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DISCLOSING THE PRESIDENT’S ROLE IN RULEMAKING: A CRITIQUE OF THE REFORM PROPOSALS

Stephen M. Johnson⁺

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Whether for want of time, expertise, or political will, Congress frequently drafts laws that leave important questions unanswered. Ever since the New Deal era, administrative agencies have resolved these questions pursuant to broad delegations of authority from Congress.¹ For decades, academics have debated the appropriate role for the President in the process of settling such questions.² In practice, the President and the President’s staff often exert

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1. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2253 (2001).

2. See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 544 (1994); Kagan, *supra* note 1, at 2247; Lawrence Lessig & Cass Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 2–3 (1994); Kevin M. Stack, *The President’s Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 264 (2006); Peter L. Strauss, *Overseer, or ‘The Decider’? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 696–97 (2007).

strong influence over agencies in their resolution of the unanswered questions.³ Frequently, though, the President's hand is invisible in the records created by the agencies to justify their decisions.⁴ Rather than documenting political influences, the agencies often support their decisions with technocratic explanations that are tied to the factors that Congress explicitly authorized them to consider in implementing the statute.⁵

Despite the apparent congressional delegation of authority to administrative agencies to address certain questions unresolved by various statutes, several academics have asserted that it is entirely appropriate for the President to play a central role in the agencies' deliberative process, but that something must be done to make the role of the President in the decision-making process more transparent.⁶ Several academics, including Professor Kathryn Watts and recently appointed Supreme Court Justice Elena Kagan, suggest that courts should accord more deference to agency decisions that are based on presidential influences.⁷ This would increase transparency of agency decision making, as agencies would be required to disclose those influences in order to receive the increased deference.⁸ Professor Nina Mendelson has suggested a more direct approach.⁹ She advocates new legislation or an executive order requiring agencies to disclose presidential influences in their decision making.¹⁰

Although the goal of increasing transparency in the rulemaking process is admirable, the proposals could have some unintended consequences, such as contributing to further ossification of the rulemaking process and encouraging further partisan review by courts.¹¹ In addition, making agency rulemaking responsive to the political winds that change with each new administration might reduce consistency and certainty for the regulated industries regarding their obligations under the law.¹² Although those may be acceptable trade-offs

3. Nina A. Mendelson, *Disclosing 'Political' Oversight of Agency Decision-Making*, 108 MICH. L. REV. 1127, 1146 (2010); see also Kagan, *supra* note 1, at 2248–51 (discussing the Clinton administration's efforts to influence agency policymaking); Strauss, *supra* note 2, at 701–02 (explaining President Bush's Executive Order 13,422 and its effect of increasing presidential control over agency action).

4. See, e.g., Mendelson, *supra* note 3, at 1147–57.

5. See, e.g., Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 6 (2009); see also Mendelson, *supra* note 3, at 1141 (noting that courts generally have not provided clear guidance on whether agency action may permissibly be based on political reasons, but have been explicit that such reasons are never acceptable if they prompt a decision based on factors not related to the statute).

6. See, e.g., Kagan, *supra* note 1, at 2251–52; Mendelson, *supra* note 3, at 1159–66; Watts, *supra* note 5, at 32–45.

7. See, e.g., Kagan, *supra* note 1, at 2377; Watts, *supra* note 5, at 8–9.

8. See, e.g., Kagan, *supra* note 1, at 2372–73.

9. See Mendelson, *supra* note 3, at 1164–65.

10. *Id.*

11. See *infra* Parts V.F–G.

12. See *infra* Part V.H.

in exchange for increased transparency, it is questionable whether the proposals will effectively promote full disclosure of presidential influence in agency rulemaking.¹³

This Article examines some of the limitations of the approaches suggested by Professors Watts and Mendelson, as well as some of the problems that each approach could create. Part I of this Article outlines the debate surrounding the appropriate role of the President in influencing or controlling an agency's rulemaking. Part II explores the degree to which courts have addressed the effect of presidential influence when applying either the arbitrary-and-capricious standard under the Administrative Procedure Act (APA) or the *Chevron* test. Part III examines the proposals for changing the nature of judicial review to increase deference for agencies when their decisions are based on presidential influence, and Part IV discusses Professor Mendelson's proposal to mandate disclosure of such influences. Finally, Part V critiques both the Mendelson and Watts proposals, highlighting potential concerns and unintended consequences associated with each of the suggested reforms.

I. PRESIDENTIAL INFLUENCE OR CONTROL OVER ADMINISTRATIVE AGENCY DECISION MAKING

For decades, academics have debated what the appropriate role of the President should be in the process of resolving unanswered statutory questions, particularly when Congress has delegated authority to administrative agencies to implement those laws.¹⁴ As the President will ultimately be held accountable in national elections for the actions taken by executive-branch agencies, the President has an incentive to exert strong influence over the resolution of those unanswered questions or even to *direct* an agency to resolve such questions in a particular manner.¹⁵ Supporters of broad presidential authority cite several constitutional bases for that power, arguing that it is either encompassed within the President's executive power,¹⁶ delegated to the President in the Take Care Clause of the Constitution,¹⁷ or inherent in the President's removal power.¹⁸ Although the Supreme Court has clearly

13. See *infra* Part V.

14. See *supra* note 2 and accompanying text. Although the broader debate focuses on the President's authority over agency decision making in a variety of contexts, the focus of this Article is limited to the President's influence over executive-branch agencies in the rulemaking context. It does not explore the President's authority over independent agencies or the President's influence over executive-branch agencies in the context of adjudication.

15. See Stack, *supra* note 2, at 264.

16. "Unitary executive" theorists argue that Article II of the Constitution implicitly authorizes the President to control both executive and independent administrative agencies. Mendelson, *supra* note 3, at 1132.

17. Mendelson, *supra* note 3, at 1131-32; see U.S. CONST. art. II, § 3.

18. As Professor Stack notes, advocates for directive authority inherent in the removal power argue that "at least with regard to officers that the President may remove at will, the President can ensure that they will follow his will such that there is little practical difference

indicated that the President cannot order an agency official to withhold a ministerial action that the official is required to perform by law,¹⁹ the Court has never clearly outlined the limits on the President's authority to require agency officials to take action when a statute gives these officials discretion regarding appropriate action.²⁰ Over the years, Attorneys General have often been in disagreement about the limits of the President's constitutional power to direct an agency's discretion to be exercised in a manner favored by the President.²¹

Support for broad presidential authority to influence agency rulemaking, and perhaps even to direct it, has grown as academics have increasingly argued for a "presidential control" model to justify the existence and role of administrative agencies.²² One of the strongest recent advocates for broad presidential authority to direct agency action is the recently appointed Supreme Court Justice Elena Kagan. In an influential article at the turn of this century, Kagan argued that congressional delegations of authority to executive-branch officials should be read to grant the President authority to direct the officials in their exercise of authority under those laws.²³ In light of the power that the President's appointment and removal powers, his ability to require them to comply with extensive procedures in making decisions, and the deference that executive-branch agency officials give to the President, Justice Kagan

between removal and directive authority, and therefore little reason to presume a 'congressional intent to disaggregate them.'" Stack, *supra* note 2, at 293 (quoting Kagan, *supra* note 1, at 2328).

19. See *Kendall v. United States ex rel. Stokes*, 37 U.S. 524, 610 (1838).

20. See Stack, *supra* note 2, at 270.

21. See *id.* Compare *The President and Accounting Officers*, 1 Op. Att'y Gen. 624, 625 (1823) (finding that the Take Care Clause of the Constitution does not authorize the President to direct an executive official to exercise discretion in a specific manner when Congress has delegated authority to the official to exercise discretion), with *Relation of the President to Executive Departments*, 7 Op. Att'y Gen. 453, 463, 469-70 (1855) (finding, in the opinion of Attorney General Caleb Cushing, that the President has the implied authority, derived from the executive power and the Take Care Clause, to control the manner in which executive officials exercise discretion under statutes).

22. See Mendelson, *supra* note 3, at 1137. The presidential-control model for administrative law places significant power in the hands of the President because the President must be responsive to voters, can take a national perspective on policy issues, and has an incentive to transmit broad electoral preferences to agencies. *Id.* at 1137-38. The presidential-control model is the latest in a line of theories advanced by academics to support the legitimacy of administrative agencies in the absence of explicit constitutional authority. The earliest model, the "transmission belt" model, justified agencies "as merely implementing clear legislative directives." Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 470 (2003). Over time, that model was replaced by an "expertise" model, which envisioned agencies as "professionals or experts, disciplined in their craft by 'the knowledge that comes from specialized experience.'" *Id.* at 471 (quoting Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1678 (1975)). The expertise model was later replaced in the 1970s by an "interest group representation" model, which touted the administrative process as "a perfected political process, attempting to legitimate it by affording access to a wider range of affected interests." *Id.* at 475.

23. See Kagan, *supra* note 1, at 2329.

concluded that “when Congress delegates to an executive official, it in some necessary and obvious sense also delegates to the President.”²⁴ Steven Calabresi and Saikrishna Prakash also assert that when statutes delegate authority to an executive official, the President should be authorized to exercise that authority in place of the official.²⁵ Professor Kevin Stack notes that academics implicitly assert a similar broad authority for Presidents when claiming that a President’s executive orders can legally bind executive-branch agencies.²⁶

Supporters of the presidential-control model identify many benefits for a broad distribution of power. The primary benefit is that the agency is more accountable to the electorate when its rulemaking is controlled by the President, who is subject to a national election.²⁷ Professor Nina Mendelson suggests that agencies are likely to be more democratically responsive when they are electorally accountable.²⁸ She also argues that agency decisions can be normatively better when the President exerts control over those decisions because the President can (1) “ensure that decision-making across multiple federal agencies is coordinated;” (2) “provide direction and energy to agency officials;” and (3) ensure that agencies are not taking a “tunnel vision” approach to decision making, focusing solely on their own priorities.²⁹

The voices in favor of presidential power to direct executive-branch agency officials’ decision making, however, are not unanimous.³⁰ For instance, Professor Peter Strauss asserts that the Take Care Clause and the Vesting Clause of Article II of the Constitution, viewed in light of Congress’s delegation of decision-making authority to agency officials, provide the President with the power simply to oversee executive-agency officials’ decisions, rather than to make decisions for them.³¹ Professor Kevin Stack

24. *Id.* at 2327. Professor Kagan based her conclusion, in part, on the contrast between congressional delegations to independent agencies and executive agencies, noting that Congress aims “to insulate agency decision-making from the President’s influence” when delegating authority to independent agencies because the President has limited removal power over those agency officials. *Id.*

25. Calabresi & Prakash, *supra* note 2, at 596 & n.210.

26. Stack, *supra* note 2, at 266.

27. See Mendelson, *supra* note 3, at 1129, 1134; see also JERRY L. MASHAW, GREED, CHAOS AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 153 (1997) (arguing that without the ability to directly influence agencies, Presidents could only respond to voter sentiment by lobbying Congress).

28. Mendelson, *supra* note 3, at 1134.

29. *Id.* at 1135.

30. See, e.g., Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 54; Thomas O. McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 AM. U. L. REV. 443, 462 (1987).

31. See Strauss, *supra* note 2, at 704–05. Professor Strauss appears to agree with Attorney General Wirt, who concluded that the President’s Article II duty to see that the laws “be faithfully executed” includes a duty to respect the independent judgment of executive agency officials authorized by statutes to make discretionary decisions. See *id.* at 703; *supra* note 21 (comparing

makes a strong argument in support of this position based on principles of statutory interpretation.³²

II. PRESIDENTIAL INFLUENCE AND ITS IMPACT ON JUDICIAL REVIEW

Regardless of whether it is appropriate for the President to direct or merely influence agency decision making, the President plays an important role in the process. Until recently, however, it was also fairly clear that courts would not accord more deference to an agency's decision when reviewing it under the arbitrary-and-capricious standard³³ or the *Chevron* test³⁴ simply because the agency's decision was motivated by the President's influence.

A. Arbitrary-and-Capricious Standard

The primary case to address the issue in the context of the arbitrary-and-capricious standard is *Motor Vehicle Manufacturers' Association v. State Farm Mutual Automobile Insurance Co.*³⁵ In this case, the Supreme Court reviewed the decision of the National Highway Traffic Safety Administration (NHTSA) to rescind a rule that required cars to be equipped with air bags or automatic seat belts.³⁶ The agency made the decision to rescind the rule, established during the Carter administration, shortly after President Reagan was elected.³⁷ The Court concluded that the NHTSA acted arbitrarily and capriciously when it rescinded the rule because the agency failed to consider whether it should retain an air-bag-only requirement, as opposed to a requirement for air bags or

the differing opinions of Attorney General William Wirt and Attorney General Caleb Cushing concerning the President's constitutional authority to direct agency officials). Strauss argues that "where Congress has assigned a function to a named agency subject to its oversight and the discipline of judicial review, the President's role—like that of the Congress and the courts—is that of overseer and not decider." *Id.* at 704–05.

32. See Stack, *supra* note 2, at 284–90; see also *infra* Part V.A.

33. 5 U.S.C. § 706(2)(A) (2006).

34. In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court articulated a two-part test that frequently applies to review of agencies' interpretations of statutes:

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

467 U.S. 837, 842–43 (1984) (footnotes omitted).

35. 463 U.S. 29 (1983).

