Controlling Administrative Politics with Sunshine by Expanding the Aera Energy v. Salazar Principles

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Controlling Administrative Politics with Sunshine by Expanding the Aera Energy v. Salazar Principles

Nicholas Jimenez

In this Note, I argue for expanding the principles behind a recent D.C. Circuit decision into a common law “Sunshine Rule” that would require disclosure of political influences in agency decisions. The Note proceeds in three parts. First, I review the D.C. Circuit’s opinion and note the principles behind it. Next, I assess the potential sources of political influence on agency decisions. Finally, I conclude that a Sunshine Rule would help curb improper intragovernmental political influence in agency decisions, and that the judiciary is in the best position to establish it.

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Aera Energy v. Salazar\(^1\) presented a clear case of intragovernmental political influence. The agency actor bluntly stated that political pressure from a superior determinatively influenced his decision.\(^2\) Because D.C. Circuit precedent held that no amount of intragovernmental political influence in an agency’s decision was acceptable,\(^3\) it was straightforward for the court to determine that the political pressure in Aera Energy v. Salazar was improper.\(^4\)

The prohibition on political influence that the D.C. Circuit found in Aera Energy v. Salazar has a long history in Supreme Court precedent, although it has recently come under some question. At least since the 1983 decision in Motor Vehicle Manufacturers’ Ass’n v. State Farm Mutual Automobile Insurance Co., judicial review of agency rulemaking under an abuse of discretion standard has meant “hard look review,” which is widely interpreted to prohibit intragovernmental political influence in agency rulemaking.\(^5\) Only recently has the Court seemingly opened the door to greater intragovernmental political influence,\(^6\) in the 2009 Federal Communications Commission v. Fox Television Stations, Inc. decision. In the intervening years, many scholars have argued for increased intragovernmental political influence.

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2. Id. at 216.
in agency decisions, usually from the executive and subject to a transparency requirement,\(^7\) and many others for maintenance of a stiff prohibition.\(^8\)

*Aera Energy* raises three related questions. First, what intragovernmental political influence in agency decision making, if any, should be allowed? Second, what body is best suited to determine when an agency has made a decision subject to undue intragovernmental political influence? Third, how can that body effectively ensure that the influence exerted, if allowable or desirable, is of the proper type and measure?

In response, first, there must be a limited place for intragovernmental political influence in abuse-of-discretion review of agency rulemaking, but that political influence should always promote agency action that is within the bounds of the agency’s governing statute, is consistent with the agency’s prior factual or legal conclusions, and is attentive to the public good. Second, courts remain best suited to monitor agency decision making. Fundamentally, an agency’s duty is to execute its authorizing statute, and courts are best positioned to analyze conformity of the agency’s execution with the law. In contrast, leaving oversight of intragovernmental political influence in agency decision making to the executive and legislative branches through a system of checks and balances would lead to endless gridlock. Finally, transparency in communications between agencies and the other political branches would greatly assist in the monitoring of intragovernmental political influence. Legislation could mandate transparency, or the judiciary could reform its standard of review for abuse of discretion to require it, at least until a transparency law passed.

I. THE AERA ENERGY COURT REACHED THE RIGHT RESULT

In *Aera Energy v. Salazar*, the D.C. Circuit found inappropriate intragovernmental political influence in an agency adjudication, but found that the agency had cured it.\(^9\) The court reasoned that a subsequent, untainted decision, even though it was rendered by the same agency, was sufficient to cure the first decision because it provided the regulated entity “all they were entitled to—i.e., an agency decision on the merits without regard to extra-statutory, political factors.”\(^10\) The court rejected Aera Energy’s contention that


\(^9\) *Aera Energy*, 642 F.3d at 221.

\(^10\) Id. at 213.
curing the initial, tainted decision required mandating the decision that the agency would have rendered had it not been politically influenced.\textsuperscript{11}

\textit{A. Background}

The United States Department of the Interior (DOI) administers oil and gas leases on the Outer Continental Shelf\textsuperscript{12} pursuant to the Outer Continental Shelf Lands Act of 1953 (OCSLA).\textsuperscript{13} The Secretary of the Interior (the Secretary) delegated that authority to the Minerals Management Service (MMS), which further delegated it to regional MMS offices.\textsuperscript{14} During the exploration stage of an oil and gas lease, the leaseholder or the MMS may “suspend” the lease, effectively extending its term and preventing it from expiring.\textsuperscript{15} For efficiency purposes, leaseholders may voluntarily group leases into units based on the contours of the subsea “mineral reservoir” or “potential hydrocarbon accumulation” they intend to access.\textsuperscript{16} Once leases are unitized, the MMS typically grants suspensions at the unit level rather than the individual lease level.\textsuperscript{17} If better delineation of the contours of the mineral reservoir later shows that some individual leases do not actually lie over the reservoir, the unit should be “contracted” to exclude them.\textsuperscript{18}

Statute and case law differ on the breadth of the Secretary’s discretion regarding OCSLA leases. D.C. Circuit precedent before and after \textit{Aera Energy} bars any intragovernmental political influence in agency decisions.\textsuperscript{19} OCSLA, however, grants the Secretary a relatively broad mandate. It authorizes the Secretary to “at any time prescribe and amend such rules and regulations as he determines to be necessary and proper in order to provide for the prevention of waste and conservation of the natural resources of the outer Continental Shelf.”\textsuperscript{20} The Secretary may grant suspensions “at the request of a lessee, in the national interest, to facilitate proper development of a lease or to allow for the

\textsuperscript{11} \textit{Id.} at 219.
\textsuperscript{12} \textit{Id.} at 214.
\textsuperscript{13} 43 U.S.C. §§ 1331(a), 1332 (2006).
\textsuperscript{14} \textit{Aera Energy}, 642 F.3d at 214. In the wake of the Deepwater Horizon disaster, the Secretary abolished the MMS and reassigned its duties to the Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE). See U.S. DEP’T OF THE INTERIOR, ORDER NO. 3299, ESTABLISHMENT OF THE BUREAU OF OCEAN ENERGY MANAGEMENT, THE BUREAU OF SAFETY AND ENVIRONMENTAL ENFORCEMENT, AND THE OFFICE OF NATURAL RESOURCES REVENUE (May 19, 2010), available at http://www.doi.gov/deepwaterhorizon/loader.cfm?csModule=security/getfile&PageID=32475. However, the MMS retained authority at all times relevant to the \textit{Aera Energy} case. \textit{Aera Energy}, 642 F.3d at 214. For clarity, I will refer only to the MMS throughout, rather than BOEMRE.
\textsuperscript{15} \textit{Aera Energy}, 642 F.3d at 214.
\textsuperscript{16} \textit{Id.}
\textsuperscript{17} \textit{Id.} at 215.
\textsuperscript{18} \textit{Id.}
\textsuperscript{19} D.C. Fed’n of Civic Ass’ns v. Volpe, 459 F.2d 1231, 1246 (D.C. Cir. 1971) (holding that “determinations [must be] based strictly on the merits and completely without regard to any considerations not made relevant by Congress in the applicable statutes”).
\textsuperscript{20} 43 U.S.C. § 1334(a).
construction or negotiation for use of transportation facilities.”21 The Secretary has very broad authority to end a suspension.22 The MMS has very rarely used this discretion in a way that disadvantaged oil companies.23

Aera Energy and Noble Energy filed suit because the MMS used its discretion to the energy companies’ disadvantage by contracting two units and thereby excluding a total of four of Aera’s and Noble’s leases.24 The MMS then granted suspensions to the new contracted units, but denied suspensions to the four orphaned leases, which then expired.25 The MMS had substantial evidence the leases in question were not viable26 and should therefore be terminated, but the MMS director who made the final decision was also subject to political pressure to terminate the leases.27 Aera and Noble sued on this basis, alleging that their leases would have remained in their units and would have been suspended with the others absent political pressure.28

