
Freedom of Information Act — Administrative Law — Deliberative Process Privilege — U.S. Fish & Wildlife Service v. Sierra Club

Although “[s]unlight is said to be the best of disinfectants,”¹ too much “sunlight” can be harmful.² This tension has long undergirded the Freedom of Information Act³ (FOIA) and its exemptions. On the one hand, FOIA promotes government transparency — an important safeguard of political accountability in an open democracy.⁴ But on the other hand, agency decisionmaking suffers when the prospect of disclosure blunts candid communication among government officials.⁵ The interplay between these two considerations recently came before the Supreme Court in the first case heard by the newly appointed Justice Barrett.⁶ Last Term, in *U.S. Fish & Wildlife Service v. Sierra Club*,⁷ the Court held that the deliberative process privilege — a form of executive privilege — protected two agencies’ draft “biological opinions” from disclosure under FOIA because they were predecisional and deliberative, even though they “proved to be the agencies’ last word about a proposal[.]”⁸ While this decision represented a win for the government, the Court refused to embrace a bolder, unitary executive approach to interpreting FOIA, and thus successfully balanced the need for effective agency decisionmaking with core principles of democratic accountability.

In April 2011, the Environmental Protection Agency (EPA) proposed regulations intended to apply to cooling water intake structures.⁹ Industrial facilities use such structures to cool their equipment by drawing in water from nearby sources.¹⁰ But this water frequently brings with it fish and other organisms that “become trapped in the intake system[s] and die.”¹¹ Accordingly, because the EPA’s proposed regulation had the potential to jeopardize aquatic wildlife, the agency was

¹ Louis D. Brandeis, *What Publicity Can Do*, HARPER’S WKLY., Dec. 20, 1913, at 10, 10.

² See S. REP. NO. 89-813, at 9 (1965) (noting the costs of forcing government officials to “operate in a fishbowl”); see also *Survivor: She Annoys Me Greatly* (CBS television broadcast Feb. 13, 2013) (depicting Harvard Law School alumnus and eventual “Sole Survivor” John Cochran’s “head-to-toe” sunburn that made him look “like a little tomato”).

³ 5 U.S.C. § 552.

⁴ See Letter from James Madison to W.T. Barry (Aug. 4, 1822), in 9 THE WRITINGS OF JAMES MADISON 103, 103 (Gaillard Hunt ed., 1910) (“A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both.”).

⁵ See, e.g., *Dep’t of the Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8–9 (2001).

⁶ Justice Barrett, the former Notre Dame Law School professor, was confirmed by the Senate on October 26, 2020, and the case was argued one week later. Robert Barnes, *In Amy Coney Barrett’s First Signed Majority Opinion, Supreme Court Sides with Government over Environmentalists*, WASH. POST (Mar. 4, 2021, 5:16 PM), <https://wapo.st/3j5sW8q> [<https://perma.cc/Y4KT-77GU>].

⁷ 141 S. Ct. 777 (2021).

⁸ *Id.* at 783; see *id.* at 788.

⁹ *Id.* at 783.

¹⁰ *Id.*

¹¹ *Id.*

required under the Endangered Species Act of 1973¹² to consult with the U.S. Fish and Wildlife Service and National Marine Fisheries Service (together, “Services”) before proceeding.¹³ In these sorts of consultations, the Services prepare an official “biological opinion” on whether an agency’s proposed action poses “jeopardy” or “no jeopardy” to threatened or endangered species.¹⁴ A “jeopardy” finding requires the agency either to implement “reasonable and prudent alternatives” proposed by the Services, terminate the action, or seek a rarely granted exemption from the Endangered Species Committee.¹⁵ The EPA consulted with the Services over the next two years and, in early December 2013, staff members at the Services completed draft “jeopardy” biological opinions.¹⁶ But the decisionmakers concluded that “more work needed to be done” and extended the consultation period, thereby giving the EPA more time to revise its rule and avoid a “jeopardy” finding.¹⁷ Indeed, a few months later, the EPA passed along its revised proposal and the Services issued a final “no jeopardy” biological opinion.¹⁸ The EPA then issued its final rule.¹⁹