36. See *id.* at 34–37.

37. See *id.* at 37–38.

automatic seat belts, and because the agency did not adequately justify its conclusion that automatic seat belts did not provide adequate safety benefits.³⁸

Then-Associate Justice William H. Rehnquist concurred with the majority's finding that the NHTSA failed to explain why it rescinded the air bag requirement, but dissented from the finding that the NHTSA's decision regarding the automatic seat belts was arbitrary and capricious.³⁹ In his opinion, Justice Rehnquist wrote:

The agency's changed view of the standard seems to be related to the election of a new President of a different political party A change in administration . . . is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations. As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration.⁴⁰

The majority, however, did not address the political context of the agency's decision, and did not address whether it would be appropriate for the agency to consider such political influences in its decision making.⁴¹ Instead, the majority opinion focused on the technocratic explanations provided by the agency.⁴² Consequently, as Professor Kathryn Watts has noted, "the opinion has been widely read over time to represent the triumph of expertise to the exclusion of politics."⁴³ The Court's decision demonstrates the importance of an agency's justification of their rules based on "technocratic, scientific, or statutory driven terms, *not* political terms."⁴⁴

More recently, in *Massachusetts v. EPA*, the Supreme Court concluded that the Environmental Protection Agency acted arbitrarily and capriciously in denying a petition that asked the agency to regulate automobile emissions of greenhouse gases under the Clean Air Act.⁴⁵ The agency's decision was strongly influenced by the White House, and the agency expressly indicated that it based its decision, in part, on concerns about preserving the President's ability to negotiate greenhouse-gas emissions reductions with developing

38. *Id.* at 46–48, 51–57.

39. *Id.* at 57–58 (Rehnquist, J., concurring in part and dissenting in part).

40. *Id.* at 59 (footnote omitted).

41. Watts, *supra* note 5, at 19. Professor Watts argues, however, that the majority never explicitly rejected Justice Rehnquist's suggestion that an agency could consider politics in its decision making. *Id.* Instead, she argued, "the Court's silence on the issue most likely was simply a reflection of the fact that the agency and the litigants had not teed up the issue." *Id.*

42. *Id.*

43. *Id.* Professor Watts points out that the majority probably did not address the political context in which the decision took place because the NHTSA did not indicate that it considered any political factors in making its decision. *Id.*

44. *Id.* at 5.

45. 549 U.S. 497, 510–11, 532–34 (2007).

countries and concerns about the efficacy of relying on voluntary executive-branch programs to address climate change.⁴⁶ Academics frequently cite this decision as an affirmation of *State Farm's* “requirement” that agencies base their decisions on scientific, technocratic, and statutory expertise, rather than political factors.⁴⁷

B. Chevron Deference

Although courts generally have not granted greater deference to agencies' statutory interpretations under the *Chevron* analysis simply because the agencies' decisions have been influenced by the President, the *Chevron* decision itself is ambiguous regarding the role of presidential influence in agency decision making—partly because the opinion identified several different rationales for according deference to an agency's statutory interpretation.⁴⁸ Professor Evan Criddle notes that scholars have debated whether courts defer to agencies under *Chevron* because (1) Congress has delegated authority to the agencies, (2) the agencies have developed expertise, (3) there is a need for national uniformity, (4) the agencies' decisions are made through a deliberatively rational process, or (5) the executive branch is politically accountable.⁴⁹ As Criddle notes, there is support for each of these justifications for deference in the Court's opinion in *Chevron*.⁵⁰ If *Chevron* requires deference to agencies because Congress has delegated decision-making authority to the agencies being reviewed by courts, it would make little sense to accord an agency greater deference because the President exerted some influence over a decision.⁵¹ Similarly, if *Chevron* requires deference because an agency has developed expertise, one might argue that an agency's decision should be accorded *less* deference when based on presidential influence, rather than the agency's independent expertise.⁵²

However, many commentators argue that the primary justification for *Chevron* deference is the political accountability justification,⁵³ and there is

46. *Id.* at 511–14.

47. See Freeman & Vermeule, *supra* note 30, at 53–54; Mendelson, *supra* note 3, at 1140–41; Watts, *supra* note 5, at 21–22.

48. See Evan J. Criddle, *Chevron's Consensus*, 88 B.U. L. REV. 1271, 1272–73, 1289–90 (2008).

49. *Id.* at 1273.

50. *Id.* Professor Criddle argues that the “genius” of Justice Stevens' opinion is that it is “pluralistic” and “conciliatory,” providing “jurists who espouse fundamentally different views regarding the relationship between courts and administrative agencies” with an array of justifications supporting deference for agencies' decision making. *Id.* at 1273–74.

51. Congressional delegation is arguably the primary rationale for *Chevron* deference. *Id.* at 1284.

52. Many commentators identify agency expertise as a primary justification for *Chevron* deference. See, e.g., Criddle, *supra* note 48, at 1286; Stack, *supra* note 2, at 305.

53. See Criddle, *supra* note 48, at 1288–90 (discussing the political accountability justification for *Chevron* deference).

strong support for their arguments in the following statements from Justice Stevens's opinion:

[A]n agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices⁵⁴

Professor Kathryn Watts argues that this language, contrasted with the majority's silence regarding political influences in *State Farm*, suggests that presidential influence over agency decision making is valid in some cases, and that the Court "anchored the political control model" for administrative agencies in *Chevron*.⁵⁵

If *Chevron* deference is based on the political accountability of the President, presidential influence should play a central role in the *Chevron* analysis.⁵⁶ For instance, prior to her appointment to the Supreme Court, Justice Elena Kagan argued that the delegation of authority to executive-branch agencies should be viewed as delegating authority to the President to direct those agencies' actions,⁵⁷ and that agencies' decisions should be accorded *Chevron* deference whenever those decisions have been substantially influenced by the President.⁵⁸

Though political accountability is a popular justification for *Chevron* deference, critics argue that because very few agency decisions are influenced by direct presidential actions, it is inappropriate to suggest that accountability should be the touchstone for *Chevron* deference.⁵⁹ Critics also argue that even when the President is directly involved in an agency's decision making, *Chevron* deference would not be appropriate if it would frustrate other traditionally articulated bases for deference, such as agency expertise.⁶⁰

54. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984).

55. Watts, *supra* note 5, at 37–38 (quoting Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1765 (2007)).

56. See Criddle, *supra* note 48, at 1288–89 (commenting on the President's oversight of regulatory policy). Professor Kevin Stack notes that courts accord *Chevron* deference to decisions of independent agencies, as well as executive-branch agencies, suggesting that *Chevron* applies whenever the executive branch has greater influence over agencies than the judiciary. See Stack, *supra* note 2, at 305.

57. See Kagan, *supra* note 1, at 2251.

58. See *id.* at 2377. Justice Kagan argues that *Chevron* deference should not be limited to an agency's interpretation of a statute it "administers." *Id.* Rather, Justice Kagan would expand the traditional confines of *Chevron* and accord deference whenever the President influences an agency's interpretation of a statute. *Id.* at 1276.

59. See, e.g., Criddle, *supra* note 48, at 1289–90.

60. *Id.* at 1290. Professor Peter Strauss argues that

Professor Stack raises another challenge to the expansion of *Chevron* deference based on presidential influence, which will be discussed more fully in Part V of this Article. In short, he disagrees with Justice Kagan regarding the President's authority to direct agency decision making, and asserts that presidential influence on decision making is only relevant for *Chevron* when a statute expressly delegates authority to the President to play a decision-making role.⁶¹

III. PROPOSALS FOR CHANGE: CHANGING THE APPLICATION OF THE ARBITRARY-AND-CAPRICIOUS STANDARD

Although courts have been reluctant to do so in the past, several academics have argued that courts should accord more deference to agencies when reviewing their actions under the "hard look" application of the arbitrary-and-capricious standard if the agencies' decisions are influenced by political factors.⁶² Professor Kathryn Watts is one of the strongest advocates for this position.⁶³ Professor Watts argues that as the political-control model of administrative agencies has become predominant, it is necessary to adapt administrative law doctrines to reflect the increased focus on, and appropriateness of, political influence in agency decision making.⁶⁴ Her proposal is, in some ways, an expansion of Professor Kagan's proposal to expand *Chevron* deference to agencies when the agencies' decisions are based on presidential influence.⁶⁵ Professor Watts's proposal focuses on expanding

[i]n the ordinary world of administrative law, courts have extensive review authority over decisions such as the EPA made in *Chevron*—review authority extending to their reasonableness in terms of the agency's mandate. To make *Chevron* turn entirely on presidential politics is to omit consideration of the role of 'reasonableness' in relation to those matters found to fall within the area of discretion constituting 'step two' of its analysis. . . . Indeed, the structure of judicial review of administrative action depends, top to bottom, on the presumption that the matter being reviewed is in some respects the product of an expert, not merely a political judgment.

Strauss, *supra* note 2, at 751–52 (footnote omitted). Strauss notes that "the professional civil service within any particular agency serves as an anchor against the influence of raw politics in the exercise of delegated responsibilities." *Id.* at 756. Strauss also questions whether, assuming political accountability is a basis for according deference to agencies, it is appropriate to focus simply on the influence of the President as the spokesperson of the national will, as opposed to the President and Congress. *Id.* at 755.

61. Stack, *supra* note 2, at 267.

62. See *supra* note 7 and accompanying text.

63. See Watts, *supra* note 5, at 8–9 (summarizing her argument).

64. *Id.* at 32–39. Professor Watts asserts that the traditional application of the "hard look" analysis is based on an outdated "expertise" model for administrative agencies. *Id.* at 33. She suggests that the modern "political control" model has already prompted changes in other administrative law doctrines addressing *ex parte* communications and application of the *Chevron* test, making it appropriate to change the "hard look" analysis to reflect the new model as well. *Id.* at 39.

65. *Id.* at 31–32 (commending Justice Kagan's proposal, but finding it to fall short of the necessary reform needed).

deference to agencies under the arbitrary-and-capricious standard when agencies' decisions are based on political influences, not merely presidential influences.⁶⁶

However, Professor Watts does not advocate changing the application of the "hard look" arbitrary-and-capricious standard for all agency decisions. In her article, she primarily focuses on denials of rulemaking petitions, withdrawals of proposed rules, and rescissions of rules as actions in which it is appropriate to consider the political influences behind an agency's decision.⁶⁷ Furthermore, she notes that some political influences are unacceptable as support for an agency's decision.⁶⁸ Specifically, she states:

Although drawing a precise line between permissible and impermissible political influences is difficult, legitimate political influences can roughly be thought of as those influences that seek to further policy considerations or public values, whereas illegitimate political influences can be thought of as those that seek to implement raw politics or partisan politics unconnected in any way to the statutory scheme being implemented.⁶⁹

In order to ensure that her proposal advances the accountability and monitoring justifications for the political-control model, Professor Watts

66. *Id.* at 8–9.

67. *Id.* at 66. Professor Watts argues that these types of agency decisions are generally based on policy considerations, such as priority setting and balancing of resources, rather than on questions of science or technical expertise. *Id.* at 67–72. Accordingly, it is more appropriate for the decisions to be made based on political factors. *Id.* Professor Watts does not suggest that her approach should be used, in general, when reviewing final rules promulgated by agencies; however, she can foresee situations where an agency's final rule could appropriately be influenced by political considerations, while not precluding the scientific and technical factors that the agency is required to consider under the statute. *Id.* at 72–73. In those cases, she argues, an agency could appropriately rely on political influences as a tiebreaker, and courts could accord deference to the agency based on its consideration of those influences. *Id.* However, political influences could not justify promulgating a rule inconsistent with the evidence or the statute. *Id.*

68. *See id.* at 53–57.

69. *Id.* at 9. At the extreme end of the spectrum, Professor Watts notes that it would be inappropriate for an agency to indicate that the President directed the agency to take an action "to reward the trial lawyers, who provided significant campaign support to the President," and that it would be inappropriate for an agency to simply justify its action by stating that "the President made us do it." *Id.* at 54–55 (quoting Jerry L. Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 *FORDHAM L. REV.* 17, 21 (2001)). She recognizes, however, that her proposed standard for distinguishing appropriate influence from inappropriate influence is "inherently fuzz[y]" and that her test might encourage agencies to "spin . . . partisan or raw political decisions as somehow being driven by public values or policy choices." *Id.* at 56. Nevertheless, even when agencies "hide the ball," she reasons that agencies will "at least . . . be acknowledging some kinds . . . of political influences and . . . opening the door for greater accountability and monitoring." *Id.* at 56–57. Further, she suggests that courts could prevent agencies from hiding the ball by "smoking out undisclosed, extra-record political influences, [and] . . . penalizing agencies for decisions that seem to be based upon undisclosed political influences." *Id.* at 57.

stresses that courts should only consider political influences as valid support for an agency's decision when those influences are openly and transparently disclosed in the agency's records.⁷⁰ As noted previously, she suggests that courts should consider political influences from the President, other executive-branch officials, and Congress as valid support for an agency's decision, as long as those influences are openly and transparently disclosed.⁷¹

Although Professor Watts advocates that political influences justify an agency's decision under the "hard look" arbitrary-and-capricious standard, she recognizes that an agency cannot rely on political influences to justify a decision when a statute prohibits the agency from considering certain factors.⁷² Political influence can only guide the agency's exercise of discretion within those areas where it has discretion. However, Professor Watts argues that statutes should be read to implicitly authorize agencies to consider political influence as a decision-making factor, unless doing so would conflict with other statutory limits on the agency's decision-making authority.⁷³

Professor Watts suggests that the Supreme Court's recent ruling in *FCC v. Fox Television Stations, Inc.*⁷⁴ could signal that the Court is more open to agencies relying on political influences.⁷⁵ In that case, the Court upheld the decision of the Federal Communications Commission (FCC) to prosecute Fox

70. *Id.* at 44. The political influences could be disclosed, for instance, in "a notice of proposed rulemaking, a statement of the basis and purpose accompanying a final rule, or a statement explaining the denial of a rulemaking petition pursuant to section 555(e) of the [Administrative Procedure Act]." *Id.*

71. *Id.* at 57. Although Professor Watts advocates deference for agency decisions that are influenced by Congress as well as the President, she recognizes that the political-control model is more widely accepted as a *presidential*-control model rather than a *political*-control model, and that it is difficult to determine when congressional influence would be an appropriate factor to consider, because Congress, unlike the President, rarely speaks with one voice. *Id.* at 64–65.