B. Procedural History and Discussion

The MMS Regional Director who issued the decision to contract the two units at issue admitted that he made his decision based on pressure from a superior who wanted to please California’s U.S. Congress members.29 Aera Energy and Noble Energy appealed to the Interior Board of Land Appeals (IBLA), DOI’s final review forum, challenging the decision on the basis of improper political pressure.30 Before the IBLA’s Administrative Law Judge (ALJ), the MMS Regional Director admitted that, in the absence of political pressure, he would have granted the suspensions.31 Although his subordinates’ factual findings suggested that the leases were “marginal” and “did not qualify for continued inclusion in their units,”32 the Regional Director stated that he would have suspended the leases because: (1) doing so would have provided continued rental revenue for the government; (2) their expiration would have

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21. Id. § 1334(a)(1).
22. 30 C.F.R. § 250.170(e) (2011) (“[MMS] may terminate any suspension when the Regional Supervisor determines the circumstances that justified the suspension no longer exist or that other lease conditions warrant termination.”).
23. See John K. Van de Kamp, John A. Saurenman, Outer Continental Shelf Oil and Gas Leasing: What Role for the States?, 14 HARV. ENVTL. L. REV. 73, 103 & n.124 (1990) (explaining that DOI had suspended only “a handful” of leases for environmental reasons, compared to “hundreds, if not thousands” of leases suspended at lessees’ requests, and that DOI had never canceled a lease).
25. Id.
26. Id. at 217–18.
27. Id. at 216.
28. Id.
29. Id.
30. Id. at 216, 218.
31. Id. at 218. The ALJ’s opinion is confidential. Samedan Oil Corp., 173 IBLA 23, 30 n.6 (2007) (“The Judge’s decision and virtually the entire hearing record, including the pleadings, testimony, and exhibits, are subject to confidentiality orders issued on May 2, 2000, May 10, 2005, and July 1, 2005, pursuant to 43 C.F.R. § 4.31(a).”).
32. Aera Energy, 642 F.3d at 217.
compromised potential hydrocarbon development, since the tracts were unlikely to be re-leased in the near future given the political climate; and (3) his subordinates’ factual findings were “susceptible to different interpretations.”

The ALJ concluded that the decision resulted from political influence. Nevertheless, he upheld the Regional Director’s decision based on the factual determinations of the Regional Director’s subordinates. Since the subordinates had not been politically influenced, their factual findings that the leases were “marginal” were reliable, and thus contracting the units was appropriate. The factual record therefore mandated the very decision that the Regional Director had issued. The IBLA granted Aera and Noble a de novo review of the ALJ’s proposed fact findings, which IBLA then upheld.

Aera Energy appealed the IBLA’s decision to the D.C. District Court, which found that, because the IBLA itself (1) was not politically influenced and (2) had the authority to review the Regional Director’s decisions de novo, it had cured the decision of its political taint. The district court therefore upheld the IBLA’s decision to affirm the ALJ’s ruling and allow the units to be contracted.

On the petitioners’ appeal, the D.C. Circuit Court of Appeals held that the crux of the case was the question, “when politics has impermissibly infected an agency decision, what steps must the agency take to cure the taint?” The court identified three principles, taken from case law, to decide the matter. First, intragovernmental political influence is only important if it “shapes, in whole or in part, the judgment of the ultimate agency decisionmaker.” Second, even when political pressure has tainted a decision, the agency has an opportunity to issue a new, untainted decision. As long as the author of the new decision was politically insulated, the decision would stand. Third, precedent strongly favors a “full scale administrative record” to support decisions and “dispel doubts” about their nature.

33. Id.
34. Id. (finding the MMS Regional Director’s admission of his political motives “credible”).
35. Id.
36. Id.
37. Id.
38. Id.
39. Id. at 216.
40. Id. at 217.
41. Id. at 218 (arguing political taint on summary judgment).
42. Id.
43. Id.
44. Id. at 220. The court quickly dispatched Aera Energy’s two other arguments on appeal, holding that the IBLA did, in fact, have the power of de novo review and that, although the Regional Director’s decision was tainted, there were alternative reasons for the same outcome. Id. at 219.
45. Id. at 220 (citing D.C. Fed’n of Civic Ass’ns v. Volpe, 459 F.2d 1231, 1246 (D.C. Cir. 1971)).
46. Id. (citing Volpe, 459 F.2d at 1246, and Koniag, Inc. v. Andrus (Koniag I), 580 F.2d 601 (D.C. Cir. 1978)).
47. Id.
48. Id. (citing ATX, Inc. v. U.S. Dep’t of Transp., 41 F.3d 1522, 1528 (D.C. Cir. 1994)).
On the basis of these three principles, the D.C. Circuit upheld the district court’s decision and rejected Aera Energy’s appeal. The D.C. Circuit explained that it had “never even hinted” that, to cure a politically tainted decision, an agency must impose the decision it would have issued absent political influence. Besides lack of precedent, there were two major flaws in Aera Energy’s contention that the Regional Director must reverse his decision. First, the bases on which the Regional Director suspended the lease—rental revenue and the likelihood of releasing—were not permissible reasons for suspension under IBLA regulations. Second, requiring administrators to instate decisions they would have made in the absence of political influence would lead to problems such as requiring retired administrators to return to make new decisions at an agency for which they no longer worked.

The D.C. Circuit’s tripartite rule on permissible political influence is, as Aera Energy demonstrates, easily applied in the adjudication context. However, there are sound reasons to treat adjudication and rulemaking differently when it comes to acceptable intragovernmental political influence. According to Professor Watts, one of the leading proponents of allowing intragovernmental political influence in agency decisions, “agencies play very different roles when engaging in rulemaking versus adjudication. In the rulemaking context, agencies act as mini legislatures, whereas agencies act as mini courts in the adjudicatory context.” It seems almost inconceivable that intragovernmental political influence would be acceptable in agency adjudications, given the need for objectivity in adjudicative processes.

The court’s strict adherence to the technocratic model of administrative law, in which politics must not enter agency decision making, makes sense in the adjudication context, but the same rationales for this model do not apply in the rulemaking context. How would the court have treated the case if the agency decision had been a rulemaking? For example, what if the MMS had

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49. *Id.* at 221. The court first dismissed two of Aera Energy’s lesser arguments, which centered on the explicitness of the intragovernmental political influence and the abusive nature of the Regional Director’s decision. *Id.* The inertia represented by the Regional Director’s rote decisions to reauthorize leases could itself be seen as “political” or politically influenced, especially given the Regional Director’s improper motives for suspending most leases, but the court did not address this issue.

50. *Id.* at 222.

51. *Id.* at 223; Samedan Oil Corp., 173 IBLA 23, 37 (2007) (explaining that “the purpose of unitization is not to extend leases and neither the regulations nor written MMS policy permits unitization based on the potential loss of rental revenue or on the minimal likelihood of tract releasing”).

52. Aera Energy, 642 F.3d at 222.

53. Watts, supra note 6, at 8 n.14 (citing Sierra Club v. Costle, 657 F.2d 298, 400 (D.C. Cir. 1981)).

54. See, e.g., 5 U.S.C. § 557 (2006) (guaranteeing the independence of ALJs, such as those on the Environmental Protection Agency’s Environmental Appeals Board, from their parent agencies, so that parties receive “fair and impartial resolution of proceedings”); EPA, OFFICE OF ADMINISTRATIVE LAW JUDGES, http://www.epa.gov/oalj/ (last visited Apr. 14, 2012); Jon D. Michaels, The (Willingly) Fettered Executive: Presidential Spinoffs in National Security Domains and Beyond, 97 VA. L. REV. 801, 875–78 (2011) (discussing the disadvantages of presidential interference in individual adjudications); Mendelson, Disclosing, supra note 5, at 1131 (declining to address agency adjudication).

issued a new rule governing lease contractions that applied a more stringent standard for exclusion of leases not overlying recoverable hydrocarbons, and had done so in response to political pressure from Congress or the White House? A significant faction of legal scholars supports the introduction of intragovernmental political influence in rulemaking. Recent Supreme Court precedent also seems to open the door to increased intragovernmental political influence, which is at odds with the rule applied in Aera Energy. Aera Energy provides a lens through which to evaluate the arguments for increasing allowable political influence because (1) political influence was clearly present, (2) the court applied a clear rule against any degree of political influence, and (3) the court developed a “cure” for political influence that may be applied in future cases, and which may be affected if the definition of permissible political influence changes.