Sierra Club, an environmental organization, sued the Services in the U.S. District Court for the Northern District of California after the Services invoked the deliberative process privilege to shield the December 2013 draft opinions from disclosure pursuant to FOIA requests Sierra Club had filed.²⁰ FOIA requires federal agencies to disclose documents unless they fall within one of nine exemptions.²¹ The fifth exemption permits nondisclosure of “inter-agency . . . memorandums or letters which would not be available by law to a party . . . in litigation with the agency.”²² And the Court has interpreted this as incorporating civil discovery privileges, like the deliberative process privilege.²³ But the district court, paying close

¹² 16 U.S.C. §§ 1531–1544.

¹³ *Sierra Club*, 141 S. Ct. at 783–84; *see also* 16 U.S.C. § 1536(a)(2).

¹⁴ *Sierra Club*, 141 S. Ct. at 784.

¹⁵ *Id.* (quoting 16 U.S.C. § 1536(b)(3)); *see* Patrick W. Ryan & Erika E. Malmén, *Interagency Consultation Under Section 7, in* ENDANGERED SPECIES ACT 104, 116 (Donald C. Baur & Wm. Robert Irvin eds., 2d ed. 2010) (describing such exemptions as “rarely sought and even more infrequently granted”).

¹⁶ *See Sierra Club*, 141 S. Ct. at 784.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Sierra Club v. U.S. Fish & Wildlife Serv.*, No. 15-cv-05872, slip op. at 3–4 (N.D. Cal. July 24, 2017). The Services withheld various other documents, but the Court focused only on the December 2013 draft biological opinions. *Sierra Club*, 141 S. Ct. at 786 n.3.

²¹ *Sierra Club*, 141 S. Ct. at 785; *see* 5 U.S.C. § 552(b).

²² 5 U.S.C. § 552(b)(5).

²³ *E.g.*, *Dep’t of the Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8 (2001). The deliberative process privilege covers “documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.” *Id.* (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975)).

attention to the markup of the documents,²⁴ held that the December 2013 draft biological opinions were not protected by this privilege because they appeared to be “relatively polished draft[s].”²⁵ The Services appealed.

The Ninth Circuit affirmed in relevant part.²⁶ Writing for the panel, Judge Berg²⁷ noted that the deliberative process privilege applies to documents that satisfy a two-prong test: the documents must be (1) predecisional and (2) deliberative.²⁸ Although the district court had mentioned this two-prong test, “the test it applied to each document was whether it was a ‘relatively polished draft’ that contained ‘subjective comments, recommendations, or opinions.’”²⁹ Relying on these factors — and not the predecisional and deliberative prongs — was erroneous.³⁰ Nevertheless, the documents at issue were properly subject to disclosure because they satisfied neither prong of the test for the deliberative process privilege.³¹ They were not predecisional because they were created by a final decisionmaker and represented the Services’ final view with respect to the EPA’s *then-current* proposal; the subsequent biological opinion represented the Services’ final opinion regarding the *revised* rule.³² Nor were the documents deliberative; simply calling them “drafts” did not make them so, especially when they lacked “line edits, marginal comments, [and] other written material that expose any internal agency discussion.”³³ Because FOIA “mandates a policy of broad disclosure,”³⁴ the failure to satisfy either prong of the deliberative process privilege test accorded

²⁴ See *Sierra Club*, slip op. at 6–7 (noting the documents included only “two comments in the margins” as opposed to “multiple comments, modifications, and additions of language”).

²⁵ *Id.* (quoting *Nw. Env’t Advocs. v. EPA*, No. 05-1876, 2009 WL 349732, at *7 (D. Or. Feb. 11, 2009)).

