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Litigation-Fostered Bureaucratic Autonomy: Administrative Law Against Political Control

Daniel E. Walters*

INTRODUCTION

Administrative law doctrines are widely assumed to be instruments of political control of bureaucratic policymaking. On their face, they require that agencies follow complex procedures in rulemaking, affording interested parties a meaningful chance to make comments¹ and requiring agencies to respond to such comments in issuing a final rule.² They require agencies to follow unambiguous statutory provisions and to provide a reasonable interpretation of ambiguous statutory provisions.³ They further require agencies to articulate a reasoned basis for their policy decisions and to address alternative courses of action.⁴ These requirements grew out of a fear of a roving, headless fourth branch of government and originally manifested in attempts to give life to the non-delegation principle.⁵ The requirements eventually evolved into efforts to control bureaucratic discretion and tether the administrative state to the preferences of elected officials through more direct congressional or presidential control and supervision of administrative agencies.⁶ For years, theorists operating under the rubric of “positive political theory” or “principal-agent” theory have articulated this simple understanding of administrative law as

* J.D. 2012, University of Michigan Law School. Ph.D. student in political science at the University of Wisconsin-Madison. A previous version of this Article won the American Constitution Society’s 2009 Richard D. Cudahy Writing Competition on Regulatory and Administrative Law (Student Category). I am greatly indebted to all of the wonderful scholars who provided me with valuable criticism (as well as moral support) during the long process of writing this Article. Donald Downs, Jeb Barnes, Howard Gillman, and Phil Ethington helped me get the project off the ground, and Nina Mendelson, Margaret Jane Radin, and the participants in the Fall 2011 Student Scholarship Workshop at the University of Michigan Law School were extremely helpful in focusing the project into current form.

¹ Administrative Procedure Act, 5 U.S.C. § 553(c) (2006).

² See, e.g., *Reytblatt v. U.S. NRC*, 105 F.3d 715, 722 (D.C. Cir. 1997) (“An agency need not address every comment, but it must respond in a reasoned manner to those that raise significant problems.”).

³ *Chevron U.S.A. v. NRDC, Inc.*, 467 U.S. 837, 842-44 (1984).

⁴ *Motor Vehicle Mfrs. Assoc. v. State Farm Auto. Ins. Co.*, 463 U.S. 29, 41-43 (1983).

⁵ *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537-42 (1935). See also Lisa Schultz Bressman, *Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State*, 109 *YALE L.J.* 1399, 1403-08 (2000) [hereinafter Bressman, *Schechter*] (describing the development of the nondelegation doctrine and courts’ and scholars’ eventual move to acceptance of delegation as part of a political control framework).

⁶ See *infra* Part III.A.

political control,⁷ and recent administrative law scholarship largely endorses the “political control model,” wherein the political branches rely on administrative law doctrines to retain and exercise authority over agency policy making.⁸ Even when the elected branches genuinely do not care about specific policy outcomes, the idea of control still animates the process—here, political control is effectuated by mechanisms for encouraging interest group and public participation.⁹ In short, the idea of control of bureaucratic discretion dominates our understanding of both what administrative law does and what it should do.

This article argues that this political control model of administrative law is incomplete and that a more realistic picture can be developed by examining instances of what I call “litigation-fostered bureaucratic autonomy”—the basic idea being that career agency staff (the purported agents in the political control model) can and do use administrative litigation to resist political directives with which they disagree. The phenomenon of litigation-fostered bureaucratic autonomy can be seen more clearly once we discard the oversimplified picture of the administrative agencies as monolithic organizations. While many executive agencies are formally housed in the executive branch and are, at least in theory, subject to the control of political appointees (who are themselves directly accountable only to the executive branch and removable at will),¹⁰ the clear principal-agent chain is thoroughly disrupted by the time we reach the ground floor of the agencies, and resistance is bound to result from the individual and institutional constraints that limit principals’

⁷ See *infra* Part III.A.

⁸ See, e.g., Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749 (2007) [hereinafter Bressman, *Procedures*]. But see Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461 (2003) [hereinafter Bressman, *Beyond Accountability*] (noting that, in addition to delegation patrolling, administrative law functions to ensure that agencies act reasonably and in a nonarbitrary fashion). Professor Bressman’s 2003 article was clearly a response to the dominance of the political control model and simply sought to note that both political accountability and rationality animate administrative law. *Id.* at 463.

⁹ See, e.g., Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511 (1992) (arguing that agency processes are sites of deliberation that can lead the agency’s decision to best reflect the reasonable conclusions of the public); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975) (arguing that administrative law has come to reflect neopluralist values such as interest representation in agency processes).

¹⁰ Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 581 (2003) (“Although she cannot legislate, the President can, of course, hold an executive branch agency accountable through the power to replace the top management of an agency.”).

ability to monitor agents.¹¹ Scholarship has long documented deep divisions within agencies and, more importantly, between political appointees and career staff.¹²

Once we acknowledge these persistent and pervasive divisions within the administrative state, the challenge is to understand how the multifarious groups and individuals within agencies assert their interests, preferences, or views of the public interest. The concept of litigation-fostered bureaucratic autonomy is a preliminary attempt to characterize one particularly important but under-studied way that this resistance operates. Rank-and-file bureaucrats are purposive actors themselves¹³ and have historically used policy entrepreneurship and a variety of other informal “subversive” techniques to develop a space for bureaucratic autonomy against political principals.¹⁴ Litigation-fostered bureaucratic autonomy is an extension of this theme of resistance, though the strategy differs from previous accounts of resistance in the ways that it actually harnesses important doctrines in administrative law and adapts them for the purpose of dissent.

