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Accountability in a Global Context

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Abstract

In well-functioning democracies, the political accountability of an agent (such as an administrative agency) mean that its principals (e.g. elected officials or the electorate itself) may punish an agency by removing its leaders, reducing its budgets, limiting its jurisdiction, etc. Political accountability is fundamentally arbitrary in the sense that it is up to the “principal” as to whether to base its decisions on reasons, or not to offer any reasons at all. Legal accountability is different: the agent is required to take or refrain from taking certain actions and must defend her actions in a legal forum. Legal accountability is not arbitrary but is based on reasons, reasons connecting behavior to the relevant law binding the agent. Political accountability is best exercised directly by the person(s) who has the right to hold another to account, whereas legal accountability pushes ought to be imposed by a third party whose personal interests are not involved, such as a judge or a court.

Within international institutions, the basis for democratic electoral practices – the idea that persons should have in some sense equal entitlements to be heard – is subverted both by the system of “sovereign” states and by myriad other power wielding organizations. Global institutions are a myriad of unevenly regulated processes of public choice, so democratic-style political accountability is difficult to achieve. Global institutions are thus forced to rely on juridical or legal accountability even in circumstances where a political model might be more attractive. Deliberation and critique within global civil society may help assure that policies are responsive to all legitimate interests. But the important role played within electoral democracies by arbitrary political accountability to the people, can not wholly be substituted for within global institutions by these legal and deliberative mechanisms.

Accountability in a Global Context
(Draft of July 2007)

John Ferejohn

Introduction

My aim is to discuss accountability in supranational institutions. As I understand it, the global context is highly imperfect. It is non-ideal in tolerating vast poverty and injustice, and putting up with a great deal of endemic violence. And, the political institutions that might ameliorate this are often missing or defective in various ways. The global institutional context is partly characterized by the state system – the world’s land is divided fairly arbitrarily among sovereign states – and partly by a complex set of institutions -- national and supranational -- and norms that both facilitate and restrain interactions among states, organizations, and people. For that reason, prescriptions intended to apply to international organizations or norms need to take account of the fact that actors or organizations that operate at this level may not be well motivated.

Some supranational institutions are constituted as assemblies of states and are run by delegates of the member states and some of them are made up in other ways. And the norms may emerge from international or transnational agreements or in some other way. As many of these institutions and conventions have the capacity to affect, directly or indirectly, the well being of individuals and organizations, it is problematic if they are often unresponsive to claims either of their members or of other people who are affected by their decisions. Unresponsiveness is also puzzling as an empirical matter. Why would people create powerful and therefore dangerous organizations and turn them loose without checks?

One suspects that the answer to this question is that usually they don't. If that is right, it is probable either that international institutions and norms are not really very powerful on their own, and/or that there are checks on these institutions that may not be completely visible but which work to protect powerful states or people from having their interests infringed. In any case this belief in constraints on dangerous actions by international norms and institutions seems less plausible when it comes to weak states and vulnerable or underrepresented people. Moreover, insofar as it is difficult for states and other actors accurately to anticipate future events, it may be difficult for them to agree on institutional structures to which they would be willing to delegate authority. So, I expect international institutions to be somewhat undersupplied relative to what might be optimal.

In view of that, it is valuable to find resources by which international institutions might be made accountable and in that respect trustworthy not only to powerful states and interests but also to those less advantaged in the current status quo. Thus, what I want to pursue here is this: what are the possibilities for establishing something like democratic accountability at the global level? My answer will be more or less optimistic: I think there are ways to improve things from a recognizably democratic perspective, even in the nonideal global context. But, that general answer needs lots of qualification. Hence the paper.

I. Accountability

To say that one agent, A, is accountable to another (B) is to say that A has a kind of duty (moral or legal) to B and that B has means to enforce it. It is a normative claim that is supported by the allocation of certain rights or powers to B with respect to A, such as the right to demand an account of why A took or failed to take certain actions. B may also have some kind of

authority to directly compel A to act in some particular way, but I want to think of such powers of compulsion as inadequate to ensure that A acts as B wants and so I will emphasize B's capacity to penalize or reward A after the fact.

A may be accountable to B in various forums. We can say that A is legally accountable to B if B is able to get a court to impose sanctions on A for failing to execute his duties to B. We can say that A is politically accountable to B if B can take some direct action that can help or harm B, perhaps by removing A from office. Political accountability is a wide concept that includes the use of physical force as well as various milder forms of sanctions such as votes. Political accountability may be itself legally regulated, as for example elections are subject to legal regulations. But this seems an option and not an essential feature: in anarchic models of international relations one is often contemplating accountability relations that derive only from the powers held by the various actors.