²⁶ *Sierra Club v. U.S. Fish & Wildlife Serv.*, 925 F.3d 1000, 1018 (9th Cir. 2019). The Ninth Circuit reversed the district court’s order to produce several documents other than the December 2013 draft biological opinions. *Id.*

²⁷ Judge Berg of the U.S. District Court for the Eastern District of Michigan, sitting by designation, was joined in full by Judge Berzon, and in part by Judge Wallace.

²⁸ *Sierra Club*, 925 F.3d at 1011–12. A document is predecisional “if it is ‘prepared in order to assist an agency decision-maker in arriving at his decision,’” *id.* at 1012 (quoting *Assembly of Cal. v. U.S. Dep’t of Com.*, 968 F.2d 916, 920 (9th Cir. 1992) (alteration in original)), and it is deliberative if it “reflect[s] the personal opinions of the writer rather than the policy of the agency” or “inaccurately reflect[s] or prematurely disclose[s] the views of the agency,” *id.* at 1015 (quoting *Nat’l Wildlife Fed’n v. U.S. Forest Serv.*, 861 F.2d 1114, 1118–19 (9th Cir. 1988)).

²⁹ *Id.* at 1009 n.4.

³⁰ *Id.*

³¹ See *id.* at 1013–14, 1016. Notably, this holding created some tension with the Second Circuit, which had found that the same documents at issue here could properly be withheld. See *Cooling Water Intake Structure Coal. v. EPA*, 905 F.3d 49, 58, 65 n.9 (2d Cir. 2018). The Ninth Circuit distinguished that decision based on the Second Circuit’s invocation of the “presumption of regularity,” which meant that the decision “did not . . . analyze whether the reasons given . . . for the claims of privilege were justified.” *Sierra Club*, 925 F.3d at 1012 n.8.

³² *Sierra Club*, 925 F.3d at 1013–14.

³³ *Id.* at 1017.

³⁴ *Id.* at 1010 (quoting *Maricopa Audubon Soc’y v. U.S. Forest Serv.*, 108 F.3d 1082, 1085 (9th Cir. 1997)).

with the court's assertion that "[FOIA's] exemptions are interpreted narrowly."³⁵ Judge Wallace concurred in the result in part, but dissented with respect to the relevant draft biological opinions.³⁶ He believed the documents were predecisional, because the Services had not yet issued a biological opinion, and deliberative, because they reflected "the deliberative process" between the Services and the EPA.³⁷

The Supreme Court reversed and remanded.³⁸ Writing for the Court in her first majority opinion, Justice Barrett³⁹ held that the December 2013 draft biological opinions were in fact protected by the deliberative process privilege.⁴⁰ She began by describing the rationale for the privilege: it "protect[s] agencies from being 'forced to operate in a fish-bowl.'"⁴¹ If everything government officials say "is a potential item of discovery and front page news," officials will not communicate with each other as candidly.⁴² The privilege therefore seeks to improve agency decisionmaking by "encourag[ing] candor" and "blunt[ing] the chilling effect that accompanies the prospect of disclosure."⁴³ But this rationale does not apply, Justice Barrett noted, to a final decision, which is one that has "real operative effect," reflects "the 'consummation' of the agency's decisionmaking process," and does not leave "agency decisionmakers 'free to change their minds.'"⁴⁴ Accordingly, the deliberative process privilege distinguishes between documents that satisfy its two-pronged test⁴⁵ — the test used by the Ninth Circuit — and documents that reflect final decisions.⁴⁶

Justice Barrett then proceeded to apply this test to the draft biological opinions and, unlike the Ninth Circuit, found that the documents

³⁵ *Id.* at 1011.

³⁶ *Id.* at 1019 (Wallace, J., concurring in the result in part and dissenting in part).

³⁷ *Id.* at 1020–21.

³⁸ *Sierra Club*, 141 S. Ct. at 788–89.