72. *Id.* at 45–46.

73. *Id.* at 47–48. Professor Watts argues that, in general, when a statute does not explicitly authorize an agency to consider certain factors in making a decision, courts might arrive at two contradictory conclusions based on Congress's silence: Congress did not want the agency to consider those factors, or Congress gave the agency discretion to consider those factors because it did not prohibit consideration of those factors. *Id.* Supported by several opinions from the U.S. Court of Appeals for the D.C. Circuit, she argues that Congress's silence regarding a factor should be interpreted to allow the agency to consider that factor. *Id.* & 47 n.208 (providing examples of D.C. Circuit cases supporting her position). Accordingly, she deduces that courts should not interpret Congress's silence regarding consideration of political influences to mean that an agency cannot consider those influences. *Id.* at 47–48. Although she recognizes that the Supreme Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), could be read to limit an agency's authority to consider factors that are not explicitly identified in the statute the agency is administering, she nonetheless maintains that the Court's more recent decision in *Entergy Corp. v. Riverkeeper*, 129 S. Ct. 1498 (2009), clarified that an agency may consider political factors in the face of congressional silence regarding those factors. See Watts, *supra* note 5, at 48.

74. 129 S. Ct. 1800 (2009).

75. See Watts, *supra* note 5, at 10–11.

Television for broadcasting “fleeting expletives,” even though the agency was changing its interpretation of “indecenty” by prosecuting Fox.⁷⁶ Writing for a plurality of the Court, Justice Antonin Scalia noted that the agency’s decision was “spurred by significant political pressure from Congress.”⁷⁷ However, a majority of the Court upheld the agency’s new interpretation of the law, noting that an agency’s change in policy need not be subject to more stringent review under the arbitrary-and-capricious test than an agency’s initial adoption of a policy.⁷⁸ In describing the case, Professor Watts suggests that the Court’s decision “arguably makes it easier for agencies to change their policies due to changes in the political wind.”⁷⁹ Although the case involved political influence from Congress, Professor Nina Mendelson suggests that the plurality opinion could also justify agency reliance on presidential influence in decision making.⁸⁰

If courts are willing to consider political influences as valid support for agency decisions under the “hard look” arbitrary-and-capricious analysis, Professor Watts suggests that such a change will have several benefits. First, she argues that the change would reduce the extent to which agencies subvert science by making political decisions with manufactured technocratic justifications.⁸¹ Under the current model, she notes, agencies have an incentive to distort scientific facts to justify politically driven decisions.⁸² If agencies could openly disclose the political bases for their decisions, such distortions would become unnecessary. As a second benefit, Watts argues that her proposed change to the arbitrary-and-capricious standard would increase the likelihood that courts would defer to agencies and thus reduce the ossification of rulemaking.⁸³ Agencies would be more likely to proceed with rulemaking, and to proceed expeditiously, because they would have greater assurance that their rules would be upheld.⁸⁴ However, the primary benefit of Professor Watts’s proposal would be the increase in agency transparency and accountability.⁸⁵ Citing Professor Lisa Schultz Bressman, Professor Watts stresses that “by requiring agencies to explain their decisions in a transparent

76. *Fox Television*, 129 S. Ct. at 1815–16.

77. *Id.* at 1816.

78. *Id.* at 1810–11.

79. Watts, *supra* note 5, at 10.

80. Mendelson, *supra* note 3, at 1139.

81. See Watts, *supra* note 5, at 12 (discussing allegations that the George W. Bush White House subverted scientific facts to further political goals).

82. *Id.* at 40.

83. *Id.* at 41–42.

84. *Id.* Watts notes that unpredictable judicial review and the need to draft detailed technical justifications for agencies’ decisions have increasingly encouraged agencies to adopt policies through means other than informal rulemaking. *Id.*

85. *Id.* at 13.

manner, political actors and their constituents gain access to information about agency action and can monitor agencies.”⁸⁶

Professor Watts recognizes that it might be difficult to change the application of the arbitrary-and-capricious standard in the manner that she proposes because of a “first-mover” problem.⁸⁷ Agencies may be reluctant to rely on political factors when making decisions without first knowing whether courts will uphold those decisions, and courts likewise may be reluctant to signal a willingness to consider political influences if agencies have not acknowledged their consideration of those factors in the past.⁸⁸ Professor Watts also notes that it might be necessary to balance the change in the application of the arbitrary-and-capricious standard with penalties for agencies that fail to disclose political influences.⁸⁹ Finally, Professor Watts recognizes that courts may be uncomfortable with, or lack the expertise in, evaluating political influences and the weight that they should be accorded in applying the new standard.⁹⁰ Despite those challenges, Watts concludes that the benefits weigh in favor of moving forward.⁹¹

86. *Id.* at 42 (citing Bressman, *supra* note 55, at 1780). In her article, Professor Watts outlines a litany of agency rules assertedly influenced by politics, and notes that not a single agency disclosed any political influences in relation to those rules. *See id.* at 23–29.

87. *Id.* at 13.

88. *Id.* However, Professor Watts suggests that some courts have already begun to signal a willingness to consider political factors. *Id.* at 75. She also suggests that a bold agency might rely on political factors in a narrow case “where courts are more likely to see the value of political judgments—such as denials of rulemaking petitions or withdrawals of proposed rules based upon clearly articulated administration priorities.” *Id.* at 74.

89. *Id.* at 13. Specifically, she suggests an affirmative requirement that agencies disclose political influences. *Id.* at 76. This approach is advocated more forcefully by Professor Nina Mendelson and is described in Part IV of this Article. Professor Watts recognizes the difficulty that courts may have in determining when agencies are relying on, but not disclosing, political influences. Watts, *supra* note 5, at 76.

90. *Id.* at 80–81.

91. *See id.* at 89. Professor Watts suggests that there may be many situations in which a court need not determine the weight to give the political factors that an agency considers, but merely needs to determine whether the agency acted rationally in considering those factors. *See id.* at 82 (suggesting that when an agency declined to initiate or withdraw a discretionary rulemaking based on presidential priorities and preferences regarding the allocation of resources, the reviewing court would merely need to determine “that the agency’s reliance on these priorities in setting its own discretionary rulemaking agenda was rational”). Similarly, she argues that when an agency chooses between “multiple factually supportable and statutorily permissible options” based on political influence, a court would simply need to “assess as a factual matter whether the agency was correct to claim that rational and legitimate political influences supported the selection of one factually and legally permissible rule over another.” *Id.* The most difficult cases for courts would arise when the agency, based on political influences, chooses an approach that is not *foreclosed* by statute or scientific evidence, but an alternative approach is strongly supported by the scientific evidence. *Id.* In those cases, Professor Watts suggests that courts should consider the form and content of the political influence and more readily defer to political influence that is provided “in a form designed to reinforce some of the positive attributes of politics, such as accountability, public participation, and representativeness . . .” *Id.* at 83.

IV. PROPOSALS FOR CHANGE: MANDATORY DISCLOSURE OF POLITICAL INFLUENCES

While Professor Watts proposes changing the application of the “hard look” arbitrary-and-capricious analysis as a means of encouraging agencies to disclose political influences in their decision making, Professor Nina Mendelson advocates a more direct approach. She proposes a mandatory requirement that agencies disclose presidential or executive influences on their rulemaking decisions.⁹² Professor Mendelson bases her proposal on the assumption that it is entirely appropriate for the President to exert influence over agency decision making.⁹³ However, she stresses that her analysis of agency rulemaking demonstrates that agencies rarely disclose such influence.⁹⁴ Consequently, she argues, failure to disclose such influence decreases the legitimacy of agencies’ actions.⁹⁵

Professor Mendelson suggests that the best way to implement her proposal would be for Congress to enact new legislation that requires agencies to prepare a publically accessible docket, containing written materials regarding rules that the agency receives from the White House Office of Management and Budget (OMB) or any other executive-branch officials and, with final rules, a summary of its communications (written or oral) with the executive-branch or other agencies, as well as the extent to which those communications influenced the final rule.⁹⁶ In the absence of legislation, Professor Mendelson proposes, as a less effective alternative, an executive order that would impose similar duties on agencies.⁹⁷ In addition, she proposes that courts should defer to agency decisions that are based on executive influence, regardless of the

92. Mendelson, *supra* note 3, at 1130. Her focus includes both interpretive rules and legislative rules, but does not include adjudication. *Id.*

93. *See id.* at 1130 (stating that undisclosed presidential influence is detrimental to the legitimacy of an agency rule).

94. *Id.* at 1157. Similarly, the President and other White House officials also rarely acknowledge their influence in rulemaking. *Id.* at 1148–49. Despite the silence, Professor Mendelson asserts that her analysis of rulemaking data over the last few presidential administrations also strongly suggests that presidents are exerting influence over agencies’ rulemaking decisions, but are not disclosing the influence. *Id.* at 1154. Specifically, she points out that although the White House Office of Management and Budget (OMB) has reviewed hundreds of rules promulgated during several administrations, and although a very high percentage of those rules have been changed in light of OMB review, neither the agencies nor the White House generally attribute the changes to presidential influence. *Id.* at 1148–57.

95. *Id.* at 1130.

96. *Id.* at 1164.

97. *Id.* However, she recognizes that an executive order is less desirable because agencies have previously ignored some of the disclosure requirements in existing executive orders. *Id.* at 1164–65. Executive orders generally are not enforceable in court. Nina A. Mendelson, *Chevron and Preemption*, 103 MICH. L. REV. 737, 786 (2007). As a final, but least favored alternative, Professor Mendelson also suggests that agencies could “self-regulate and issue rules requiring disclosure” of information about executive-branch influence in future agency actions. Mendelson, *supra* note 3, at 1165.

motivation for the influence, as long as the agency's decision comports with the factors that the agency is authorized to consider by statute.⁹⁸

Regardless of which form is implemented, Professor Mendelson asserts that mandatory disclosure of presidential and other executive influences on agency decision making has two main benefits. First, disclosing such information would increase the legitimacy of an agency's decision, as the public would "see the value-laden aspects of the decision as a reflection of presidential preferences, rather than the decision of an unelected agency official."⁹⁹ Second, disclosing the information would reveal the President's true involvement in the decision-making process, resulting in much more transparency.¹⁰⁰ The increased transparency should increase public involvement in the decision-making process, thereby encouraging democratic responsiveness and accountability in the agency.¹⁰¹ The President would also be more accountable as a result of the more transparent process.¹⁰² Additionally, Congress could then amend statutes if it felt that the President were exerting too much or too little influence over the decision making.¹⁰³

98. *Id.* at 1172. In this regard, her proposal differs significantly from Professor Watts's proposal. Professor Mendelson's proposal would authorize a court to defer to an agency's decision without regard for the form or content of the President's influence, as long as the decision was within the discretion delegated to the agency. *Id.* But see *supra* note 91 (discussing Professor Watts's proposal). Professor Mendelson distinguishes between policy issues and technical issues in her proposal, noting that a court should not give increased deference to an agency when it is improperly deciding a technical question by labeling it as a policy question, on which a court should defer to executive influence. *Id.* at 1173–74. Although she recognizes that there is a risk that an agency might try to immunize technical issues from review by identifying them as policy- or value-laden issues, she believes that the risk is minimal. *Id.* at 1174.

99. *Id.* at 1165.

100. *Id.* She argues that disclosure would clarify whether the President is encouraging agencies to make decisions based on specific policies or values or is "simply second-guessing expert decisions made within the agencies," and whether agencies are acting independently or simply acquiescing to every direction from the President. *Id.* at 1165, 1177.