II. EVALUATING INTRAGOVERNMENTAL POLITICAL INFLUENCE

This Part begins by developing normative guidelines to assess what political influence should be acceptable, using case law as needed but proceeding a priori. From there, it focuses down one level to consider the guidelines the Supreme Court has laid out for arbitrary and capricious review and how they work. Finally, it looks to actual sources of political influence, the capacities and failings they have, and the ability of the Supreme Court’s doctrines to control them. Considering these aspects, I endorse revisiting the Supreme Court’s precedent.

A. Normative Guidelines

Before assessing the state of hard-look review under Supreme Court precedent, or its success in practice, it makes sense to develop a normative framework by which to assess what political influence should be acceptable and what should not. This section attempts to draw up that framework.

To evaluate the limits of intragovernmental political influence on agency action, the limits on agency action in general must be delineated. The most fundamental limit on an agency’s discretion is that it may not act outside its statutory authority. Thus, intragovernmental political influence is improper if it “was intended to and did cause the agency’s action to be influenced by factors not relevant under the controlling statute.”

56. See generally, EDLEY, supra note 7; Kagan supra note 7; Watts, supra note 6.
57. FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800 (2009); Bell, supra note 6, at 658.
58. A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 54 (John F. Duffy & Michael Herz eds., 2005) (explaining that agencies are “almost always created by statute” and “must find statutory authority for their actions, and operate within statutory limitations”); Holly Doremus, Scientific and Political Integrity in Environmental Policy, 86 TEX. L. REV. 1601, 1638 (2008) (“In theory, judicial review should ensure that decisions remain within relevant statutory bounds.”); Mendelson, Disclosing, supra note 5, at 1141 (citing Volpe, 459 F.2d at 1236).
While an agency’s authorizing statute sets limits on the agency’s actions, the statute also guides the agency in acting consistently with its congressional mandate. However, statutes, particularly environmental statutes, usually give agencies broad and oftentimes vague discretion in rulemaking. This may be because Congress believed the agency was best suited to decide specific questions, overlooked or chose not to consider particular questions of authority, or could not muster the political will to narrow the statute.

A second crucial limit on agency discretion is the requirement, upheld in Fox, that agency decisions not “ignore . . . factual or technical conclusions.” This limit is relatively uncontroversial, although it may engender complexity when government scientists “shade or misrepresent” their findings in response to intragovernmental political influence.

There is also general agreement that agency actions should not be “aimed at achieving some goal other than service to the public interest.” Graft, for example, is a form of influence that clearly would not serve the public interest. Setting aside this and other widely presumed boundaries to agency

60. Doremus, supra note 58, at 1602 (“The concern here is one familiar to observers of the politics of the regulatory state—that the agency will undermine a statutory scheme by responding more to political pressures or the personal biases of agency personnel than to the evidence and the goals articulated by the legislature.”); Shapiro & Levy, supra note 5, at 395 (noting that agency capture undermines the purpose for which agencies were created), 410 (describing the purpose of more rigorous “substantive review” which, in State Farm, ensured that an agency operates in accord with its “authorizing legislation” and “the statutory purposes for which the agency was created”); Jody Freeman & Adrian Vermeule, Massachusetts v. EPA: From Politics to Expertise, 2007 SUP. CT. REV. 51, 53 (2007) (characterizing the Court’s holding in Mass. v. EPA as preventing agency delay if that delay would undermine the “main purposes of the statute”). The MMS’s specific mandate under OCSLA included “that the character of the waters above the outer Continental Shelf as high seas and the right to navigation and fishing therein shall not be affected.” 43 U.S.C. § 1332(2) (2006).

61. Doremus, supra note 58, at 1630.

62. See, e.g., Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984) (“Congress intended to accommodate both interests, but did not do so itself on the level of specificity presented by these cases. Perhaps that body consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency.”).

63. FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1811 (2009) (explaining that, although an agency need not necessarily explain a rule change generally, “[s]ometimes it must—when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy”).

64. Mendelson, Disclosing, supra note 5, at 1141 (arguing that presidential influence should not “prompt” agencies to transcend these bounds). For a discussion of scientific integrity in agency decisions, see generally, Doremus, supra note 58.

65. Doremus, supra note 58, at 1613–20 (providing suggestions for enforcing scientific and political integrity), 1639–52.

66. Mendelson, Disclosing, supra note 5, at 1141, 1144 (arguing that presidential influence should not work against the public interest).

67. Id. at 1144. Professor Mendelson does not thoroughly address situations in which an agency’s decision might have multiple objectives, of which only an ancillary one was inappropriate. Instead, she suggests that instances of ancillary inappropriate influence would have to be controlled by the “political system.” Id. at 1145.
action (e.g., bribery, corruption, and other illegal activities), the definition of the “public interest” is largely an issue of political values.

These values can and should change in a democracy as a society evolves, but there ought to be consistent and nonpartisan bases on which to assess the content of intragovernmental political influence to ensure that it reflects the values of democratically elected political actors. One suggestion for separating “good” intragovernmental political influence from “bad” suggests that “legitimate” intragovernmental political influences from political actors should be defined in a way that includes policy considerations and political value judgments (e.g., “The President favors a reading of the Clean Air Act that excludes greenhouse gases from its coverage because the statute cannot work effectively or comprehensively to deal with global warming.”), but excludes raw political goals or pure partisan politics (e.g., “The President has directed us not to regulate greenhouse gases because his key campaign contributors do not want to incur regulatory costs associated with preventing global climate change.”).

Undoubtedly this standard is, as its author admits, fraught with “inherent fuzziness,” and it is likely that courts will not be “entirely comfortable with this line-drawing task.” It also raises concerns over “whether judges ought to be searching for public values to support governmental decisions.” The proposal describes the appropriate distinction, but may fail as a practical test for distinguishing “good” influence from “bad.”

A differing interpretation of the treatment of political influence under hard look review suggests that the standard described above is an inherent part of the fundamental limitation upon agencies to act within their statutory authority. Under this theory, hard look review acknowledges that political values motivate agency decisions and only invalidate decisions when agencies use politics to justify their decisions without showing that a decision was

69. See Watts, supra note 6, at 53–58, 83 & n.349.
70. Id. at 56, 53 n.239.
71. Id. at 56.
72. Id. at 83.
73. Id. at 53 (emphasis omitted).
74. An early proponent of introducing political considerations into hard look review has suggested that the best assessment of the quality of the politics involved in a decision looks at the level of inclusiveness in the process. Courts should play a representation-enforcing role, and “failure to include key groups in a bargaining process should be considered a substantial and substantive flaw in the agency’s political decision making.” Edley, supra note 7, at 199. Despite the intuitive appeal of an approach based on increased representation, extra-governmental political influences is beyond the scope of this Note.
76. Id. at 6–7.
superior, for reasons other than politics, to other regulatory paths the agency
could have taken. 77 In a sense, an agency’s statutory authority delineates the
particular values that the agency may act upon, and thus hard look review
allows for a certain level of political influence.

