Account Me In: Agencies in Quest of Accountability

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Abstract:

This article adds to the literature about accountability by examining the little-studied phenomenon of agencies making efforts—sometimes substantial efforts—to be accountable. It briefly describes how three agencies—the EPA, the FDA and especially the IRS—worked to increase their accountability. It demonstrates that agencies are often not the enemy in the “accountability game”. In today’s world agencies, contrary to the stereotype, often buy into the language and practice of accountability. It addresses three arguments for this behavior: a rational choice argument based on comparison of the costs of non-accountability with the benefits of accountability; a power of ideas argument showing that agencies, like individuals, can respond to new ideas of governance; and a role conception argument based on agencies’ choice to increase their accountability into their view of their mission.

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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. The database was an initiative undertaken by the EPA to improve the scientific accuracy and the quality of information available on risks associated with certain chemicals; it is used, for example, when EPA determines whether to establish air and water quality standards regulating certain chemicals. 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). The procedures surrounding the IRIS database—as everything related to the project—were designed by the EPA and are not mandated by law.

In spite of this potential freedom, the procedure the EPA adopted for IRIS—from the start of the system—included extensive steps of review, and extensive opportunity from input and checks by external actors. The procedures put in place by Administrator

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2 The EPA’s website explains that: “IRIS (Integrated Risk Information System) is a compilation of electronic reports on specific substances found in the environment and their potential to cause human health effects. 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, EPA, U.S., available at: http://cfpub.epa.gov/ncea/iris/index.cfm (Last visited July 13, 2009).


6 See part III.B for a detailed description of these procedures.
Jackson aimed at achieving a process that is “more transparent and timely, and … will ensure the highest level of scientific integrity”.

The process adopted exposed the EPA’s suggestions to external peer review, notice and comment (using the same process required for informal rulemaking under the APA plus review by the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) in the White House, as required for significant rules. Most of these elements were part of the IRIS system from the start, in one form or the other; the agency voluntarily chose to expose its decision to extensive scrutiny from various directions.

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 developed more in detail in part III.C. It invested in improving customer service. The number of calls answered rose dramatically, and the quality of the response was getting very positive reviews. Improvement in

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8 5 U.S.C §553.
consumer service was required under the 1998 legislation reforming the IRS.\textsuperscript{11} However, Congress had previously passed other reforms requiring improvements in customer service, for example taxpayer rights provisions in the 1980s, and without sincere agency commitment and agency initiated efforts, those had limited effect.\textsuperscript{12} This time, the agency was committed, and put in place changes increasing its transparency and its 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 information as possible available.\textsuperscript{13}

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, as seeking to avoid accountability whenever possible, or at least as needing to be forced to be accountable. Other scholars, in response, emphasize the multiple and conflicting pressures for accountability placed on agencies, and sees them as victims of too much accountability. This literature 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 both perspectives have a lot of truth in them, they miss an important part of the picture. As the examples above suggest, agencies are not always the enemies of

\begin{footnotesize}
\begin{itemize}
\item[12] Rosso... note10, at 129-130.
\item[13] See part III.A.
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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, 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. This happens for a number of reasons—internal and external—and not just because of cost/benefit considerations.

This paper examines such actions by agencies and addresses the reasons they do them. Following this introduction, the article proceeds in four parts. Part I provides the background, reviewing current literature and demonstrating that it places 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 possible explanations for such behavior, focusing on 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 Internal Revenue Service (IRS), the Food and Drug Administration (FDA) and the Environmental Protection Agency (EPA). This discussion shows that the phenomenon is a real and common one, and hopefully provides empirical support for the explanations addressed in part II for this behavior. Part IV
discusses implications for theory and practice of accountability in the administrative state.

**Part 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.¹⁴ Not surprisingly, controlling them has been a constant occupation of scholars, politicians and citizens, and an extensive literature discussing accountability exists. ¹⁵

This “accountability literature” covered much ground and taught us much. However, it

¹⁴ “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."

tends to treat the accountability environment the agencies face as something that agencies either manipulate to achieve their goals or are subject to. In the terms mentioned above, it tends to treat agencies as either villains or victims.\textsuperscript{16}

\textbf{I.A Agencies as the Villains in the Accountability Story}

Much of the writing about agencies today sees them as the enemy, or the villain, of the accountability story. There are several varieties of this approach. In the most neutral one, the one least hostile to agencies, explains the need of accountability as a principal-agent problem: Congress created agencies to do its bidding. Agencies may have their own interest and prefer following their own preferences\textsuperscript{17} or the preferences of the industries they are captured by\textsuperscript{18} to following Congress’ wishes. Without accountability, agencies will be free to do so. Scholars of the administrative state should address mechanisms of oversight over agencies, examine them, evaluate them, and suggest improvements.\textsuperscript{19}

\hypertarget{foot16}{\textsuperscript{16}}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. 149, 153-160. Le Grand describes how loss of faith in the welfare state led to seeing the officials administering it as “knaves” instead of “knights” and the people drawing benefits as “knaves” instead of “pawns”. Id.


\hypertarget{foot19}{\textsuperscript{19}}Some of this literature focuses on Congressional oversight; e.g. DAN B. WOOD & RICHARD W. WATERMAN, BUREAUCRATIC DYNAMICS: THE ROLE OF BUREAUCRACY IN A DEMOCRACY, 33-35 (1994); Wood & Waterman, 33-35; SIDNEY A. SHAPIRO & ROBERT GLICKSMAN, Congress, the Supreme Court, and
A more extreme version of the agencies as villains story focuses, instead, on examples of agency abuse and misconduct and uses that to demonstrate that agencies, if and when possible, would be unaccountable and avoid mechanisms put in place. Many of these studies then suggest increased controls or improved enforcement of existing controls.

For example, in a number of recent studies scholars demonstrated agencies avoiding some of the procedures put in place by the APA. In a very recent article, Michael Kolber demonstrated that when using the procedure known as direct final rulemaking, in which an agency publishes a rule without going through the notice and comment process before hand, the FDA tended to use it not for non-controversial rules, where notice and comment is a waste of time (the stated goal of the process) but for rules expected to be controversial. These findings about the FDA also reflect those of an article by Lars Noah criticizing the Food and Drug Administration (FDA) for cavalierly

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ignoring legal and statutory requirements\textsuperscript{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, controversial issues, lack of leadership, and problematic legislative directives).\textsuperscript{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\% of its rulemakings.\textsuperscript{24}

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 a rulemaking,\textsuperscript{25} and thus, using the Chaney doctrine\textsuperscript{26}, avoided judicial review until the DC circuit finally called it on the issue.\textsuperscript{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.”\textsuperscript{28} Dobkin, focusing on the Immigration and Naturalization Services, sees agencies as lacking accountability by acting behind the scenes, which leads to “lawlessness.”\textsuperscript{29}

\textsuperscript{22} NOAH LARS, \textit{The little agency that could (act with indifference to constitutional and statutory strictures)}, 93 CORNELL L. REV. 901, 903-905 (2008).
\textsuperscript{23} Id, 902-903.
\textsuperscript{24} KRISTINE HICKMAN, Coloring Outside the Lines: Examining Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements 82 NOTRE DAME L. REV. 1727, 1748-1752 (2007).
\textsuperscript{26} Heckler v. Chaney, 470 U.S. 821 (1985).
\textsuperscript{27} BHAGWAT, supra note 25 169-170.
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 at least since the Clinton administration the agency seemed to have been allowing oil companies to underpay. Later investigations showed a culture of accepting gifts from industry representatives, sexual relationship 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. 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.