³⁹ Justice Barrett was joined by Chief Justice Roberts and Justices Thomas, Alito, Kagan, Gorsuch, and Kavanaugh. This composition of Justices broke an informal tradition where each new Justice writes for a unanimous Court in her first majority opinion. Marcia Coyle, *Barrett's Debut Majority Opinion Drew Two Dissenting Justices, Ending Unanimity Streak*, LAW.COM (Mar. 4, 2021, 2:48 PM), <https://www.law.com/nationallawjournal/2021/03/04/barretts-debut-majority-opinion-drew-two-dissenting-justices-ending-unanimity-streak> [<https://perma.cc/3H38-DB98>]. In this regard, Justice Barrett followed in the footsteps of her predecessor, Justice Ginsburg, who likewise drew a dissent in her first opinion. See *John Hancock Mut. Life Ins. Co. v. Harris Tr. & Sav. Bank*, 510 U.S. 86, 111 (1993) (Thomas, J., dissenting).

⁴⁰ *Sierra Club*, 141 S. Ct. at 786.

⁴¹ *Id.* at 785 (quoting *EPA v. Mink*, 410 U.S. 73, 87 (1973)).

⁴² *Id.* (quoting *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 9 (2001)).

⁴³ *Id.*

⁴⁴ *Id.* at 786 (first quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 160 (1975); then quoting *Bennett v. Spear*, 520 U.S. 154, 178 (1997); and then quoting *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 190 n.26 (1975)).

⁴⁵ Justice Barrett added that the two prongs of this test — "predecisional" and "deliberative" — overlap considerably "because a document cannot be deliberative unless it is predecisional." *Id.*

⁴⁶ *Id.* at 785–86.

were both predecisional and deliberative “because they reflect[ed] a preliminary view — not a final decision.”⁴⁷ Evaluating the documents “in the context of the administrative process which generated them”⁴⁸ illustrated that they were “opinions that were subject to change,” and thus not final.⁴⁹ That the EPA responded to the initial “jeopardy” opinion by dramatically altering its proposal was inapposite; a final decision’s “real operative effect” refers “to the legal, not practical, consequences that flow from an agency’s action.”⁵⁰ What mattered was whether the Services — and not the EPA — treated the draft opinions as final.⁵¹ And Justice Barrett found that they did not: lower-level staff had drafted the documents, but the Services’ decisionmakers had never signed off on them, noting instead that “more work needed to be done.”⁵² While the staff recommendations proved to be the last word about the EPA’s then-current proposal, “[t]he recommendations were not last because they were final; they were last because they died on the vine.”⁵³ Further consultation led to significant alterations of the EPA’s proposal, which in turn led to the Services’ final “no jeopardy” opinion.⁵⁴ Because *this* was the final agency action at issue, the drafts that preceded it were part of the interagency deliberative process.⁵⁵ Justice Barrett concluded by addressing a concern she had raised at oral argument: agencies may not evade scrutiny by mendaciously labeling a document as a draft, because the inquiry is a functional rather than a formal one.⁵⁶

Justice Breyer dissented.⁵⁷ He began by distinguishing between final biological opinions, draft biological opinions, and drafts of draft biological opinions.⁵⁸ While mere drafts of drafts might be protected by the deliberative process privilege, draft biological opinions “reflect ‘final’ decisions regarding the ‘jeopardy’ the EPA’s then-proposed actions

⁴⁷ *Id.* at 786; *see id.* at 788.

⁴⁸ *Id.* at 786 (quoting *Sears*, 421 U.S. at 138).

⁴⁹ *Id.*

⁵⁰ *Id.* at 787 (citing *Sears*, 421 U.S. at 160).

⁵¹ *Id.* at 788.

⁵² *Id.*

⁵³ *Id.* (citing *Sears*, 421 U.S. at 151 n.18).