B. Evolution of the Case Law on Intrigovernmental Political Influence in
Agency Decisions

The easiest place to look to assess when intragovernmental political
influence is acceptable is the governing precedent on the subject. Under the
APA, a court will overturn an agency’s decision if it is arbitrary and
capricious. 78 Two contradictory threads have developed in the case law
regarding the amount of intragovernmental political influence that courts will
allow under arbitrary and capricious review of agency decisions. Under the
dominant “hard look” review established in Motor Vehicle Manufacturers
Association of the U.S., Inc. v. State Farm Mutual Auto. Insurance Co. (State
Farm), 79 influence from the political branches is always undesirable and at
least weighs against the agency’s finding on review, or on some readings
disqualifies it outright. 80 Justice Scalia’s 2009 opinion for the Supreme Court
in Federal Communications Commission v. Fox Television Stations, Inc. 81
reestablished the other thread, in which some degree of intragovernmental
political influence is acceptable. 82

1. State Farm “Hard Look” Review

Until recently, State Farm defined arbitrary and capricious “hard look”
review; 83 it “requires an agency (on pain of judicial reversal of its action) to
address all significant issues, take into account all relevant data, consider all
feasible alternatives, develop an extensive evidentiary record, and provide a
detailed explanation of its conclusions.” 84 This standard “reflects an ideal
vision of the administrative sphere as driven by experts, although also
demanding that they take into account and respond to the contributions of
interested parties.” 85 Lower courts have interpreted State Farm to preclude
consideration of intragovernmental political influence in agency action. 86

77. Id. at 14.
action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise
not in accordance with law.”).
(1983).
80. See Mendelson, Disclosing, supra note 5, at 1141.
82. See infra Part II.C.2.
83. Kagan, supra note 7, at 2380; see also State Farm, 463 U.S. at 36-37, 43.
84. Kagan, supra note 7, at 2270 (citing State Farm, 463 U.S. 29).
85. Id. at 2380. Kagan explained that, although hard look review “affirms control of
administration by experts at the possible expense of interest groups, [it also] in some sense depends on,
and in turn provides additional impetus to, the paper hearing process that has become the hallmark of the
The Supreme Court upheld hard look review in 2007 in *Massachusetts v. EPA* (*Mass. v. EPA*). Some have interpreted the case as the latest in a series of “expertise-forcing” checks on executive influence over agency decisions. “loudly reiterat[ing] the message that *State Farm* has been read to have established more than twenty years earlier: agencies must justify their decisions in expert-driven, not political, terms if they wish to convince courts that reasoned decisionmaking has occurred.”

The popular interpretation of *State Farm*, however, likely exaggerates the Court’s intent for at least three reasons. The majority in *State Farm* did not actually reach the issue of whether political considerations are appropriate bases for agency decision making, so that even after *Mass. v. EPA*, the Supreme Court remained free to “correct” the popular interpretation of *State Farm* without overturning the case. Furthermore, Justice Rehnquist’s partial dissent in *State Farm*, which garnered three additional votes, asserted the legitimacy of intragovernmental political influence in agency decisions. Finally, only one term after *State Farm* and considering similar facts, the Court granted strong deference to the decisions of administrative agencies in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* *Chevron*’s reasoning depends on democratic legitimacy, which derives from agencies’ susceptibility to intragovernmental political influence.

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86. See Mendelson, *Disclosing*, supra note 5, at 1138 n.53 (2010) (citing Freeman & Vermeule, supra note 60; Kagan, supra note 7; Stack, supra note 8; and Watts, supra note 6, all asserting that *State Farm* meant this or was read to mean it); Bell, supra note 6, at 646; D.C. Fed’n of Civic Ass’ns v. Volpe, 459 F.2d 1231, 1246 (D.C. Cir.1971) (holding that any intragovernmental political influence was inappropriate in agency decisions); *Koniag I*, 580 F.2d 601, 611 (D.C. Cir. 1978) (same); ATX, Inc. v. U.S. Dep’t of Transp., 41 F.3d 1522, 1528 (D.C. Cir. 1994) (same).
88. Watts, supra note 6, at 22 (citing Freeman & Vermeule’s interpretation of *Massachusetts*, supra note 60, at 54, 64–65, as “embrac[ing] a type of ‘expertise-forcing’ whereby the Court sought to ‘protect administrative expertise from political intrusion’ by forcing agencies to engage in expert-driven decisionmaking”).
89. Freeman & Vermeule, supra note 60, at 52 (“*Mfass.J v. EPA* is best understood not so much as an environmental law case, not primarily anyway, rather it is a companion case to *Gonzales v. Oregon, Hamdan v. Rumsfeld*, and other episodes in which Justice Stevens and Justice Kennedy have joined forces to override executive positions that they found untrustworthy, in the sense that executive expertise had been subordinated to politics.”).
90. Watts, supra note 6, at 22.
92. FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1810 (2009) (“[O]ur opinion in *State Farm* neither held nor implied that every agency action representing a policy change must be justified by reasons more substantial than those required to adopt a policy in the first instance.”).
95. See Kagan, supra note 7, at 2372–83; May, supra note 8, at 434–36; Cynthia R. Farina, Statutory Interpretation and the Balance of Power in the Administrative State, 89 COLUM. L. REV. 452,
2. Revised Influence Standard Under FCC v. Fox

The Court recently revisited the State Farm paradigm in Federal Communications Commission v. Fox Television Stations, Inc. (Fox). The Court clarified the meaning of arbitrary and capricious review under the APA, holding that it should be no more rigorously applied when an agency changes a rule than when it first enacts one. The FCC had changed its indecency policy to make broadcast networks subject to fine for broadcasting “fleeting expletives,” which Fox had done in 2002 and 2003. The FCC’s policy change in Fox was based on shaky reasoning supported by little or no new evidence, and the Court found that “the precise policy change at issue here was spurred by significant political pressure from Congress,” though it upheld the new rule anyway. However, the Fox Court recognized two scenarios in which a higher bar applies to changing a rule than to enacting it: first, when new facts contradict facts supporting the initial rule and, second, when significant reliance interests have grown to depend on the old rule. There is wide agreement that Fox permits more intragovernmental political influence in agency decisions than hard look review under State Farm, and

97. Id. at 1811 (“[An agency] need not demonstrate to a court’s satisfaction that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change adequately indicates. This means that the agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate.”).
98. Id. at 1808.
100. Fox, 129 S. Ct. at 1813. In concurrence, Justice Thomas hypothesized changes in “factual circumstances”—namely, advances in technology and advent of the Internet—that might have influenced the FCC. Id. at 1822 (Thomas, J., concurring).
101. Id. at 1815–16.
102. Id. at 1812.
103. Id. at 1811.
104. Watts, supra note 6, at 10, 22 (“Justice Scalia’s opinion for the Court emphatically rejected the notion that all shifts in agency policy are subject to more rigorous judicial review, and hence his opinion seems to make it easier for agencies to change their policies due to changes in the political landscape. In this sense, Justice Scalia’s opinion for the Court at least implicitly seems to cast doubt on a technocratic approach.”) (internal citations omitted); Mendelson, Disclosing, supra note 5, at 1139 (“Justice Scalia . . . hinted that political preferences could be a reason for an agency decision.”); Bell, supra note 6, at 658; Brooks, supra note 99, at 689 (“This relaxation of ‘hard look’ review may, in turn, allow agencies that desire to change policy for purely political reasons to do so as long as they can provide some justification that does not completely defy logic.”); Charles Christopher Davis, Note, The Supreme Court Makes it Harder to Contest Administrative Agency Policy Shifts in FCC v. Fox Television Stations, Inc., 62 ADMIN. L. REV. 603, 604 (2010) (worrying that Fox “wash[ed] away a judicial gloss on the Administrative Procedure Act’s . . . arbitrary and capricious standard of judicial review, making it much easier for agencies to reverse themselves in the future”).
that Fox “opens the door for more discussion about the proper role of politics” in agency decisions. 105

One argument challenging Fox’s loosening of hard look review notes that the FCC action in Fox was a formal adjudication rather than a rulemaking, and thus the agency would not have had a notice-and-comment record upon which the Court could draw its conclusions.

Fox’s effect, therefore, should be to encourage agencies “to take up ‘soft’ regulatory topics like indecency in adjudications rather than rulemakings.” The APA does not cover independent agencies such as the FCC, and those agencies are thus not subject to arbitrary and capricious review at all.

