Classical Administrative Law in the Era of Presidential Administration

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Thirty years ago, Peter Barton Hutt, the acknowledged dean of food and drug law, began a luncheon talk to a gathering of administrative law professors by observing: "Either you don't teach administrative law or I don't practice administrative law because what you and I do have nothing to do with each other."[1] Hutt explained that most of his administrative practice was informal, depending more on navigating inside the agency and its congressional overseers and executive counterparts than on partaking of the public hearings and judicial disputes that dominate courses in administrative law.[2] From this perspective, an administrative lawyer might well feel something has gone wrong if she finds herself actually using lessons learned from a traditional course in administrative law; public processes and judicial review are but poor sequels to the failed inside play.

The informal practice Hutt described has only become more crucial to the administrative lawyer – and more complicated to navigate – in the intervening years. As Dan Farber and Anne Joseph O'Connell explain in their excellent article, *The Lost World of Administrative Law*, "[t]he actual workings of the administrative state have increasingly diverged from the assumptions animating the [Administrative Procedure Act] and classic judicial decisions that followed."[3] Whereas, they observe, classical administrative law assumes a discrete, judicially reviewable agency decision made by a Senate-confirmed presidential appointee based on statutorily mandated procedures and criteria as applied to the evidence before her, the contemporary operation of the administrative state frequently involves overlapping, unreviewable agency decisions made by unconfirmed acting agency heads or unconfirmed presidential aides, based on procedures and criteria enunciated in presidential executive orders rather than statutes.[4]

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[1] Recounted in Peter L. Strauss, *Teaching Administrative Law: The Wonder of the Unknown*, 33 J. LEGAL EDUC. 1, 8 (1983). The quote is from Hutt's remarks at a celebration of his twenty years of teaching food and drug law at Harvard Law School; the remarks are available at http://www.youtube.com/watch?v=PQGW2PEI51k.

[2] Strauss, 33 J. LEGAL EDUC. at 8.

[3] Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1140 (2014).

[4] Id. at 1154-55.

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Farber and O'Connell describe many ways in which contemporary practice departs from classical doctrine, but the aspect of contemporary practice that figures most prominently in their analysis is the White House's expansive control over agency decisions – control given a sympathetic rendering, and a catchy name, in then-Professor Elena Kagan's justly renowned article, *Presidential Administration*.[5] The most public way in which presidential administration is operationalized – and the one emphasized by Farber and O'Connell – is the process of regulatory review overseen by the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB). Today, this process is governed by Executive Order 12,866, issued by President Bill Clinton in 1993, and by Executive Order 13,563, issued by President Barack Obama in 2011.[6] As Farber and O'Connell explain, regulatory review by OIRA alters the classical vision of administrative law by giving pride of place to presidential executive orders, non-statutory decision-making processes and criteria, and personnel outside the action agency.

I agree with Farber and O'Connell's conclusion that contemporary administrative practice is out of step with classical administrative law as they describe it – the "lost world" of their title. OIRA's current process of regulatory review is a free-for-all in which anyone in the administration with an ax to grind can participate and even prevail.[7] Here, Peter Hutt's observation from three decades ago rings truer than ever: quiet maneuverings anywhere in the executive branch may well produce a better outcome for a client than all the public hearings and judicial review that classical administrative law has to offer. The large cast of characters involved in presidential administration means that the agency charged by statute with making a particular decision may not actually be the decision maker and that factors outside statutory bounds will likely be brought to bear on the decision. In addition, the secrecy and coziness of the process of presidential administration stand in sharp contrast to the transparency and inclusiveness of classical administrative law. In making these points in Part I below, I largely elaborate on rather than depart from Farber and O'Connell's basic story line.

In one important respect, however, I believe that Farber and O'Connell's argument overstates the divergence between the doctrine and practice of administrative law. Classical administrative law, as described by Farber and O'Connell, requires that regulatory decisions be made by the agencies charged by statute with making them, based on statutorily mandated procedures and criteria as applied to the evidence before them. Yet on this central point, administrative law itself is split from within. Indeed, White House control over agency decisions takes full advantage of a cross-current in contemporary administrative law doctrine that

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[5] Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

[6] E.O. 12,866, E.O. 13,563.

[7] See Lisa Heinzerling, *Inside EPA: A Former Insider's Reflections on the Relationship Between the Obama EPA and the Obama White House*, 31 PACE ENVTL. L. REV. 337, 354-58, 379-80 (2014).