⁵⁴ *Id.*

⁵⁵ *See id.*

⁵⁶ *See id.*; Transcript of Oral Argument at 30–33, *Sierra Club*, 141 S. Ct. 777 (No. 19-547). Justice Barrett noted that the privilege will not apply where “the evidence establishes that an agency has hidden a functionally final decision in draft form.” *Sierra Club*, 141 S. Ct. at 788. However, she found no such “charade” here. *Id.*

⁵⁷ Justice Breyer was joined by Justice Sotomayor. Upon its initial publication, the dissent omitted the words “with respect,” leading some observers to interpret this as a “dig” against Justice Barrett. *E.g.*, @strictscrutinypodcast, TIKTOK (Mar. 5, 2021), <https://vm.tiktok.com/ZMetpDngd> [<https://perma.cc/8BZL-PTTT>]. But the opinion has since been revised to include that language. *Sierra Club*, No. 19-547, slip op. at 6 (Breyer, J., respectfully dissenting), https://www.supremecourt.gov/opinions/20pdf/19-547diff_4357.pdf [<https://perma.cc/7BQ9-JYTD>].

⁵⁸ *Sierra Club*, 141 S. Ct. at 789 (Breyer, J., dissenting).

would have caused,” and are therefore subject to disclosure.⁵⁹ Justice Breyer provided five reasons for this conclusion. First, an agency’s ability to make changes to a document in the future does not alter the document’s finality because even a final biological opinion could theoretically be withdrawn and substituted with a new one.⁶⁰ Second, a draft “jeopardy” biological opinion is functionally identical to a final “jeopardy” biological opinion because “both have substantially the same effect on the EPA.”⁶¹ Third, draft biological opinions, and not final ones, trigger the EPA’s decision on how to proceed.⁶² Fourth, agency officials expect draft biological opinions to be made public — regulations require their disclosure in other, non-FOIA contexts — so the rationale of encouraging frank discussion is not vitiated.⁶³ And fifth, legal consequences, not merely practical ones, flow from draft biological opinions by, for example, “limit[ing] the EPA’s set of available options.”⁶⁴ For these reasons, Justice Breyer would not have extended the deliberative process privilege to draft biological opinions, and because the fact-intensive question remained whether the documents at issue were drafts, or drafts of drafts, he would have remanded the case to the lower court.⁶⁵

Much of administrative law involves a careful balancing of competing values. The Administrative Procedure Act,⁶⁶ for example, “settled ‘long-continued and hard-fought contentions, and enact[ed] a formula upon which opposing social and political forces have come to rest.’”⁶⁷ FOIA is no different: it carefully contemplates the trade-offs between government transparency and agency effectiveness.⁶⁸ The Court in *Sierra Club* evinced a sensitivity to striking a careful balance between these considerations by taking care not to shortchange the importance of political accountability, even as it sided with the government. And it did so within a modern context animated by broader anxieties about the administrative state,⁶⁹ where the need for political accountability is particularly salient. Specifically, the Court declined to adopt a bolder alternative that would

⁵⁹ *Id.*

⁶⁰ *Id.* at 789–90.

⁶¹ *Id.* at 790.

⁶² *Id.*

⁶³ *Id.* at 790–91.

⁶⁴ *Id.* at 791.

⁶⁵ *Id.* at 791–92.

⁶⁶ 5 U.S.C. §§ 551, 553–559, 701–706.

⁶⁷ *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 523 (1978) (quoting *Wong Yang Sung v. McGrath*, 339 U.S. 33, 40 (1950)).

⁶⁸ *See, e.g.*, H.R. REP. NO. 89-1497, at 10, 12 (1966) (noting that “[a] democratic society requires an informed, intelligent electorate,” *id.* at 12, but also that “a full and frank exchange of opinions would be impossible if all internal communications were made public,” *id.* at 10).

⁶⁹ *See generally* PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014).

have been consistent with the unitary executive theory. Although that theory is frequently justified by reference to democratic accountability,⁷⁰ adopting such an approach here would have, in some respects, run counter to this underlying motive. Therefore, Justice Barrett’s well-reasoned and pragmatic approach to *Sierra Club*, while less consistent with the Court’s recent embrace of the unitary executive theory, wisely preserved other competing administrative law values that underpin FOIA.