The widely held view that Fox loosens hard look review, however, is more persuasive. In his dissent in Fox, Justice Stevens interpreted the majority opinion as applying to notice-and-comment rulemaking, and the Ninth Circuit has acted in concert with this view. And, even if Fox technically did not concern notice-and-comment rulemaking, the FCC solicited and considered public comments in notice-and-comment rulemaking fashion. Fox therefore exposes some aspects of administrative action to a greater degree of intragovernmental political influence.

C. Choosing a Standard of Review

Despite the apparent change from the State Farm standard of hard look review to the Fox standard in 2009, instances of intragovernmental political influence seem to have increased in number since Fox. This persistence after the Fox decision suggests that a comparison of the two approaches is worthwhile. This Part juxtaposes the arguments for returning to the prior State Farm precedent, as it was popularly understood, with the arguments for moving on from State Farm to some new paradigm, discussed in later sections. I conclude that the argument for moving to a new regime wins.

105. Watts, supra note 6, at 11.
106. Armijo, supra note 8, at 579 (arguing that Fox “add[s] more branches to an agency’s decision tree,” but does not “allow it to openly consider politics during rulemakings”).
107. Id. at 579–80 (citing Fox, 129 S. Ct. at 1819 n.8 (Scalia, J., responding to Justice Breyer’s dissent)). Armijo suggests that even Justice Stevens ignored the distinction between the FCC’s policy change in the adjudication context versus the notice-and-comment rulemaking context. Id. at 580 n.32; see also CBS Corp. v. FCC, 663 F.3d 122, 127 (3d Cir. 2011) (noting that “the issue in [Fox] was ‘the adequacy of the Federal Communications Commission’s explanation of its decision’”).
108. Armijo, supra note 8, at 580.
109. Id. at 581.
110. Id. at 580 n.32.
111. Modesto Irrigation Dist. v. Gutierrez, 619 F.3d 1024, 1034 (9th Cir. 2010) (holding that National Marine Fisheries Service supplied Fox with “good reasons” for its change of policy regarding salmon and steelhead trout, based in significant part on information in the notice-and-comment record).
112. CBS Corp., 663 F.3d at 142.
113. See infra section II.D (discussing the various sources of intragovernmental political influence and their persistence after Fox).
1. An Argument for Returning to State Farm Precedent

The Fox decision has received significant criticism for modifying the State Farm version of hard look review; many would side with the Fox dissents in arguing for the new rule’s curtailment. Justice Breyer’s dissenting opinion focused on preventing extra-agency intragovernmental political influence over agencies, stopping intra-agency arbitrariness from entering agency decision making, and upholding the integrity and purpose of the APA. Among Justice Stevens’ dissenting arguments were the importance of preserving original congressional intent in creating independent agencies, and regulatory stability.

Fox’s apparent introduction of intragovernmental political influence into agency decision making has been criticized on many other grounds. First, political influence makes it more difficult for the public to overturn agency decisions with which it disagrees, since the grounds on which it could do so are narrower. This diminishes any guarantee that agencies will act in the “public interest.” Second, agency expertise is a superior to extra-agency influence as a basis for decision making. Third, Fox sets out a very weak standard for evaluation of agency decisions that contradict prior factual findings, requiring only a “detailed justification” of the agency’s actions, which is not to require much at all.


115. Id. (warning that, after Fox, agency decisions might be made based on “unexplained policy preferences”). Breyer argues that the independent “agency’s comparative freedom from ballot-box control makes it all the more important that courts review its decisionmaking to assure compliance with applicable provisions of the law—including law requiring that major policy decisions be based upon articulable reasons.” Id. at 1830. Breyer focused on the importance of requiring an agency to explain why it chose to change a policy, rather than allowing the change alone to suffice as a reason. Id. at 1831 (relying principally on Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983)).

116. Id. at 1830 (citing 5 U.S.C. § 706(2)(A) (2006)) (arguing that the APA “helps assure agency decisionmaking based upon more than the personal preferences of the decisionmakers”). Breyer asked, “Where does, and why would, the APA grant agencies the freedom to change major policies on the basis of nothing more than political considerations or even personal whim?” Id. at 1832. According to Breyer, State Farm did not require a heightened standard of review for a rule change, but merely the same standard as in initial rulemaking. Id. at 1831–32.

117. FCC, 129 S.Ct. at 1825 (Stevens, J., dissenting) (noting that Congress had intended the FCC be “as free from intragovernmental political influence or arbitrary control as possible” (quoting S.Rep. No. 772, 69th Cong., 1st Sess., 2 (1926))). Interestingly, Stevens also noted the “strong presumption” that the FCC is exercising Congress’s will when it acts. Id. at 1826.

118. Id.; id. at 1834–36 (Breyer, J., dissenting). Justice Ginsberg joined Justice Breyer’s dissent and also wrote her own, focusing on the First Amendment implications of the Court’s holding. Id. at 1828 (Ginsburg, J., dissenting).

119. Bell, supra note 6, at 658–61.

120. See id.

121. Id.
2. An Argument for Moving On from State Farm Precedent

Despite concerns about Fox, there are at least two arguments in favor of moving on from the technocratic ideal embodied in State Farm’s popular interpretation. First and foremost, intragovernmental political influence continues to pervade agency decision making, as the following Part shows. Another reason is simply practical: because Fox is now the law, any attempted improvements to the intragovernmental political influence framework should attempt to work within, rather than fight, the Fox standard, which presumably was crafted by a Supreme Court well aware of governmental displeasure with State Farm. Finally, it may be that the popular “technocratic ideal” interpretation of State Farm was itself never reasonable, and Fox does not actually increase agencies’ exposure to intragovernmental political influence.

D. Evaluating the Sources of Political Influence

This Section evaluates the three sources of political influence: the executive, Congress, and the agencies themselves. Each actor has its powers over agencies, as well as its strengths and weaknesses as an agent of political control. Each actor’s weaknesses are significant enough that none should be given political control over agency actions (as, for example, presidential administration or the legislative veto would do), thereby making the judiciary arguably the most desirable agent to control influence. Finally, the persistent improper influence of each of the three political actors despite State Farm hard look review indicates that it is time to consider alternatives to the standard of review. The final section will consider two such alternatives: transparency legislation, and revised arbitrary and capricious review based off of the Aera Energy court’s principles, the “Sunshine Standard.”

1. Executive Influence

Executive influence in its strongest and purest form is known as “presidential administration,” or the “unitary executive.” Presidential administration is a theory of executive governance under which the President “exercis[es] directive authority over . . . agencies and assert[s] personal ownership of their regulatory activity.” The executive includes the President, the Executive Office of the President (EOP), the Office of Management and Budget (OMB). Presidential administration in practice began under President Reagan and has continued during the Obama Administration.

Presidential administration theory has received support due to the perceived democratic legitimacy it brings to agency decision making through

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122. Kagan, supra note 7, at 2246.
123. Watts, supra note 6, at 60-61 (referencing specifically the Vice President and the Chief of Staff).
124. Id. at 2277.
125. Shapiro & Wright, supra note 8, at 577–78.
the inherent publicity of the President’s actions, its potential to unify agency agendas across the federal government, and the “energy” that such “political direction” can bring to administration. Criticisms of presidential administration theory, on the other hand, focus on its inefficiency, particularly the inevitable delays in appointments, and its failure to democratize agency decision making, since voters tend to consider only high-visibility policy issues.

Kagan’s “strong” version of presidential administration, under which the President has the power to “direct” executive agencies, cleverly sidesteps separation of powers concerns by asserting that when the President directs agencies, he “step[s] into the shoes” of agency heads, thereby making his actions reviewable by Congress. When Congress delegates authority to an executive agency, it does not intend to exclude the President from asserting direct control over the agency. Kagan conceded that, contrary to her argument, congressional intent to withhold direct agency control from the President could be negatively implied by statutes explicitly granting direct agency control to the President. Since this does occur, the normative case for presidential administration must be limited to instances in which delegation to the President is explicit.