I argue that, contrary to the simplistic, traditional account of administrative law as an instrument of political control, key administrative law doctrines actually afford career staff strategic tools to vindicate their losing viewpoint. The power of this strategy inheres in the fact that many administrative law doctrines are built on the assumption of core notions of reasonableness¹⁵ that are anathema to internal division or dissonance.¹⁶ This foundation of rationality sets up a strategic incentive structure: If an agency decision must be reasonable, a losing constituency in an agency therefore only needs to somehow reveal evidence of dissonance in the agency’s decision-making process.

¹¹ Adam Shinar, *Dissenting from Within: Why and How Public Officials Resist the Law*, 40 FLA. ST. U. L. REV. (forthcoming 2013).

¹² See *infra* Part I.A.

¹³ It is fairly rare for administrative law scholarship to treat or acknowledge career staff as purposive actors. *But see* Mendelson, *supra* note 10, at 612-16 (describing some of the “subversive” activities of career staff during the transition to new presidential administrations); Shinar, *supra* note 12 (developing a theoretical account of why public officials in hierarchies might be inclined to resist orders).

¹⁴ See *infra* Part I.B (describing the various informal, non-legalistic mechanisms of resistance that scholars have so far catalogued).

¹⁵ See David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 159 (2010) (arguing that all of the varying standards for review of agency action actually collapse into a core review for reasonableness).

¹⁶ An agency’s interpretation of ambiguous statutes must be “reasonable.” *Chevron U.S.A. v. NRDC, Inc.*, 467 U.S. 837, 844-45 (1984). An agency’s exercise of policy discretion must be based on a “rational connection between the facts found and the choice made.” *Motor Vehicle Mfrs. Assoc. v. State Farm Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Once the degree of dissonance hits a certain threshold, it becomes more difficult for a court to avoid a conclusion that an agency's final choice was arbitrary or unreasonable.¹⁷ While the result of vacatur is merely to return policy to the status quo ante, this could be a substantial victory for career staff in battles with aggressive political administrations.

The challenge for losing sub-constituencies is thus finding an effective channel or mechanism for amplifying division. While a great deal of this behavior is difficult to see, the incentives are undoubtedly there, and, as this article shows through two case studies, the structure of the administrative process and the practice of administrative litigation create plenty of opportunities for career staff to reveal dissonance that could be understood by judges as unreasonableness in the administrative process sufficient to justify vacatur of rules.

Administrative litigation as a means of fostering bureaucratic autonomy is certainly not used in every case. Arguably, it takes a lot of demonstrated division for these mechanisms to produce a court decision vacating an agency action. Yet the existence of even a few cases should capture the attention of administrative law scholars and political scientists writing in this field, especially when there are reasons to believe that the practice could be operating mostly sub-legally (i.e., political officials would presumably be aware of the dynamics of litigation-fostered bureaucratic autonomy, and therefore would seek to head off controversy and engage in deliberation and negotiation before staff resistance jeopardizes a rule) and that this kind of strategic practice, even when not obvious on the face of the record, is nevertheless important in a wide variety of administrative contexts.

What practical import does this insight carry? What function administrative law serves is, of course, an antecedent question to any evaluation of administrative law, and evidence that administrative law is used to undermine political accountability necessarily pulls us into debates about the justification of the administrative state. This article will not wade too deeply into this quagmire, but some attention to the question is required and will be given in the concluding section of the article. It is enough for now to say that, despite its tendency to undermine the lines of

¹⁷ Obviously, this effect will not appear in all cases. Arguably, judges might come to (or may already) expect some level of dissonance. But as with all strategic tools, expecting this dynamic to apply in all cases would be expecting too much—part of the effectiveness of the strategy is exercising discretion in using it so as to preserve the vitality and force of the strategy when it is needed most. Thus, we should really only expect to see the strategy utilized in exceptional circumstances, but we should also understand that the threat can have deterrent value even when it does not materialize in publicized conflict.

political control on which traditional accounts of bureaucratic legitimacy and administrative law are built, litigation-fostered bureaucratic autonomy actually does lend democratic legitimacy to the administrative state. It can empower potentially marginalized constituencies within an agency (constituencies that often have unique and important perspectives on important administrative matters), thereby enhancing the quality of deliberation and simultaneously providing an internal check on overreaching executive control. And though the costs of unconstrained and excessive use of subversive tactics always pose a danger to the smooth and effective functioning of government, there are nevertheless reasons to believe that the tactics of litigation-fostered bureaucratic autonomy will be only selectively employed.

Part I of this article will first lay out the evidence of intra-agency dissent and will then develop the primary thesis that one of the principal means by which career staff signal this dissent to judges is via administrative litigation. Since career staff cannot sue their own agency, they instead rely on opportunities for strategic cooperation with news media and issue networks that document dissonance within agencies and who in turn empower non-governmental actors, such as interest groups, to challenge agency rules in court. This vicarious litigation strategy is, I suggest, a fairly common method by which career bureaucrats protect and enlarge their policy-making autonomy. I review two examples of career staff actively working with media and public interest groups to undermine an agency's final policy by highlighting evidence that the agency's process was myopic or illegal in some respect. Together, these patterns lead to what I call "litigation-fostered bureaucratic autonomy."

Part II will examine limitations on this behavior—namely, the potential professional or legal repercussions that may have a chilling effect on such behavior—concluding that political appointees lack either the will or the capacity to police all such behavior, leaving career staff relatively free to pursue the strategy of litigation-fostered bureaucratic autonomy. Part III will engage in a more general reflection on the implications of all of this strategic resistance for the literature's dominant "political control" model, as well as its implications for agency process models of democratic legitimacy. I argue that the dynamics of litigation-fostered bureaucratic autonomy present serious descriptive challenges for these dominant theoretical paradigms, at least insofar as litigation-fostered dynamics and other related mechanisms of bureaucratic resistance occur fairly regularly. Despite the incompleteness of the political control model, however, I argue that litigation-fostered bureaucratic autonomy is a desirable feature of the

administrative process because of its tendency to curb the excesses of political principals and encourage public-interest-minded deliberation about issues that are both highly technical and value laden.

