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Political Oversight of Agency Decisionmaking

Author : Michael E Herz

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Nina A. Mendelson, [Disclosing “Political” Oversight of Agency Decision Making](#), 108 *Mich. L. Rev.* 1127 (2010).

Administrative agencies are often said to possess (a) expertise and (b) accountability. These are the attributes that Justice Stevens relied on in [Chevron](#), for example, to justify judicial deference to agency “interpretation” that is really policymaking. Both of these admirable characteristics are exaggerated, but neither is mythical. What is to be done, however, when they conflict?

This is a recurrent question. Whether and when agencies should be set up as independent commissions, the disagreement between the majority and the dissent in [State Farm](#), much of the battle over regulatory review – all involved at least in part the question whether the president’s preferences, or “political” considerations, should trump the agency’s (expert) judgment. One doctrinal locus of this dispute is the arbitrary and capricious test. Is it “reasoned decisionmaking” if an agency does something simply because the White House told it to? *State Farm* and [Massachusetts v. EPA](#) suggest the answer is no. Four, and arguably five, Justices in [FCC v. Fox Televisions Stations](#) imply the answer may be yes, and a number of commentators – most recently, [Kathryn Watts](#) – have argued for judicial acceptance of political justifications for agency action.

One standard move by administrative lawyers – common in but not unique to the field – is to seek procedural responses to substantive problems. We don’t know what the right answer is, but we can figure out a procedure that will resolve most of the concerns so we don’t have to figure out the right answer.

In a superb recent article, [Disclosing “Political” Oversight of Agency Decision Making](#), which was selected by the [ABA’s Section of Administrative Law and Regulatory Practice](#) as the best article in administrative law last year, Professor [Nina Mendelson](#) has taken the procedural approach to the substantive problem of White House influence on agency decisionmaking. She argues against regulation, limitation, or special judicial deference and in favor of disclosure of political reasons for a particular decision. (Importantly, by “political” she means not a particular *type* of reason – such as a reason that will appease important constituencies and advance the President’s chances of re-election – but rather reasons that have their source in the White House.)

Mendelson begins with two important but often overlooked points. First, we know remarkably little about the content and scope of presidential oversight of rulemaking. Second, there’s presidential oversight and there’s presidential oversight; that is, some presidential influence is almost indisputably appropriate and enhances the legitimacy of agency decisionmaking, and some (e.g. leaning on the agency to ignore scientific fact or to do something inconsistent with statutory constraints) is not.

Although presidents have long exerted significant influence on agency rulemaking, and although that influence has been regularized and concentrated in [OIRA](#) for three decades, it remains quite invisible. The OIRA review process is fairly opaque (though less so than it once was), influence by other parts of the White House even more so, and official explanations of agency action almost always are silent about political considerations. As a result, the democratic responsiveness and accountability that, in theory, presidential oversight provides goes unrealized. Presidents take credit when it suits them, but keep their distance from controversy. (Although Mendelson does not make the connection explicit, her account resonates with critiques by supporters of a nondelegation doctrine with teeth who are dismayed by Congress’s desire to take credit but not blame.)

Mendelson proposes that agencies be required, ideally by statute, to summarize the content of regulatory review in issuing rulemaking documents. (She offers a relatively transparent recent fuel economy [rulemaking](#) as a possible model.) First, this would allow the public to see the president's hand in the final decision and, for better or worse, hold him accountable. Second, it would enhance our understanding of executive review and, in a sunlight-is-the-best-disinfectant sort of way, discourage inappropriate interference. Third, this information would be useful to Congress, which might respond legislatively.

The thorniest problems raised by this proposal involve judicial review. How should this newly available information affect courts? Here, as she acknowledges, Mendelson edges somewhat closer to Watts, calling for courts to be deferential to "value preferences or policy calls," as long as they are consistent with statutory factors relevant to the decision and do not reflect a skewing of the factual analysis. She acknowledges, and warns against, the possibility of courts being *too* deferential, and insists on the importance of their scrutinizing with some care agency determinations of legal or technical issues as opposed to "value-laden policy questions." This analysis raises some larger questions about what, exactly, the legitimate bases of agency decisions are, which are explored, though not fully resolved, in the final section.

Mendelson's turn to disclosure – to procedure rather than substance – does not *completely* escape the underlying conundrum regarding the appropriate scope of presidential influence over agency decisionmaking. Nonetheless, among her proposal's many benefits would be that it would place us (Congress, or the courts, or the voters) in a far better position to answer that question.

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