

Respecting EPA

by Jonathan Cannon

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When President Richard M. Nixon created the U.S. Environmental Protection Agency (EPA) in 1970, his vision was of “a strong, independent agency.”¹ The first EPA Administrator, William D. Ruckelshaus, established three principles for the Agency: (1) support for the scientific process and reliance on scientific results; (2) adherence to rule of law, including faithful implementation and enforcement of environmental laws; and (3) avoidance of excessive politicization. These principles have guided EPA leadership and decisionmaking for much of the Agency’s history, in both Republican and Democratic Administrations. Obvious and significant departures from them at EPA under the Administration of President George W. Bush, however, raise questions about whether these principles are compatible with the current preference for presidential administration, whether we can hope for their resurrection in future EPAs, and whether we should. This Comment briefly documents this most recent chapter of EPA’s history, tries to understand its significance, and suggests a future path for White House relations with EPA (and perhaps by extension other executive branch agencies with significant regulatory responsibilities involving technical or scientific expertise).

I. The Bush EPA

The Bush Administration has given short shrift to the Ruckelshaus principles.

A. Science

While the Bush Administration has claimed to follow “sound science,” there is evidence that it has ignored, suppressed, or misrepresented scientific information generated by EPA in pursuit of predetermined policy goals. In an April 2008 survey of EPA staff scientists by the Union of Concerned Scientists,

889 of the scientists reported that they had experienced at least one instance of political pressure in carrying out their duties over the last five years; nearly 400 had seen scientists’ work misrepresented by Agency policymakers; and 285 had observed Agency policies justified by partial or selective information.² Specific examples of ignoring or misrepresenting science have been the focus of congressional attention, including the infamous editing of an EPA climate change report by White House staffer, Philip A. Cooney, a former oil industry lobbyist without scientific training.

B. Legal Fidelity

In some of its efforts to avoid or limit the costs of environmental measures, the Bush Administration has relied on marginal statutory interpretations. The courts have rebuffed a number of these interpretations in high-profile decisions that have been dismissive of the Agency’s legal reasoning. These cases include *Massachusetts v. EPA*,³ in which the U.S. Supreme Court rejected EPA’s effort to read greenhouse gas (GHG) emissions out of the Clean Air Act (CAA),⁴ and *New Jersey v. EPA*,⁵ in which the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit found that EPA’s exemption of power plant mercury emissions from the Act’s air toxics program departed from the plain text of the statute. By Rep. Henry A. Waxman’s (D-Cal.) count, the Agency has lost all or part of two-thirds of the CAA cases in the D.C. Circuit arising from decisions in this Administration, and “[i]n a majority of these cases, the courts severely rebuked EPA” for ignoring the plain language of the statute.⁶

C. Politicization

Closely linked to these features of the Bush EPA is the White House’s assertive role in elevating political considerations above other concerns in agency decisionmaking. This has been most obvious in cases where the White House dictated EPA

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1. Special Message From the President to the Congress About Reorganization Plans to Establish the Environmental Protection Agency and the National Oceanic and Atmospheric Administration, Reorganization Plan No. 3 of 1970 (July 9, 1970).

2. Union of Concerned Scientists, *Interference at EPA: Science and Politics at the U.S. Environmental Protection Agency* 2-3 (April 2008).
3. 549 U.S. 497, 37 ELR 20075 (2007).
4. 42 U.S.C. §§7401-7671q, ELR STAT. CAA §§101-618.
5. No. 05-1097, 38 ELR 20046 (D.C. Cir. Feb. 8, 2008).
6. Letter from Rep. Henry A. Waxman, Chairman, House Comm. on Oversight and Gov’t Reform, to Stephen L. Johnson, Administrator, U.S. EPA (Oct. 21, 2008).

decisions, even though these decisions were not, in the judgment of agency experts, consistent with the science or the law. For example, at the behest of the White House, the Administrator overruled staff recommendations to: (1) grant a CAA waiver to California for its auto emission standards for GHG emissions; (2) make a finding of “endangerment” that would trigger federal regulation of GHG emissions in response to *Massachusetts*; and (3) set a secondary air quality standard for ozone under the Act that is more stringent than the primary standard.

All these features of the Bush EPA—aggressive political oversight and control, manipulation of science, and impatience with legal constraints—evidence resistance to EPA’s mission. But more importantly for my purposes here, they also evidence a sustained resolve, not seen in past Administrations, to conform Agency decisions to White House political preferences notwithstanding the views of expert Agency staff.

II. Presidential Administration

The prevailing model of the federal administrative state is the presidential control model or presidential administration. Under this model, agencies work under the active control of the Chief Executive. Agency actions are also subject to congressional oversight and judicial review for arbitrariness and illegality, although proponents of this model argue against intrusive review. But presidential oversight is considered essential to political accountability and political accountability essential to agency legitimacy.

The presidential control model dominates recent scholarly opinion, although it also attracts considerable criticism.⁷ It also dominates recent practice in both Democratic and Republican Administrations.⁸

III.A Future Path

Critics of the presidential control model might argue that what happened in the Bush EPA is exactly what we should have expected. The William J. Clinton Administration, they might note, also took an expansive view of presidential involvement in administrative actions, but environmentalists did not complain because the president’s political preferences were in accord with their own (and also generally aligned with the science and law). Under an Administration less receptive to environmental interests, however, the presidential control model predictably has come back to bite us. If we want steady progress along a path of scientific objectivity, legal fidelity, and political restraint, we should reject the presidential control model and seek to insulate EPA from White House influence.