101. See *id.* at 1165–66.

102. *Id.* at 1166. Unlike the proposals to change the nature of the application of the arbitrary-and-capricious standard, Professor Mendelson's proposal does not require courts to determine whether a particular instance of presidential influence is appropriate or inappropriate. By alerting the public of such influences, the disclosure of communications coming from the President or close advisors, ranging "from an articulation of core values, . . . seeking the support of key constituencies, . . . [or] simple political will," will prompt a consideration of the appropriateness or inappropriateness of such influences. See *id.* at 1175, 1177. However, she maintains that presidential pressure leading an agency to make a decision that was outside of its statutory authority or irrational would likely be inappropriate. *Id.* at 1141. Specifically, she argues that "presidential influence that is inconsistent with the agency's legal constraints; presidential influence that prompts the agency to ignore its factual or technical conclusions; and influence that is aimed at achieving some goal other than service to the public interest" would be "out of bounds," as would political manipulation of scientific research and pressure that is unrelated to "any notion of the public interest." *Id.* at 1141, 1143–44.

103. *Id.* at 1165. Although Professor Mendelson focuses on the possibility that Congress could amend statutes to clarify the role that the President plays in overseeing agency decision

Thus, in contrast to proposals that simply modify the application of the arbitrary-and-capricious standard, Professor Mendelson asserts that the mandatory requirement is superior because agencies are unlikely to disclose presidential or political influence without a mandatory requirement, despite the fact that disclosure might lead to increased deference.¹⁰⁴

Professor Mendelson acknowledges, but dismisses, claims that a mandatory disclosure requirement could deter a full and open discussion of policies,¹⁰⁵ and that it could encourage the President to disengage from particular agency proceedings.¹⁰⁶ She also recognizes, but rejects, other concerns: that agencies might comply with the letter of the law by including boilerplate statements in rulemaking proceedings that fail to fully disclose the true nature of executive influence;¹⁰⁷ that agencies might not be candid about the true nature of executive influence;¹⁰⁸ and that the President might exert influence through channels that are not subject to mandatory disclosure under her proposal.¹⁰⁹ Finally, she realizes that the extensive discovery needed to unearth undisclosed executive influence could disrupt agency decision making, and that her proposal could be undermined if agencies assert executive privilege to prevent disclosure of executive communications; however, she believes that the discovery process could be streamlined to reduce the likelihood of those problems.¹¹⁰

making, Congress could act more directly by making more of the policy decisions itself in the statute and reducing the amount of discretion that agencies have to make decisions based on presidential influence.

104. *Id.* at 1165–66. In addition to the “first-mover” concerns previously discussed, she also suggests that a President may wish to conceal information about his or her role in an agency’s decision making “to maintain ‘deniability’ and to avoid political risks,” regardless of whether disclosure of the influence would increase the likelihood that the agency’s decision would be upheld in court. *Id.* at 1166.

105. *Id.* However, because her proposal would not require disclosure of all conversations, but would merely require a summary of communications, she argues that the proposal “would still leave considerable room for private deliberations.” *Id.* at 1167.

106. *Id.* However, she feels that Presidents might be reluctant to disengage because the public might negatively view their inaction as a “failure to oversee the agency.” *Id.*

107. *Id.* In response, though, she argues that the availability of judicial review and discovery should reduce the likelihood that agencies will merely include boilerplate language to support their decisions. *Id.*

108. *Id.* at 1168. However, she suggests that even if disclosure is less than candid, it would be an improvement over the status quo. *Id.*

109. *Id.* She rejects this position as unlikely and less than forcible. *See id.*

110. *Id.* at 1169–70. Although each of the criticisms that Professor Mendelson summarily rejects could be explored and supported much more fully, this Article does not attempt to refine those criticisms, focusing instead on different concerns, which Professor Mendelson did not address.

V. CRITIQUING THE MENDELSON AND WATTS PROPOSALS

Although the goal of increasing transparency in the rulemaking process is admirable, the proposals to change the application of the arbitrary-and-capricious standard and to require disclosure of presidential influences in rulemaking could have unintended consequences, such as contributing to further ossification of the rulemaking process, encouraging partisan judicial decision making, and reducing consistency and certainty for regulated communities and the public.¹¹¹ In addition, contrary to the predictions of its supporters, changing the application of the arbitrary-and-capricious standard might have little practical effect on the frequency of judicial approval of agency rulemaking.¹¹² Furthermore, there may be significant problems created in implementing the proposals to change the application of the arbitrary-and-capricious standard and to require disclosure of presidential influences.¹¹³

At a more fundamental level, though, to the extent that the proposals suggest that courts should accord agencies greater deference when the President influences their decisions, the proposals are based on the adoption of the presidential-control model and the rejection of an expertise model.¹¹⁴ Although the presidential-control model is clearly in vogue, strong arguments can be made that the legitimacy of agency action should not be measured by responsiveness to the President's will.¹¹⁵ In addition, contrary to the suggestion of some academics, it is not clear that the Supreme Court is any more willing to accord deference to an agency's reliance on presidential influence after the *FCC v. Fox* decision than the Court was when it decided *State Farm*.¹¹⁶

A. Criticisms of the Presidential-Control Model

Proposals to increase deference for agency decisions that are influenced by the President carry great weight when one begins with the proposition that it is appropriate for the President to play a central role in directing or influencing agencies' decision making. However, such proposals are less persuasive if one rejects that premise. Professor Kevin Stack, one of the strongest critics of the presidential-control model, bases his criticism on statutory, constitutional, and policy grounds.¹¹⁷

First, as a matter of statutory interpretation, Professor Stack challenges Justice Kagan's claim that statutes that delegate discretionary authority to executive-branch agencies implicitly delegate authority to the President to

111. See *infra* Parts V.F–H.

112. See *infra* Part V.E.

113. See *infra* Part V.D; see also *supra* notes 112–17 and accompanying text.

114. See *supra* notes 22–30.

115. See *infra* Part V.A.

116. See *infra* Part V.C.

117. See Stack, *supra* note 2 at 265–67.

direct the agencies' exercise of discretion.¹¹⁸ Professor Stack argues that Congress has enacted statutes that explicitly delegate decision-making authority to the President, as well as statutes that delegate decision-making authority to agencies "with the approval of the President" or "under the direction of the President."¹¹⁹ In addition, within the same statute, Congress occasionally has delegated authority to agencies under the direction of the President in one section, but without limitation in another section.¹²⁰ Professor Stack argues that these choices by Congress are deliberate, just as the choices to delegate decision-making authority to an independent agency as opposed to an executive-branch agency.¹²¹ Thus, Congress is experienced in delegating authority to the President to make decisions or direct decisions.¹²² Consequently, as a matter of statutory interpretation, when Congress delegates decision-making authority to agencies without outlining a role for the President, courts should not interpret the statutes as implicitly authorizing the President to direct or control the agencies' decision making, even though the delegation is to an executive-branch agency.¹²³

As a constitutional matter, Professor Stack argues that the President's constitutional power to remove executive-agency officials does not grant the President the authority to direct executive agencies' decision making.¹²⁴ On the contrary, to the extent that the President can exert influence over agencies by removing officials, it is less important that the President also have the authority to direct the officials' decision making.¹²⁵ Although there would be political ramifications for a President's decision to remove an

118. *Id.* at 274–76.

119. *Id.* at 268, 276 (citing 7 U.S.C. § 610(c) (2000); Act of May 19, 1828, ch. 55 § 10, 4 Stat. 270, 274). Professor Stack refers to these statutes as "mixed agency-President delegations." *Id.* at 268.

120. *Id.* at 285–87 & 285 n.107.

121. *Id.* at 290–91.

122. *Id.*

123. *Id.* at 285–89. By contrast, Professor Kagan argues that Congress intends that the President direct agency decision making in all cases, but that Congress delegates authority to the President explicitly in some cases, rather than to an agency, to give the President latitude to decide which agency should ultimately exercise the authority. *See* Kagan, *supra* note 1, at 2329. Professor Stack argues, though, that Professor Kagan's statutory interpretation argument is fatally flawed. Professor Kagan contends that "[o]nly if Congress sometimes stipulated that a delegation of power to an agency official was subject to the ultimate control of the President—which Congress has not, to my knowledge—would a claim of this kind (that is, a claim relying on the negative implication of other statutes) succeed in defeating my argument." *Id.* at 2329–30. Stack points out that Congress has done precisely that on several occasions, undercutting Professor Kagan's argument. *See* Stack, *supra* note 2, at 287–89.

124. Stack, *supra* note 2, at 294–96.

125. *See id.* at 295 (arguing that the President is able to use his removal power to gain agency support for his policies by firing a disagreeable department head and filling the vacancy with someone more agreeable).

executive-agency official, the President's constitutional power does not carry with it an implied power to act in place of the official in lieu of removing that official.¹²⁶ In addition, Professor Stack argues that Congress assigns decision-making authority in statutes based on an understanding that the President's removal power does not carry with it a directive power.¹²⁷ Apart from the removal power, Professor Stack further asserts that the unitary-executive theory, founded in Article II's delegation of executive power to the President, does not compel the conclusion that congressional delegations to executive agencies implicitly include directive authority for the President.¹²⁸ If that were the case, Stack argues, then statutes that delegate decision-making authority to any official other than the President should be unconstitutional.¹²⁹

Finally, Professor Stack suggests several policy reasons for not interpreting statutes delegating decision-making authority to an executive-branch agency as simultaneously delegating authority to the President to direct the agency's decisions.¹³⁰ Specifically, he argues that delegating directive authority to the President would remove the real decision-making process from the rulemaking procedures required by law because the APA does not govern the President's actions.¹³¹ According to Professor Stack, it does not make sense to infer directive power for the President, thereby removing the decision-making process from the APA's constraints, when the President can influence agencies' decision making through the removal power and other controls that the President has over agencies.¹³² Professor Stack also raises the concern that inferring directive authority without limitation would arm the President with too much power in comparison with Congress.¹³³ He notes that the transaction costs for the President in implementing policy are much lower than the costs of congressional action and that the President has greater incentives to expand his power than members of Congress have to restrict it.¹³⁴ Further, he notes that it is very difficult for Congress to overrule executive actions with which it disagrees.¹³⁵

126. *Id.* at 295. Professor Stack notes, though, that the assignment of the decision-making authority to an agency alone, as opposed to the agency and the President, significantly impacts the bargaining positions of the agency and the President. *Id.* at 295–96. He suggests that the delegation of authority to an agency alone increases the chances that the agency will resist the influence of the President. *Id.*

127. *See id.* at 296 (arguing that Congress delegates authority with the presumption that its choice will affect the scope of the President's influence).

128. *Id.* at 266–67.

129. *Id.*

130. *Id.* at 318–21.

131. *Id.* at 318.

132. *Id.* at 318–19.

133. *Id.* at 319–20.

134. *Id.*

135. *Id.* at 320–21.

Other critics join Professor Stack in assailing the notion that agency decision making should be directed or strongly influenced by the President. Notably, supporters of the expertise model of administrative agencies are quick to point out that agencies rely less on expertise, and their decisions are accordingly less defensible, when they are guided by presidential direction and control instead of expertise.¹³⁶ Other critics of the presidential-control model complain that the model does not account for the importance of congressional influence on agency decision making.¹³⁷ Professor Lisa Schultz Bressman criticizes the presidential-control model on entirely different grounds. Instead of focusing on holding agencies accountable through the President or Congress, Professor Bressman argues that “a focus on the avoidance of arbitrary agency decisionmaking lies at the core of both a theoretical justification of administrative legitimacy and a practical evaluation of administrative law doctrines,” and that the presidential-control model is deficient because it does not include such focus.¹³⁸

Professor Stack, Professor Bressman, and supporters of the expertise model of administrative agencies attack the political-control model from different angles. However, to the extent that they, and other critics of the presidential-control model, discount the role of the President in directing or controlling agency decision making, there is little reason for critics who agree with their views to support increased judicial deference for agency decision making based on presidential influence.

B. Silence and Relevant Factors

Another, but much weaker, criticism occasionally leveled at proposals to increase deference for decisions based on presidential influence is that it is improper for an agency to consider political influences in its decision making, unless the authorizing statute explicitly allows the consideration of those influences.¹³⁹ If the statute is silent, then the agency’s consideration of political or presidential influences is not authorized by the statute, and the agency’s decision is therefore arbitrary and capricious.¹⁴⁰

136. See Freeman & Vermeule, *supra* note 30, at 54–55, 88 (discussing *Massachusetts v. EPA* and *State Farm* as examples of the Supreme Court rejecting political influence); McGarity, *supra* note 30, at 450; see also Watts, *supra* note 5, at 30 (discussing Justice Stephen Breyer’s support for an expertise model of agency decision making).