To begin, consider the broader context in which *Sierra Club* was decided. Concerns have grown in recent years over the power and size of the administrative state,⁷¹ with some declaring it an unconstitutional “headless fourth branch.”⁷² While these critics vary with respect to the reasons for their skepticism, “they converge, above all, on one major concern: that *the administrative state threatens the rule of law*.”⁷³ This threat arises, in part, due to the apparent lack of democratic accountability enabled by several features of modern administrative law. Under this view, delegations of authority by Congress to agencies “erode the accountability of members of Congress as well as of executive branch agencies” because agencies can create legal rules without going through the legislative process.⁷⁴ Judicial deference to agency interpretations of law likewise erodes democratic accountability: “*Chevron*”⁷⁵ — the seminal case outlining the modern deference framework⁷⁶ — “is nothing more than a judicially orchestrated shift of power from Congress to the Executive Branch.”⁷⁷ And agency independence, whereby agency officials are protected from the President’s ability to remove federal officers, insulates decisionmakers from the President and thus from the people.⁷⁸ For skeptics of the modern administrative state, these three features (delegation, deference, and independence) together form a perfect storm that eliminates democratic accountability.⁷⁹

⁷⁰ See, e.g., Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 42–45 (1995) (arguing that accountability was a principal reason for which the Founders created a unitary Executive).

⁷¹ See, e.g., MIKE LEE, OUR LOST CONSTITUTION 7 (2015) (lamenting the roughly 80,000 pages of regulations promulgated by administrative agencies in 2013 compared to Congress’s mere 800 pages of legislation in the same year).

⁷² The phrase “headless fourth branch” has frequently been invoked to deride administrative agencies as usurping the three-branch constitutional structure. See, e.g., *City of Arlington v. FCC*, 569 U.S. 290, 314 (2013) (Roberts, C.J., dissenting); *PHH Corp. v. CFPB*, 839 F.3d 1, 6 (D.C. Cir. 2016).

⁷³ CASS R. SUNSTEIN & ADRIAN VERMEULE, *LAW & LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE* 2 (2020).

⁷⁴ Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1512 (2015).

⁷⁵ 467 U.S. 837 (1984).

⁷⁶ See *id.* at 842–43.

⁷⁷ Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2150 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014)).

⁷⁸ See David Casazza, Note, *Liberty Requires Accountability: Checking Delegations to Independent Agencies*, 38 HARV. J.L. & PUB. POL’Y 729, 731 (2015).

⁷⁹ See Justin Walker, *The Kavanaugh Court and the Schechter-to-Chevron-Spectrum: How the New Supreme Court Will Make the Administrative State More Democratically Accountable*, 95 IND.

The unitary executive theory purports to provide a structural way of assuaging at least some of these concerns. The theory “is a bracingly simple idea.”⁸⁰ It posits that “[t]he entire ‘executive Power’ belongs to the President alone.”⁸¹ Accordingly, “the President must be able to control subordinate executive officers through the mechanisms of removal, nullification, and execution of the discretion ‘assigned’ to them himself.”⁸² This structure, by contemplating agencies as component parts of the larger presidency, addresses not only formalist constitutional concerns about the administrative state, but also “preserves ‘the chain of dependence,’ such that ‘the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community.’”⁸³ This ensures that “the President is ‘a single object for the jealousy and watchfulness of the people,’”⁸⁴ thereby allowing the public to attribute executive decisions to one individual and thus calibrate their preferences at the polls knowing that that is where the buck ultimately stops.

Returning now to *Sierra Club*, the Court had before it a way of resolving the case that would have been consistent with the unitary executive theory. When applying the predecisional prong of the deliberative process privilege, the threshold question for a court is: What decision is the purported deliberation preceding?⁸⁵ In the Court’s view, that decision was the Services’ final opinion “about the likely effect of the EPA’s proposed rule on endangered species,” or more simply, the biological opinion.⁸⁶ But this conclusion is “hardly intuitive.”⁸⁷ The relevant decision could have been the EPA’s final rule altogether, representing the decision of the executive branch as a whole, as opposed to the decision of an individual agency participating in an interagency process that leads to a broader executive branch decision.⁸⁸ Put differently, if agencies are seen as mere parts that together form the larger unitary

L.J. 923, 926 (2020) (arguing that “Delegation + Deference + Independence = The Absence of Democratic Accountability”).