Quite apart from its merits, this scenario is unlikely to occur. Presidents since Ronald W. Reagan have seen potential political benefits in increased control over administrative agencies and have sought to realize those benefits in numer-

ous ways. Executive Order No. 12866,⁹ which has persisted in its basic form through four Administrations, institutionalizes centralized review of major agency rulemakings and other agency actions. It is hard to see the momentum in favor of presidential administration suddenly reversing itself.

Even if a repudiation of the presidential model were possible, it would not seem advisable to fence off agencies such as EPA entirely from White House influence. Presidential oversight can help correct pathologies commonly attributed to agencies: (1) undue influence by a dominant interest group; (2) myopic focus on an agency mission that fails account for the overall public interest; or (3) bureaucratic inertia that prevents an agency from acting when action is desirable. Because the president is politically accountable to the American people as a whole and not tied to any one interest group or concept of the public good, he may be in a position to address these pathologies and also have the political incentive to do so. This role is consistent with his constitutional duty to “take care that the laws be faithfully executed.”¹⁰

For these reasons, it would seem unwise as well as futile to advocate for rejection of the presidential control model. The recent excesses at EPA may be best understood as a corruption of that model rather than an inevitable extension of it. Even staunch advocates of presidential administration such as Elena Kagan acknowledge that “there is no good reason for a President to displace or ignore purely scientific determinations The exercise of presidential power in this context would threaten a kind of impartiality and objectivity in decisionmaking that conduces to both the effectiveness and legitimacy of the administrative process.”¹¹ Nonarbitrariness may be as important to legitimacy as political accountability.¹² Adherence to authorizing statutes also is important to legitimacy.

The conclusion is unexceptional: in agency decisionmaking, politics should operate within the bounds of scientific expertise and law. That still leaves plenty of room for discretion—the realm where politically informed policy choices are made. Even in this realm, however, EPA may generally take better account of public preferences than a White House less steeped in the issues.¹³ In any event, the system works best when discussions between EPA and its counterparts in the White House and the Office of Management and Budget (OMB) remain respectful of what each brings to the table.

There is reason to hope that future presidents will see the benefits of limiting use of presidential command accordingly. President Clinton himself, while committed to strong presidential administration, often avoided involvement with environmental regulation for fear that it would “appear excessively to politicize administrative action thought to rest on neutral competence.”¹⁴ The Clinton White House and OMB gave

9. 58 Fed. Reg. 51735 (Sept. 30, 1993).

10. U.S. CONST., art. II, §3.

11. Kagan, *supra* note 8, at 2357.

12. See Bressman, *supra* note 7, at 464-68.

13. Lisa Shultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 7, 51-52 (2006).

14. See Kagan, *supra* note 8, at 2356.

7. See Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 463 n.1 (2003).

8. *Id.* at 487-88; Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2277-82 (2001).

EPA substantial independence, and when the president did take ownership of an EPA matter, as he did with the 1997 revisions of the ambient air quality standards for ozone and particulates, he largely followed Agency recommendations supported by staff.¹⁵

In its failure to show the same caution in its interventions with EPA, the Bush Administration has paid a price. While presumably maximizing the immediate political benefits of Agency decisions, it has depleted the Agency's capital of legitimacy, with a resulting loss of credibility with other governmental institutions and the public. Congressional oversight hearings have multiplied, drawing unflattering scrutiny of Agency decisions, diverting Agency resources, and distracting EPA leadership. As already mentioned, the courts have reversed an increasing percentage of EPA decisions, many on grounds that the Agency failed to follow the statute's plain meaning. The Agency's loss of credibility in the courts now looms as a factor in judicial reversal of cases that the Agency might otherwise have been expected to win.¹⁶ Criticisms of EPA decision-making have also spilled into the press and adversely affected the public's views about whether the Administration is doing a good job with the environment. A September 2007 public opinion poll showed that only 20% approved of the president's handling of environmental issues (compared to over 50% who disapproved),¹⁷ down from an environmental job approval rating of over 50% in the first year of the Bush Administration.¹⁸

While foregoing the ability to maximize political benefits over the short term, a more restrained exercise of presidential influence that maintains agency legitimacy and respects the Agency's familiarity with the issues is likely to provide greater political benefits over the long term and thus should be the preferred strategy of succeeding Administrations, whether Democrat or Republican. This is exactly the conclusion reached in 1983 by President Reagan, the president most identified with bringing the presidential control model into vogue, after the politically disastrous events surrounding the resignation of his first appointee as EPA Administrator, Anne M. Gorsuch. In announcing her replacement (Ruckelshaus), President Reagan promised a new era of environmental protection and gave Ruckelshaus substantial discretion in managing the Agency—according to his principles.¹⁹ Let the new era begin.

15. Congressional Research Service, *Air Quality: EPA's New Ozone and Particulate Matter Standards* (June 27, 1997), <http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-384:1>.

16. Representative Waxman letter, *supra* note 6 (quoting E. Donald Elliott on the "repercussions" of loss of credibility in the D.C. Circuit's recent *CAIR* decision).

17. Associated Press-Stanford University Poll, Sept. 21-23, 2007, <http://www.pollingreport.com/enviro.htm>.

18. Gallup Poll (Mar. 5-July 1, 2001), <http://www.pollingreport.com/enviro2.htm>.

19. MARISSA MARTINA GOLDEN, *WHAT MOTIVATES BUREAUCRATS: POLITICS AND ADMINISTRATION DURING THE REAGAN YEARS* 138-39 (2000).