137. See, e.g., Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965, 968 (1997).

138. Bressman, *supra* note 22, at 463–64. The misplaced focus of the presidential-control model, she argues, “misleads us into thinking that accountability is all we need to assure ourselves that agency action is constitutionally valid.” *Id.*

139. See Watts, *supra* note 5, at 47 (discussing the two ways to interpret congressional silence).

140. See *Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 465 U.S. 29, 43 (1983).

As Professor Richard Pierce recounts, prior to 2007, it appeared that the Supreme Court and lower courts allowed agencies to consider any factors (political or otherwise) that were logically relevant to the question before the agency, even though the statute that authorized the agency to resolve the question did not explicitly list those factors for consideration.¹⁴¹ Agencies could consider factors that were not explicitly listed in the statute, unless Congress clearly limited the agency's discretion to consider those factors.¹⁴² However, Professor Pierce suggests that a pair of Supreme Court decisions in 2007, *Massachusetts v. EPA*¹⁴³ and *National Ass'n of Home Builders v. Defenders of Wildlife*,¹⁴⁴ could be read to preclude the consideration of factors not explicitly enumerated in a statute.¹⁴⁵ Professor Kathryn Watts raises similar concerns about the *Massachusetts v. EPA* decision.¹⁴⁶ However, her concerns are more targeted, as she suggests that the case could be read to limit agencies' authority to consider presidential influences, as statutes rarely explicitly authorize presidential influence.¹⁴⁷

In reviewing *Massachusetts v. EPA*, both Professor Pierce and Professor Watts suggest that the Court's rejection of the Environmental Protection Agency's (EPA) consideration of the President's ability to negotiate international agreements regarding climate change and the President's desire to implement a comprehensive climate-change strategy could be read as signifying that the Court viewed the list of factors in the statute as an exclusive list that the agency could consider in deciding whether to regulate carbon dioxide emissions from mobile sources as an air pollutant under the Clean Air Act.¹⁴⁸ Similarly, in reviewing the *Home Builders* case, Professor Pierce suggests that the Court's determination that the Department of Interior lacked the authority to decline to transfer permitting authority to the State of Arizona under the Clean Water Act, even if the Department concluded that the transfer violated the Endangered Species Act, could also be read as limiting the

141. See Richard J. Pierce, Jr., *What Factors Can An Agency Consider in Making a Decisions?*, 2009 MICH. ST. L. REV. 67, 67–68.

142. *Id.* at 73.

143. 549 U.S. 497 (2007).

144. 551 U.S. 644 (2007).

145. Pierce, *supra* note 141, at 81–82.

146. See Watts, *supra* note 5, at 49–50.

147. *Id.*

148. See Pierce, *supra* note 141, at 78–82; Watts, *supra* note 5, at 48–49. Regarding the majority's decision, Professor Pierce was troubled because

Congress was silent with respect to the factors the EPA can consider in deciding whether to defer a judgment that greenhouse gas emissions from cars are a pollutant, and all of the factors that the EPA considered are logically relevant to that decision.

Yet, the majority interpreted that congressional silence to prohibit the EPA from considering any of those factors.

Pierce, *supra* note 141, at 78–79.

agency's authority to consider factors not explicitly listed in the authorizing statute.¹⁴⁹

Ultimately, Professor Pierce concludes that if the *Massachusetts v. EPA* and *Home Builders* decisions limit agencies' authority to consider factors not explicitly listed in statutes, they should be read narrowly to only apply to cases in which the list of factors in the statute is preceded by mandatory language, like "shall," as the statutes did in *Massachusetts v. EPA* and *Home Builders*.¹⁵⁰ More cynically, Professor Pierce suggests that it is difficult to synthesize a consistent rule from the two cases because the Court's reasoning, like the agencies', may have been motivated by political factors.¹⁵¹

However, it is not clear that the *Massachusetts v. EPA* or *Home Builders* decisions departed in any meaningful way from the precedent identified by Professor Pierce. Arguably, the Court did not prohibit an agency from considering factors other than those identified in the statute in either case.¹⁵² Instead, the Court required the agency to justify its decision based on the factors specifically listed in the statute.¹⁵³ Presumably, an agency can consider factors not explicitly listed in the statute to the extent that they are relevant and logically related to the factors listed in the statute.¹⁵⁴

For instance, in *Massachusetts v. EPA*, the Court reviewed a provision of the Clean Air Act that requires the EPA to regulate air pollutants from mobile sources in a particular manner if the agency, in its judgment, concludes that the air pollutant "cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare."¹⁵⁵ When the Court struck down the EPA's decision to not make an endangerment finding for carbon dioxide due to certain political concerns,¹⁵⁶ the Court was not suggesting that

149. *Id.* at 80–82.

150. *See id.* at 82. Professor Pierce suggests that Congress's choice to use mandatory language (e.g., shall), accompanied by a list of factors, could "properly" be read as "an implicit congressional prohibition on consideration of any factor other than, or in addition to, the factors set forth in the statutes." *Id.* at 82.

151. *Id.* at 86–87. Professor Pierce notes that the *Massachusetts v. EPA* and *Home Builders* decisions should not be read as creating a new rule of statutory construction "that requires a court to interpret congressional silence as a prohibition on agency consideration of a factor that is logically relevant to a decision" because four of the Justices who voted in the majority in the former case dissented in the latter. *Id.* This would mean "that nine Justices have adopted the principle that congressional silence with respect to a logically relevant decisional factor must be interpreted as a prohibition on agency consideration of that factor, while eight Justices have adopted the opposite principle." *Id.* As a result, Professor Pierce suggests that the Justices' voting patterns in the cases might have been influenced by political and ideological preferences, rather than canons of statutory construction. *Id.* at 86–87.

152. *See infra* notes 157, 164–65 and accompanying text.

153. *See infra* notes 158–59, 165 and accompanying text.

154. *See infra* notes 157–58, 164–65, 173 and accompanying text.

155. *Massachusetts v. EPA*, 549 U.S. 497, 532–33 (2007) (quoting 42 U.S.C. § 7521(a)(1) (2006)) (alteration in the original).

156. *See supra* text accompanying note 148.

the agency could not consider those factors because they were not listed in the statute.¹⁵⁷ Instead, the Court rejected those factors because they were not relevant to the ultimate decision whether carbon dioxide causes or contributes to air pollution, which may reasonably be anticipated to endanger public health or welfare or whether the agency should make such an “endangerment” finding.¹⁵⁸ Accordingly, it was not appropriate for the agency to base its decision on factors other than those identified in the statute.¹⁵⁹

The *Home Builders* decision is more complicated because the Court viewed the case as involving a conflict of statutes, rather than a case addressing whether an agency could consider factors that are not explicitly listed in a statute when making a decision under that statute.¹⁶⁰ The case involved a provision of the Clean Water Act requiring that the EPA approve the transfer of water-pollution permitting authority to states if the nine requirements listed in the statute were met.¹⁶¹ The respondents, Defenders of Wildlife, argued that the EPA could not approve the transfer, however, if the transfer would “jeopardize” an endangered species, thereby violating the Endangered Species Act.¹⁶² As the Supreme Court noted, Defenders of Wildlife conceded that the nine transfer requirements in the Clean Water Act were met.¹⁶³ Accordingly, the Court was not asked to determine whether the Department of Interior could consider a factor that was not listed in the statute as a permissible basis for the agency’s decision making. Instead, the Court was asked to decide the more limited question of whether the agency could consider an unlisted factor when all of the listed factors had been satisfied.¹⁶⁴ Thus, the *Home Builders* decision should be viewed as a narrow statutory-interpretation decision, rather than a precedent-setting decision resolving the scope of an agency’s authority to consider factors in the face of congressional silence.¹⁶⁵

157. See *Massachusetts v. EPA*, 549 U.S. at 533–34 (striking down the EPA’s decision because it did not offer a reasoned analysis supporting its decision).

158. *Id.* at 533–34. Thus, its decision was arbitrary or capricious. *Id.*

159. *Id.* at 532–33. Because the statute did not set forth any standards for the EPA to use in deciding to make an endangerment finding, the dissent argued that it was wrong for the Court to find that the factors justifying the agency’s decision were not relevant to the standards for decision in the statute. *Id.* at 552 (Scalia, J., dissenting). The dissent argued that the agency should be allowed to consider factors that “agencies regularly take into account” in the absence of congressionally set standards, such as presidential priorities. *Id.*

160. *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 661–62 (2007).

161. See 33 U.S.C. § 1342(b) (2006); *Home Builders*, 551 U.S. at 649.

162. *Home Builders*, 551 U.S. at 669–71; see also 16 U.S.C. § 1536(a)(2) (2006).

163. *Home Builders*, 551 U.S. at 662.

164. See *id.* at 661–62.

165. On the statutory-interpretation question, the Court noted that the repeal of a statute by implication is disfavored and that specific statutes control over more general statutes, implying that the Endangered Species Act should not be read as modifying the mandatory requirements of section 402(b) of the Clean Water Act. *Id.* at 662–64. The Departments of Interior and Commerce, which were charged with implementing the Endangered Species Act, had promulgated regulations that resolved the conflict between section 7(a)(2) of the Endangered

If there were any question about whether the *Massachusetts v. EPA* and *Home Builders* decisions significantly limited agencies' authority to consider factors not explicitly listed in a statute, it was resolved, as Professor Pierce ultimately notes,¹⁶⁶ in the Supreme Court's decision in *Entergy Corp. v. Riverkeeper*.¹⁶⁷ In that case, a majority of the Court determined that the EPA could consider the cost of technological alternatives in setting a pollution-control standard under the Clean Water Act, based on the language requiring the "best technology available for minimizing adverse environmental impact,"¹⁶⁸ even though the statute did not explicitly authorize the consideration of costs.¹⁶⁹ The Court stressed that this language was broad enough to allow for the consideration of costs and upheld the agency's decision, regardless of the existence of several other provisions in the Clean Water Act that explicitly authorized consideration of costs,¹⁷⁰ from which the Court could have inferred that Congress's failure to explicitly authorize consideration of costs in the disputed section indicated Congress's intent to foreclose the consideration of costs.¹⁷¹

Directly addressing the argument that the statute should be read as prohibiting any consideration of cost, because Congress did not explicitly identify cost as a factor, the majority wrote:

The inference that respondents and the dissent would draw from the silence is, in any event, implausible, as § 1326(b) is silent not only with respect to cost-benefit analysis but with respect to all potentially relevant factors. If silence here implies prohibition, then the EPA could not consider *any* factors in implementing § 1326(b)—an obvious logical impossibility. It is eminently reasonable to conclude that § 1326(b)'s silence is meant to convey nothing more than a refusal to tie the agency's hands as to whether cost-benefit analysis should be used, and if so to what degree.¹⁷²

Species Act and other laws by providing that the requirements of section 7(a)(2) applied to "discretionary" agency actions, but not to mandatory actions, like EPA's duties under section 402(b) of the Clean Water Act. *Id.* at 665. The Court ultimately concluded, under the *Chevron* analysis, that the agencies' resolution of the conflicting statutory directives was reasonable. *Id.* at 666–67.

166. See Pierce, *supra* note 141, at 88.

167. 129 S. Ct. 1498 (2009).

168. 33 U.S.C. § 1326(b) (2006).

169. *Entergy*, 129 S. Ct. at 1506–08.

170. 33 U.S.C. §§ 1314(b)(1)–(4), 1316(b)(1)(B).

171. *Entergy*, 129 S. Ct. at 1507–08.

172. *Id.* at 1508. The Court did not believe that its decision conflicted with its prior decision in *Whitman v. American Trucking Assn's, Inc.*, 531 U.S. 457 (2001). *Id.* The majority wrote that "*American Trucking* thus stands for the rather unremarkable proposition that sometimes statutory silence, when viewed in context, is best interpreted as limiting agency discretion. For the reasons discussed earlier, § 1326(b)'s silence cannot bear that interpretation." *Id.* The Court also

After *Entergy*, it seems clear, once again, that agencies should be able to consider factors that are not explicitly listed in statutes, as long as they are relevant to the factors and standards set forth in the statute as the basis for agency decision making.¹⁷³ Similarly, agencies should be able to consider political influences and factors as long as they are relevant to the statutory factors and standards. It is also clear, though, that after *Massachusetts v. EPA*, agencies cannot rely on political influences and factors to justify a decision when those considerations disregard the factors or standards set forth in a statute.¹⁷⁴

C. Misreading *FCC v. Fox*

Though the *Massachusetts v. EPA* and *Home Builders* decisions should not be read as *limiting* the authority of agencies to consider a variety of factors in decision making when Congress is silent, neither those cases, nor *FCC v. Fox*, should be read to suggest that the Supreme Court is *broadening* its acceptance of agencies' consideration of political factors. To the extent that the Supreme Court remains skeptical of agencies' consideration of political factors, it is unlikely that courts will embrace the proposals to modify the application of the arbitrary-and-capricious standard to increase deference for agencies' decision making based on political factors.¹⁷⁵

As noted, Professors Watts and Mendelson both suggest that the *Fox* decision could signal the Court's shift toward greater openness regarding the consideration of political factors.¹⁷⁶ It is also true that a *plurality* of the *Fox* Court approved the FCC's consideration of political factors when the agency changed its policy regarding fleeting expletives.¹⁷⁷ Upholding the agency's new policy, the plurality wrote that "[i]f the F.C.C. is indeed an agent of

distinguished its prior decision in *American Textile Manufacturers Institute, Inc. v. Donovan*, 452 U.S. 490 (1981). Describing that case, the Court wrote,

In *American Textile*, the Court relied in part on a statute's failure to mention cost-benefit analysis in holding that the relevant agency was not required to engage in cost-benefit analysis in setting certain health and safety standards. But under *Chevron*, that an agency is not *required* to do so does not mean that an agency is not *permitted* to do so.

Id. (citations omitted).

173. Even the dissenting Justices in *Entergy* conceded that a statute's silence should not always be read as prohibiting consideration of factors that mentioned in the statute. *See id.* at 1517 (Stevens, J., dissenting) ("When interpreting statutory silence in the past, we have sought guidance from a statute's other provisions."). Thus, for the dissent, context was key.

174. *See supra* notes 155–58 and accompanying text.

175. *See supra* Part III.