Nevertheless, executive branch political influence in particular “is here to stay—and many now view it as a necessary component of administrative legitimacy.” There is an extensive history of executive branch influence that intensified under President Reagan and continues today, accomplished primarily by Executive Order and OMB and Office of Information and Regulatory Affairs (OIRA) review of agency actions. OIRA’s influence appears to be increasing, judging from the decreasing number of agency rules that survive OIRA review unscathed: while approximately 40 percent of rules received OIRA approval under President Clinton, fewer than 10 percent have been approved during President Obama’s tenure.

127. Watts, supra note 6, at 58.
129. James Q. Wilson, The Origins of Regulation, in FEDERAL ADMINISTRATIVE AGENCIES: ESSAYS ON POWER AND POLITICS 140 (Howard Ball ed., 1984) (explaining that regulatory agencies’ actions have little or no significance for White House and Congress because politicians do not win or lose votes on the issue).
131. Id. at 2329.
132. Id. at 2329–30.
134. Mendelson, Disclosing, supra note 5, at 1178.
135. Id. at 1146–51.
136. Id.
137. Id. at 1149–51.
Department of Transportation, the Army Corps of Engineers, the Mine Safety and Health Administration, and the EPA.138

The political branches have employed similar tactics to influence EPA’s regulation of the oil and gas industry for the past twenty-five years.139 The author of one scientific study recalled that the EPA told her that “her findings were altered because of pressure from the Office of Legal Counsel of the White House under Ronald Reagan.”140 Similar pressure has continued to be employed for the last quarter-century, during which “efforts by some lawmakers and regulators to force the federal government to police the industry better have been thwarted, as E.P.A. studies have been repeatedly narrowed in scope and important findings have been removed.”141

Other examples of executive branch influence over EPA decision making abound. EPA has recently considered listing coal ash as a hazardous waste under the Resource Conservation and Recovery Act (RCRA).142 Despite the clear hazard presented by coal ash,143 the statute’s unambiguous definition of hazardous waste,144 and recent coal ash-related disasters,145 OIRA, in concert with industry lobbyists, pressured EPA not to regulate coal ash as a hazardous waste146 based on OIRA’s CBA findings.147

The model of executive branch influence over agencies that began under President Reagan has continued unabated to the present day. While executive control has merits, it has often been highly detrimental, impeding agencies’ statutory missions and diminishing the public benefit they provide.

2. Congressional Influence

Congress has significant influence on agency action148 through multiple avenues. Congress’s paramount influence over an agency derives from the

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138. See id. at 1151–59.
140. Id.
141. Id.
142. See, e.g., Commentary, White House Misadventures in Coal Ash Rule, OMB WATCH (May 18, 2010), http://www.ombwatch.org/node/11001.
148. Watts, supra note 6, at 64 & n.282.
organic statute that created the agency. This “dead hand” influence is particularly important, since judicial review of agency action usually begins with assessing whether or not the action falls within the bounds of the organic statute. Another form of congressional control over agencies occurs through appropriations bills and riders, which influence agency budgets. This control, however, is “sporadic and very particularized” because Congress’s “cumbersome organization and time-consuming process” prevents the type of decisive action that, for instance, the President can achieve.

Congress also has a number of less direct controls over agencies’ actions. Through the “power of inquiry,” Congress can subpoena witnesses, subject to executive privilege. Furthermore, under the Congressional Review of Agency Rulemaking Act (CRARA), every “significant” agency rule must be presented to both houses of Congress and does not take effect until sixty days thereafter.

There are limits to congressional control over agencies, though many of these limits are themselves limited. The Constitution prevents Congress from directly controlling officers of the United States. In INS v. Chadha, the Supreme Court declared unconstitutional direct legislative vetoes over agency decisions, which Congress had written into a multitude of statutes. Under the CRARA, however, Congress has the power to pass a joint resolution disapproving a major rule and thus prohibiting its taking effect, although this power remains subject to presidential veto.

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150. See also Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984) (holding that “as always,” the first question is “whether Congress has directly spoken to the precise question at issue”); Shapiro & Wright, supra note 8, at 584.
151. Funk, supra note 149, at 212.
152. Farina, supra note 95, at 508.
156. Id. § 801(a)(1)(A)(i).
157. Id. § 801(a)(3).
158. Farina, supra note 95, at 508.
160. 5 U.S.C. § 802.
161. Id. § 801. The “REINS” Act, recently approved by the House of Representatives, would make two drastic changes to this framework. See Felicia Sonmez, REINS Bill to Expand Congressional Power Over Executive Regulations Passed by House, WASH. POST (Dec. 7, 2011, 5:38 PM), http://www.washingtonpost.com/blogs/2chambers/post/reins-bill-to-expand-congressional-power-over-executive-regulations-passed-by-house/2011/12/07/gIQAs6VMdO_blog.html. First, it would require affirmative congressional approval before a “major” regulation can take effect, H.R. 10, 112th Cong. § 801(b)(1) (1st Sess. 2011), available at http://www.gpo.gov/fdsys/pkg/BILLS-112hr10ih/pdf/BILLS-112hr10ih.pdf, rather than merely requiring notice and reserving to Congress the ability to disapprove a rule. Second, congressional approval would not require the president’s signature. 5 U.S.C. § 802. The likelihood that the REINS Act will pass the Senate, not to mention both houses with the two-thirds vote
Congress’s influence over agency adjudications is also limited. Like private parties, members of Congress are subject to the Administrative Procedure Act’s (APA) prohibition against ex parte communications during adjudications. However,

outside the context of formal or other on-the-record proceedings, a court is not likely to set aside an agency decision because of alleged congressional influence unless the evidence shows that the pressure brought to bear caused the agency action to be affected by factors that are not relevant under the governing statute.

A reviewing court could never sanction agency action that exceeded the agency’s statutory mandate. The statute governing an agency is therefore both the firmest guideline and the broadest, since nothing but new legislation can authorize an agency to act outside it.

Despite Congress’s ability to influence agency decision making, it is not an ideal agent of intragovernmental political influence in a normative sense. First, it is widely held that administrative agencies fit best within our government structure as part of the executive branch, which means that, when they exercise discretion, they do so on behalf of a democratically accountable President. Second, simply by its nature as a multi-member deliberative body, Congress cannot speak unanimously as easily as the President can, and therefore cannot direct agencies with the same speed or clarity.

Finally, Congress and the executive may be subject to the zero-sum “oversight game,” under which each actor vies for control of agency action at the expense of the others, ultimately leaving the agency to choose its course. The influence of the political branches can almost never reliably control agency action because whenever the political branches disagree, an agency may choose its favorite among the House, Senate, and executive’s different interpretations of what the governing statute allows, and then rely on that body to effectively veto dissent by the others. The more divided the House, Senate, and

necessary to override a presidential veto, is slim. Sonmez, supra note 161. Nevertheless, it shows that congressional oversight of administrative agencies remains a salient issue.

162. Funk, supra note 149, at 213.

163. Id.

164. Watts, supra note 6, at 59–60 (“Of course, presidential prodding should not be allowed to help explain agency action where the President directs an agency to act in a way that would flout congressional will as set forth in the statute being implemented, or where the President asks the agency to act in a way that would conflict with the existing evidence.”).