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Farber and O'Connell do not linger over:[8] the D.C. Circuit's endorsement, over thirty years ago, of politically motivated rulemaking.[9] The court's decision in *Sierra Club v. Costle* creates a large fissure within administrative law doctrine itself. Agencies must, in order to survive judicial review, apply statutory criteria to the evidence before them, but their decisions need not be motivated by those criteria and that evidence. As I explain in Part II below, I believe this is a tension that must be resolved, not accommodated,[10] and that either classical administrative law or *Sierra Club v. Costle* has to go.

I. "Somebody Who Matters"

> "[I]f you go through what's happened in the last few years, you will find some rules that were held up for a long time. If they were held up, it's because somebody who matters had a reasonable concern that just had to be addressed."[11]

This is Professor Cass Sunstein, administrator of OIRA from 2009 to 2012, offering "correctives" to "myths" about OIRA and explaining why rules are sometimes "held up for a long time" there. In the lecture quoted here, the illustrative examples Sunstein gives of "somebody who matters" are lawyers in the Department of Justice who might have legal concerns about a particular rule and others in government who might raise a "technical policy problem" with a rule, such as the inadequacy of an assessment of the rule's impacts on small business.[12] In other work describing the role of OIRA, Sunstein reveals that the "somebody who matters" also might be someone who occupies a much more powerful position in the executive branch than a staff attorney at the Department of Justice or a policy analyst in another agency. The person who matters – the person capable of delaying a rule or stopping it indefinitely – might be the White House Chief of Staff, the head of OMB, economists within the White House, aides on the Domestic Policy Council, the head of another agency, a member of Congress, or the President himself.[13]

Considering OIRA's recent track record on the length of regulatory reviews, it seems clear that today there are many somebodies who matter and who are empowered to delay or stop agency initiatives. In a 2013 report for the Administrative Conference of the United States on OIRA delays, Curtis Copeland

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[8] Farber and O'Connell briefly mention *Costle*. Farber & O'Connell, at 1160 & n. 123, 1164 & n. 157.

[9] Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981).

[10] Cf. Farber & O'Connell, at 1178 (noting that they offer proposals that "accommodate rather than resolve" tensions in American political culture").

[11] Cass R. Sunstein, What OIRA Really Does, RegBlog (Sept. 10, 2013), at http://www.regblog.org/2013/09/10-sunstein-what-oira-does.html.

[12] *Id.*

[13] Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1851-52, 1855, 1856, 1858, 1871 (2013).

found that the average time for OIRA to complete review was 79 days in 2012 and 140 days in 2013, compared to a historical average (1994-2011) of 50 days.[14] As of June 2013, 52 percent of the rules under review at OIRA had been there for more than 90 days, and more than half of these had been there for more than a year.[15] Copeland noted that his figures might even understate recent review times, as OIRA had during this period engaged in informal reviews that took place "off the clock," had often required agencies to obtain its approval before submitting rules for formal review, and had delayed publicly logging rules submitted by agencies for review.[16] Copeland found that review times appeared to be getting shorter in 2013,[17] but he also noted that dozens of rules at OIRA in the fall of 2013 had been there for six months or more.[18] As of January 24, 2014, 64 of the 117 rules under review at OIRA had been there for more than 90 days, eight had been there since 2012, 11 since 2011, and two since 2010.[19] As I have written elsewhere, it is implausible to believe that all of these long-delayed rules are under active review; it is more plausible to conclude that somebody who matters has pocket-vetoed them.[20]

The variety and numerosity of the people who matter in the OIRA review process, and the evident power of this process to delay or stop rules, strongly corroborate Farber and O'Connell's account of a mismatch between classical administrative law doctrine and contemporary administrative law practice. White House control over agency rules greatly enlarges the group of decision makers and thus the universe of inside players who might help an administrative lawyer avoid a bad regulatory result for her client, often even before the public administrative process begins. The contemporary administrative lawyer need not rest with trying to convince the action agency of the correctness of her client's cause; she can choose among a wide assortment of inside players, from the OIRA administrator to a GS-12 in the Small Business Administration.

Thus, the effective decision maker in any given regulatory scenario may not be the agency charged by statute with making the relevant decision. And it is usually not the President or even his closest aides who is making the call. As Farber and O'Connell point out, Justice Kagan's argument that a statute giving authority to an executive agency also gives decision-making authority to the President and his

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[14] Curtis W. Copeland Length of Rule Reviews by the Office of Information and Regulatory Affairs, Final Report prepared for the Administrative Conference of the United States, at 4 (Dec. 2, 2013), available at http://www.acus.gov/sites/default/files/documents/OIRA_Review_Final_Report_with_Cover_Page.pdf [hereinafter *Copeland ACUS Report*].