I. INTERNAL DIVISION AND LITIGATION-FOSTERED BUREAUCRATIC AUTONOMY

Though scholarship almost always treats administrative agencies as cohesive and unitary,¹⁸ this Part argues for two critical departures from this view. First, there is much evidence to suggest that agencies are themselves internally fractured and frequently demonstrate conflict between various constituencies within agencies. Second, much scholarship focuses on final agency outputs and simply assumes that if another constituency within the agency loses or is disappointed in the policy-making process, then that is the end of the conflict. This Part argues that losing constituencies are, in fact, purposive actors with a critical and powerful legal mechanism of resistance at their disposal even after a rule is promulgated. This is what I call “litigation-fostered bureaucratic autonomy”: that is, the strategic use of public dissent to undermine an agency’s final decision under administrative law doctrines that require that an agency’s decision be reasonable, non-arbitrary, and genuinely engaging of the full range of regulatory options.

A. Conflict and Internal Division in the Administrative State

In depicting the administrative state as internally divided, I do not paint on a blank canvas. Legal scholars have, for their part, largely avoided the issue, but political scientists and public administration scholars have long noted the complex intra-institutional politics of agencies. Their studies paint a picture of an administrative state that is more fractured and complex than is often assumed in the hierarchical, linear principal-agent model that dominates discussions of the theoretical foundations of administrative law.

The differentiated preferences and opportunities for resistance are most obvious at the lowest levels of the federal bureaucracy. Thus, Herbert Kaufman’s trailblazing study of the forest rangers “at the base of the

¹⁸ *But see* Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 *YALE L.J.* 1032 (2011) (defying this trend and asking administrative law scholars to pay greater attention to the ways that administrative law doctrines strengthen certain parts of agencies (e.g., various professional groups or different levels of management) and weaken other parts).

administrative pyramid”¹⁹ of the Forest Service at least acknowledged that, though the Forest Service was remarkably unified (partly because of the well-socialized culture of the agency), “[t]he influences on the decisions and behavior of Rangers . . . come from four sources: higher head-quarters, face-to-face work groups, local interests, and from ‘inside’ the Rangers themselves.”²⁰ In other words, influence came not solely from political direction, but also from individual Rangers’ responses to their unique regulatory environments.

The study of “street-level bureaucrats” positioned far away from the central offices of the administration has likewise underscored the tremendous amount of discretion that these actors possess to tailor administration to the needs of clients and to their own preferences.²¹ And even though the sheer size of the bureaucratic hierarchy can explain a good deal of the division and discretion within federal agencies, these patterns do not begin and end at the street or enforcement level. Daniel Carpenter, for instance, documents similar pockets of autonomy even at the higher levels of the agency. He shows how influential managers within the administration have frequently engaged in entrepreneurial networking and reputation-building activities to carve out significant political autonomy from political principals.²² All of this evidence is consistent with the traditional historical narrative of the development of the administrative state: The passage of the Pendleton Act and the creation of the Civil Service drove a wedge through the traditional linkage of administration with patronage, freeing the energies of experts and policy visionaries and often creating friction between these actors and political principals.²³

Whether the amount of division we actually see is consistent with the expectations of civil service reform, the fact of division should hardly be surprising—it is an integral feature of the American administrative state. Indeed, the eminent bureaucracy scholar James Q. Wilson reminds us that we can hope to understand the behavior of regulatory agencies only if we “view these agencies as coalitions of diverse participants who have

¹⁹ HERBERT KAUFMAN, *THE FOREST RANGER: A STUDY IN ADMINISTRATIVE BEHAVIOR* 5 (spec. reprint ed. 2006).

²⁰ *Id.* at 219.

²¹ MICHAEL LIPSKY, *STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES* (1980).

²² DANIEL P. CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862-1928*, at 353-54 (2001).

²³ Mendelson, *supra* note 10, at 612 (“Since the early 1900s, when the civil service was reformed to eliminate the ‘spoils system’ and to create a civil service selected on the basis of merit considerations, political appointees have faced a potentially uneasy relationship with the career civil servants already in the bureaucracy.”).

somewhat different motives”—there are “careerists,” “politicians,” and “professionals” all responding to a “political environment that provides a changing pattern of rewards to each coalition member.”²⁴

The implications of pervasive division can be serious and can lead to endemic conflict. Hugh Heclo’s study of presidential turnover yielded something of an iron law: “Every new administration gives fresh impetus to an age-old struggle . . . between political leadership and bureaucratic power.”²⁵ The causes of this struggle are myriad: a non-exhaustive list would include insulation of career staff in particular agencies and even particular programs,²⁶ ideological differences,²⁷ role-perception,²⁸ self-interest,²⁹ professional norms,³⁰ agency culture and history,³¹ differing time horizons,³² and even a sort of “agency esprit de corps.”³³ In a very real sense, civil servants are often different—demographically, politically, and professionally—from their political principals in the White House and the agency’s central offices, and they can therefore be expected to actively

²⁴ JAMES Q. WILSON, *THE POLITICS OF REGULATION* 373-74 (1980).

²⁵ HUGH HECLLO, *A GOVERNMENT OF STRANGERS: EXECUTIVE POLITICS IN WASHINGTON* 1 (1977).