Some aspects of accountability can be captured by a principal-agent model.¹ The rights of the principal to hold the agent to account are expressed, in this model, as the set of reward/punishment schemes that she is able to impose on the agent. The ability to impose a reward/punishment scheme may be partially shaped by moral or legal entitlements. So, we say that citizens may hold elected officials to account through elections but not by demanding kickbacks from them.² In the context of domestic public administration, we can think of elected

¹ One can construe such relations positively by simply defining as a principal, someone who has the capacity (in fact) to establish and enforce a reward scheme for another.

² It was not always so. Lewis Namier described a kickback scheme in 18th C England, in the Structure of Politics at the Ascension of George III, arguing that it formed the basis for the organization of British politics at the time.

officials (or perhaps the electorate itself) as standing in this kind of relationship to public agencies.³

To apply the agency perspective in political settings we need to acknowledge that the principal may be (and usually is) a collectivity. A collective principal may take actions in various ways: the board of directors of a corporation may be authorized to take actions on behalf of the corporation. Or a government may take actions on behalf of a polity. But even if this is so, the complexities of collective action remain. The board of directors or the government are exercising delegated powers in the above example and the delegation in question needs to be agreed to by the individuals who make up the collectivity. Collective action problems may be easy or hard to “solve” or (I would say) “resolve.” In the case of a board or a government, the very fact that we can see and speak of them suggests that the delegations in question have already taken place and, to that extent, a unified collective principal exists and can take action (including enforcing relations of accountability). But this does not mean that the collective action “problem” has disappeared and, generally speaking, agents always have reason to try to undercut or subvert a unified principal who can call them to account.

Political accountability

Political officials, however they attain authority, hold agencies to account by offering sanctions and rewards. In the case of well functioning democracies, elected officials or the electorate itself may, at prescribed times and according to prescribed procedures, punish an

³This is complex insofar as elected representatives are themselves accountable to their electors or perhaps, as Burke thought, to some broader constituency. After all, when an elected representative holds a public agency responsible he is not acting for himself but, instead, on behalf of others. Perhaps it is better, still taking a normative view, to see the electorate as a principal and all public officials as agents who have complex duties with respect to each other. The forms of this relationship – the lines of accountability and their specific content – seem endlessly variable. More shall be said on some of this variation below.

agency by removing a leader, reducing budgets, limiting its jurisdiction, etc.⁴ This may be done for “cause” or not; whether cause is required is a political decision. So, I want to say that political accountability is fundamentally arbitrary in the sense that it is up to the “principal” to base decisions on reasons, or to refuse to do so. Indeed, as I will argue, in holding the agency to account, the political principal need not even offer reasons at all or may be actually prohibited from doing so.

Political accountability is usually enforced by the principal to whom the duty is owed. But this is not necessary: a political agent may be required to act for the nation but face reelection only in a constituency. Moreover, when the principal is a collectivity (as it nearly always is in political settings), there are other important exceptions to this. The principal may delegate to some single agent the right to hold other agents accountable. A prime minister or president may be entitled to fire cabinet ministers without showing cause, for example. One may think that the minister is “really” politically accountable to the electorate, but nevertheless this relation runs through the chief executive.

Legal Accountability

Legal accountability is different: in this case, the agent is required to take or refrain from taking certain actions and must defend her actions in a legal forum. The agent is put on notice, through the enactment of prior law/standards, as to what is required of her to keep her job/jurisdiction/freedom, and she risks a penalty only for violating those legal standards. So, in this respect, legal accountability is not arbitrary but is based on reasons, reasons connecting

⁴One could object that political accountability as I have defined it only exists against the background of some legal norms: that is, whatever norms are in place to conduct and regulate elections and to allow the political bodies to conduct business in a procedurally acceptable manner.

behavior to the relevant law binding the agent.⁵ This not to say that legal accountability is necessarily more predictable, in fact, than political accountability. That depends on contingent facts: political actors may be statistically predictable while legal standards must be applied by imperfect and opinionated human agents. An important point about legal accountability is that the principal may have no role at all in enforcing it.