[15] *Id*. at 31-32.

[16] *Id.* at 34-40.

[17] *Id*. at 32-33.

[18] *Id*. at 33.

[19] Statistics gleaned from information available at www.reginfo.gov.

[20] Lisa Heinzerling, *Who Will Run the EPA?*, YALE J. ON REG. 39, 43 (2014).

aides cannot reasonably be stretched to embrace "presidential" administration by other officials in the executive branch.[21]

The variety and numerosity of the people who matter in the OIRA review process also greatly enlarge the range of factors that might contribute to the ultimate regulatory decision. The statute empowering the action agency to regulate may specify a relatively narrow band of criteria relevant to a regulatory decision, but it is unlikely that the whole cast of characters participating in White House regulatory review limit themselves to that narrow band. As Farber and O'Connell observe, current practices in regulatory review "show that instead of the agency making decisions on statutory criteria, the White House may call the shots, and the decision may result from criteria not found in the delegating statute."[22] For example, in the one case in the present administration in which the President publicly rejected a rule under review at OIRA, he explained his decision on grounds disallowed by the underlying statute. In returning a national air quality standard for ozone to the Environmental Protection Agency, President Obama explained his decision in terms of "regulatory burdens" and "regulatory uncertainty," while also citing the economic downturn.[23] The trouble is, the Supreme Court has unanimously held that EPA may not consider regulatory costs in setting these standards.[24]

Going outside the action agency to personnel in the White House or in other agencies has another feature that staying inside the action agency may lack: secrecy. While agencies routinely log the fact and substance of communications with outside parties concerning regulatory matters pending before them, other agencies – when they are simply kibitzing on the initiatives of other agencies – do not. Moreover, in public disclosures made under the governing executive orders on regulatory review, OIRA reveals only communications with outside parties, not with personnel within the White House or the larger executive branch.[25] Even when interagency comments are made publicly available, OIRA pressures agencies not to disclose the identity of the commenters or even their institutional affiliation.[26] In fact, insofar as oral communications are concerned – even when it comes to oral communications with parties outside the executive branch – OIRA discloses only the rule under

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[21] Farber & O'Connell, at 1187 n. 270.
[22] *Id*. at 1169.
[23] Statement by the President on the Ozone National Ambient Air Quality Standards (Sept. 2, 2011), available at http://www.whitehouse.gov/the-press-office/2011/09/02/statement-president-ozone-national-ambient-air-quality-standards.
[24] Whitman v. American Trucking Associations, 531 U.S. 457, 465 (2001).
[25] Relevant documents (under the heading "OIRA Communications With Outside Parties") are available at http://www.whitehouse.gov/omb/oira_default.
[26] Heinzerling, *Inside EPA*, 31 PACE ENVTL. L. REV. at 374-75.

discussion and the participants in the discussion, not the specifics of the exchange.[27] In these ways, the seemingly open and welcoming public process of agency rulemaking can become a cover for the quiet manipulations of power occurring elsewhere in the executive branch.

And make no mistake: these machinations favor regulated industry. A 2011 report by the Center for Progressive Reform found that, over the preceding decade, industry representatives outnumbered public representatives in OIRA meetings on rules under review by about five times.[28] OIRA staffers sometimes attend as many as three to five meetings a day with outside groups;[29] the predominance of industry representatives at such meetings assures that OIRA will hear mostly views sympathetic to regulated entities. Moreover, industry groups can wield power in the OIRA process through even more insidious means. An Executive Order issued by President George W. Bush, still in effect, gives the Office of Advocacy within the Small Business Administration a "first among equals" status in OIRA review; agencies are directed to give "every appropriate consideration" to its comments on draft rules and generally to respond to these comments in the preambles to their final rules.[30] The Office of Advocacy has run with its special status in the OIRA process. A 2013 report by the Center for Progressive Reform found that, over a ten-year period, the Office of Advocacy was "by far the most frequent non-White House participant in OIRA meetings, and attended more than three times the number of meetings attended by the most active industry participant" (the American Chemistry Council).[31] Moreover, a 2011 report by the Center for Regulatory Effectiveness, relying on emails obtained through the Freedom of Information Act, showed a straight line from the talking points of industry trade associations to

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[27] Relevant records are available (under the heading "Oral Communications Records") at http://www.whitehouse.gov/omb/oira_oral_communications/.