²⁶ ROBERT MARANTO, *BEYOND A GOVERNMENT OF STRANGERS: HOW CAREER EXECUTIVES AND POLITICAL APPOINTEES CAN TURN CONFLICT TO COOPERATION* 40 (2005) (“The very specialization of bureaucracy and expertise of careerists understandably leads dedicated bureaucrats to consider their area the most important in government. This lack of perspective often undermines their claims in the eyes of politicians, for unlike bureaucrats, politicians can never give their hearts to just one cause [save perhaps reelection].”).

²⁷ MARISSA MARTINO GOLDEN, *WHAT MOTIVATES BUREAUCRATS?: POLITICS AND ADMINISTRATION DURING THE REAGAN YEARS* 26-27 (2000); MARANTO, *supra* note 27, at 41-45 (discussing evidence that “ideological differences between career and noncareer executives cause considerable tension, particularly in social welfare and regulatory agencies”); Joel D. Aberbach & Bert A. Rockman, *Clashing Beliefs Within the Executive Branch: The Nixon Administration Bureaucracy*, 70 *AM. POL. SCI. REV.* 456, 466 (1976).

²⁸ GOLDEN, *supra* note 28, at 20-25 (synthesizing research suggesting that bureaucrats are uniquely motivated by the public interest and a desire to “do the right thing”).

²⁹ *Id.* (describing rational choice theories of bureaucratic behavior, which posit that career staffs are probably most interested in increasing the agency budget and maximizing job security or leisure time).

³⁰ *Id.* at 27 (noting that various professional constituencies within agencies may be more or less adept at using methods of resistance).

³¹ *Id.* at 27-28 (noting the way that important historical events—for instance, the explosion of the space-shuttle *Challenger*—can path-dependently alter the culture of an agency, making them more or less resistant to risky policy change).

³² *Id.* at 23-28. The importance of this point cannot be overstated, especially because this article argues for the importance of litigation as a tool of bureaucratic autonomy. Litigation can obviously take years, and so agency staff with a longer time horizon than a passing political administration has a distinct advantage in a war of attrition over a rule—simply waiting out a political administration may be a viable option, and this certainly gives additional force to the litigation-fostered bureaucratic autonomy thesis. In fact, it may give agents such a distinct advantage that it poses problems for a democratic justification of the process. For an argument that this is not the case, see Part III.B.3.

³³ *Id.* at 28-29 (noting the ways that agencies with a strong sense of collective mission may be less loyal to presidential administrations and more able to overcome collective action problems, thus leading to a greater likelihood of collective resistance).

seek out opportunities for resistance when specific policy initiatives clash with their preferences.

The most common analysis of this division between political constituencies and career constituencies is that it is a problem to be solved, as the division creates substantial risk of shirking or sabotage, reflecting the increasing distrust of bureaucracy seen in the highly influential public choice literature.³⁴ However, many public administration scholars have argued that because of civil servants' professional training and the organizational emphasis on the public interest in agencies, civil servants are unlikely to over-utilize methods of resistance.³⁵ I discuss the idea of internal division in bureaucracy not to engage in a normative evaluation of this division, but rather to observe that the idea of internal division itself, especially between "career" and "political" types of actors, has long been recognized in the literature and is an ever-present reality in bureaucratic policymaking. Whether such divisions are based on presumably noble notions of professionalism or of the public interest or on presumably ignoble notions of protecting an agency's turf,³⁶ enlarging the agency's budget,³⁷ or advancing one's own self-interest³⁸ is largely beside the point here. The point is simply that agencies are, quite naturally, internally divided.³⁹

Hecló's account of a divided administrative state certainly resonates today. Perhaps no administration will be remembered more for division

³⁴ HECLÓ, *supra* note 26, at 236-49 (recognizing the need for reform and giving his own thoughts for finding a middle way); JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 196-202 (1989) (describing the divisions between political executives and career executives and the possible implications of these divisions on management style and regulatory effectiveness). See generally Sidney A. Shapiro & Ronald F. Wright, *The Future of the Administrative Presidency: Turning Administrative Law Inside-Out*, 65 U. MIAMI L. REV. 577, 596-97 (2011).

³⁵ See, e.g., GOLDEN, *supra* note 28, at 21, 151-52 (arguing that most civil servants most of the time seek to accommodate political direction with which they disagree); WILLIAM T. GORMLEY, JR. & STEVEN J. BALLA, BUREAUCRACY AND DEMOCRACY: ACCOUNTABILITY AND PERFORMANCE 41-48 (2d ed. 2008).

³⁶ WILSON, *supra* note 35, at 28 ("Executives, in trying to maintain their agencies [and their own position in them], worry about retaining control over their turf—a popular bureaucratic word for what I call 'autonomy.' No agency has or can have complete autonomy, but all struggle to get and keep as much as they can.")

³⁷ See, e.g., ANTHONY DOWNS, INSIDE BUREAUCRACY (1967); WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT (1971).

³⁸ D. RODERICK KIEWIET & MATHEW D. MCCUBBINS, THE LOGIC OF DELEGATION: CONGRESSIONAL PARTIES AND THE APPROPRIATIONS PROCESS 5 (1991).