There are “institutional” implications of the distinction between political and legal accountability. Political accountability is best exercised directly by the person(s) who has the right to hold another to account. Since it is fundamentally arbitrary, it cannot really be delegated, at least not completely and perfectly, and preserve its political nature.⁶ Legal accountability pushes in the other direction: it ought not to be exercised by interested person(s), but should be imposed by a dispassionate third party. Someone whose personal interests are not involved: a judge or a court.

Political and legal accountability are substitutes but, as I have suggested, they have quite different properties. As an example the Athenians, who were suspicious of elections and of permitting public officials to serve repeatedly, imposed legal accountability in the form of an “exit” audit on their public officials (euthenai). They also applied legal accountability to those who proposed decrees to the assembly (graphe paranomen). At the same time they permitted political accountability of officials by ostracism (where no reasons could be given) and impeachment (eisengallia) or political trials in the Assembly.

⁵Throughout this paper I use “reason” in a broad sense to include any kind of justification of an action that represents it as required by pre-existing norms. This requirement can be indirect and turn on considerations of moral or legal theory. The important features of everything that qualifies are that it is not arbitrary, can be implemented by an independent third party, and can be subjected to challenge according to understood practices of discourse. This is meant to rule out relations of force and bribery as well as of arbitrary whim.

Another example is the use of impeachment which, it is claimed, subjects officials to a legal rather than political standard. Senators sit as judges rather than as legislators in an impeachment trial and are obligated to apply a legal rather than a political standard. Obviously, in both cases, legal accountability is sometimes bent to serve political purposes. Insofar as this occurs, it is an instance of imperfect or defective legal accountability and not of political accountability.

II. Folk Democratic Theory

Consider a modern polity that has relatively well functioning political institutions: a relatively fair electoral process for selecting a legislature/government which makes law and policy, and a system of effective public agencies and courts that interpret and execute law and policy. In common sense or folk democratic theory, the people or electorate stand as political principals in relation to the other institutions and their occupants. Their choices and decisions are to be treated, for this reason, as needing no justification, at least if those decisions are made within a certain institutional context (an election or perhaps a referendum). Their acts are considered sovereign in this sense. Indeed, seeking or demanding reasons from voters is discouraged or forbidden, perhaps out of worries about voter intimidation or bribery, but perhaps too as a sign of respect for the sovereign nature of the voters' decisions.⁷

⁶This raises the issue of transitive political accountability: the president stands in a political relationship to agencies whereas voters stand in that relation to the president. So, is a presidential decision to fire an agency head political or legal? I am inclined to put this on the political side of the distinction since the firing can be arbitrary on the part of the president or based on the forecast of an arbitrary response by voters in a future election.

⁷And in any case, even if reasons were somehow extracted, there is every likelihood that they would be sparse, ill-formed and incoherent. The ideas in this section were developed jointly with Pasquale Pasquino and are published in Wojciech Sadurski, ed., "Constitutional Courts as Deliberative Institutions: Toward an Institutional Theory of Constitutional Justice," The Hague: Kluwer Law International, 2002, 21-36 (with Pasquale Pasquino).

Folk democratic theory contains, I think, a simple theory of delegation. While the people are free to act in any way that they choose when, for example, exercising their franchise, those holding delegated power are not similarly free. For example, at the first rung in the ladder of delegation, members of the legislature are to be understood as advancing the interests of their constituents. They are expected to give reasons of a certain kind in the form of political justifications, perhaps in the form of party platforms, or speeches published in a legislative journal, but there are many other circumstances where justifications may be offered. The justificatory reasons legislators are expected to offer are directed to the voters (to support the claim that they are acting on their behalf and in their interest). In practice these reasons are usually only loosely related to the actual actions taken. And, in any case, manifestos or campaign “promises” are not legally enforceable but only (if at all) politically.⁸

Take another step on the ladder and we get to administrative agencies. Agencies are required to give reasons for certain of their actions. Folk theory expects agencies to give more and better reasons than legislators, and subjects those reasons to legal as well as political controls. So the relationship between an agency’s actions and the justifications for them may (at times) be policed by courts or other agencies, though this connection still seems to be fairly loose (largely governed in the US by the “rational basis” standard of review that entails a lot of deference by the reviewing tribunal to the agency). But as importantly agencies remain subject to political controls even if these are sometimes indirect: their budgets can be slashed, their jurisdictions altered or stripped, their leaders fired, or simply turned out of office as the result of elections. So, agencies are expected to give reasons in both political and legal fora and are, in

⁸ Legislatures often give reasons to agencies and courts and as a way of making their directive instructions clear, but these are not justificatory reasons.

this sense subject both to reasonable and more or less arbitrary forms of control. In these respects they are required to give more and better reasons than legislatures.