[28] Center for Progressive Reform, Behind Closed Doors at the White House: How Politics Trumps Protection of Public Health, Safety, and the Environment at 8 (Nov. 2011), available at http://www.progressivereform.org/articles/OIRA_Meetings_1111.pdf.

[29] Robin Bravender & Emily Yehle, Wonks in embattled regulatory office are mysterious – but 'not nefarious,' E & E News (Feb. 18, 2014), available at http://www.eenews.net/stories/1059994711.

[30] E.O. 13272, Proper Consideration of Small Entities in Agency Rulemaking, 67 Fed. Reg. 53461 (Aug. 16, 2002). The Center for Progressive Reform makes a persuasive case for revoking this executive order in its report, Distorting the Interests of Small Business: How the Small Business Administration Office of Advocacy's Politicization of Small Business Concerns Undermines Public Health and Safety at 11, 14-15, 23 (Jan. 2013).

[31] CPR, Distorting the Interests of Small Business, at 14.

Office of Advocacy comments on rules to regulatory outcomes favorable to the industry groups.[32]

OIRA review, in short, vastly enlarges the terrain on which the inside game can be played. So long as one can capture one agency – even one person – who matters, one need not capture the agency that is trying to act; one can, if one wants to influence an EPA rule, turn to the Department of Agriculture or the Small Business Administration for help. In moving outside the action agency, one also stands a good chance of enlarging the range of factors that will be considered, often beyond statutory boundaries. OIRA review, moreover, also offers the tantalizing possibility of influence without fingerprints. In all of these ways, contemporary administrative law practice parts company with classical administrative law doctrine.

II. "A Rarefied Technocratic Process" (Not)

> "[I]t is always possible that undisclosed Presidential prodding may direct an outcome that is factually based on the record, but different from the outcome that would have obtained in the absence of Presidential involvement. In such a case, it would be true that the political process did affect the outcome in a way the courts could not police. But we do not believe that Congress intended that the courts convert informal rulemaking into a rarified technocratic process, unaffected by political considerations or the presence of Presidential power."[33]

This is the D.C. Circuit in 1981, finding no impropriety in the EPA's failure to docket a meeting with President Carter concerning the agency's pollution standards for coal-fired power plants. As long as the public record compiled for the rule actually supported the ultimate decision and the rule was within statutory bounds, the rule could stand. In a law review article published many years after the decision, the author of the opinion, Patricia Wald, emphasized the link between the court's ruling on disclosure and its conclusion that political intervention would not itself doom a rulemaking proceeding: for her, the legal irrelevance of the political intervention made it unnecessary to invade executive branch confidences by requiring disclosure of communications concerning the intervention.[34] (One might also, of course, draw

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[32] Center for Regulatory Effectiveness, Small Businesses, Public Health, and Scientific Integrity: Whose Interests Does the Office of Advocacy at the Small Business Administration Serve? (Jan. 2013).

[33] Sierra Club v. Costle, 657 F.2d at 407-08.

[34] Patricia M. Wald & Jonathan R. Siegel, *The D.C. Circuit and the Struggle for Control of Presidential Information*, 90 GEO. L.J. 727, 766 (2002) ("By decoupling the legal validity of the rule from any presidential action that may have led to it, the D.C. Circuit not only protected the President's flexibility to give direction to executive agencies, but also removed any reason why parties challenging the rule would have a valid need to know about the President's actions.").

the opposite conclusion: the court's unwillingness to denounce presidential interference in agency rulemaking might make it even more important to disclose the interference, so that accountability might come through the political process even if not through the courts.)

Professor Peter Strauss has called *Sierra Club v. Costle* the "canonical" case on political intervention in agency decision making.[35] The decision has been cited hundreds of times in the scholarly literature and is included in all of the leading casebooks on administrative law.[36] Although the courts have, in the intervening years, largely been able to sidestep the legal questions surrounding political intervention in rulemaking,[37] it is fair to say that *Sierra Club v. Costle* has provided a great deal of comfort both to advocates of the White House process of regulatory review and to academics who favor presidential administration.

Sierra Club v. Costle strikes at the heart of the administrative process as Farber and O'Connell describe it.[38] The decision allows agencies to engage in a charade in which they offer up a technical explanation as a cover for a political decision and condones political meddling with expert-driven agencies.