³⁹ It becomes more relevant—perhaps even decisive—when we turn to the normative question in Part III.B-C. If public administration scholars are right that civil servants will not always push every possible disagreement to impasse or engage in sabotage, then the democratic legitimacy of methods of resistance such as litigation-fostered bureaucratic autonomy is less in question. I argue in that Part that litigation-fostered bureaucratic autonomy will not be over-utilized and hence retains legitimacy.

within agencies than the George W. Bush administration. As Freeman and Vermeule show, there were “suggestions of widespread tampering” with global warming-related information in administrative agencies, and there can be no doubt that “[e]pisodic such as this apparently created significant tension between career agency staff and political appointees.”⁴⁰ Indeed, though Freeman and Vermeule’s focus is almost entirely on showing the intense division between agency scientists and the administration on the global warming question, they also note other instances of division, including the administration’s efforts to silence a Department of Agriculture employee’s warnings about antibiotic-resistant bacteria and the “directives made by political appointees to botanists, biologists, and ecologists in the U.S. Fish and Wildlife Service . . . to refrain ‘for nonscientific reasons . . . from making . . . findings that are protective of [endangered] species.’”⁴¹ Also well known were the administration’s efforts to institute a form of “peer review” which would have actually “barred agency scientists, or any scientist funded by the agency (no matter how indirectly), from participating in the peer review process, with no such bar applying to industry scientists,”⁴² as well as the efforts to use the White House’s Office of Information and Regulatory Affairs (OIRA) to “exert more centralized political control over agency staff.”⁴³

This type of aggressive political control of agency career staff, though perhaps more extreme during the Bush administration, is not atypical, and the successive years of clashes with political principals have certainly taken their toll on career staff and have engendered consistent feelings of differentiation, at least within social welfare and regulatory agencies. In the latest update of its ongoing survey research of scientists in federal administrative agencies across administrations, the Union of Concerned Scientists reported striking evidence of widespread dissatisfaction among employees in a variety of agencies: 33% of EPA scientists surveyed “disagreed that the EPA was acting effectively to ‘clean up and/or mitigate existing pollution or environmental problems’”; 39% of FDA scientists “disagreed that the ‘FDA is acting effectively to protect public health’”; 69% of FWS scientists “disagreed that the FWS is acting effectively to preserve endangered or threatened species”; and 70% of NMFS scientists claimed that “they did not trust ‘NOAA Fisheries decision makers to make

⁴⁰ Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 55.

⁴¹ *Id.* at 56.

⁴² *Id.* at 57.

⁴³ *Id.* at 58.

decisions that will protect marine resources and ecosystems.”⁴⁴ These numbers are representative and fairly consistent over time.⁴⁵

Not surprisingly, all of this internal disaffection means that certain constituencies within agencies oftentimes find better friends and more fruitful means of resistance outside the agency, for instance in interactions with interest groups, congressional committees, the media, or regulated industry. Again, political scientists, economists, and public administration scholars have done some work in identifying and documenting the empirical regularity of modes of inter-institutional resistance to political administration. Most administrative law scholars are familiar with the idea that many agencies are “captured” by the industries they are charged with regulating.⁴⁶ That is, agency staffers develop mutually beneficial working relationships with regulated firms, resulting in overly lax regulation and disregard of public preferences. Perhaps an equally well-known phenomenon demonstrating these inter-institutional dynamics is the so-called “iron triangle” or “subsystem” theory.⁴⁷ According to the “iron triangle” theory, parts of administrative agencies enter into cooperation with congressional committees overseeing the agency as well as with interest groups. Together, the three actors can create a permanent “subgovernment” which pursues the collective interests of the three actors even though those interests “might be opposed by other subparts of the institutions and are not endorsed by the larger institution within which those subunits operate.”⁴⁸ More recent research suggests that the iron triangle phenomenon might be less prominent than a related but very different pattern of “issue network” influence, involving large, fluid coalitions of technical experts that combine to influence agency

⁴⁴ UNION OF CONCERNED SCIENTISTS, *Voices of Federal Scientists: Americans' Health and Safety Depends on Independent Science*, at 2 (Jan. 2009), http://www.ucsus.org/assets/documents/scientific_integrity/Voices_of_Federal_Scientists.pdf.

⁴⁵ MARANTO, *supra* note 27, at 43 (reporting survey responses by career staff in social welfare and regulatory agencies to the question of whether “political appointees and career executives agreed on policy goals” and finding that the percentage agreeing with this claim ranged from 20% in the first Reagan administration to 39% in the Clinton administration).

⁴⁶ See, e.g., MARVER H. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* 3-4 (1955).

⁴⁷ See, e.g., DOUGLAS CARTER, *POWER IN WASHINGTON: A CRITICAL LOOK AT TODAY'S STRUGGLE TO GOVERN IN THE NATION'S CAPITAL* (1964); THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* (2nd ed. 1979).

⁴⁸ M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. Pa. L. Rev. 603, 646 (2001). See generally FRANK R. BAUMGARTNER & BETH L. LEECH, *BASIC INTERESTS: THE IMPORTANCE OF GROUPS IN POLITICS AND IN POLITICAL SCIENCE* 120-26 (1998) (reviewing the subsystems literature).

policymaking,⁴⁹ but the larger point remains: There is differentiation across groups within agencies and enough discretion at various levels of the bureaucracy that disaffected career servants can and do combine with actors outside the agency in an effort to influence policy outcomes. All of this points the way to the specific dynamics of litigation-fostered bureaucratic autonomy, which similarly see bureaucrats interacting with outside groups to influence policy through legal challenges of rules.