Politicians also regularly attack agencies for lack of accountability. That, for example, was at the heart of Representative Elliot Levitas’ strong promotion of the

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gies%20drugs&st=cse.
32 Id.
legislative veto, which would have given Congress control over agency rules.\textsuperscript{33} 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’.”\textsuperscript{34}

In the discussions leading to the enactment of the IRS Restructuring and Reform Act of 1998,\textsuperscript{35} Senator Frank Murkowski from Alaska said that:

“Federal agencies tend to act as if they are a law unto themselves, believing they are accountable to no one… … the system was designed to avoid accountability.”\textsuperscript{36}

The studies of agencies as accountability villains capture an important part of the truth; there are abuses in the administrative state—some abuses that cannot be justified, such as the behavior of the Minerals Management Service, some abuses that can be seen as the only way to deal with the complex situation agencies face and get the job done, which can possibly discuss the FDA example above. But it is not the whole picture.

\textbf{I.B Agencies as Victims of Excessive Accountability}

A completely different approach to agency accountability emphasizes the problematic nature of accountability in the American administrative state, focusing on an alleged excess of accountability mechanisms. These scholars do not deny that there are

\textsuperscript{33} \textsc{James L. Sundquist}, The Decline And Resurgence Of Congress 324, 353 (Brookings Institution Press. 1981). \textsc{Barbara Hinkson Craig}, Chadha: The Story of an Epic Constitutional Struggle 149-150 (University of California Press. 1990).

\textsuperscript{34} Ron Nixon, Not All Earmarks Are Paid in Full, and a Senator Wants to Know Why, \textit{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

\textsuperscript{35} Pub. L. No. 105-206.

\textsuperscript{36} \textsc{William V. Roth, Jr.}, (ed) IRS OVERSIGHT, 9 (1999).
abuses by agencies. But they suggest that the more common situation in the administrative state is a well meaning, hard working administration assailed from all sides by demands and accusations that make doing its job 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. This well-accepted classification distinguishes between types of accountability on 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. Bureaucratic (or hierarchical) accountability refers to a high degree of control exercised within the agency or within the executive branch—other agencies, the White House, the President. It is hierarchical in nature. It includes, though is not limited to, relations between lower agency officials and higher agency officials. Professional accountability is internal but involves a low degree of control—emphasizing 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; in relation to agencies, this includes control by

37 E.g. THOMAS O. MCGARITY, Some Thoughts on "Deossifying" the Rulemaking Process, 41 DUKE L. J. 1385, 1398 (1996-1997)
40 This discussion is based on DUBNICK & ROMZEK, AMERICAN PUBLIC ADMINISTRATION: POLITICS AND THE MANAGEMENT OF EXPECTATIONS, supra note 38, pp. 77-82.
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, 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 facing them 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.  

Hargrove and Glidewell ask how officials deal with “Impossible jobs”, jobs where the “clients” (e.g. welfare recipients, prisoners) are not very sympathetic, where there is high conflict among interested constituencies and little confidence in the profession and the agency.

There are many other examples.

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 to agencies being blamed regardless of what they do,

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and that this excess blame can lead to a range of negative results—from defensive behavior to despair.\textsuperscript{44}

Similarly, Kagan, in his book adversarial legalism, tracks the problematic effects of the decentralized, multi-layered system of government in the United States on making public policy.\textsuperscript{45} For example, he describes how the involvement of multiple actors—several federal and state agencies, federal and state courts—made the dredging of the Port of Oakland very slow, much more costly than anticipated (and uncertain), costing the city of Oakland jobs and revenues.\textsuperscript{46} He acknowledges that adversarial legalism has benefits—making the system more open to new claims and accessible.\textsuperscript{47} However, at least when it comes to regulation, Kagan strongly suggests that the costs of adversarial legalism outweigh the potential benefits.\textsuperscript{48}

The debate about “ossification” of the rulemaking process is another example of studies warning against the negative effects of excess accountability. In a very strongly written article, Thomas McGarity criticized the complexities added to the rulemaking process as harmful to the functioning of the administrative state.\textsuperscript{49} In a follow up article he emphasized that it is unrealistic to tie agencies’ hands so thoroughly while expecting them to deliver and be effective.\textsuperscript{50} He also emphasizes that the extensive accountability

\begin{thebibliography}{99}

\bibitem{44} BEHN, \textsl{supra} note 15, pp. 1-6 on the phenomenon, 69-72 on some of the negative impacts.
\bibitem{46} id, pp. 27-30.
\bibitem{47} id, pp. 31-32.
\bibitem{48} id, pp. 196-204.
\bibitem{49} THOMAS O. MCGARTY, \textit{Some Thoughts on "Deossifying" the Rulemaking Process}, 41 DUKE L. J. 1385, 1448-1459 (1996-1997)
\bibitem{50} THOMAS O. MCGARTY, \textit{The Courts And The Ossification Of Rulemaking: A Response To Professor Seidenfeld} 75 TEX. L. REV. 525, 525-526.
\end{thebibliography}
used undermines the agencies’ efforts to protect the public from the harms they were put in place to combat.\textsuperscript{51}

Other scholars expressed similar concerns,\textsuperscript{52} though recent empirical studies have cast doubts on the extent to which agency rulemaking is indeed ossified.\textsuperscript{53}

The bottom line of all these studies is that agencies, subject to extensive accountability mechanisms, are often unfairly blamed for problems not of their making, are abused and have trouble doing their jobs. As with the “agencies as villains” narratives, these studies capture a part of the picture, but ignore another part. It is to this missing link I turn now.

\textbf{I.C Agencies as Accountability Initiators}

The part of the picture that current literature under emphasizes 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.\textsuperscript{54}

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\item Id. 530-533.
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An approach placing agency or agency discretion at the center and 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.55

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 study that stands out as an exception is Elizabeth Magill’s recent study of self-regulation.56 Magill examines agencies’ voluntary adoption of regulations that limit their discretion.57 She makes an important contribution to the literature by emphasizing agencies’ own activities and their role in creating the environment and turning a clear, unbiased eye on these activities by agencies.

Many of the limits agencies adopt through self-regulation may be seen as reforms that increase accountability; but not all.58 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 principle59 – some of the efforts agencies make to increase their accountability are not captured by her discussion. More importantly, her methodology – an analytical discussion – is dramatically different from the qualitative empirical description based on case studies used in this article, and

56 M. Elizabeth Magill Agency Self-Regulation 77 George Washington L. Rev. 859.
57 Id, p. 861.
58 See below, text near fn ####-####
59 MAGILL, supra note 56 at 877-881.
her explanations for why agencies adopt self-regulation are more limited than those used by her, focusing mostly on what I describe as “rational choice” explanations.\textsuperscript{60}

This article adds to the literature by suggesting that agencies also act voluntarily to increase their accountability, and providing 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 idea 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 losing its meaning.\textsuperscript{61} It had been defined as covering electoral accountability,\textsuperscript{62} punishment,\textsuperscript{63} or control of one party by another.\textsuperscript{64} 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... 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..."\textsuperscript{65}

\textsuperscript{60} Id, 884-891.

\textsuperscript{61} BEHN, 2-3; BOVENS, in 182, 182; DUBNICK, Seeking Salvation for Accountability Prepared for delivery at the 2002 , August 29- September 1, 2002, Boston. 1; RICHARD MULGAN, 'Accountability': an Ever-Expanding Concept?, 78 PUB. ADMIN. 555, 555-556 (2000).


\textsuperscript{63} BEHN, 3.

To solve the problem of defining accountability, I am focusing my discussion on two types of reforms agencies adopt: increasing their transparency and increasing their responsiveness to external actors. Increasing transparency is often suggested as a means of increasing accountability;\textsuperscript{66} and allowing external actors more of a say increases control, as well as the threat of sanctions.\textsuperscript{67} Therefore, reforms in which agencies increase their transparency or the influence of other actors fit squarely in the rubric of agencies working to increase their accountability.

The next section will address the reasons behind agencies’ seeking of accountability, as a preparation for the case studies.