165. Id. at 64.

166. Id. at 64–65.


168. Id. at 4; see also Matthew D. McCubbins, Roger G. Nolla & Barry R. Weingast, Structure and Process. Politics and Policy: Administrative Arrangements and the Political Control of Agencies, 75 VA. L. REV. 431, 438–39 (1989) (using an economic model of House, Senate, and executive interactions to show that any agency action falling within a Pareto-optimal range of options cannot be corrected by any of those three actors, because at least one actor will prefer it and can use its veto to prevent the others from interfering); Arnold W. Reitze, Jr., The Legislative History of U.S. Air Pollution Control, 36
President, the more options the agency has. This presents two problems. The first concerns democratic legitimacy—the agency in question will appear to be under the control of the political branches, when in fact it makes final policy decisions on its own, and these policy determinations may push the bounds of the underlying statute in ways that only one of the three political actors supports. Second, the political branches are likely to engage in escalating efforts to wrest control of agencies from one another, furthering political gridlock in Washington.\textsuperscript{169}

Justice Kagan has argued that presidential and congressional agency oversight escalate in something of an arms race,\textsuperscript{170} and her claim seems well founded. Congress can be just as effective as the executive in stanching agency action, particularly with regard to the EPA.\textsuperscript{171} A number of examples illustrate this trend. First, EPA’s 2010 issuance of new ozone regulations under the Clean Air Act (CAA) was heavily influenced by politics. To prevent new regulations, House Republicans unsuccessfully attempted to pass an appropriations rider prohibiting expenditures on a reconsideration of the Bush Administration ozone standard,\textsuperscript{172} and several senators from both parties asked the agency to stop reconsidering it.\textsuperscript{173} President Obama stopped the reconsideration of the ozone rule and EPA Administrator Lisa Jackson deferred to his judgment.\textsuperscript{174} The House has tried to exert more direct control over EPA action through the “TRAIN” Act, which would require CBA for the new ozone rules, and an amendment to the CAA that would allow EPA to consider cost when setting ozone standards.\textsuperscript{175}

Second, politics has hindered the regulation of hydraulic fracturing (“fracking” or “hydrofracking”), the oil and gas industry’s latest growth area,
through manipulation of agency science.176 “Industry and political pressure” effectively gutted a 2004 EPA fracking study to avoid suggesting that fracking invoked the Safe Drinking Water Act through the practice’s contamination of groundwater.177 A new national study of fracking “was narrowed because of pressure from industry and its allies in Congress.”178 Allegations of political motivation are equally forthcoming from opponents of fracking.179

Of course, the EPA is not the only agency affected by pressure to distort science, as cases like the Tummino series on regulation of the “Plan B” emergency contraceptive demonstrate.180 Recently, Health and Human Services Secretary Sebelius issued a memorandum maintaining the prescription requirement for Plan B for girls under seventeen, overruling FDA Commissioner Hamburg, who had found the requirement unnecessary. Critics claim the move was clearly motivated by politics and ideology and that it overruled the latest scientific evidence on Plan B, which had demonstrated the drug’s safety for girls older than eleven.181 Some have even called for making the FDA an independent agency, specifically to shield it from further intragovernmental political influence.182

3. Internal Pressure on Agencies

The agencies exert two types of political pressure on themselves. First, agencies are structured to check each other. The OMB, OIRA, and agencies within the EOP oversee the activities of other executive branch agencies.183 Second, agencies check themselves from within using formal and informal “inside-out controls.” Each of these forms of control presents its problems, from procrustean formulas to unenforceable norms.

176. For an example of the extreme pressure on the EPA from a number of sources, see Ben Geman, EPA Stands by “Fracking” Study but Calls Reach Limited, THE HILL (Feb. 1, 2012) http://thehill.com/blogs/e2-wire/e2-wire/208061-epa-stands-by-fracking-study-but-calls-reach-limited.
177. Urbina, supra note 139.
178. Id.
179. See, e.g., Mark Drajem, Lawmakers Fault EPA in Fracking Hearing Delayed by Arrest, BLOOMBERG BUSINESSWEEK (Feb. 6, 2012, 5:04 AM), http://www.businessweek.com/news/2012-02-06/lawmakers-fault-epa-in-fracking-hearing-delayed-by-arrest.html (quoting the Republican chairman of the Energy and Environment subcommittee as claiming that an EPA groundwater study was an example of “politics trumping policy and advocacy trumping science”).
183. Because these offices are directly controlled by the president, these horizontal controls could also be considered part of presidential administration.
a. **Horizontal Controls**

Agencies are structured to include “institutional checks,” ensuring that one agency may block the actions of another.\(^{184}\) Pursuant to Executive Orders instated by every president since Reagan, agencies must prepare “regulatory impact statements” applying cost-benefit analysis (CBA) to agency rulemaking, which are subsequently reviewed by OIRA.\(^{185}\) OMB and OIRA wield considerable power to block agency actions\(^{186}\) because CBA is widely applied; agencies have applied CBA even under circumstances in which the operative statute explicitly prohibits it.\(^{187}\) These particular agencies provide the President with significant control over executive agencies\(^{188}\) and therefore could be categorized under presidential administration as a method of presidential control. CBA has prominent proponents\(^{189}\) but it also has significant flaws as a method of agency control.\(^{190}\)

b. **Inside-Out Controls**

Agencies experience internal political pressures of various forms. First, internal pressure may manifest itself as attempts to conform to the expected desires of the political branches, exactly as happened to the MMS in *Aera Energy*.\(^{191}\) In these cases, inside-out controls indirectly magnify the power political branches already wield through such tools as congressional appropriations riders. In addition, however, inside-out controls may also be

\(^{184}\) Shapiro, *supra* note 167, at 10.


\(^{186}\) Mendelson, *Disclosing*, *supra* note 5, at 1146–47.


\(^{188}\) See, e.g., Exec. Office of the President, Office of Mgmt. and Budget, *The Mission and Structure of the Office of Management and Budget*, http://www.whitehouse.gov/omb/organization_mission/ (last visited Dec. 15, 2011) (“Coordination and review of all significant Federal regulations by executive agencies, to reflect Presidential priorities and to ensure that economic and other impacts are assessed as part of regulatory decision-making.”).


wholly internal to an agency, such as personal political motivations\textsuperscript{192} and the viewpoints typical of bureaucratic professions.\textsuperscript{193}

Since “agency effectiveness itself is a form of democratic responsiveness” to democratically enacted statutes,\textsuperscript{194} agencies have an obligation to adhere to a technocratic ideal of “professionalism,”\textsuperscript{195} whereby bureaucrats carry out their mandate with a sense of duty, or “neutral competence.”\textsuperscript{196} Agencies are guided by this “inside-out” control to varying degrees.\textsuperscript{197} Most bureaucrats are primarily “other-regarding” and are professionally driven by altruistic motives.\textsuperscript{198} Despite government’s overall poor reputation among the media and the general public, citizens seem to be satisfied by agency performance.\textsuperscript{199} Professionalism as an inside-out control has limitations, however. It works better in some agencies than others,\textsuperscript{200} and it is difficult to enforce.\textsuperscript{201} It may be difficult to determine which agencies are more “professional” and thus need less supervision.\textsuperscript{202}

III. POTENTIAL SOLUTIONS TO IMPROPER INTRAGOVERNMENTAL POLITICAL INFLUENCE

A new mechanism to control intragovernmental political influence control is warranted by the judiciary’s inability—or perhaps its reluctance—to curtail it. Some potential solutions have already been discussed and rejected above, such as direct control of agencies by either of the political branches. This section considers two new approaches, a transparency law and its judicially created equivalent, a “Sunshine Standard,” and makes a case for the latter.

A. A Transparency Law

More transparency around the influence coming from political branches might provide better control over agency action than reformed judicial review.\textsuperscript{203} While political influence from the White House is not necessarily “good” or “bad,” “silent” White House control of regulation is both significant

\begin{footnotes}
\footnote{192}{Dolan, \textit{ supra} note 191, at 309 (detailing the political pressures and their sources internal to the Department of Justice).}
\footnote{193}{Elizabeth Magill & Adrian Vermeule, \textit{Allocating Power Within Agencies}, 120 YALE L.J. 1032, 1038 (2011).}
\footnote{194}{Shapiro & Wright, \textit{ supra} note 8, at 617.}
\footnote{195}{\textit{Id}. at 578.}
\footnote{196}{\textit{Id}. at 588.}
\footnote{197}{\textit{Id}. at 578.}
\footnote{198}{\textit{Id}. at 599.}
\footnote{199}{\textit{Id}. at 600–02.}
\footnote{200}{\textit{Id}. at 619.}
\footnote{201}{\textit{Id}.}
\footnote{202}{See generally Shapiro & Wright, \textit{ supra} note 8.}
\footnote{203}{Mendelson, \textit{Disclosing}, \textit{ supra} note 5, at 1127 (“Agencies should be required to summarize executive influence on significant rulemaking decisions. Such an ex ante disclosure regime is superior to proposals that judges be more receptive to political reasons in reviewing a particular agency action.”).}
\end{footnotes}
and negative. Without sufficient transparency, it is easy for an agency to overstep its statutory bounds unnoticed, and difficult for those who do notice to challenge the agency’s actions. Transparency legislation, perhaps enacted as an amendment to the APA, would “require that a significant agency rule include at least a summary of the substance of executive supervision.” Section 307(d) of the CAA, which essentially mandates transparency of communications between agencies and the OMB, might be one model.