176. *See supra* notes 75–80 and accompanying text.

177. *See FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1816 & n.4 (2009) (plurality opinion).

Congress, it would seem an adequate explanation of its change in position that Congress made clear its wishes for stricter enforcement.”¹⁷⁸

However, five Justices appeared to oppose the agency’s decision to justify a change in position based on political factors. Justice Breyer, for example, wrote “[t]hat law grants those in charge of independent agencies broad authority to determine relevant policy. But it does not permit them to make policy choices for purely political reasons nor to rest them primarily upon unexplained policy preferences.”¹⁷⁹ In a separate dissent, Justice Stevens argued that the FCC’s regulations “are not subject to change at the President’s will.”¹⁸⁰ Most importantly, although Justice Kennedy joined with most of the plurality opinion, he refused to join with the portion of the opinion suggesting that the FCC could base its change in position on political influence.¹⁸¹ Instead, he wrote a concurring opinion that seemingly affirmed *State Farm*’s requirement that agencies must justify their changes in policy with technical reasons based upon the requirements laid out in the statute, rather than political influences.¹⁸²

Even if Justice Kennedy had joined with the plurality in its conditional support of the FCC’s reliance on political factors to support its decision making, the Court’s opinion would not necessarily support the position, advanced by Professors Mendelson and Watts, that executive agencies can justify their decision making by relying, in part, on presidential influence.¹⁸³ To the extent that the plurality in *Fox* suggested that it was appropriate for the FCC to rely on congressional influence in changing its policy regarding fleeting expletives, it did so based on the assumption that the FCC was an “agent of Congress,” rather than an executive agency, which was an assumption that the plurality viewed skeptically.¹⁸⁴ Thus, the plurality did not express any view regarding whether it is appropriate for executive agencies to rely on presidential influence to support their decision making.

Instead of *increasing* authority for agencies to consider political factors in decision making, it is arguable that, if agencies can consider political influences during decision making at all, the *Fox* decision could make it more

178. *Id.* at 1816. The plurality suggests that Congress uses its oversight and appropriations powers to control executive agencies. *Id.* at n.5.

179. *Id.* at 1829 (Breyer, J., dissenting). Justice Breyer further wrote, “[w]here 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.

180. *Id.* at 1825 (Stevens, J., dissenting).

181. *Id.* at 1822 (Kennedy, J., concurring).

182. *See id.* at 1823–24. He concurred, rather than dissented, because he determined that the FCC adequately explained its change in position on grounds other than political considerations. *Id.* at 1824.

183. *See infra* Parts III–IV.

184. *Fox*, 129 S. Ct. at 1816 (plurality opinion). The plurality’s skepticism toward viewing the FCC as an “agent of Congress” was based on “the unconstitutionality of a scheme giving the power to enforce laws to agents of Congress.” *Id.*

difficult for agencies to rely on political influences to justify a *change* in policy than to rely on political influences when initially establishing a policy. The major focus of the *Fox* case, after all, was on whether agencies are held to a different standard when changing a policy than when initially adopting a policy, not on whether it was appropriate for agencies to consider political influences to justify the change.¹⁸⁵ On that primary question, Justice Breyer, in his dissenting opinion, argued that when an agency *changes* a policy that it previously adopted, it has an obligation to “focus on the reasons that led the agency to adopt the initial policy” and explain why it is now interpreting the law differently, without simply relying on political influences.¹⁸⁶

Justice Stevens’s dissent went further. He argued that, in the interest of regulatory stability, there should be a strong presumption in favor of an agency’s initial policy interpretations and that an agency must “justify why its prior policy is no longer sound before allowing it to change course.”¹⁸⁷ On this question, Justice Kennedy, in his concurrence, wrote:

This separate writing is to underscore certain background principles for the conclusion that an agency’s decision to change course may be arbitrary and capricious if the agency sets a new course that reverses an earlier determination but does not provide a reasoned explanation for doing so. In these circumstances, I agree with the dissenting opinion of Justice Breyer that the agency must explain why “it now reject[s] the considerations that led it to adopt that initial policy.” . . . The question whether a change in policy requires an agency to provide a more-reasoned explanation than when the original policy was first announced is not susceptible, in my view, to an answer that applies in all cases. . . . The question in each case is whether the agency’s reason for the change, when viewed in light of the data available to it, and when informed by the experience and expertise of the agency, suffice to demonstrate that the new policy rests upon principles that are rational, neutral, and in accord with the agency’s proper understanding of its authority.¹⁸⁸

185. *See id.* at 1810. A five member majority of the Court determined that there was “no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review.” *Id.*

186. *Id.* at 1829–32 (Breyer, J., dissenting). Justice Breyer would require “the agency to answer the question, ‘Why did you change?’ And a rational answer to this question typically requires a more complete explanation than would prove satisfactory were change itself not an issue.” *Id.* at 1830. He stressed that he was not requiring a heightened standard of review, but rather “application of the *same standard* of review to different circumstances, namely circumstances characterized by the fact that the change is at issue.” *Id.* at 1831.

187. *Id.* at 1826 (Stevens, J., dissenting).

188. *Id.* at 1822 (Kennedy, J., concurring) (citation omitted). Justice Kennedy’s opinion, therefore, leaves open the possibility that in some cases, it may be more difficult for an agency to justify a change in a policy than the initial adoption of that policy.

Five Justices, therefore, wrote or joined in opinions that could, as a practical matter, make it more difficult for agencies to change policies, for political reasons or otherwise, than to adopt policies initially.

Thus, it seems dubious to read *Fox* as inaugurating increased Supreme Court approval for consideration of political factors by agencies in decision making. Although *Fox* might not signal a change in the Court's position, it remains to be seen whether Justice Kagan's ascension to the Court will spark that change. As previously noted, Justice Kagan has advocated greater judicial deference for agency decisions based on presidential influence.¹⁸⁹ She is replacing Justice Stevens, who was one of the dissenting Justices in *Fox*, so it is possible that, in the right case, she could provide the fifth vote in favor of expanding agencies' consideration of political, or at least presidential, influences.

D. More Deference? How Much More?

Putting aside concerns regarding challenges to the political-control model of administrative law and skepticism regarding whether the Supreme Court favors increased consideration of political influences, there are several other concerns that need to be addressed regarding the proposals to change the application of the arbitrary-and-capricious standard and to require disclosure of presidential influences. Perhaps the most difficult issues that would arise in implementing Professor Watts's proposal to accord greater deference to politically motivated decisions by agencies involve determining which political factors an agency can consider, and how to weigh those factors against other criteria that an agency is required to consider by law.

Professor Watts proposes that agencies should be allowed to justify their decisions based on political influences that seek to further policy goals or public values, but not based on political influences that seek to implement raw partisan politics unconnected to the statutory scheme being implemented.¹⁹⁰ Although it may be easy to discern the legitimacy of political influences at their extremes, there is a vast grey area in between consisting of influences that will not fall easily into either of her categories. It also may be difficult for courts to enforce her proposal without clear guidance on where to draw the line separating appropriate political influences from inappropriate ones. More importantly, Professor Watts acknowledges that her proposal would provide agencies with the incentive to identify "appropriate" political influences for their decisions, while failing to disclose any inappropriate political influences.¹⁹¹

Her proposal is also difficult to implement because she does not clarify how much weight a court should give the political influences that the agency considers, other than to suggest that the influences are additional justifications

189. *See supra* note 58.

190. *See supra* note 69.

191. *See Watts, supra* note 5, at 56–60, 76.

for an agency's decision.¹⁹² Presumably, they would not take precedence over factors that an agency is required to consider by statute. If political influences do not take precedence over those factors, though, the agency has little incentive to disclose the influences unless they are consistent with the factors that the agency is required to consider.¹⁹³

Perhaps the influences might be viewed as a "thumb on the scales" or a "tie breaker" in favor of a position supported by the President or Congress, if all other factors are equal and the agency is choosing between two approaches that are each consistent with the statutory factors,¹⁹⁴ which is unlikely to be a frequent set of circumstances. If, on the other hand, the influences are simply one more factor to consider and have no greater weight than any other factor, it is not clear that consideration of political influences would result in a significant increase in the amount of deference that courts accord to agencies under the arbitrary-and-capricious standard.¹⁹⁵ Professor Watts's proposal is also difficult to implement because she suggests that political influences can help justify an agency's decision, but she does not provide any guidance regarding how a court should weigh competing political influences, such as when the President and Congress disagree, or how to clearly identify what constitutes political influence from Congress.¹⁹⁶

Professor Mendelson recognized these implementation difficulties in Professor Watts's proposal, which is why she restricted her proposal to sweeping presidential influences, rather than "political influences," limited only by the authorizing statute and hard science.¹⁹⁷ Although her proposal also

192. See *id.* at 67–72 (arguing that political influence should play a "role" in judicial deliberations).

193. See *supra* Part V.B (discussing judicial treatment requiring that outside considerations be relevant to the statutory factors).

194. See Watts, *supra* note 5, at 82. Perhaps that is what Professor Watts is suggesting when she argues that when an agency chooses between "multiple factually supportable and statutorily permissible options" based on political influence, a court would simply need to "assess as a factual matter whether the agency was correct to claim that rational and legitimate political influences supported the selection of one factually and legally permissible rule over another." See *id.* However, her proposal might call for even greater weight for political influences. See *id.* at 83.

195. See Mendelson, *supra* note 3, at 1173 (stating that presidential influence is just one factor that courts would review, and it would not preclude effective review); see also Part V.E (discussing how consideration of political influences would have little practical effect on deference).

196. See *id.* at 63–65 (discussing potential conflicting influences between Congress, congressional committees, congressmen, and the President).

197. See Mendelson, *supra* note 3, at 1172–77. However, her proposal still suffers, to some extent, from problems similar to Professor Watts's proposal, due to the arguments she makes in support of her position. See *supra* notes 98, 102 (discussing her arguments). When Mendelson identifies some influences as "out of bounds," her proposal requires courts to draw lines without a significant bright line, in a situation in which agencies have an incentive to "hide the ball" regarding their true justifications, just as with Professor Watts's proposal. See *supra* text accompanying note 195.

encourages agencies to frame the rationales for their decisions in terms of the statutory factors and to disclose presidential influence selectively (that is, only if it supports a decision consistent with the statutory factors), the heart of her proposal is a mandatory requirement for disclosure of presidential influences, intended to counteract selective reporting by agencies.¹⁹⁸ Nevertheless, she acknowledges that agencies might find ways to avoid the mandatory disclosure requirement for influences that are not consistent with the statutory requirements.¹⁹⁹ Ultimately, both Professor Mendelson's proposal and Professor Watts's proposals could be criticized as leaving courts with the difficult task of drawing lines without firm guidance.

E. More Deference? Maybe Not

Even if courts are able to distinguish between appropriate and inappropriate influences on agency decision making and are thereby able to weigh those influences, it is not clear that considering those influences under the arbitrary-and-capricious standard will result in greater deference for agencies. Without increased deference, there is little added incentive for agencies to disclose the political or presidential influences on their decision making.²⁰⁰

As previously noted, Professor Watts, and to some degree Professor Mendelson, argue that courts should be allowed to consider political influences, including presidential influences, as support for an agency's decision when reviewing the decision under the arbitrary-and-capricious standard.²⁰¹ Both assume that courts will defer more frequently to agencies when applying the modified standard.²⁰² However, Professor David Zaring argues that, in practice, there is very little variance in the deference that courts accord to agencies, regardless of the standard the courts purport to apply when reviewing agencies' decisions.²⁰³

Professor Zaring acknowledges that courts claim to be applying six different standards when reviewing agency decisions, based on whether the court is reviewing a question of fact, law, or arbitrariness, whether the agency procedures were formal or informal, and whether judicial deference is required, as with the *Chevron* test.²⁰⁴ However, by comparing empirical studies documenting the rate at which agency decisions were upheld under each of the different standards, Professor Zaring concludes that courts reach similar results under each of the standards, reversing agencies slightly less than one-third of

198. See Mendelson, *supra* note 3, at 1164–65.

199. *Id.* at 1168.

200. See *supra* notes 87–88 and accompanying text (describing the first-mover dilemma).

201. See *supra* notes 62–66, 98 and accompanying text.

202. See *supra* note 201.

203. David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 137 (2010).

204. *Id.* at 136–37, 143. Professor Zaring also notes that courts *claim* that the choice of the standard to be applied can affect, in a practical way, the outcome of the case. *Id.* at 137.

the time.²⁰⁵ Ultimately, Professor Zaring posits that courts use a reasonableness test in applying each of the standards, notwithstanding the label given to the standard employed.²⁰⁶ Consequently, he advocates a single “reasonableness” standard, which would apply to judicial review of agency action regardless of whether the case involves questions of law or fact, involves formal or informal procedures, focuses on whether the agency acted arbitrarily and capriciously, or involves the *Chevron* analysis.²⁰⁷ This “reasonableness” test would replace the “hard look,” “substantial evidence,” “arbitrary and capricious,” *Chevron*, *Skidmore*, and *de novo* standards currently used by courts to review agency actions.²⁰⁸

If Professor Zaring is correct, then even if the arbitrary-and-capricious standard is modified to include presidential or political influences as part of its analysis, courts will be unlikely to affirm agencies’ decisions at a greater rate than under the unmodified arbitrary-and-capricious standard. The results will be the same regardless of how the standard is framed. If the decisions of agencies are not affirmed more frequently under a modified arbitrary-and-capricious standard, agencies will not have an incentive to disclose the presidential or political influences on their decision making.