**Part II: Agencies want to be Accountable**

So, if, as I argue, some agencies want to be accountable, the question remains, why? This part of the article suggests some explanations supported by the case studies detailed in the next section. 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 the costs to itself arising out of a successful accusation of lack of accountability, and to improve the benefits to itself that derive from accountability. This, for example, is the argument suggested to explain the EPA’s behavior in part III.B. However, other

\textsuperscript{66} KOPPELL, 95-96.(transparency as a dimension of accountability); MAY, 11-12.(transparency as increasing accountability); 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 PUBLIC MANAGEMENT REVIEW, 191, 192-193 (2007).

\textsuperscript{67} WEST.(whole piece equates participation with accountability); CAMILLA STIVERS, The Listening Bureaucrat: Responsiveness in Public Administration, 54 PUB. ADMIN. REV. 364, 367 (1994).(responsiveness to the public promotes accountability)
explanations have as much power; this article examines two of those alternative explanations.

One 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 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 both were strongly committed to transparency in a way that the staff may not have been at the time these two men came in. Charles Rossotti was a businessman before becoming commissioner of the IRS. These people sometime bring with them external ideas that motivate them to push a reform through an agency. However, sometimes separately and sometimes as a response to the reform, ideas can also be internalized by the agency’s civil servants, those running the day to day operations of the agency. There, we are talking about role conception. Even before the 1998 reform, several IRS staff members were promoting increasing transparency, since they internalized the ideas of transparency as part of their role; after the reforms introduced by Hutt, FDA officials wanted to go further than he did in transparency. This reflects a redefinition of the officials’ role to include a commitment to transparency.
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.\textsuperscript{68} The classical approach sees the “what” that bureaucrats seek to maximize as the budget.\textsuperscript{69} However, more recent approaches add in bureaucrats’ desire to maximize preferred policy outcomes.\textsuperscript{70}

While there has been substantial criticism of rational choice theory as not empirically grounded and in tension with the realities of the administrative state,\textsuperscript{71} 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.


\textsuperscript{69} NISKANEN, 40-41.

\textsuperscript{70} SEAN GAILMARD AND JOHN W. PATTY, Slackers and Zealots: Civil Service, Policy Discretion, and Bureaucratic Expertise, 51 Am. J. Pol. Sci. 873, 874 (2007); MICHAEL M. TING, The "Power of the Purse" and Its Implications for Bureaucratic Policy-Making 106 PUBLIC 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, for example, WOOD & BOHTE, Political Transaction Costs and the Politics of Administrative Design 179-182; JOHN D. HUBER & CHARLES R. SHIPAN, The Costs of Control: Legislators, Agencies, and Transaction Costs, 25, 27 LEGISLATIVE STUDIES QUARTERLY 25, 27 (2000).

In the last decades governments suffered from a legitimacy crisis.\textsuperscript{72} Trust in
government has been dropping substantially.\textsuperscript{73} The perception of a legitimacy crisis easily
leads to increased pressure on agencies to be accountable and more and more efforts put
into holding them accountable. The large amount of writing about accountability in the
last decades,\textsuperscript{74} demonstrate how important the issue has become. In a sense, the
administrative state today is the administrative state under attack.\textsuperscript{75} In this environment,
agencies pay a very high price for an accusation of lack of accountability that sticks. All
the agencies 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 as justification for
demands to reform agencies or cut their budget or change the legislation or other
unpleasant consequences. For example, the Internal Revenue Service (IRS)’s
reorganization of 1998 was motivated at least in part by complaints that the IRS was not
sufficiently accountable to Congress.\textsuperscript{76} 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 1C, 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?\textsuperscript{77}

\textsuperscript{72} Dowdle; THEODORE J. LOWI, THE END OF LIBERALISM: IDEOLOGY, POLICY AND THE CRISIS OF PUBLIC
\textsuperscript{73} KENNETH P. RUSCIO, Trust, Democracy, and Public Management: A Theoretical Argument, 6 J. PUB.
\textsuperscript{74} See supra, footnote 15 .
\textsuperscript{75} RUBIN, The Myth of Accountability and the Anti-Administrative Impulse, 2074-2075
\textsuperscript{76} A Vision for a New IRS, pt. (1997).
\textsuperscript{77} BEHN, 14-15. Behn gives the example of the rules adopted by government procurement officials,
oberved by scholar Steven Kelman to add complexity to the process to avoid legal protest or political challenges. Id, p. 15.
No wonder, then, that administrators want to demonstrate that they are accountable and do not fall into the category of evil, unaccountable agencies.

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.\textsuperscript{78} The reasons she suggests include giving agency heads the ability to control lower officials to whom they delegate authority;\textsuperscript{79} to clarify the problem internally and help bureaucrats explain their decisions;\textsuperscript{80} to publicize its policy and offer stronger commitment;\textsuperscript{81} to limit future changes of policy following a change of administration;\textsuperscript{82} to protect agency autonomy against intervention from political actors\textsuperscript{83} and to increase production of collective goods as information and reputation.\textsuperscript{84}

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; it may make it harder to change existing policy; it may provide the higher ranks of the agency with more information about what the rest of the agency is doing; and it may increase its reputation.

**B. Pantouflage: 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

\begin{itemize}
\item [78] Magill, supra note 56, 884-891.
\item [79] Id, 884-886.
\item [80] Id, 887.
\item [81] Id.
\item [82] Id, 888.
\item [83] Id, 889.
\item [84] Id, 890-891.
\end{itemize}
to avoid accountability and not add to the already existing complicated system they face, an argument commonly made.\textsuperscript{85} That’s one of the arguments the agencies-as-villains story draws on. For example, one of Paul Light’s interviewees said about Presidential administration’s desire 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 what they end up getting is French poodles.”\textsuperscript{86}

Second, while a rational choice explanation may explain an agency’s choice to work to increase its accountability, it does not explain the form the agency chooses to increase its accountability. 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\textsuperscript{87}—some agencies devote substantial portions of their scarce resources to accountability. Accordingly, other explanations are necessary.

One such explanation is the power of ideas. As demonstrated by B. Guy Peters, current ideas about governing draw on several extremely important traditions, many of which are connected to accountability.\textsuperscript{88} Scholars have demonstrated that ideas can have

\begin{itemize}
  \item[88] B. GUY PETERS, THE FUTURE OF GOVERNING 16-22 (2001). Peters demonstrate that among the ideas that shape governance in today’s world are participation and market-based ideas, including ideas of transparency. Id.
\end{itemize}
strong influence on behavior of organizations. In the case of agencies, ideas can also be
translated into actual pressures and changes through politicians, interest group pressures
and the administrators’ epistemic community, including those that write about agencies.

One set of extremely influential ideas draws on market ideology and private-sector reforms. One of the arguments of those supporting this strand of ideas of market-style reforms is that traditional hierarchical mechanisms of accountability do not work very well; market style mechanisms can provide better accountability and achieve better results. Whether or not, as an empirical matter, market-style reforms do in fact improve accountability—and there is doubt about that claim—the idea exists and is powerful, and this belief in the efficacy of the market can easily drives 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


92 For those raising concerns about the effect of market style reforms on accountability, see Minow 1260-1263; Greg Palast, et al., Democracy and Regulation: How the Public Can Govern Essential Services 21-22 (2003); Carol Harlow, Public Service, Market Ideology, and Citizenship, in Public Services and Citizenship in European Law, (Mark Freedland & Silvana Sciarra eds., 1998). On the other hand, there is also a substantial literature supporting the claim. In addition to the references above, see: Scott, 48-50; Steven K. Vogel, Freer Markets, More Rules 17-21 (1996).
really compete with the market’s reputed price discipline may emphasize, instead, such more achievable benefits as increased information and transparency.  

Many of those appointed to lead agencies came in with a strong belief in ideas of transparency. 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 reform adopted. The politically appointed commissioner was also on board. In the case of the IRS, Commissioner Rossotti’s belief in the need to reform the IRS and his continued belief in transparency also advanced the reform.