The charade embraced by *Sierra Club v. Costle* undermines the fundamental rationale for administrative agencies. Allowing an agency to hide the real reasons for its decisions so long as it comes up with a solid technical reason for them perverts the place of expertise in administrative law. Independent expertise becomes a mere means to the end of surviving judicial review rather than being the very purpose of turning to an administrative agency in the first place. It makes agencies' technical expertise a very expensive and circuitous means of achieving political results. In order to survive judicial review based on the record and explanation it has compiled, an agency will need to do a lot of work – work that simply masks the agency's real motivations.

The *Sierra Club* charade also has unhealthy consequences for administrative agencies themselves. Expertise and reason giving become a way to survive judicial review rather than being the anchors of agency identity and culture. This shift wholly disrespects the professional integrity of an agency's experts; they are made to speak to and to profess reliance on technical matters even where doing so is part of an elaborate sham.

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[35] Peter L. Strauss, *Legislation That Isn't – Attending to Rulemaking's "Democracy Deficit,"* 98 CAL. L. REV. 1351, 1363 (2010).
[36] Richard J. Pierce, Jr., *The Special Contributions of the D.C. Circuit to Administrative Law*, 90 GEO. L.J. 779, 781 (2002).
[37] See, e.g., Mississippi v. EPA, 723 F.3d 246 (D.C. Cir. 2013) (rejecting EPA's secondary air quality standard for ozone without reaching arguments citing political interference with rulemaking process).
[38] The discussion that follows draws from Lisa Heinzerling, *The FDA's Plan B Fiasco: Lessons for Administrative Law*, 102 GEO. L.J. 927 (2014).

Indeed, condoning an agency's dissembling about the real reasons for its decisions makes the administrative process one big lie. Requiring an agency to compile an administrative record and then to explain its decision making in light of that record becomes an elaborate – and time-consuming and expensive and cynical – charade if that record and that explanation only serve to inoculate from judicial invalidation a decision actually made based on reasons outside the record and not revealed in the explanation.

Many of the reasons I have given for objecting to a license for dissembling on the part of agencies also apply to a license for political meddling. The compilation of a thick, fact-intensive, intricately detailed administrative record is a monument to futility if the real reasons for an agency decision are, say, that the President believes in reproductive choice (or doesn't) or prefers clean air (or doesn't). The displacement of the scientific views of an agency's professional staff with political leanings upsets, as much as dissembling does, the culture of expertise that defines the modern administrative agency. The introduction of political reasons into the administrative law structure also greatly unsettles the expectation that like cases will be treated alike unless there is a good reason to treat them differently; perhaps the agency, in future cases, would ignore a prior, politically charged decision precisely because it was politically charged, thus introducing a whole new cycle of political calculations into the next generation of agency decisions.

The role of the President in agency decisions has deepened and intensified with every recent administration, regardless of party. Decisions that were once thought solidly within an expert agency's remit are now openly countermanded by the President himself. Proposals forwarded to the White House for regulatory review are revised – sometimes almost beyond recognition – by a shadowy mélange of political operatives, White House economists, career staff in other agencies, Cabinet members, and others. Other proposals languish at the White House indefinitely, with no public explanation of their status. In a world where the White House political apparatus has come to run the regulatory apparatus of the U.S. government, it is past time to reconsider the judicial precedent that condones this state of affairs and the dissembling that attends it.

We have, in short, two systems of administrative law: one in which public processes based on statutorily defined criteria lead to outcomes that are reviewed by courts for their adherence to these criteria and for their basic rationality, and one in which secret processes based on unstated, and likely capricious, criteria can quietly upend the outcomes of the former system but need not even be revealed to the courts. Farber and O'Connell wonder whether "we should give up on the idea that the public explanation [for an agency decision] corresponds to the actual reasons for a regulation,"[39] but I think they end up about where I am: I believe – for

[39] Farber & O'Connell, at 1187.

the reasons I have described here – that to give up on this idea is to give up on the basic premises of classical administrative law.

Conclusion

Professors Farber and O'Connell have done a great service by so thoughtfully identifying the gaps between classical administrative law and actual administrative practice today and by offering a range of possible responses. At the very least, their article should persuade administrative law teachers that they must – simply must – teach their students about the OIRA process if their students are to understand how administrative law works today. More than that, though, Farber and O'Connell have opened up a valuable conversation about how much of classical administrative law we should keep – and how much we might have already lost.