However, reasonable minds could differ regarding the conclusions that Professor Zaring draws from his comparison of the empirical studies examining the rates at which agency decisions were affirmed under the various standards.²⁰⁹ Although he concludes that courts affirm agency decisions at roughly the same rate regardless of which standard is being used, the data that he reviews are a bit more equivocal. For instance, the actual rates at which courts affirmed agency decisions in the twelve studies that he reviewed ranged

205. *Id.* at 137, 169–78. Based on twelve empirical studies and his own study, Professor Zaring concludes that judges defer to agency action between sixty to seventy percent of the time, irrespective of the type of review employed by the court. *Id.* at 169. He further concludes, from the data, that “unless there is some reason to believe that these very similar validation rates mask very different sorts of inquiries, what courts are really doing is the same sort of analysis regardless of the standard of review.” *Id.* (footnote omitted).

206. *Id.* at 165–68. Given that the six standards are actually one, Professor Zaring counsels that “the rules governing judicial review have no more substance at the core than a seedless grape.” *Id.* at 138 (quoting Ernest Gellhorn & Glen O. Robinson, *Perspectives on Administrative Law*, 75 COLUM. L. REV. 771, 780 (1975)).

207. Zaring, *supra* note 203, at 138–39. Zaring argues that the proliferation of a variety of standards requires courts to expend energy categorizing agency decisions as specific types to determine the appropriate standard of review, and distracts courts from the underlying “reasonableness” review that they ultimately carry out under each of the standards. *See id.* at 137–38 (describing the confusion judges encounter when attempting to decide which standard applies in a particular case).

208. *Id.* at 136–37.

209. *See generally id.* at 169–76 (discussing prior scholarship on the subject).

from fifty-four percent to seventy-seven percent.²¹⁰ Although the average rate of affirmance under all of the studies was sixty-nine percent, the rates in the three studies that examined the largest number of decisions were fifty-eight percent, seventy-six percent, and seventy-seven percent.²¹¹ Contrary to Professor Zaring's conclusions, the rate at which agencies' decisions are affirmed might actually vary depending on the standard that is applied. If the standards are applied differently in practice, after all, then Professors Watts and Mendelson may be correct to presume that changing the manner in which the arbitrary-and-capricious standard is applied might actually result in greater deference for agencies' decisions, which would prompt greater disclosure of presidential and political influences.²¹²

F. Ossification

Regardless of whether Professor Zaring's cynicism is justified or not, the proposals of Professor Watts and Professor Mendelson may create other problems. For instance, Professor Watts suggests that her proposal might *decrease* the ossification of agency rulemaking by encouraging agencies to make rules because they would be accorded greater deference.²¹³ However, her proposal and Professor Mendelson's proposal could have precisely the opposite effect. To the extent that additional mandatory procedures for disclosure of presidential influence on agencies would be required under Professor Mendelson's proposal,²¹⁴ and to the extent that agencies would be required to disclose the nature and content of political influences to earn deference under Professor Watts's proposal,²¹⁵ both proposals could *increase*, rather than *decrease*, the ossification of agency rulemaking by increasing the procedural requirements necessary.

For more than a decade, academics and policymakers have suggested that agencies are beginning to avoid notice-and-comment rulemaking in response to the increased likelihood of consequent litigation challenging the new rules,²¹⁶ as well as the ossification of the process resulting from the burdensome procedural requirements imposed by courts, Congress, and the executive

210. *Id.* at 171 tbl.1. Professor Zaring dismisses the study that found an affirmance rate of fifty-four percent as an outlier because the study focused on cases decided in the D.C. Circuit at a time "when liberal judges roared." *Id.* at 170.

211. *Id.* at 171 tbl.1.

212. *See supra* notes 201–02 and accompanying text.

213. *See* Watts, *supra* note 5, at 41–42.

214. *See supra* notes 96–97 and accompanying text.

215. *See supra* notes 74–75 and accompanying text.

216. *See* Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1296 (1997); PHILIP K. HOWARD: THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA 87 (1994); JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 284 (1989).

branch.²¹⁷ The rulemaking process, from the publication of the notice of proposed rulemaking until the publication of a final rule, generally takes three to five years.²¹⁸

Many factors are blamed for the “ossification” of notice-and-comment rulemaking, including the judicial interpretation of the rulemaking provisions of the Administrative Procedure Act,²¹⁹ the procedural requirements imposed by the Regulatory Flexibility Act,²²⁰ the Small Business Regulatory Enforcement Fairness Act,²²¹ and similar laws,²²² as well as the review procedures imposed by the executive branch through Executive Order 12,866²²³ and a variety of other executive orders addressing takings,²²⁴ federalism,²²⁵ and children’s health,²²⁶ among other topics.²²⁷

217. Stephen M. Johnson, *Ossification’s Demise: An Empirical Analysis of EPA Rulemaking from 2001-2005*, 38 ENVTL. L. 767, 768 (2008) [hereinafter, Johnson, *Ossification’s Demise*]; see JERRY L. MASHAW & DAVID HARFST, *THE STRUGGLE FOR AUTO SAFETY* 9–25 (1990); Stephen M. Johnson, *Good Guidance, Good Grief*, 72 MO. L. REV. 695, 695–97 (2007); Stephen M. Johnson, *The Internet Changes Everything: Revolutionizing Public Participation and Access to Government Information Through the Internet*, 50 ADMIN. L. REV. 277, 278 (1998); Stephen M. Johnson, *Ruminations on Dissemination: Limits on Administrative and Judicial Review under the Information Quality Act*, 55 CATH. U. L. REV. 59, 159–67 (2005); Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525, 541–49 (1997) [hereinafter McGarity, *Response*]; Thomas O. McGarity, *Some Thoughts on ‘Deossifying’ the Rulemaking Process*, 41 DUKE L.J. 1385 *passim* (1992) [hereinafter McGarity, *Some Thoughts*]; Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 60–62 (1995) [hereinafter Pierce, *Seven Ways*]; Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483 *passim* (1997).

218. McGarity, *Some Thoughts*, *supra* note 217, at 1387–90 & tbl.1; see also Cornelius M. Kerwin & Scott Furlong, *Time and Rulemaking: An Empirical Test of Theory*, 2 J. PUB. ADMIN. RES. & THEORY 113, 124 (1992) (“For almost all program offices, the amount of time from proposal to final is just about the same . . .”). *But see* Johnson, *Ossification’s Demise*, *supra* note 217, at 784 (finding that rules finalized by EPA between 2001 and 2005 were finalized, on average, within one and a half to two years after being published as proposed rules).

219. See Pierce, *Seven Ways*, *supra* note 217, at 65–66.

220. 5 U.S.C. §§ 601–612 (2006).

221. Small Business Regulatory Fairness Act of 1996, Pub. L. No. 104-121, title II, 110 Stat 847, 857–74 (1996) (codified in scattered sections of Titles 5 and 15).

222. See Johnson, *Ossification’s Demise*, *supra* note 217, at 774–75 (discussing the Information Quality Act, the Paperwork Reduction Act, the Unfunded Mandates Reform Act, and the Congressional Review Act).

223. See Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *reprinted as amended in* 5 U.S.C. § 601 (2006) (requiring OMB review).

224. *E.g.*, Exec. Order No. 12,630, 3 C.F.R. 554 (1988), *reprinted in* 5 U.S.C. § 601 (requiring agencies to evaluate the effect that their actions would have on individuals’ Fifth Amendment rights).

225. *E.g.*, Exec. Order No. 13,132, 3 C.F.R. 206 (1999), *reprinted in* 5 U.S.C. § 601 (requiring agencies to evaluate the effect that their actions would have on principles of federalism).

In light of the “ossification” of rulemaking, coupled with the frequency of challenges to rules, academics have noted that agencies are increasingly reluctant to change existing rules or to issue new rules.²²⁸ Instead, agencies are relying more frequently on adjudication and informal tools, such as guidance documents, policy statements, and interpretive rules to interpret laws.²²⁹ When agencies rely on these informal tools, it reduces opportunities for the public to participate in the development of policies and makes it more difficult for the regulated community to locate the law, to comply with the law, or to challenge the policies adopted by agencies.²³⁰

Professor Mendelson’s proposal aspires to increase the transparency of notice-and-comment rulemaking by requiring agencies to prepare a docket for each rule that includes all written communications from executive-branch officials; by requiring agencies to prepare written summaries of oral communications between executive-branch officials, other agencies, and the agency regarding the rulemaking; and describing the extent to which those communications influenced the final rule.²³¹ Compliance with these new procedures would likely slow the rulemaking process simply because these procedures require more record keeping and disclosure. More significantly, to the extent that failure to comply with these new procedures, or to adequately explain the basis for a rule in light of the additional information that must be disclosed, creates additional avenues to challenge an agency’s decision, litigation-averse agencies would have additional incentives to avoid notice-and-comment rulemaking. Thus, Professor Mendelson’s proposal has the potential to exacerbate the current “ossification” trend.

Although Professor Watts’s proposal does not *require* agencies to disclose presidential or political influence, it does *encourage* disclosure to receive greater deference for the decisions made in reliance on that influence.²³² As with Professor Mendelson’s proposal, disclosure of additional information would, by necessity, require additional record keeping and would likely slow the rulemaking process. If courts *were* to accord more deference to an agency’s decision because the agency disclosed information about political influences, as Watts and Mendelson propose,²³³ both proposals might reduce the incentive of agencies to avoid rulemaking due to fear of litigation. If,

226. *E.g.*, Exec. Order No. 13,045, 3 C.F.R. 198 (1997), *reprinted in* 42 U.S.C. § 4321 note (2006) (requiring agencies to evaluate the environmental and health risks that a rule may impose on children).

227. Johnson, *Ossification’s Demise*, *supra* note 217, at 777 n.77.

228. McGarity, *Some Thoughts*, *supra* note 217, at 1390–92.

229. Johnson, *Ossification’s Demise*, *supra* note 217, at 778.

230. *Id.* at 778–79.

231. *See supra* notes 96–97 and accompanying text.

232. *See Watts*, *supra* note 5, at 41–42 (arguing that increased deference based upon political influence would decrease ossification).

233. Mendelson, *supra* note 3, at 1171–72; Watts, *supra* note 5, at 41–42.

however, Professor Zaring is correct in his assertion that courts are likely to affirm or reverse agency decisions at roughly the same rate regardless of the standard of review,²³⁴ then Professor Watts's proposal could slow the rulemaking process down without providing agencies any additional benefit.

Ultimately, both proposals could hamper the rulemaking process by requiring additional procedures without *decreasing*, and possibly *increasing*, the potential for litigation. To that extent, the proposals seem to provide further incentives for agencies to avoid notice-and-comment rulemaking. Although the goal of the proposals is increased disclosure of the reasons for policies and rules adopted by agencies, the outcome could be decreased access to the policies and laws themselves.

G. Partisan Judging

Although increasing the transparency of agencies' decision making by requiring disclosure of the presidential and political influences has many benefits, it may have one unfortunate and unintended negative consequence as well. Several recent studies have suggested that judges often decide cases based on partisan political preferences.²³⁵ To the extent that the reform proposals of Professors Watts and Mendelson increase the exposure of the political influence behind an agency's decision, they also increase the opportunity for judges to determine whether to uphold the agency's decision based on their own political preferences.

Professors Thomas Miles and Cass Sunstein, among others, suggest that judges, including Supreme Court Justices, frequently appear to be motivated by political ideology.²³⁶ Professors Miles and Sunstein reviewed decisions of the Supreme Court and federal appellate judges in cases applying the *Chevron* standard to determine whether application of the standard reduced judicial policymaking.²³⁷ In theory, the standard should create a uniform rate at which judges approve agency decisions that do not correlate to the ideology of the judges.²³⁸

234. Zaring, *supra* note 203, at 169–70.

235. See Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1, 59 (1998); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 825–26 (2006); see also Scott Keller, *Depoliticizing Judicial Review of Agency Rulemaking*, 84 WASH. L. REV. 419, 422 (2009) (stating that the current state of judicial review of agency rulemaking gives judges too much freedom to decide according to partisan preferences).

236. See Miles & Sunstein, *supra* note 235, at 825–26.

237. *Id.* at 825.

238. *Id.* at 827–28. Under the two-part *Chevron* test, if a statute is ambiguous, it is the agency, rather than the court, that is charged with making policy, and the court should defer to the agency's interpretation as long as it is reasonable. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1983).