The other set of important ideas that influence modern agencies are ideas about increasing participation and the role of citizens in government. Substantial amounts of scholarship have promoted the idea of giving citizens more opportunities to participate, often suggesting new and original modes of doing so. Practical experiments in participatory government have been conducted. The effect of this may have been much

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93 See GRAHAM, supra note ##, for an example of the regulatory agencies in England trying to increase their legitimacy through transparency.
94 Scott Furlong, Political Influences on the Bureaucracy - the Bureaucracy Speaks, 8 JOURNAL OF PUBLIC ADMINISTRATION RESEARCH AND THEORY, 39 (1998); WOOD & WATERMAN, BUREAUCRATIC DYNAMICS: THE ROLE OF BUREAUCRACY IN A DEMOCRACY.
95 PETERS, 50-64.
greater on agencies may have been especially large than on Congress and the President. Much attention has been given to efforts to increase participation in agency proceedings.98 Just as with market ideology, a good deal of criticism has been directed towards the participatory efforts—some directed at the methods, which mostly focused on inherent inequalities in the ability to participate and influence,99 but sometimes also on the inappropriateness of participation to certain administrative decisions.100 Even so, the influence of participatory ideas on bureaucrats has been substantial. These ideas enter the bureaucratic consciousness through training and scholarship, as well as through pressure from political appointees to the agency and from the White House.


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In the cases, Hutt’s belief in input led him to raise the importance of comments by requiring a response to each comment. The EPA’s staff and commissioners’ desire to increase input is also directly connected to the style of reforms adopted, all three aimed at increasing stakeholder participation. The Taxpayer Advocacy Panel directly increased the role of private citizens, hopefully representative of “the public”, in decision-making.

**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 and bureaucrats’ strong commitment to the mission of the agency they are in. 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 of their interest in policy making and in improving goals. The most recent line of public administration studies addressing this, starting in the 1990s, coined the term “Public Service Motivation.”

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101 ABERBACH & ROCKMAN pp. 85.
This line of literature used empirical 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. Not only that, but the studies suggest and 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 private sector counterparts; that they are more strongly motivated when they feel their mission is important; their devotion to the public interest is not limited to their jobs, as they also volunteer more off the job in terms of both money and time. 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. But the trend is clear, and perhaps not surprising—after all, in the United States, high level public servants usually have a graduate degree.

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105 Perry, Measuring Public Service Motivation: An Assessment of Construct Reliability and Validity, Supra note 102, pp. 6-9, 20-21; Brewer & Selden, Whistle Blowers in the Federal Civil Service: New Evidence of the Public Service Ethic, supra note 104 at pp. 429-433; Philip E. Crewson, Public-service motivation: Building empirical evidence of incidence and effect, 7 Journal of Public Administration Research and Theory, 499, 500, 512 (1997); James L. Perry & Lois Recasino Wise, The Motivational Bases of Public Service, 50 Pub. Admin. Rev. 367, 369-370 (1990). One limitation of this literature is that it focuses almost completely on the upper levels of the civil service, those in management positions, and therefore will not tell you much about the motivation of your postwoman or custom official; but since the accountability mechanisms discussed here are usually created by relatively high levels in the organization, as the case studies demonstrate, this literature describes exactly the relevant population.


but compared to private sector employees they are paid less, and certainly enjoy less prestige than managers in private businesses, or equivalent level civil servants in other countries. They typically face very challenging jobs; why would anyone take on such work unless they 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: to do a good job, they also need to be accountable. 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 can increase the level of public service motivation, including reforms aimed at increasing accountability.

In other words, civil servants—bureaucrats—are strongly motivated to serve the public interest; 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, it is easy to expect that civil public

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113 Joel D. Aberbach and Bert A. Rockman, What has happened to the U.S. Senior Civil Service? 8 THE BROOKINGS REVIEW 176, 179 (2001).
114 DONALD P. MOYNIHAN & SANJAY K. PANDEY, The Role of Organizations in Fostering Public Service Motivation, 67 ADMIN. REV. 395, 400 (2002) (“better educated Americans were more likely than others to work for the government”).
servants will internalize the demand for accountability as being part of their mission and a necessity if they are to do their jobs 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 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.116 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 into the decisions themselves.
- …making agency rulemaking more accessible to the public…
- Makes it much easier for the public to see the comments,…”117

There were, of course, also negative comments,118 but the reason given for the positive comments—the increase of access—supports the claim that many bureaucrats internalized the need for public access and accountability.

117 id.
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 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 NDA because of the negative policy consequences from that. In speaking to IRS officials, they too say many of the staff, especially in the high levels, internalized the need to increase transparency.\textsuperscript{119} 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.

**Part 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 that agencies are willing to add accountability mechanisms is not hard. Examples are legion. To use a major one, the Administrative Procedure Act exempts matters “relating to agency management or personnel or to public property, loans, grants, benefits, or contracts” from rulemaking procedures.\textsuperscript{120} 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 in their own regulations the notice and comment requirements, without any legal obligation—even though adopting notice and comment subjects them to possible

\textsuperscript{118} Ibid, pp. 23-24.
\textsuperscript{119} Telephone Interview with IRS official (under promise of confidentiality) (June 24, 2009).
\textsuperscript{120} 5 U.S.C §553 (a)(2).
criticism and facilitates judicial review. 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 rule making provisions of the APA the exemption therein for rules 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.”

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. As section 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; accordingly, an agency 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, the Atomic Energy Commission, as it was then,
voluntarily adopted adversarial proceedings, including cross-examinations, even though those added to the length of proceedings.\textsuperscript{126}

Taking this further, Elizabeth Magill demonstrated that agencies often engage in self-regulation, regulation limiting their discretion, providing many examples.\textsuperscript{127}

A few of these were:

“.. the 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.\textsuperscript{128} .. the 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.”\textsuperscript{129}

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 Food and Drug administration (FDA) reformed its procedures to increase transparency and participation in the 1970s, and provides an early case study of such behavior. The Environmental Protection Agency (EPA) has been experimenting with new ideas to increase its accountability at least since the 1980s. The Internal Revenue Service (IRS), widely held up for years as an example of complete non-accountability,\textsuperscript{130} has been working for over ten years on increasing its transparency and responsiveness to the general public.

\textsuperscript{127} MAGILL, supra note 56, pp. 866-869.
\textsuperscript{128} Ibid, pp. 867. Footnote omitted.
\textsuperscript{129} Ibid, p.868. Footnote omitted
The history of these agencies shows the persistence of the 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) and continues today (with the FDA and 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 agencies, important according to any criteria I could think of. 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. 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 U.S. public policy.

A. The efforts of the Food and Drug Administration (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.\footnote{Today 5 U.S.C. §552.} In the 1970s, the DC Circuit required that agencies respond to the major issues raised in comments\footnote{“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.” Natural Resources Defense Council, Inc. v. U. S. Nuclear Regulatory Commission, 547 F.2d 633, 646 (D.C. Cir. 1976). See also Portland Cement Ass’n v. Ruckelhaus, 486 F. 2d 375, 394 (D.C. Cir, 1973).} and emphasized that the basis of a decision must be clearly
explained.\textsuperscript{133} But even as the D.C. Circuit started its quest to control rulemaking,\textsuperscript{134} 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 undertaken by the FDA: FDA’s work to increase its transparency by internalizing the values in the Freedom of Information Act (FOIA)\textsuperscript{135} 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.

**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.\textsuperscript{136} Historically, the FDA, like other agencies, produced minimal compliance, releasing information only sparsely and reluctantly. This was a defense mechanism against criticism: “if the public doesn’t get information, they have a difficult time objecting to what FDA does.”\textsuperscript{137} 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.