B. Administrative Law and Empowerment of Career Staff: The Dynamics of Litigation-Fostered Bureaucratic Autonomy

If, as seems to be the case, career staff frequently find themselves at odds with political principals over agency goals and specific regulatory programs, a question inevitably arises: *How can these losing constituencies within agencies vindicate their preferences?* If they fail to protect their interests in the rulemaking process, are they just out of luck? We know that they can seek the help of Congress, but Congress may be apathetic about the problem, be shackled by inertia, or actually agree with the political position ultimately taken by the political principals. Career staff can engage in overt resistance by defying the policy (though that strategy is risky), or they can fight back more subtly by interpreting the winning policy narrowly.⁵⁰ Or, as some have argued, the best long-term strategy for losing constituencies might be to do as much as they can to compromise and cooperate with their political principals,⁵¹ even if those political principals are unwilling to meet them in the middle. For many career civil servants, particularly those “lifers” who are most likely to see an aggressive political administration as a threat to their life’s work, there will be sufficient motivation in a “sense of commitment to civil service” and “willingness to supply ‘responsiveness to the legitimate political leaders of the day’” to put differences aside and cooperate as much as possible.⁵²

Yet career employees do have at least some opportunity to resist political control.⁵³ Professor Nina Mendelson’s study of “agency burrowing” notes the ways that outgoing presidential administrations may

⁴⁹ Marisa Martino Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?*, 8 J. PUB. ADMIN. RES. & THEORY 245, 249 (1988).

⁵⁰ Shinar, *supra* note 12.

⁵¹ GOLDEN, *supra* note 28, at 152 (finding that this was the dominant strategy of career staff in the National Highway Traffic Administration during the Reagan administration); HECLD, *supra* note 25.

⁵² Mendelson, *supra* note 10, at 615.

⁵³ See, e.g., GOLDEN, *supra* note 28, at 16-20 (describing various mechanisms of resistance ranging from exit in protest to strategies of “voice” including “sabotage, the deliberate slowdown of agency activity [sometimes referred to as foot-dragging], ‘guerilla warfare,’ ‘leaking, and whistle-blowing’”).

solidify the tenure of allies in administrative agencies in hopes that their allies will act “subversively” in a new administration.⁵⁴ For instance, such allies could “let an assignment fall between the cracks or simply fail to perform a disliked task promptly.”⁵⁵ They could “fail to be energetic or entrepreneurial on behalf of the new President’s agenda.”⁵⁶ To the extent that an agency’s work is decentralized and depends on ground-level staff to identify regulatory agenda items, a career employee could decline to notify superiors of opportunities to pursue the President’s regulatory agenda.⁵⁷ Even when a particular policy is forced on agency staff, nothing prevents them from laying the groundwork for implementation of their preferred policy positions for future, more receptive political administrations.⁵⁸ Finally, career staffers may more actively “throw a ‘wrench in the works’ by leaking information to discredit a person or agency.”⁵⁹ Overall, there is substantial evidence that career staff do in fact avail themselves of these methods of resistance,⁶⁰ though public administration scholars divide on how pervasive these activities are in the vast business of administrative agencies.⁶¹

All of these options, if acted on frequently, could have some effect on the realization of a President’s regulatory agenda. At the same time, however, it would be difficult to say that a career staffer’s employment of these strategic tools could single-handedly change an adverse regulatory

⁵⁴ See Mendelson, *supra* note 10, at 612.

⁵⁵ *Id.*; see also Anthony M. Marino, John G. Matsusaka & Jan Zabochnik, *Disobedience and Authority*, 26 J.L. ECON. & ORG. 427, 428 (2010) (acknowledging a need to account for “lackluster effort” or “ineffective enforcement” by agents).

⁵⁶ See Mendelson, *supra* note 10, at 612.

⁵⁷ *Id.* at 613.

⁵⁸ See Lisa Heinzerling, Presentation for the Environmental Law and Policy Program at the University of Michigan Law School: Climate Change and the EPA (Nov. 17, 2011), <http://web.law.umich.edu/flashmedia/public/Default.aspx?mediaid=1868> (discussing the ways that the Office of Transportation and Air Quality in the EPA responded to President George W. Bush’s complete dismissal of their greenhouse gas rule by unilaterally supplementing the dossier with new studies and models which ultimately made immediate promulgation possible once the Obama administration took over).

⁵⁹ *Id.*; see also GOLDEN, *supra* note 28, at 153 (concluding that in the EPA during the Reagan administration, a “group of ‘mavericks’ strenuously resisted the Regan administration and its policies” by “repeatedly leak[ing] and blow[ing] the whistle”).

⁶⁰ MARANTO, *supra* note 26, at 38 (noting that, in a data set of interviews from 1999-2000, 8 of 35 political appointees “noted specific instances in which career officials withheld information, or in other ways worked against appointee initiatives, because of either policy conflict or battles over who should control the organization”).

⁶¹ Compare GOLDEN, *supra* note 27, at 154 (“[T]he research presented in this book and summarized here suggests that upper-level career civil servants are more responsive than resistant to the president and his appointed deputies.”), with ROSEMARY O’LEARY, *THE ETHICS OF DISSENT: MANAGING GUERRILLA GOVERNMENT* (1st ed. 2005) (finding subversive action to be commonplace in the administrative state).

outcome. Most of these tools apply primarily in the policy-formation process, and in most cases a determined President will be able to push through a desired policy against the will of even the most intransigent career bureaucrats. Thus, the existence of a tool with real legal force would be fundamentally different in both kind and degree from the currently recognized tools of bureaucratic resistance, thereby meriting greater attention.

One such option that students of administrative law would probably not point to is administrative litigation. Yet, as this section demonstrates, perhaps they ought to. Administrative litigation not only provides the legal force that bureaucrats need, but also extends the timeframe for dissent past the agency's final action.⁶² Thus, as the following case studies show, the informal methods of dissent that most agree occur at least some of the time can gain considerable legal force when they find their way into legal fora.

