, or may aim at the wrong problems. So, even when we do not need to worry about the motives of agencies in relation to accountability, we still need to worry about the design of accountability. Second, agencies still face the problem of multiple principals, and their priorities may differ from those of the Congress or the public.[286] Assuming that legislative supremacy is ingrained and required under the American constitutional scheme, efforts may be necessary to align agency accountability behavior with congressional preferences. Finally, not all agencies will make these efforts, and those that do may not make them all the time.

Even so, taking all of the foregoing caveats into account and giving each its full weight, it still seems clear that we cannot ignore agencies' efforts to increase their own accountability.

[286] *See* Furlong, *supra* note 97, at 61.