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\textsuperscript{133} Kennecott Copper Corp. v. Environmental Protection Agency, 462 F.2d 846, 849-850 (D.C. Cir. 1972).
\textsuperscript{135} 5 U.S.C. §552.
\textsuperscript{137} Telephone interview with Peter Barton Hutt, Former Chief Counsel of FDA, currently senior counsel in Covington & Burling (June 20, 2009).
The mandate fit in with Hutt’s own philosophy. Hutt 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.\(^{138}\)

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.\(^{139}\) 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 with 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.\(^{140}\)

The result was a proposed rule published in the *Federal Register* on May 5, 1972.\(^{141}\) The rule spread over 10 of the *Register’s* small-print, three-column pages, and

\(^{138}\) Telephone interview with Peter Barton Hutt, Former Chief Counsel of FDA, currently senior counsel in Covington & Burling (June 20, 2009).

\(^{139}\) Telephone interview with Peter Barton Hutt, Former Chief Counsel of FDA, currently senior counsel in Covington & Burling (June 20, 2009).

\(^{140}\) Telephone Interview with Richard A. Merrill, formerly Chief Counsel of the FDA, currently Professor of Law, Emeritus, Virginia Law School (July 7, 2009).
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.”

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, 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), the Trade Secrets Act (prohibiting disclosure of trade secrets by federal officials) and section 331 (j) of the Food, Drug and Cosmetics Act (prohibiting the revealing of trade secrets to anyone outside the department other than the courts or Congress). Hutt decided that the strong prohibitions on disclosing trade secrets, as well as long standing agency precedent, supported a restrictive approach to disclosing materials attached to NDAs, under which the

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142 Id. p. 9128.
143 JAMES BECK AND ELIZABETH D. AZARI, FDA, Off-Label Use, and Informed Consent: Debunking Myths and Misconceptions, 53 FOOD & DRUG L. J. 71, 75-76.
144 5 U.S.C. §552(b) (4): “This section does not apply to matters that are— … (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;”
145 18 U.S.C. §1905: “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”.
146 21 U.S.C. §331 (j): [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”.
supporting materials would remain confidential.\textsuperscript{147} However, to 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).\textsuperscript{148}

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\textsuperscript{149} and by consumer interest groups for not providing enough information.\textsuperscript{150} 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\textsuperscript{151}), and during that time the agency received 667 letters, including 68

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\footnotesize
147 Telephone interview with Peter Barton Hutt, Former Chief Counsel of FDA, currently senior counsel in Covington & Burling (June 20, 2009).
149 Id. 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, 128-131 (1998).
150 JUDITH AXLER TURNER, Consumer Report/FDA pursues historic role amid public, industry pressures 1975 NATIONAL JOURNAL REPORTS 250, 254 (copy 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, HEALTHDAY REPORTER, June 2, 2009, available at http://www.woio.com/Global/story.asp?S=10466574 (last visited on July 30, 2009). See also: HALPERIN, 287.
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substantive comments to the rules (which the final regulation answered in detail).\footnote{Public Information, 39 Fed. Reg. 44602 (December 1, 1974)(Codified at 21 C.F.R. part 20).}

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.\footnote{Telephone interview with Peter Barton Hutt, Former Chief Counsel of FDA, currently senior counsel in Covington & Burling (June 20, 2009).}

The regulations that FDA promulgated between 1972-1974 had a dramatic impact on the FDA’s FOIA practice: before the regulations, FDA granted only about 10% of FOIA requests submitted to it; after them, it granted about 98%.\footnote{H\textsc{alperin}, 286.} The agency seemed to have internalized and bought in to 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 understand consequences—releasing all trade secrets will destroy the American pharmaceutical industry.\footnote{Telephone interview with Peter Barton Hutt, Former Chief Counsel of FDA, currently senior counsel in Covington & Burling (June 20, 2009).}

The goal of this increased transparency, as stated by Peter Hutt, was to increase public scrutiny of 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;\footnote{LOUIS P JR GARRISON, et al., \textit{Assessing A Structured, Quantitative Health Outcomes Approach To Drug Risk-Benefit Analysis}, 26 \textsc{Health Affairs} 684, 685 (2007).} but the agency, in this case, acted with the goal of increasing accountability. Nor was this the
last time FDA acted to increase its transparency, though the later examples are beyond the scope of this project.157

**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,” agencies must explain their actions in the “concise and general statement” demanded by the APA158 and must respond to the comments they received.159, 160 In fact, in today’s world, that reality is more often than not criticized.161 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 that extensive information 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.162 The democrats in Congress were wary

157 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 the website of the transparency blog, at: [http://fdatransparencyblog.fda.gov/about-this-blog.html](http://fdatransparencyblog.fda.gov/about-this-blog.html).
158 5 U.S.C. §553 (c).
162 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 membership taken from the official site of the Office of the Clerk, United States House of Representatives, available at:
of the FDA, and kept a close eye on it, repeatedly criticizing its actions and demanding explanations from officials. In an effort to increase the agency’s legitimacy and reduce Congress’ concerns, Hutt undertook to reform the agency’s procedures, 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, mounting pressures of workload, as the agency’s authority was expanded by Congress, made this inefficient, and the agency increased its use of rulemaking in the early 1960s. One of Hutt’s major projects was to guide the implementation of the change to an agency that works primarily through rulemaking. This change fit with the general trend towards increased rulemaking in the 1960s-1970s, 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.

http://clerk.house.gov/art_history/house_history/index.html; visited on June 24, 2009; Senate membership is taken from the compilation “Party Division in the Senate, 1789-Present” found on the official Senate site, at: http://senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm
163 Telephone interview with Peter Barton Hutt, Former Chief Counsel of FDA, currently senior counsel in Covington & Burling (June 20, 2009).
164 Telephone interview with Peter Barton Hutt, Former Chief Counsel of FDA, currently senior counsel in Covington & Burling (June 20, 2009).
165 SCHILLER, Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s, 1148-1149.
166 Telephone interview with Peter Barton Hutt, Former Chief Counsel of FDA, currently senior counsel in Covington & Burling (June 20, 2009).
167 SCHILLER, supra note 165 at pp.1145-1152.
168 Id. at 1140-1141. And see PIERCE, Seven Ways to Deossify Agency Rulemaking, 59. for an elaboration on the benefits of agency rulemaking.
However, rulemaking as the FDA did it did not look like rulemaking as today’s administrative scholars describe it.\textsuperscript{169} Instead, rulemaking included a short notice including the proposed regulation (and the other minimal information required by the APA)\textsuperscript{170}, 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 promulgate the final regulation.”\textsuperscript{171}

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\textsuperscript{172} and in the final rule.\textsuperscript{173} The preamble would have to include:

… 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.\textsuperscript{174}

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.

\textsuperscript{169} Though it probably looked more like the process anticipated and designed by the drafters of the APA. SCHILLER, 1159.
\textsuperscript{170} 5 U.S.C. s. 553 (b), time and 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.
\textsuperscript{171} Telephone interview with Peter Barton Hutt, Former Chief Counsel of FDA, currently senior counsel in Covington & Burling (June 20, 2009).
\textsuperscript{172} 21 C.F.R. §10.40 (b)(vii).
\textsuperscript{173} 21 C.F.R. §10.40 (c)(3).
\textsuperscript{174} Id.
We told the American public, this is why we are doing it.”¹⁷⁵ 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.¹⁷⁶

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 FDA. That is not to say that the agency always responded to comments to the satisfaction of commentators and/or the courts. In the Nova Scotia case, for example,¹⁷⁷ the court criticized FDA’s commissioner for not responding to certain issues raised directly by the Bureau of Commercial Fisheries of the Department of Interior.¹⁷⁸ 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 Environmental Protection Agency (EPA)’s Works at Being Accountable:**

Like the FDA, the EPA engaged in many efforts to increase its accountability. And like for the FDA, this article is only going to focus on a small sample of these behaviors. The laws governing the Environmental Protection Agency (EPA) were designed to promote accountability through the “fire alarm” approach discussed by McNollgast under which Congress creates accountability mechanisms that allow citizens