Controlling political influence through up-front disclosure requirements would be more effective than trying to control it post hoc through judicial review because it might better encourage agency accountability, discourage inappropriate political interference, facilitate judicial enforcement, and engage the public more in the decision making process.

On the other hand, mandating that some forms of intragovernmental political influence be transparent could simply drive political influence underground. In anticipation of this effect, the law could require “an agency to identify and explain in its rulemaking notice any significant changes made to a rule as a consequence of either presidential or legislative oversight,” presumably making the process routine, habituating administrators to the task, and capturing all influences. At the very least, a transparency rule would be unlikely to increase the amount of improper intragovernmental political influence. A judicially created Sunshine Standard, however, might be equally likely to result in undergrounding untoward influences.

Finally, while a transparency law clearly holds some advantages over a judicially created standard, it has one principal comparative weaknesses: it would require passage by Congress. Transparency legislation has a robust history of political support in the United States. The quintessential piece of transparency legislation, the Freedom of Information Act, has repeatedly

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205. See, e.g., id.
206. Shapiro, supra note 167, at 27.
207. Mendelson, Disclosing, supra note 5, at 1130.
208. Id. at 1164.
209. Id. at 1130–31; see also Edley, supra note 7, at 190 (emphasizing disclosure of political influence on agency actions under “harder look review”). Because Edley focused on judicial review, however, the methods of enforcing disclosure he suggested were weak in comparison to a transparency rule. Id. at 200.
210. See, e.g., Shapiro, supra note 167, at 28 (explaining that a written communication requirement would lead to increased oral communication instead).
211. Id. at 29 (emphasis added).
212. Cf. Edley, supra note 7, at 201 (“[D]isclosure of inappropriate politics is certainly no less likely under a regime of harder-look review than under current doctrine.”).
213. See Peter H. Sand, The Right to Know: Environmental Information Disclosure by Government and Industry, in MAKING LAW WORK: ENVIRONMENTAL COMPLIANCE & SUSTAINABLE DEVELOPMENT (VOL. 2) (Durwood Zaelke et al. eds., 2005) at 19 (describing “avalanche of ‘sunshine statutes’ following in the . . . wake [of FOIA, the APA, and California’s Brown Act of 1952] all over North America and in other common law countries” (footnote omitted)).
received bipartisan support in Congress and beyond, and has continued to expand over decades, from the original incarnation of FOIA in 1966 through the recent OPEN Government Act in 2007. Nevertheless, it has also suffered setbacks through the countervailing efforts of both Congress and, in the most recent action, the executive. This mixed history suggests that support for transparency legislation might well be sufficient in the longer term, but it would not be assured easy passage at present.

B. Judicial Review: Aera Energy and the Sunshine Standard

The third principle behind curing political influence in informal adjudications that the Aera Energy court identified was that precedent strongly favored a “full scale administrative record” to support decisions and “dispel doubts” about their nature and to “insulate [the agency] from extraneous pressures unrelated to the merits of the question.” The “Sunshine Standard” would extend this principle to mandate that a “full scale” administrative record include evidence of intragovernmental political influences. A reviewing court would simply consider agency actions “arbitrary and capricious” if they did not include a record of any intragovernmental political influence that affected them. Because this proposed standard covers formal and informal adjudications, as well as notice-and-comment rulemaking, it is much broader than the transparency rule proposed above, which would only “require that a significant agency rule

216. 5 U.S.C. § 552.
221. Id. (citing ATX, Inc. v. U.S. Dep’t of Transp., 41 F.3d 1522, 1528 (D.C. Cir. 1994)).
222. Id. (quoting D.C. Fed’n of Civic Ass’ns v. Volpe, 459 F.2d 1231, 1239 n.84 (D.C. Cir. 1971)).
223. Volpe, 459 F.2d at 1249.
224. The limitation that only intragovernmental political influence that actually affected the rule in question need be included echoes the Aera Energy court’s first principle, that influence is only important if it “shapes, in whole or in part, the judgment of the ultimate agency decisionmaker.” Aera Energy, 642 F.3d at 220.

Supreme Court precedent holding that, as some have argued, hard look review already excludes intragovernmental political influence because it is simply extraneous to the agency’s statutory mandate, would not necessarily invalidate the Sunshine Standard. See, e.g., Seidenfeld, supra note 75, at 3. Requiring the inclusion of evidence of political influence in the administrative record, without giving it credit one way or the other, could not be said to violate this interpretation.
include at least a summary of the substance of [political] supervision.” If this breadth imposed too great an administrative burden, the court developing the Sunshine Standard might simply narrow it to likewise cover only significant rules. On the other hand, if the Sunshine Standard were kept broad, subsequent transparency legislation would still integrate easily, since it would simply replace the Sunshine Standard for agency rulemaking, leaving the Sunshine Standard to continue to govern adjudications.

The governing hard-look review standard set out in Fox, which does not credit political influences in agency decisions, would not change with the Sunshine Standard. Evidence of intragovernmental political influence would be available to the reviewing court, but the court would only use it to help evaluate the agency’s proffered reasons for a given action. For example, the FCC would not be able to use a memorandum it received from the President urging imposition of penalties for fleeting obscenities to explain why it had come to that decision in the face of countervailing evidence; it would still have to give “good reasons” as it does now. The Sunshine Standard would, however, provide the reviewing court with a record of the pressure on an agency in the process of coming to its decision, which it could use to evaluate the reasons an agency gave for its decision.

As discussed above, the Sunshine Standard’s principal advantage over a legislatively enacted transparency rule is its origin in the judiciary. After implementation, the Sunshine Standard would almost certainly be challenged as antidemocratic “judicial activism,” but two factors support its survival. First, the principle of open government that it represents is consistently politically popular, as the above discussion of transparency legislation showed. Furthermore, were any opposition to the Sunshine Standard really to take hold, for whatever reason, the ensuing publicity might prompt Congress to pass transparency legislation, achieving the same end.

Judicial review presents the best channel through which to expose political pressure on agencies. It would be simple to craft based on current precedent and would involve relatively few risks. The next time the D.C. Circuit is presented with a case of political influence, especially one where evidence of influence is less obvious than in Aera Energy, it should consider this reform.

CONCLUSION

It is probably impossible to fully track—let alone eliminate—improper political influence from agency decisions big or small, formal or informal. It is
also probably impossible to keep the political branches from struggling for control of the agencies, which is the source of much of the improper influence. The judiciary remains the most promising bastion of nonpartisan dispute resolution that it aspires to be. The public would be better served if, when it fulfills that task, the judiciary had available to it the record of political oversight to which an agency had been subject during the course of its decision. One promising way to ensure that transparency would be for Congress to enact legislation. Another, and perhaps more promising because it would not require the feat of passage through Congress, would be judicial revision of the hard-look review standard to require a record of all political oversight over agency adjudications and rulemakings as part of a “full scale administrative record” as described most recently in *Aera Energy v. Salazar*. Like the transparency laws from which it gets its name, this Sunshine Standard of review might reinvigorate confidence in American government, confidence that administrative officials are making decisions based on the evidence rather than on the desire to please political superiors—even if the decision would come out the same.

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