Finally we reach the courts. Judges are generally highly insulated from political accountability though not completely so. They are required to give reasons and the reason giving process is regulated both internally (by other judges, either by higher courts, or by other courts who pay greater or lesser deference to their rulings) or externally by those who may or may not comply with judicial orders or, more generally, with judicially interpreted law. As a generalization, courts seem subject to much more strenuous reason giving requirements, and the system of hierarchical review together with stare decisis polices these requirements. Moreover, the political branches ultimately can regulate or pressure the courts in various ways. The connection between reasons and actions is more tightly regulated in the judicial setting than it is in agencies or the legislature.

Folk democracy, so far as I have stated it, makes no claim about how much delegation can be justified; it says only that if there is delegation to elected or unelected officials, there is an expectation of justification or reason giving in return. It asks for more reason giving when the chain of justification is longer. And it insists on retaining a kernel of authority to the people: the power to remove officials. Of course, something needs to be said about the kinds of reasons that are required or expected. This varies across institutions and from one polity to another.

Legislators are expected to give reasons to the people (explaining why they are taking an action or not) and to other officials (spelling out what is required or expected of them). Agencies have to explain why their actions are justified (in terms of the relevant legislation) and should be permitted to stand by courts. And courts have to explain to other actors why the apparently attractive policy choices of those actors are illegal.

There is cross national variation as well: in the UK, acceptable reasons offered by a court or an agency are limited to those found in acts of parliament (as interpreted) or to the common law where that does not conflict with the former. In the US, courts can draw authority directly from the constitution, which is thought to be a kind of popular expression by the people acting in what Madison called their highest sovereign capacity. To varying degrees many postwar European states permit their constitutional courts to reference the written constitution, and permit their ordinary courts to refer to other, transnational, sources. But of course all of these sources require interpretation and so one expects that courts and agencies will not merely point to a source but give an account of its meaning for the present application.

A well functioning political/legal system can be expected to exhibit a range of accountability relations that runs roughly from the political to the legal or, if you prefer, from the arbitrary or willful to the reasonable or deliberative. This range expresses what I have called minimal or "folk" democratic understandings. Folk theory recognizes what might called an increasing democratic "deficit" that increases as one moves toward courts and away from the people. This is especially true where the court rules on the constitutionality of legislation. But, I think it recognizes as well a kind of deliberative deficit that increases as we move in the other direction. In other words, folk theory would regard decisions by courts or agencies that have not been well justified in terms citizens would generally accept as somehow inadequate.

We need to ask now about the normative status of folk democratic theory. Let's assume for the moment that it is a good description of what is popularly understood and expected of citizens and officials in democracies. Is it, in virtue of that, any kind of a guide to what is actually required for a well functioning democracy? Answering this question requires a normative democratic theory. At the risk of abusive oversimplification I think there are two

main lines of normative theory that may hope to account for folk intuitions. The first I shall call strong democratic theory, by which I mean theories that depend on some notion of popular sovereignty that treats the people's wants as somehow authoritative for policy making, at least in principle. The second line of thought is deliberative in that it treats the common interests of the people as the proper aim of government.

Folk theory rests on the presumption that citizens are, for the most part, reasonably authoritative as to their genuine interests however and wherever those interests are pursued, including actions taken by public authorities. This is not to say that voters or representatives are infallible but only that their views and actions are entitled to a high level of deference by public officials. This deference is expressed in two ways already described: those exercising delegated authority are expected to offer reasons for actions, and those reasons should be somehow connected not only to the interests of the people but also to public opinion. At least this presumption holds where democratic institutions are reasonably well functioning (ie. fair, frequent, and competitive elections, a well apportioned legislature with authority to shape public laws, an efficacious executive, a judiciary guided by law, etc.). But is this actually a plausible guide to what democracy requires?

Joseph Schumpeter argued some years ago that it was not. He thought the people were very likely to be incompetent in making public policy. Popular incompetence arises mostly from what we would now call collective action problems: ordinary people have no reason to invest in learning about the political options facing the state -- such knowledge is useless to them in their everyday lives -- so they will have very little idea of the technical connections between policies and the way things are going in their lives. Politicians are in a different position. If they are in government they have strong incentives to learn about policy and policy effects even if their

evaluations may differ somewhat from those of ordinary citizens. In this sense they are likely to have some degree of competence in choosing among policies.