However, in reviewing the opinions of Supreme Court Justices, Miles and Sunstein determined that the validation rates for Justices varied by almost thirty percent among the Justices.²³⁹ More important than the simple variation in approval rates, though, Miles and Sunstein concluded that political ideology played an important role in the Justices' decision making: (1) "liberal" Justices voted to validate agency decisions more often than "conservative" Justices in general; (2) the rate at which the Justices validated agency decisions seemed to be significantly influenced by whether the agency interpretation was "liberal" or "conservative;" and (3) the rate at which the Justices validated agency decisions seemed to be significantly influenced by the political party of the administration whose decisions were being reviewed.²⁴⁰ Miles and Sunstein concluded that "the most conservative members of the Supreme Court show significantly increased validation of agency interpretations after President Bush succeeded President Clinton."²⁴¹

In a study of *Chevron* decisions of the federal appellate courts in 1995 and 1996, Professor Orin Kerr also found evidence that judges were influenced by political ideology.²⁴² Professor Kerr reviewed two hundred cases decided during that time period and found that: (1) in cases involving denial of entitlement benefits, republican judges upheld denials one hundred percent of the time, while democratic judges upheld the denials only forty percent of the time; (2) in immigration appeals, republican judges supported the government against the individual in seventy-one percent of the cases, while democratic judges only supported the government in forty-two percent of the cases; and (3) in cases involving commerce, trade, and taxes, in which deferring to the government would further "liberal" policies, democratic judges upheld agencies' actions in ninety-two percent of the cases, while republican judges upheld agencies' actions in only sixty-eight percent of the cases.²⁴³ Based on those findings, Kerr concluded that there was a tendency for republican and

239. Miles & Sunstein, *supra* note 235, at 831. Justice Breyer voted to uphold agency decisions in almost eighty-two percent of the *Chevron* cases in the study, while Justice Thomas voted to uphold agency decisions in only about fifty-two percent of the cases. *Id.* In a recent article, I found a similar divergence in a review of *Chevron* decisions issued by the Roberts Court. See Stephen M. Johnson, *The Roberts Court and the Environment*, 37 B.C. ENVTL. AFF. L. REV. 317, app. B at 356–59 (2010). Of the environmental law cases decided by the Roberts Court using the *Chevron* analysis, Justices Ginsburg, Souter, and Stevens only voted to uphold the agencies' decisions in one of five cases, while Justices Alito, Scalia, Roberts, and Thomas voted to uphold the agencies' decisions in four of five cases. *Id.*

240. See Miles & Sunstein, *supra* note 235, at 823.

241. *Id.* Though they also noted that "liberal" Justices voted to validate agency decisions less frequently when they reviewed decisions of a republican administration than a democratic administration, the disparity in validation rates was much less dramatic than in validation rates for the most "conservative" Justices. *Id.* at 826.

242. See Kerr, *supra* note 235, at 1, 59.

243. *Id.* at 38–39.

democratic judges to reach results consistent with their political ideologies, at least in cases with clear political divisions.²⁴⁴

Not all commentators agree that judges are increasingly deciding cases based on political ideology, though. For instance, in a 1997 study of two hundred and fifty environmental decisions in the U.S. Court of Appeals for the D.C. Circuit, Professor Richard Revesz found no statistically significant difference in the application of *Chevron* to those cases by republican or democratic judges.²⁴⁵ Similarly, Professor David Zaring reviewed federal appellate court decisions applying the substantial-evidence test, which applies to agency fact-finding in formal proceedings, and concluded that republican-appointed judges voted to uphold the agency's findings seventy percent of the time, while democratic-appointed judges voted to uphold the agency's findings seventy-two percent of the time.²⁴⁶

If, however, skeptics are correct that judges are increasingly deciding cases based on political ideologies, disclosure of the President's influence on an agency during the rulemaking process, as the proposals of Professors Watts and Mendelson would require, could increase the number of cases decided along partisan lines. In many cases, the President's position on a policy or a rule may be clear even without the imposition of additional disclosure requirements.²⁴⁷ In those cases, judges who are predisposed to decide a case based on political ideology will do so, regardless of whether Professors Watts's or Mendelson's proposals are implemented. However, it is likely that Professors Watts's and Mendelson's proposals, if implemented, will expose the President's position on policies and rules where the President's position would not otherwise be obvious and will expose the extent to which the President was involved in the agencies' decision making. Indeed, those are precisely the

244. *Id.* at 39–40.

245. See Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1747–48 (1997); see also Richard J. Pierce, Jr., *Chevron Should Not Be Converted into a Voting Rule: A Response to Gersen and Vermeule's Proposal*, 116 YALE L.J. POCKET PART 248, 250 (2007), <http://www.yalelawjournal.org/the-yale-law-journal-pocket-part/administrative-law/chevron-should-not-be-converted-into-a-voting-rule:-a-response-to-gersen-and-vermeule%27s-proposal/> (providing further analysis of Revesz's study).

246. Zaring, *supra* note 203, at 180. Professor Zaring acknowledged, however, that his finding did not mean that politics do not play a role in adjudicating agency fact finding. Instead, he wrote,

There is no question that they do in many cases The implication may be that—at least for fact-based cases—there is a range of acceptable agency behavior. Within that range, agencies may find the facts they like without much ideological policing by judges, either because fact-based cases are viewed as cases for smaller stakes than are law-based cases . . . or because ideological commitments match unevenly with factual findings.

Id.

247. *E.g.*, Strauss, *supra* note 137, at 965–67 (discussing several instances when President Clinton made his views on controversial rules known).

goals of the proposals.²⁴⁸ Disclosure of information about the content and extent of presidential influence in those cases could prompt, or at least facilitate, partisan judging where there might not have been partisan judging in its absence.

H. Erosion of Consistency

There is one other unintended consequence that could flow from the proposals of Professor Watts and Professor Mendelson. To the extent that both proposals envision courts according greater deference to agencies when the agencies' decisions are based on presidential influences, the proposals could provide further impetus for both midnight rulemaking and dawn rescissions of rules. If a President knows that an agency's decision will be entitled to more deference because of the President's influence, the President has a greater incentive to play an active role in implementing policies through rulemaking throughout the his or her term in office, especially at the end of the term when the President will not suffer any political repercussions for implementing those policies.²⁴⁹ Similarly, a President who is beginning a term in office has a greater incentive to play an active role in undoing the midnight rules enacted by the outgoing President, when the President knows that courts will accord deference to the new policies because the President supports them.²⁵⁰ If the proposals exacerbate both midnight rulemaking and dawn rescissions, as they might, they will greatly interfere with the interests of the regulated community and the public in the uniformity, reliability, and consistency of agency decision making.

Midnight rulemaking and dawn rescissions are prevalent across presidential administrations.²⁵¹ A recent study by Jay Cochran III of the Mercatus Center at George Washington University documented sharp increases in agency rulemaking at the end of presidential terms for the past five decades.²⁵² Jason Loring and Liam Roth noted that the EPA, the Occupational Safety and Health Administration (OSHA), and the National Highway Transportation Safety Administration (NHTSA) issued forty percent of their 1992–1993 rules and fifty-one percent of their

248. See *supra* Parts III–IV.

249. Jack M. Beermann, *Presidential Power in Transitions*, 83 B.U. L. REV. 947, 956 (2003).

250. See Jason M. Loring & Liam R. Roth, *After Midnight: The Durability of the "Midnight" Regulations Passed by the Two Previous Outgoing Administrations*, 40 WAKE FOREST L. REV. 1441, 1444 (2005).

251. See Jack M. Beermann, *Combating Midnight Regulation*, 103 NW U. L. REV. 352, 360 (2009); Loring & Roth, *supra* note 250, at 1441.

252. Jay Cochran III, *The Cinderella Constraint: Why Regulations Increase Significantly During Post-Election Quarters 3* (March 8, 2001) (unpublished manuscript) (on file with the Mercatus Center at George Mason University), available at [http://www.mercatus.org/sites/default/files/publication/The_Cinderella_Constraint\(1\).pdf](http://www.mercatus.org/sites/default/files/publication/The_Cinderella_Constraint(1).pdf).

2000–2001 rules in the last five weeks prior to the change of a presidential administration.²⁵³

Professor Jack Beermann has identified several reasons for midnight rulemaking, including:

(1) the natural human tendency to work a deadline . . . ; (2) hurrying to take as much action as possible near the end of the term to project the administration's agenda into the future; (3) waiting to take potentially controversial action until the end of the term when the political consequences are likely to be muted; and (4) delay by some external force that prevented the administration from taking desired action until late in the term.²⁵⁴

Critics of midnight rulemaking argue that: (1) it is an inefficient way to make policy, as oversight is limited during the midnight period; (2) the haste with which the rules are adopted often results in rulemaking errors; and (3) the process undermines political accountability.²⁵⁵ Consequently, many critics argue that measures should be implemented to reduce midnight rulemaking.²⁵⁶ Unfortunately, the proposals of Professors Watts and Mendelson could incentivize midnight rulemaking.

Regarding dawn rescissions of rules, some Presidents aggressively rescind or revise midnight regulations of their predecessors. President William J. Clinton, for instance, amended or repealed fifty-seven percent of the midnight regulations issued by President George H.W. Bush's administration through EPA, NHTSA, and OSHA.²⁵⁷ Some academics suggest that Presidents may be reluctant to revise midnight rules because it may be difficult to justify the changes under the arbitrary-and-capricious standard as applied in *State Farm*.²⁵⁸

In the past, several academics have suggested that changing the manner in which the arbitrary-and-capricious standard is applied to the rescissions or revisions of rules, to provide more deference for agencies, could reduce midnight rulemaking.²⁵⁹ If it is easier for a new administration to undo the former administration's rules, the former administration has less of an incentive to issue rules on the way out of office.

253. See Loring & Roth, *supra* note 250, at 1454.

254. See Beermann, *supra* note 248, at 352 (footnote omitted).

255. Loring & Roth, *supra* note 249, at 1448.

256. See, e.g., Beermann, *supra* note 251, at 353–54, 359–60; Loring & Roth, *supra* note 250, at 1449; Andrew P. Morriss et al., *Between a Hard Rock and a Hard Place: Politics, Midnight Regulations and Mining*, 55 ADMIN. L. REV. 551, 597 (2003).

257. See Loring & Roth, *supra* note 250, at 1456. However, the administration of President George W. Bush only amended or repealed nineteen percent of the midnight rules issued by President Clinton through EPA, OSHA, and NHTSA. *Id.*

258. *Id.* at 1457; Beermann, *supra* note 251, at 361.

259. See Beermann, *supra* note 251, at 359–60; Loring & Roth, *supra* note 250, at 1460.

Although that is true to some extent, there is a political cost that the new administration must pay to rescind or revise the prior administration's midnight rulemaking,²⁶⁰ and the political cost may be too high in some cases. Thus, changing the application of the arbitrary-and-capricious standard as applied to revisions or rescissions of rules will not eliminate the incentive for Presidents to engage in midnight rulemaking. Further, Professors Watts's and Mendelson's proposals are different from the prior proposals that were targeted at reducing midnight rulemaking. Watts's and Mendelson's proposals would modify the application of the arbitrary-and-capricious standard not only for rescissions or revisions of rules, but for the midnight rulemaking engaged in by an outgoing administration.²⁶¹ Thus, their proposals provide increased incentives for an outgoing administration to engage in midnight rulemaking, which counterbalances any reduction in the incentive for midnight rulemaking due to increased deference for the rescissions by the incoming administration.

The combination of an increased incentive for both midnight rulemaking and dawn rescissions could have significant ramifications for the stability of the law. If courts usher in a new era of deference based on presidential influence, so that it is much easier for agencies to change policies and rules whenever a new President is elected, agency decisions could become less reliable, uniform, and consistent, and the public and regulated community may find it more difficult to anticipate what the law will be following the next change in administration.

VI. CONCLUSION

The goals of the reform proposals of Professors Watts and Mendelson are laudable. To the extent that the President and executive branch are exerting influence over the policies and rules developed by agencies, disclosure of that influence increases accountability of agencies and the executive branch, increases opportunities for effective public participation in the decision making process, and improves the quality of agencies' decision making. Supporters of the proposals also claim that the proposals will reduce ossification of agency rulemaking by increasing the deference that courts accord to agencies, and that the proposals will reduce the distortion of science by agencies. However, Professors Watts and Mendelson acknowledge that there may be significant problems in implementing their proposals, including difficulties in identifying permissible influences for agencies to consider under Watts's proposal and difficulties in enforcement under Mendelson's proposal. The architects of the proposals also recognize that, even with their reforms in place, agencies may be reluctant to disclose the full extent of presidential involvement in decision making when such a disclosure would not benefit the agencies.

260. See Beermann, *supra* note 251, at 353.

261. See *supra* Parts III–IV (proposing increased deference whenever presidential or political factors influence an agency's decision).

In addition to the problems that Professors Watts and Mendelson acknowledge, the proposals may have some unintended consequences. Changing the application of the “hard look” arbitrary-and-capricious analysis might ultimately have little effect, in practice, on the rate at which courts uphold agencies’ rulemaking. If the increased disclosure of presidential and executive-branch influences does not equate to greater success for agencies in litigation, and if the new procedures for disclosure increase the time and cost for rulemaking, the reforms could increase, rather than decrease, the ossification of rulemaking. This could divert more of the agencies’ policymaking to policy statements, guidance documents, and other informal tools, which limit opportunities for public participation and limit the public’s ability to access the law. The increased disclosure of presidential and executive-branch influence in rulemaking might also facilitate partisan judging. Moreover, it might erode consistency and certainty for regulated communities and the public by encouraging agencies to change important policies and interpretations of law with each new administration. Ultimately, the costs of the reform proposals might outweigh the accountability and transparency benefits of the proposals, especially when the proposals might not achieve those benefits due to the implementation hurdles acknowledged by the reformers.