1. Endangered Species Act Litigation

One of the most politicized administrative agencies during the George W. Bush administration was the Department of the Interior (DOI). Reports of questionable interference by political appointees in a variety of leasing matters and scientific issues clouded the agency's reputation throughout the Bush administration's tenure, ultimately reaching a high-water mark when, in 2007, a deputy assistant secretary for Fish and Wildlife and Parks at DOI, Julie MacDonald, was forced to resign amidst accusations that she had "personally reversed scientific findings, changed scientific conclusions to prevent endangered species from receiving protection, removed relevant information from a scientific document, and ordered the Fish and Wildlife Service (FWS) to adopt her edits."⁶³ As early as 2004, MacDonald was targeted for her role in heavily editing scientific findings in a leaked draft of an FWS biological opinion on the ESA and the sage grouse.⁶⁴ Starting in late 2006, the criticism picked up as the Union of Concerned Scientists began to drum up support for an investigation into MacDonald's activities after "[d]ocuments . . . obtained by several conservation organizations

⁶² Leaks that provoke congressional oversight hearings also allow for this extension of constraints beyond the promulgation of the agency's rule, but, unlike congressional oversight hearings, litigation is likely to be more time consuming and more threatening to the rule, especially if the court vacates the rule.

⁶³ Press Release, Union of Concerned Scientists, *Systematic Interference with Science at Interior Department Exposed* (Oct. 30, 2006), http://www.ucsusa.org/news/press_release/systematic-interference-with.html [hereinafter, *Systematic Interference*].

⁶⁴ *Leaked FWS Analysis Indicates Greater Sage Grouse Decision Tainted by Politics*, SAGEBRUSH SEA CAMPAIGN, http://www.sagebrushsea.org/leaked_FWS_analysis.htm (last visited Nov. 20, 2011).

show[ed] that MacDonald, an engineer with no training in biology, and other Interior officials personally edited scientific documents to change the conclusions of wildlife biologists with FWS regarding what species are eligible for Endangered Species Act protection.”⁶⁵ All told,

[h]undreds of pages of records, obtained by environmental groups through the Freedom of Information Act, chronicle[d] the long-running battle between MacDonald and Fish And Wildlife Service employees over decisions whether to safeguard plants and animals from oil and gas drilling, power lines, and real estate development, spiced by her mocking comments on their work and their frequently expressed resentment.⁶⁶

Further demonstrating the ways that strategic information leaks can be used by pro-regulatory or anti-regulatory forces is the fact that MacDonald was also accused of leaking information to interested organizations such as the California Farm Bureau Federation and the Pacific Legal Foundation.⁶⁷

Amidst the interest group and media attention to these accusations of scientific impurity and after an anonymous complaint from within DOI, the agency’s Office of Inspector General (OIG) initiated a formal investigation into MacDonald’s conduct.⁶⁸ OIG’s inspection revealed that MacDonald’s intrusive behavior had “demoralized the FWS program” and that “many of the field biologists had expressed concerns similar to the OIG complainant.”⁶⁹ Indeed, the report catalogues the statements of multiple DOI officials, virtually all confirming that MacDonald had manipulated the work of career staff. The FWS Director, Dale Hall, confirmed he had “been involved in a ‘running battle’ with MacDonald over the chain of command in FWS and her repeated attempts to circumvent it.”⁷⁰ Even in this report, evidence abounds that career staff felt a need to build a record of the political manipulation, presumably for strategic purposes. Hall noted

⁶⁵ *Systematic Interference*, *supra* note 64.

⁶⁶ Juliet Eilperin, *Bush Appointee Said to Reject Advice on Endangered Species*, WASH. POST, Oct. 30, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/29/AR2006102900776.html>.

⁶⁷ *Report: Interior Official Blasted for Twisting Environmental Data*, USA TODAY, Mar. 29, 2007, http://www.usatoday.com/news/washington/2007-03-29-interior_N.htm?csp=15.

⁶⁸ *Id.*

⁶⁹ DEP’T OF INTERIOR, OFFICE OF INSPECTOR GEN., INVESTIGATIVE REPORT ON ALLEGATIONS AGAINST JULIE MACDONALD, DEPUTY ASSISTANT SECRETARY, FISH, WILDLIFE & PARKS 5, available at http://www.biologicaldiversity.org/swcbd/PROGRAMS/esa/pdfs/doi-ig-report_jm.pdf.

⁷⁰ *Id.* at 16.

that when MacDonald decided to unilaterally lower from 2.1 miles to 1.8 miles field biologists' determination of the Southwest Willow Flycatcher's flying radius, he "told the field staff to inform her of the science behind their findings, and if she still said to make the change, to go ahead and do so—but to document everything."⁷¹

The MacDonald episode shows how personnel within agencies can gear up for legal fights, but we now turn to other cases that show how career staff in agencies can use their knowledge of the political manipulation to influence ESA listing litigation, overcoming the presumption of deference accorded to DOI's official scientific opinion (i.e., the marked-up versions attributable to the political administration). Though it is not possible to document every example of this dynamic—partly because listing cases are so common—a few cases are particularly clear in demonstrating the ways that agency staff can use litigation to resist political direction.

In 2005, the Ninth Circuit decided that the failure of the National Marine Fisheries Service (NMFS) to analyze the impact of a proposed irrigation project on habitat of the threatened coho salmon was arbitrary and capricious.⁷² Despite being a fairly run-of-the-mill Endangered Species Act case—agencies are required to conduct a formal consultation and provide a "biological opinion" that utilizes the "best available science"⁷³ if a proposed action threatens a listed species—the case is notable for the way that attorneys from interest groups used the dissenting opinion of one particular NMFS scientist to sway the court. In 2001, Mike Kelly was appointed as the "technical lead" on the team of scientists assigned to write a biological opinion (BiOp).⁷⁴ The team's first draft BiOp concluded that the proposed irrigation project would, in fact, jeopardize the coho salmon, but the Department of Justice apparently nixed the BiOp.⁷⁵ Kelly's team then proposed a second BiOp, which did not represent Kelly's preferred position but still satisfied him as being "legitimate."⁷⁶ At this point, the issue was essentially taken from the scientists. According to Kelly, the team heard that the Bureau of Reclamation and/or DOI believed that the

⁷¹ *Id.* (emphasis added).