So, Schumpeter endorsed a minimal kind of democratic theory: a state is democratic if the people control access to office through elections. Ordinary people may be able to form judgments about the character of politicians – he thought they were unlikely even to be very good at that – but in any case their electoral judgments are final: if a political leader is voted out, she leaves office. This is a kind of democratic theory in the sense that it shows the people to have some essential or minimal role in putting lawmakers into office and throwing them out. But, in the language of agency theory, there is little reason to think that policies and laws will have any connection at all either to what the people want or what is in their interests.

While there is much to be said for Schumpeter's modest view of democracy, I think he missed the insistent nature of the democratic expectations embodied in folk theory. It seems to me that democratic expectations tend to push in two directions as time goes on, on the one hand towards requiring political decision making to be more transparent and insisting on more public justification for action, and on the other toward permitting more direct popular involvement in political decisions. The strength of pressures waxes and wanes but they seem pretty consistent. We rarely see people agreeing to cut back on direct democracy once they have achieved it, or relinquishing transparency either. So while Schumpeter might be right that the people in their own interests ought to accept a limited role, my guess is that they will tend to reject this advice.⁹

⁹ It is easy to give a parade of horrors that would have made Schumpeter smile. Transparency oriented reforms very often simply make it easier for organized interests to get what they want from the policy process and probably tend to make things worse from a public interest perspective. And direct democratic reforms are easily captured by such interests as well. So maybe the children should just shut up and listen to Schumpeter.

III. Strong Democratic Theory

What some thinkers have called strong democratic theory is an attempt to justify the expectations embodied in a version of folk democratic theory. Strong democracy is a normative theory that seeks, among other things, to justify substantial constraints on delegations of authority. Certain kinds of consent theories provide common examples in seeing some forms of delegation as simply unjustified and illegal. Others are more willing to permit delegation but have insisted that delegations be made responsive to public interests, through elections or even to threats of an “appeal to heaven.”

Rousseau’s version was perhaps the most extreme in claiming that the people cannot alienate their legislative power – which he considered to be an exercise of sovereign power -- to a representative assembly.¹⁰ Rousseau did permit other kinds of delegation however: executive powers could be delegated and (as far as I can see) so could judicial powers. But holders of these powers were mere magistrates who were executing sovereign commands and not acting on their own discretion. Whether this distinction is tenable is highly questionable of course; political science has witnessed many oscillations on the question of whether it is or could be made a workable distinction, but surely most students of politics are skeptical that it can be.

Other versions permit more delegated authority by, for example, drawing a line between acts of a sovereign – as in the exercise of what Abbé Sieyès called the constituent power -- and ordinary legislative power (which would be a constituted power). One could say that while sovereignty cannot be delegated, legislative authority can be delegated to parliament as long as institutions and practices are put in place to ensure that parliament is accountable to the people in regular and competitive elections. This is the common answer in advanced democracies.

What strong theories have in common is that they see delegated authority as somehow defective in a certain way relative to authority directly exercised by the people. Such delegations may be necessary or advantageous to the people,¹¹ but they ought to be subject to controls (political or legal or both) to make sure they are acceptable to the people. Such exercises of power need to be explained and justified rather than simply taken as an exercise in prerogative. In that sense, the exercise of delegated power is not self justifying in the way that the exercise of the constituent power in a constitutional referendum might be.

IV. Deliberative Democratic Theory

The alternative approach goes something like this: a polity is democratic insofar as its policies reliably track the common interests of its residents, where those are defined in ways to reflect democratic values (requiring for example that policies express equal concern and respect). Such a theory would be deliberative in requiring leaders to intelligently discover and pursue policies supported by good reasons. A deliberativist could think that people may have some direct knowledge as to what ends they want to achieve, but deliberative theory does not concede epistemic superiority to the people either as individuals or as electors, at least not on all issues. A deliberativist can cheerfully accept Schumpeter's skepticism about popular competence when it comes to choosing technically complex policy options and insist on leaving the choice of public policies to achieve these ends to specialist political leaders. Of course, these professionals can be mistaken, but their judgments are contested in settings likely to yield better answers. And, moreover, they still have to stand for election.

¹⁰That is not to say that there cannot be an elected assembly that makes rules – but those rules cannot be taken as laws but only as acts of magistracy.