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¹⁷⁵ Telephone interview with Peter Barton Hutt, Former Chief Counsel of FDA, currently senior counsel in Covington & Burling (June 20, 2009).
¹⁷⁶ Telephone Interview with Richard A. Merrill, formerly Chief Counsel of the FDA, currently Professor of Law, Emeritus, Virginia Law School (July 7, 2009).
¹⁷⁸ Id, p. 248.
to take action to challenge or block agency deviation from Congressional mandates.\textsuperscript{179} Many of the statutes delegating power to the EPA include provisions for citizen lawsuits.\textsuperscript{180} One source estimated that in the 1980s, about 80\% of EPA’s rules were subject to litigation, and described 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.”\textsuperscript{181}

In an effort to reduce the dissatisfaction with its programs and 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”\textsuperscript{182} that the report “demonstrates EPA’s commitment to be held accountable for results.”\textsuperscript{183} In its “Framework for Implementing EPA’s Public Involvement Program,”\textsuperscript{184} the EPA explained that its goal is

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\textsuperscript{180} 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, 33 U.S.C §1365. The Clean Air Act has a similar citizen suit provision, 42 U.S.C. §7604.
\textsuperscript{181} \textsc{Deborah S. Dalton,} Negotiated Rulemaking Changes EPA Culture, in \textsc{Federal Administrative Dispute Resolution Deskbook} 135, 146 (Marshall J. Breger, et al. eds., 2000).
\textsuperscript{183} Id, p. 2.
\end{flushleft}
“to have excellent public involvement become an integral part of EPA's culture, thus improving all of the Agency’s decision making.”

Many examples can be provided, and this article will only shortly describe three, taken in chronological order: adoption of negotiated rulemaking, the development of the IRIS system, and the 2001 online dialogue.

**Negotiated Rulemaking**

Starting in 1983 the EPA voluntarily conducted a pilot of negotiated rulemaking procedures following a recommendation of the Administrative Conference of the United States; it was one of the first agencies to do so. The Negotiated Rulemaking Act was only enacted in 1990, at least partly drawing on the EPA’s experience. The EPA chose negotiated rulemaking in an effort to reduce the adversarial nature of the regular rulemaking process and especially the litigation accompanying it, but also because of the increasing acceptance of negotiation as a form of decision making in the environmental context.

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. Participants expressed

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185 Id. p. 1.


188 MEE, supra note186, at 216.


190 Id. at 29.
satisfaction with the process.\textsuperscript{191} This initial success spurred the agency to engage in further negotiated rulemaking.

EPA engaged in a very systematic effort, creating a project staff devoted to identifying appropriate rules for negotiated rulemaking, monitor and evaluate facilitators and improve the process.\textsuperscript{192} Since 1990, the project’s role was redefined to include general conflict resolution mechanisms.\textsuperscript{193}

By 2000, the EPA had conducted 21 negotiated rulemakings, more than other agencies, on a wide range of topics.\textsuperscript{194} It engaged in many more evaluations to see whether certain rulemakings were appropriate for negotiated rulemaking.\textsuperscript{195} While the evaluation of negotiated rulemaking is mixed,\textsuperscript{196} EPA made a clear effort to engage stakeholders in its decision making.

\textbf{The Integrated Risk Information System Database}

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

\textsuperscript{191} Id. at 30.
\textsuperscript{192} DALTON, in 135, 146-149.
\textsuperscript{193} Id, 151-152.
\textsuperscript{194} Id, 135. For some descriptions see Id, 135-146.
\textsuperscript{195} Id, 151.
various chemicals. IRIS has been adopted by EPA in 1985, but the major efforts at reforming its procedures started in the mid 1990s.197

After a 1997 review process, EPA introduced several changes which included, for example, creating a hotline for users, an annual agenda specific to IRIS assessments published in the federal register, publishing external peer review drafts of IRIS assessments on its website and considering public comments on the drafts.198 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 assessments and comment on them; OMB involvement increased over the years.199

Adding the OMB process was controversial. Critics attacked it on several grounds. It was seen as adding a political element to what should be a professional endeavor.200 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 Office of Management and Budget to review EPA documents 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.

198 Id (taken almost, though not completely, verbatim from the report).
199 Id, 12, 22-23.
By 2007, the IRIS assessment process involved the following stages:\textsuperscript{201}

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. EPA would also do its own literature search and create a literature review.

4. 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 GAO report, “OMB informs EPA when EPA has adequately addressed interagency comments.”\textsuperscript{202}

6. EPA would publish the results of the toxicological review and convene a public meeting of external peer reviewers.

7. After external review, 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, EPA would post the assessment on its website.

\textsuperscript{201} This description is based on a combination of the GAO report 08-440, supra note ## p. 13, and a descriptive article from the non profit OMB Watch, separating out the process before the 2008 reform described below and the post 2008 process: OMB WATCH, WHITE HOUSE GAINS INFLUENCE IN TOXIC CHEMICAL ASSESSMENTS, April 15, 2008; available at http://www.ombwatch.org/node/3642. Last visited July 30, 2009. Copy also with author.

\textsuperscript{202} GAO, Id, p. 13.
In 2008 this process was strongly criticized by the General Accountability Office (GAO) as too long and inefficient, but it certainly has substantial accountability built in, most voluntarily taken on by the agency (though adding the OMB review seemed to be due to political pressure).\textsuperscript{203}

On April 10, 2008, 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, 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, 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 will provide the assessment to other agencies). In addition, if another agency demonstrates that the chemical is critical to its mission, that agency could require further study of the substance.\textsuperscript{204}

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 Environmental Protection Agency (EPA)’s administrator revised the process once again, announcing it in a memo to EPA top officials that was

\textsuperscript{203} Id, 3-5.
\textsuperscript{204} OMB WATCH, WHITE HOUSE GAINS INFLUENCE IN TOXIC CHEMICAL ASSESSMENTS, April 15, 2008; available at \url{http://www.ombwatch.org/node/3642}. Last visited July 30, 2009. Copy also with author.
also published on the agency’s website.\textsuperscript{205} The goal of the new process was to streamline and simplify the review process. OMB review was returned to review at only two stages, before and after the input of the expert peer review, the agency announced that it would lead the new process will be led by it (previously, the process was coordinated and managed by OMB)—EPA will give the agencies opportunity to comment and meet with them, but it intends to have the final say.\textsuperscript{206} Other agencies will no longer be able to delay the process to conduct research on “mission critical” chemicals.\textsuperscript{207} In addition, all written comments from other agencies and the White House were to be made public.\textsuperscript{208}

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 decision.

\textit{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

\textsuperscript{206} Id, page 4.
could be implemented.\textsuperscript{209} This dialogue demonstrates EPA’s search for accountability both in terms of content and in the actual fact that EPA conducted such a dialogue.