⁸⁰ Cass R. Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Present, Future*, 2021 SUP. CT. REV. (forthcoming 2021) (manuscript at 1), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3666130 [<https://perma.cc/ZU74-GS93>].

⁸¹ *Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2197 (2020) (quoting U.S. CONST. art. II, § 1, cl. 1); see also Sunstein & Vermeule, *supra* note 80 (manuscript at 2).

⁸² Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 599 (1994).

⁸³ *Fleming v. U.S. Dep’t of Agric.*, 987 F.3d 1093, 1113 (D.C. Cir. 2021) (Rao, J., concurring in part and dissenting in part) (quoting 1 ANNALS OF CONG. 518 (1789) (statement of Rep. Madison)).

⁸⁴ *Id.* (quoting THE FEDERALIST NO. 70, at 428 (Alexander Hamilton) (Clinton Rossiter ed., 2003)).

⁸⁵ See *Sierra Club*, 141 S. Ct. at 785–86.

⁸⁶ *Id.* at 786.

⁸⁷ Eli Nachmany, *Full Disclosure: The Unitary Executive Theory’s Recent Cameo at Supreme Court Oral Argument in a FOIA Case*, FEDERALIST SOC’Y: FEDSOC BLOG (Nov. 24, 2020), <https://fedsoc.org/commentary/fedsoc-blog/full-disclosure-the-unitary-executive-theory-s-recent-cameo-at-supreme-court-oral-argument-in-a-foia-case> [<https://perma.cc/QT9P-PXWM>].

⁸⁸ See *id.*

Executive, deliberations by and among those agencies all serve to inform the final rule that the Executive chooses to issue. Chief Justice Roberts gave voice to this conception of the deliberative process privilege at oral argument,⁸⁹ with some amici cautioning against its adoption.⁹⁰

Had the Court considered the EPA's final rule to be the relevant decision, *Sierra Club* might have better accorded with efforts to further entrench the unitary executive theory. In recent years, the Court has given the President greater control over administrative agencies. In *Free Enterprise Fund v. Public Co. Accounting Oversight Board*,⁹¹ for example, the Court held unconstitutional two layers of for-cause removal protection for some federal officials, thus bringing them one degree closer to presidential control.⁹² *Seila Law LLC v. CFPB*⁹³ likewise invoked the separation of powers to strike down removal protections intended to secure the independence of the single individual who served as the Consumer Financial Protection Bureau's head.⁹⁴ The Court's most recent Term continued this trend by extending the principle of *Seila Law* to hold unconstitutional the single-head structure of the Federal Housing Finance Agency in *Collins v. Yellen*,⁹⁵ and condemning the unreviewable executive authority of certain administrative judges in *United States v. Arthrex, Inc.*⁹⁶ *Sierra Club* could have extended these efforts into the privilege context. Specifically, some have advocated in favor of a single "unitary 'executive privilege,'" which would combine the deliberative process privilege and the presidential communications privilege.⁹⁷ In the context of the latter — a privilege that shields from disclosure communications made by and among advisors in the course of advising the President — the question is "how far down the line of command from the President does the presidential privilege extend."⁹⁸ So, had the Court in *Sierra Club* shifted what counts as a final decision up the chain of decisionmaking, it would have brought these privileges one step closer together, and thus one step closer to forming a unitary executive privilege.

The Court, of course, did none of this. But in declining to adopt an approach informed in such a way by the unitary executive theory, *Sierra Club*

⁸⁹ See Transcript of Oral Argument, *supra* note 56, at 5 ("[W]hy isn't the decision here EPA's final rule on the cooling water intake structures, and the Services' opinion simply is predecisional from the perspective of that final rule?").