In fact, a deliberativist would argue that a folk democracy of the kind described above would fail to be democratic if its policies systematically failed to track common interests. It is easy to see how such a failure might occur: even well functioning elections are plagued with collective action problems that discourage people from becoming informed as to their genuine common interests or the best ways to achieve them. Therefore, putting the people in a position where they can direct policies themselves or demand accountability from officials would merely produce a crowd pleasing politics of pandering and posturing. It is a recipe for arbitrary policies and not policies that track the public interest.

On a deliberative account, democracy demands that accountability not be arbitrary but be reliably guided by common interests. If that is right, folk understandings of democracy are wrong and pernicious since they would extend frequently to justifying stupid and self defeating actions by the people or their political representatives. Xenophon reported an Athenian during the disgraceful trial of the generals shouting: “it is outrageous to say that the people cannot do whatever they want.” As Kant said (in **Perpetual Peace**) this is a recipe for despotism – where the despot is the multitude – indeed Kant thought it was despotism itself.

In this sense deliberativists challenge the basic presumption of folk theory. They demand not deference to popular will but to the best policy i.e. to that policy which best reflects the real interests of the people.¹² In extreme versions of such a theory, it must be said, one struggles to see the sense in which it could be seen as a “democratic” theory, in that it denies the authorial aspect democratic theories sometimes embrace: essentially it rests on the idea that government is

¹¹Necessity may arise from technical considerations such as the size and expanse of society and need for a full time government. Advantages of representation include specialization, wisdom, temperance, and the selection of the “better sort” as representative.

¹²I need not go into the issues of social choice that lay concealed in this expression. Part of determining what a best policy is must involve negotiating the political tensions involved in formulating any definite conception of the public interest.

“for” and not “by” the people. There is no sense, as there is in the case of consent theories, that the people are subject only to laws and commands of their own making (even if the making is usually very indirect since it works through delegation). Still, there is something democratic about the idea that policy should be rationally chosen to achieve the ends of genuine collectivity, where those ends embody democratic values, and doing this effectively requires the empowerment of specialists to make policy and places limits on the extent to which the people can call these specialists to account.

The Athenians themselves seem to have realized this problem: when they restored their democracy in 403 it was moderated in various ways, especially by amplifying legal forms of accountability relative to political forms and making it more likely that the democracy would act for (norm guided) reasons rather than arbitrarily (by will or passion). Still they did not completely eliminate relations of political accountability. The ekklesia as well as the courts could demand an account from generals or magistrates and remained free to impeach or sanction them in other ways. In effect, the people accepted the idea of instituting more judicial controls on the ekklesia while also insisting that the ekklesia remain a place where accounts had to be given if things went badly.

Modern democracy is a kind of compromise between these two views. The folk democratic theory imposes certain constraints on how a democratic government should work even if it does not provide a full and attractive normative theory of democracy. Sometimes it pushes the idea that the laws to which the people are subject should be, in some sense, made by them. More often it seems to push for enhancing the conditions of political accountability, which is a more modest idea. For the most part the expectations of folk theory are not very

demanding. This leaves plenty of room for the deliberative conception, which emphasizes the effective pursuit of substantive democratic goals over the conformity to democratic processes.¹³

The modern compromise requires the development of well regulated representative institutions which permit extensive delegations of authority to executive officials and even to unelected and unaccountable judges. These officials are accountable both politically and juridically (in the wide sense of requiring reasonable justifications to be offered in a variety of fora). Folk democracy insists only on the right of the people to make certain arbitrary choices in elections, and perhaps in other settings where a popular judgment is required. But, outside of those circumstances, political officials and judges remain free to act reasonably, guided by consideration of what our common interests are, or what fidelity to the law requires.

V. The Administrative State in Democratic Theory

The rise of massive public bureaucracies was a wrenching phenomenon for democrats and especially for folk democrats. The very reason for the creation of these new agencies was that popular processes could not effectively produce legislation capable of dealing with the explosion of issues confronting the expanding industrial state. In effect, the people and their immediate agents were forced down the delegation tradeoff outlined above. And, as I suggested, what they expected in return for this delegation was, in part, reasons for action. Public agencies were created and empowered in between the legislature and the courts, and were expected to provide reasoned justifications for the policies they chose: justifications that could be contested

¹³ There are deliberativists, Jurgen Habermas and Joshua Cohen for example, who advance process based conceptions of deliberation. I think those arguments are most persuasive in circumstances where one could think that ideal processes would reliably produce good outcomes. I am skeptical about whether such a relationship exists, even in near ideal settings.

and, in principle, overridden in democratic processes. The struggles that followed, both political and legal, suggest just how imperfect, incomplete and contested this process was... and still is.