The 2001 dialogue involved 1,166 members of the public and substantial numbers of EPA staff.\textsuperscript{210} The process started with the circulation of a draft of the PIP for comments in December 2000.\textsuperscript{211} The process was open to anyone, and EPA engaged in substantial efforts to advertise it. Quoting from Beirle:

“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.”\textsuperscript{212}

About a month before the dialogue, people could register, either as active—i.e. allowed to post messages—or passive participants, who could read messages but not post them.\textsuperscript{213} There was a Dialogue Website where EPA and Information Renaissance posted an electronic briefing book with substantial amounts of materials.\textsuperscript{214}

\textsuperscript{211} Beirle, supra note 209, p. 15.
\textsuperscript{212} Id, pp. 16-17.
\textsuperscript{213} Id, p. 17.
\textsuperscript{214} Id, p. 18.
Ten of the EPA’s offices held a day of discussion each. Participants could post messages or answer previous messages in a thread. 215 Officials responded to “something that was relevant to their programs.” 216 The material collected was included in EPA brochures 217 and in a Public Involvement Policy issued in June 2003. 218 A report was prepared after the fact describing the process in detail. 219

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 Internal Revenue Service (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. 220 One of the goals of the act was to increase the agency’s accountability. 221 The reform was passed amid substantial accusations of lack of accountability; in a typical example, Senator Grassley said the IRS:

"…seems 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

215 Id, p. 17.
216 BONNER, et al., in. Supra note 210, p. 147.
217 Cited in BONNER, in footnote 21, Id, Brochures on public involvement, EPA # 233F03005-233F03012 and 233F03014; the brochures are available at http://nepis.epa.gov/EPA/html/Pubs/pubtitleOther.htm.
219 Bierle, supra note ##.
221 HENNING.
forgiven. And the cause of this, of course, I think, and it is the basic unfairness is the lack of accountability". 222

Similarly, Senator Frank Murkowski from Alaska said that:

"... we agreed that there was no accountability in the IRS. We agreed that the system was designed to avoid accountability". 223

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. 224

It is of course true that this reform was imposed from the outside by Congress, which had input from some members who were actively hostile to the IRS; 225 however, the IRS Commissioner, Charles O. Rossotti, strongly supported reforming the agency and had substantial input into some of the provisions of the act. 226

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. 227 These reforms paralleled and reinforced ongoing efforts of officials inside the IRS to increase its transparency and responsiveness that had been begun before the reform. 228

222 Id. p 159.
224 THORNDIKE, supra footnote 130, p. 768. Some of them pretty 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 10, at 599.
225 THORNDIKE Id. at
226 Id. At 775-777. RAINEY & THOMPSON, 597.
227 Telephone Interview with IRS official (under promise of confidentiality) (June 24, 2009).
228 Telephone Interview with IRS official (under promise of confidentiality) (June 24, 2009). 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).
This section will mention two examples, the Taxpayer Advocacy Panel which allowed a panel of citizens substantial input into IRS operations and the efforts to increase the accuracy and transparency of IRS policies. This is a shortened description; a more detailed description is in progress.

**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.229 The panel is a collection of one hundred volunteer citizens, organized into a number of issue committees, who contribute 300 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,230 a promise to consider them.231 Or they may be rejected, in which case an explanation is included.232

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229 A description of the panel can be seen on its website available at: http://www.improveirs.org/. According to the TAP’s first annual report from 2003, it was created when: “The 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 SERVICE, TAXPAYER ADVOCACY PANEL 1 ANN. REP. ii (2003); available at http://www.improveirs.org/annualreports/reports.shtml, copy with author.

230 See, for example, item TAP B07-027, INTERNAL REVENUE SERVICE, TAXPAYER ADVOCACY PANEL 5 ANN. REP., exhibit 1, p. 2 (2007), available at http://www.improveirs.org/annualreports/reports.shtml: “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.”

231 For example, TAP N07-009, INTERNAL REVENUE SERVICE, TAXPAYER ADVOCACY PANEL 5 ANN. REP., exhibit 1, p. 6-7 (2007), available at http://www.improveirs.org/annualreports/reports.shtml: “Form 12153 is a critical part of Collection Due Process that begins the 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
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\textsuperscript{233} 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 one of the taxpayers’ advocacy panel’s committees, the Information Reporting Advisory Committee.\textsuperscript{234} 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.\textsuperscript{235}

The panel represents the agencies’ (IRS and Treasury) efforts to increasing their accountability in two ways. First, the creation of the panel was a voluntary act by the Treasury, with collaboration from the IRS. Second, the IRS regularly engages in dialogue with the panel, with top officials responding to panel recommendations and changing policies according to it—again, opening themselves to criticisms for their response and to input from stakeholders.

**Increasing Transparency and Accuracy of the Internal Revenue Manual**

The core of this is the IRS’ 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

\textsuperscript{232} As was done for one of the recommendations in TAP A07-4066, Id, p. 7-8.

\textsuperscript{233} Form 1099 is used to report withholding of a variety of incomes, including, commonly, interest—see the instructions for the form at: http://www.irs.gov/pub/irs-pdf/i1099msc.pdf last visited on July 16, 2009.

\textsuperscript{234} Telephone interview with Deborah Gascard Wolf, Director of the Office of Privacy, Information Protection and Data Security, IRS (July 14, 2009).

\textsuperscript{235} Id.
could hurt citizens accused of non-compliance due to errors.\textsuperscript{236} 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 reflect current policies (not easy for an extremely large agency) and has taken a series of steps in that direction.\textsuperscript{237} 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 in that. Guided by SPDER, 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 in two ways—from paper to electronic and from an organizational unit to process.

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 inconsistencies when searches came up with a variety of results.\textsuperscript{238}

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

\textsuperscript{236} The description is taken from the comments of IRS officials to the Taxpayer Advocate’s criticisms of their lack of transparency, found in IRS, NATIONAL TAXPAYER ADVOCATE 2006 ANN. REP. 24-26 available at: http://www.irs.gov/pub/irs-utl/2006_arc_vol_1_cover_section_1.pdf. Copy with author. The substance of the descriptions has been acknowledged by the National Taxpayer Advocate, Id at p. 27.
\textsuperscript{237} Telephone Interview with IRS official (under promise of confidentiality) (July 1, 2009); Telephone Interview with IRS official (under promise of confidentiality) (June 24, 2009).
for people outside the IRS to know their way around and was very vulnerable to inconsistencies in relation to specific processes. 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.239

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.240 The goal is to write the IRM following information mapping principles, active voice and plain language.

Another change was a policy change in relation to materials for internal use only.241 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.242

As can be seen from this very short description, substantial efforts were made by the IRS to increase the transparency of its policy and make information about its policies more readily available.

239 Telephone Interview with IRS official (under promise of confidentiality) (July 1, 2009).
240 Telephone Interview with IRS official (under promise of confidentiality) (July 1, 2009).
241 Which may fall under any of a number of exemptions to FOIA—5 U.S.C. §552 (b) (2), (5) or (7).
242 Telephone Interview with IRS official (under promise of confidentiality) (July 1, 2009). This description is very short; a more detailed description of the IRS reforms is in preparation.
Part IV: Implications and Discussion

A. What is NOT Implied?

Let’s start with what this paper is not implying. I am not saying that there is no need for external accountability mechanisms since agencies will be accountable on their own. Most of the efforts to increase accountability described in this paper 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.\textsuperscript{243} 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 they wouldn’t have, that the efforts to increase accountability were motivated by the desire to prevent further external attempts to reduce accountability. It does not require evil intent for agencies not to undertake efforts: agencies have many other tasks beyond 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

\textsuperscript{243} See Part III A above.
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 inserting a political component into a professional decision.\textsuperscript{244} The FDA’s decision to publicize the summary of the basis of its decisions relating to new drug applications was criticized by industry members for providing too much information and harming industry, and by consumer protection organizations for not providing enough data.\textsuperscript{245}

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 accountability tools and mechanisms available. An agency may lack expertise and not do a particularly good job in 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.\textsuperscript{246} Hutt sees the FDA as working to increase its transparency, but as demonstrated in part IIA, external observers criticize it for lack of transparency. External direction may be required to help agencies steer their accountability choices.

\textsuperscript{244} See part IIB.
\textsuperscript{245} See part IIA.
Finally, as demonstrated by the example of the Minerals Management Service, 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 this paper does not intend to say is that agencies’ efforts to increase accountability are generally successful. Assessing success of accountability mechanisms requires two complex, challenging inquiries that I am not undertaking here. The first is a value judgment as to just what a successful accountability mechanism would look like. For example, if it is a mechanism that increases input from outside parties, if it gives stakeholders or citizens full control is that desirable, or not? Substantial input from stakeholders can be seen as an agency being responsive or as a situation of capture; in the matter of public participation, some scholars strongly support extensive participation, others are concerned that it may harm expertise and decision-making. As for publications, the benefits and costs of transparency are also debated. If increasing transparency is a good, should agencies provide more information or provide information in a more simplified, easy to access way?