⁹⁰ Brief Amici Curiae of the ACLU et al. in Support of Respondent at 28, *Sierra Club*, 141 S. Ct. 777 (No. 19-547) (criticizing the idea that "because the President oversees the entire executive branch, any agency record, however authoritative and decisional from the agency's perspective, is merely tentative and deliberative *with respect to him*").

⁹¹ 561 U.S. 477 (2010).

⁹² See *id.* at 509.

⁹³ 140 S. Ct. 2183 (2020).

⁹⁴ *Id.* at 2197.

⁹⁵ 141 S. Ct. 1761, 1783–84 (2021).

⁹⁶ 141 S. Ct. 1970, 1988 (2021).

⁹⁷ E.g., Michael N. Kennedy, Comment, *Escaping the Fishbowl: A Proposal to Fortify the Deliberative Process Privilege*, 99 NW. U. L. REV. 1769, 1803 (2005).

⁹⁸ *In re Sealed Case*, 121 F.3d 729, 742 (D.C. Cir. 1997).

preserved other competing values within administrative law. As has been mentioned, the concept of the unitary Executive is often justified by reference to constitutional formalism.⁹⁹ But it is also invoked as an effective means of promoting democratic accountability.¹⁰⁰ While the bolder approach to the deliberative process privilege might have assuaged formalist concerns about the administrative state by more closely aligning the Court's FOIA jurisprudence with a unitary executive branch structure, it also would have run counter to the principle of democratic accountability. Specifically, it would have narrowed the scope of disclosable government documents, thereby offending the congressional pronouncement that because "[a] government by secrecy benefits no one," FOIA's policy of disclosure is "much-needed."¹⁰¹ So, neither side got exactly what it wanted. Open government advocates were deprived of the opportunity to inspect the December 2013 draft biological opinions. And proponents of the unitary executive theory might have preferred "a new FOIA jurisprudence" that represented "a more whole-of-government approach."¹⁰² But *Sierra Club's* middle-ground approach will hopefully be tolerable for both sides, in that it maintains ample room for public scrutiny of government decisionmaking while simultaneously safeguarding some of the conditions necessary for that decisionmaking to be effective.

It remains to be seen how the Court will consider subsequent cases involving the administrative state. But if *Sierra Club* is any indication, the Court's future approach may involve a measured contemplation of legitimate concerns on every side of an issue. This approach, should it continue to be adopted, may meet with disappointment from critics of the administrative state, who have generated much "excitement and anticipation . . . that administrative law would be fundamentally revamped by the Roberts Court."¹⁰³ To be sure, such an overhaul may very well happen,¹⁰⁴ but until it does — and some are skeptical that it will¹⁰⁵ — the Court's pursuit of an "equilibrium accommodation that . . . reconciles long-standing and hard-fought contentions" will hopefully be "acceptable or at least tolerable as a non-ideal second best."¹⁰⁶ And *Sierra Club* suggests that this may have to be enough.

⁹⁹ See Calabresi & Prakash, *supra* note 82, at 559.

¹⁰⁰ See *Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2203 (2020).

¹⁰¹ S. REP. NO. 89-813, at 10 (1965).

¹⁰² Nachmany, *supra* note 87.

¹⁰³ SUNSTEIN & VERMEULE, *supra* note 73, at 11.

¹⁰⁴ Consider as just one of many indications Justice Alito's famous remark — made even before Justices Kavanaugh and Barrett began to hear cases before the Court — that he would "support [the] effort" to reinvigorate the nondelegation doctrine "[i]f a majority of th[e] Court were willing to reconsider [it]." *Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Alito, J., concurring).

¹⁰⁵ See Adrian Vermeule, *Never Jam Today*, YALE J. ON REGUL.: NOTICE & COMMENT (June 20, 2019), <https://yalejreg.com/nc/never-jam-today-by-adrian-vermeule> [<https://perma.cc/EU89-JZQD>].

¹⁰⁶ SUNSTEIN & VERMEULE, *supra* note 73, at 11.