Things were very different for deliberativists. The administrative state appeared not so much as a usurpation or end run around the people, but as an extension of governmental powers to achieve common purposes. Delegation to agencies vastly widened the reach and grasp of the deliberative organs (Congress, the executive and the courts) and promised exercise of these new powers in a reasonable way. The early theories of state agencies presumed well intentioned and, above all, competent administrators who could be relied upon usually to pursue public projects honestly and effectively.

Even if these beliefs were eventually undermined, the pathway to insuring that agencies would be responsive to public interests was clear enough from a deliberativist perspective. It was a matter of making sure that agencies would respond to reason in the right ways by assuring that all reasonable viewpoints were regularly and fairly presented prior to policy choice, and that decisions were tied to these reasons. Both political and legal agents had roles to play in policing these regulations.

At a theoretical level, the administrative state requires a revised conception of political agency. The main reason for this is that delegation creates chains of agency relations, so accountability now has to be a transitive relation. Elected officials are accountable to the electorate as before of course, but now agencies are accountable to the legislature. The nesting of accountability relations creates new possibilities for agency slack because the agency has the chance to go around its principal (the legislature) to the higher level principal (the electorate). Students of American bureaucracy are familiar with moves of this kind starting (probably) with Alexander Hamilton's Treasury Department and running through Douglas MacArthur and many

others. Alternatively, and perhaps more likely, the legislature and the agency can collude against the voters. Such alliances used to be called “iron triangles” when they involved external interest groups as well and, in one form or another, seem very common.

Folk democracy and deliberative democracy provide different conceptions of agency in the context of the administrative state. Folk democrats insist that agencies be directly or indirectly accountable to the people and that this accountability is unconstrained by reason. Deliberative democrats want agencies to respond to reason: to gather, hear and act on the range of relevant reasons for action. This might entail actually listening to the people express themselves on occasion, but more often, good reasons can be generated in a more controlled and disciplined process involving surrogates like NGOs, professors, and interest groups. If those entities are somehow biased away from presenting the whole range of relevant reasons, the deliberativist is happy enough to create and subsidize new groups and give them a place at the table.

At the same time as the extensive delegations of power to agencies was taking place, there were increasing demands for more and better regulated democracy. This was reflected in lots of ways: the creation of direct institutions of democracy, the demand for more control of elected officials through the use or threat of recall and direct primary, the reform of apportionment, and legal attacks on political machines, etc. We see these developments as connected: the growth of the large industrial state increased demands for its regulation and also amplified folk democratic demands for more channels of political accountability. In the end however, it had to admitted that administrators were very hard to control by political means and there would have to be ways found to provide substitutes for democratic controls. The “acceptable” tradeoffs were along the lines I have already laid out: roughly speaking, agents were

required to give reasons for their actions, if not directly to the people, then to their elected representatives. And they were also made more subject to legal rather than political accountability so they were forced to be accountable in some ways in courts.

But this trade is never completely acceptable from the perspective of folk democracy precisely because the nature of accountability had changed fundamentally. As I have represented it, folk democracy is essentially nondeliberative in the sense that each person's right to make political judgments is unconditional and she is free to make them in any way she chooses. She doesn't have to be reasonable. One is reminded of the story of the Athenian, Aristides the Just, who came across a poor and barely literate farmer trying to write a name on an ostraca. The man asked him how to spell "Aristides" and so Aristides wrote it on the shard for him, but he asked what he had against this man Aristides. The man replied "I'm sick and tired of hearing him being called 'the Just' all the time."

From the deliberative viewpoint the progressive era reforms are less comprehensible. What sense did it actually make to permit the people a direct role in policy choice through the popular initiative? Was there some magic potion by which they could overcome the collective action barriers that Schumpeter emphasized, and make policies that would further their real interests? What was the justification for permitting popular recall, or judicial elections, or direct primaries? Wouldn't these institutions simply get officials to pander, to choose inferior but popular policies in order to please the electorate. All this is quite puzzling from the deliberativist viewpoint.