Agreeing on the standard for successful accountability is one challenge to making a scholarly assessment of success at improving accountability; another challenge is the fact that there is a wide range of empirical problems in measurement—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

247 See Part IC1.
248 Arnstein;Innes & Booher;Leib;James S Fishkin, Democracy and Deliberation: New Directions for Democratic Reform (Yale University Press. 1991).
249 COGLIANESE, Is Consensus an Appropriate Basis for Regulatory Policy?, in;ROSSI.
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? This approach can be questioned 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. Or, to make another example, 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 always justified. A more general reason this paper does not address the question of assessment is that at this point I have simply not undertaken the labor intensive research required to answer questions about the success of a program. Accordingly, this paper does NOT claim to show that agencies do a good job at being accountable—just that they try.

B. What is Implied?

In this paper I intend to show, or at least suggest, that agencies are not always the enemy in the “accountability game” and are never just a pawn in it. First, as to agencies not being the enemy: As the paper demonstrates, important agencies make substantial

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251) Schlosberg, et al., ‘To Submit a Form or Not to Submit a Form, That is the (Real) Question’: Deliberation and Mass Participation in U.S. Regulatory Rulemaking

252) This method was used, for example, by WEST, 68; GOLDEN, 251-252; MARIANO-FLORENTINO CUÉLLAR, Rethinking Regulatory Democracy, 57 ADMIN. L. REV. 411, 429-435 (2005); JASON YACKEE WEBB & SUSAN YACKEE WEBB, A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy, 68 J. POL. 128 (2006).

efforts to increase their accountability; 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; various agencies experimented with negotiated rulemaking before Congress passed an act that mandated it.

The case studies suggest that agencies make these efforts from a variety of motivations. For example, a typical case is that of an agency that is under attack trying to improve its accountability so as to reduce the severity of the attacks and at the same time make real improvements in performance. All three agencies that I report on in this paper acted to increase their accountability after being strongly attacked. This would support the view that agencies are unwilling participants in the accountability game. However, the extent of the efforts and the level of innovation in them 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” in terms of accountability, 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 Congress’ preferences.255 Studies of judicial

review focus on behavior and how courts evaluate agencies, 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. Agencies are typically sophisticated political actors. They can and do 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. One way agencies can influence their environment is by making efforts of their own to increase their accountability, thus preemipping external efforts.

This suggests a number of important policy implications to current administrative law and practice.

An important question is whether, and how, to incentivize agencies to undertake more efforts to increase their accountability. 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


257 With some exceptions – one possible exception is O'REILLY, Losing deference in the FDA's second century: judicial review, politics, and a diminished legacy of expertise, 949-950 and 977-978. (loss of deference to FDA is largely because it became captured by political actors) But see, for an opposing view, DAVID C. VLADÉCK, 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, 983-985 (2008).


negotiated rulemaking undertaken by agencies can be explained by the lack of incentives: even if, as suggested by several studies, participants are satisfied with the process, from the agency’s point of view, since it still has to go through the regular notice and comment procedures, there may not be sufficient incentive. At any rate, in spite of efforts by the Clinton administration to increase the use of negotiated rulemaking, the number of such rulemakings remains very small. 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. 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 faced with a claim of insufficient participation or transparency is to take advantage of the ability of agencies to create accountability mechanisms and charge the agency with producing a plan for increasing accountability. That way, the court does not directly dictate new procedures—forbidden under Vermont Yankee—but can still address a lack of sufficient procedures. Courts may be less


261 HARTER, id., 36-37.


reluctant to allow agencies to use guidelines\textsuperscript{265} if the agencies 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,\textsuperscript{266} and they allow—in fact, mandate—agency deviation in appropriate specific cases. Especially since the jurisprudence about policy documents v. rules is vague and the criteria to distinguish them are unclear.\textsuperscript{267} 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 heads of agencies face when trying to promote ideas of accountability within agencies is that the officials face substantial other demands on their time and accountability requires time and efforts. When faced with promoting accountability at the same time as responding to changes in the agency’s act, conducting major investigations of alleged misrepresentations of the results of clinical trials, drafting the Medical Device Act of

\textsuperscript{265}For example, the DC circuit criticized agencies for using guidance documents instead of rulemaking and avoiding rulemaking in the following cases - General Elec. Co. v. E.P.A., 290 F.3d 377, 382-383 (2002) (case does not address what procedures were used in the issuance of the guidance document). Appalachian Power Co. v. E.P.A. 208 F. 3d 1015, 1020 (2000), where the court said: “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 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.”


\textsuperscript{267}\textbf{Add cases too}. On this difficulty, see STRAUSS, 1476-1479.
1976, and a large range of other missions, promoting accountability was not always the first priority.\textsuperscript{268} 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 many other things to do, if they look at a list of priorities, IRM and updating it falls to bottom of list.”\textsuperscript{269} According some deference to an agency engaged in accountability seeking can help balance those costs.

In addition to creating incentives, acknowledging that agencies engage in increasing accountability can open the door to more systematic study on such activity, as suggested by Magill for self-regulation.\textsuperscript{270} In addition for providing a promising source of information and thought for researchers trying to understand agency action, it can make more systematic a wealth of information 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,\textsuperscript{271} 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

\textsuperscript{268} Telephone Interview with Richard A. Merrill, formerly Chief Counsel of the FDA, currently Professor of Law, Emeritus, Virginia Law School (July 7, 2009).
\textsuperscript{269} [sic] Telephone Interview with IRS official (under promise of confidentiality) (July 1, 2009).
\textsuperscript{270} Magill, supra note 56, at 860-861.
rulemaking, and OMB incorporated it into an executive order, recommending it to all agencies.\textsuperscript{272}

This learning can be made even more systematic. In that, we can learn from other countries. For example, in Australia, there is an “Office of Best Practice Regulation” to study how to make regulation better, including increasing its transparency.\textsuperscript{273} Another potential international source of inspiration is the OECD’s report comparing best practices across countries.\textsuperscript{274}

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 emphasis and where not. If a mechanism had been widely adopted by agencies and seemed to be working, that could justify increased deference.\textsuperscript{275}

Just as important, if agencies also engage in increasing accountability, they require training and resources to do so. Otherwise, they may make mistakes. For example, in an age where transparency is increasing through use of online mechanisms,

\begin{thebibliography}{9}
\bibitem{275} I suspect some of the requirements placed on agencies by courts during the years were actually ideas borrowed from existing agency practices, either in or across agencies. But that’s a topic for another project and requires further research.
\end{thebibliography}
agencies need training in use of information technology, and in many cases personnel with new kinds of abilities. Some agencies already started hiring people with new skills:

“[the office] hired a college professor to help with curriculum and the tax forms. …, someone with background in lobbying… 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.”

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

**Conclusion:**

This paper suggests that agencies are accountable, and furthermore, 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 and not given credit. In relation to their accountability behavior agencies are either criticized or pitied. Both approaches are too simplistic. In terms of criticism, being an administrator in the United States is a darn hard job. The United States is large and complex, which makes managing any problem difficult; its political system is decentralized and adds even more complexity; and like most modern states, it engages in many different spheres of activities. 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.

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276 Telephone Interview with IRS official (under promise of confidentiality) (August 3, 2009).
278 See MEYER, supra note 14, p. 2-5.
279 See the examples in part I.a.
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 tries to give a fuller picture. Agencies also contribute to their accountability environment, by acting, at times, as “accountability entrepreneurs” and at others as accountability brokers.

Does that mean we do not need to worry about agency accountability? Unfortunately not. First, agencies’ efforts to be accountable may not be effective, or may aim at the wrong problems. So, if we do not need to worry about agencies’ motives 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. 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.

Still, we should not ignore agencies efforts to increase their accountability.

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