As I said before, folk democratic demands are usually more or less satisfied by the usual set of institutions of accountability: fair and competitive elections together with a pattern of delegation that matches reason giving with remoteness from the people. The people might

occasionally rise up and demand more, as they may have in the Progressive period, and when they succeed the best account is that they have wrung concessions from elected officials. We might call the institutional pattern the modern democratic bargain, and versions of it are to be found in every modern democracy. Deliberativists can accept this bargain as well insofar as reasons are developed and are in fact the primary guide to policy. That those reasons are actually presented to the people or their elected representatives is less important but may have the beneficial effect of getting the people to behave a little more reasonably in making their electoral choices. But that is a wish more than a prediction and is in any event a second order benefit.

VI. The Global Setting

The democratic bargain is much harder to reach in the larger world. For one thing, global institutions are much further out on the path of delegation than domestic agencies. Sometimes, indeed, the powers exercised are not really delegated at all. Secondly, the mechanisms by which global agents could be held to account are much less connected, even remotely, to domestic or any democratic processes. One feature that marks the global setting is the rarity of fairly conducted elections as a general means of articulating of popular judgments, or for getting rid of officials. The basis for democratic electoral practices – the idea that persons should have in some sense equal entitlements to be heard – is subverted both by the system of “sovereign” states and by myriad other power wielding organizations. Instead, at the base of global institutions are a myriad of unevenly regulated and conducted processes of public choice. What this means within the present framework is that the option of political accountability is much less available than it has been within the domestic context. There is simply less of the folk democratic option

at the global level. To the degree that there are folk democratic expectations, they are unevenly spread around the world.

For that reason global institutions are forced to rely on juridical or legal accountability even in circumstances where a political model might be attractive: specifically, where the substance of an attractive policy depends on what it is that the people actually want. This is not to say that political accountability is never available in supranational contests. Consider the politics of the late European Constitution. There, for various reasons, some state actors saw the need to get their voters to agree to the proposed constitution in referenda and, once they embarked on that course, a new avenue for accountability was opened. There are many who think that the required assent could have been given by parliaments as had generally been done with previous treaties, and that “next time” political leaders will not be so stupid as to risk popular rejection of their wise pan-European project. They think this particular Pandora’s box can be closed or Humpty Dumpty’s egg reassembled; I am not as sure of that.

Similar events are not unfamiliar in domestic settings. Agencies are sometimes advised or required to conduct proxy political processes in order to ascertain what people think about alternative policies or what they would plausibly think if they were to contemplate the matter. In the US, the Agriculture Department has occasionally employed referenda to help determine which policies are acceptable to producers. Notice and comment rulemaking has the same kind of motivation and maybe works reasonably well in arriving at (simulated) popular judgments in some circumstances. But in domestic settings, such practices take place against the background of real political processes which, in principle, impose a kind of discipline. While administrative accountability of the kind found within agencies remains fundamentally different from political accountability, there is a sense in which the political mode has the last word.

Globally, because the background political processes are much sparser and more uneven, and are often unattractive, legal accountability floats in a kind of moral vacuum. That is not to say that political accountability is completely absent. Governments can fall, delegates and commissioners can be fired or recalled, treaties can be abrogated. But the background rules of international organizations are heavily tilted toward very unresponsive forms of political decision making with an emphasis on unanimity or large supermajorities to change policies. So the paths by which policy makers could be called to account are frequently pinched or even completely blocked.

So there is less to be said in favor of political accountability in global institutions as anything more than a kind of brute fact that international institutions may need to take account of. Governments can be overthrown or defeated and this may change the lineup of principals at the table in an international institution. But this possibility provides no reason for policy makers in the institution to be systematically responsive to public sentiments. Instead they have reason to respond to well articulated democratic claims where they arise: in the developed democracies for example rather than from the third world. They have reason to respond to “facts” about political power that can affect their activities and such facts are only occasionally democratic.

This implies that global institutions cannot rely on democratic pressures to supply either constraints on or support for global institutions. The only option is more or less purely deliberative: to aim at policies which are likely to track (some attractive and democratic conception of) common interests. Doing this requires relying on well regulated administrative processes on the one hand and, where it is possible, judicial ones as well. But it also seems important to encourage and rely on deliberation and critique within global civil society, to assure that policies are responsive to all legitimate interests.

The thing that is lost however is very important: it is the possibility that officials may suddenly be removed from office for no reason other than, like the poor farmer felt about Aristides, the people are simply weary of them. Whatever the reason for such actions within domestic politics, the effect is to break up ingrown sets of officials, to ventilate the chambers of government with different ideas, possibly no better than the others in the end. Folk democracy is the club behind the door that serves to encourage officials through fear and anxiety to try to pursue good policies and to explain to the people what they are doing.