⁷² *Pac. Coast Fed'n of Fishermen's Assocs. v. U.S. Bureau of Reclamation*, 426 F.3d 1082 (9th Cir. 2005).

⁷³ *Id.* At 1085.

⁷⁴ *Narrative Statement of Michael S. Kelly*, PEER, http://www.peer.org/docs/noaa/kelly_narrative.pdf, at 1 (last accessed Dec. 4, 2012) [hereinafter *Narrative Statement*]; *Testimony of Mike Kelly*, PEER, http://www.peer.org/docs/noaa/07_30_07_mike_kelly_testimony_nr_committee.pdf, at 2 (last accessed Dec. 4, 2012) [hereinafter *Testimony*].

⁷⁵ *Narrative Statement*, *supra* note 74, at 3; *Testimony*, *supra* note 74, at 3.

⁷⁶ *Narrative Statement*, *supra* note 74, at 3.

team was “stonewalling” the project.⁷⁷ From that point on, the team’s voice was essentially silenced. As Kelly recalled, “It is clear to me that someone at a higher level had ordered us to accept the proposed [Reasonable Prudent Alternative] regardless of whether there were arguments that we could make to analyze this heretofore unanalyzed risk to the species.”⁷⁸ Ultimately, the agency rammed through a BiOp that differed in important respects from the ones developed by the team.⁷⁹

Had the story ended there, it would have been unremarkable—it would merely be evidence that scientists in agencies do not always get what they want. Instead, Kelly decided to fight back. First, he asked to be relieved of his duties on the team. Kelly testified, “I . . . hoped that my refusal to participate would apply some ‘back pressure’ up the chain of command. I expected that it would be untenable to develop a BiOp without a staff biologist.”⁸⁰ Ultimately, the strategy of insubordination did not work—in fact, Kelly received an award for his work on the project⁸¹—so Kelly filed for whistleblower protection even when there was no retaliation.⁸² With the aid of a California branch of the scientific independence watchdog Public Employees for Environmental Responsibility (PEER),⁸³ Kelly lodged a formal disclosure with the DOI’s Office of Special Counsel (OSC), complaining of the political manipulation he had experienced.⁸⁴ OSC then decided not to investigate, noting that the proper forum for resolution of Kelly’s allegations was a challenge of the agency’s action in federal court and that the OSC could not be the “arbiter of ‘conflicting science.’”⁸⁵ Take the issue to federal court is precisely what Earthjustice and a number of other environmental groups did. Part of Earthjustice’s case was “fill[ing] ‘significant gaps in the administrative record,’” and a federal magistrate judge agreed with Earthjustice that this could be accomplished by an order

⁷⁷ *Id.* at 4.

⁷⁸ *Id.* at 5.

⁷⁹ *Id.* at 5-8.

⁸⁰ *Testimony, supra* note 74, at 4.

⁸¹ *Id.*

⁸² *Id.*

⁸³ PEER is a non-profit organization dedicated to monitoring natural resource management agencies and committed to “[d]efend[ing] and strengthen[ing] the legal rights of public employees who speak out about issues concerning natural resource management and environmental protection.” *About Us*, PEER, <http://www.peer.org/about/index.php> (last accessed Dec. 4, 2012). *See also* John McArdle, ‘Being Disliked, but Feared’ Is Swaggering Advocacy Group’s Ambition, N.Y. TIMES, May 24, 2011, <http://www.nytimes.com/gwire/2011/05/24/24greenwire-being-disliked-but-feared-is-swaggering-advoca-61492.html>.

⁸⁴ Press Release, PEER, Whistleblower Testifies Against Agency in Klamath Fish Kill (Mar. 19, 2003), <http://www.peer.org/news/news-releases/2003/03/19/whistleblower-testifies-against-agency-in-klamath-fish-kill/>.

⁸⁵ *Id.*

to the defendant agencies (NMFS and BOR) to allow Earthjustice to depose Kelly.⁸⁶ The magistrate judge added:

This court finds significant gaps in the administrative record The court is not obligated to accept the agency's contention that the administrative record is complete, *especially when there is evidence of internal dissent from the ultimate decision. The agency should not be permitted to deny the existence of an internal dispute by suppressing the evidence of it.* In the case at bar, this court should supplement the administrative record by including evidence of all points of view, not just those that support the final decision of the agency.⁸⁷

Of course, Kelly appeared as a nominally adverse party at the deposition, but his testimony was clearly damning to the defendants. Notably, PEER attorneys sat in on the deposition to advise Kelly of his best interest in terms of employment in the agency.⁸⁸ Ultimately, the litigation was largely shaped by Kelly's accusations: Earthjustice and the other environmental plaintiffs framed Kelly's testimony as helping to shine

⁸⁶ *Id.*

⁸⁷ Brief for Plaintiff-Appellants at 27, *Pac. Coast Fed'n of Fishermen's Assocs. v. U.S. Bureau of Reclamation*, 426 F.3d 1082 (9th Cir. 2005) (Nos. 03-16718, 03-16863), 2004 WL 540065 (quoting magistrate judge's order of Feb. 19, 2003) (emphasis added).

⁸⁸ *Deposition of Mike Kelly*, PEER 3, 9-10 (Mar. 7, 2003), http://www.peer.org/docs/noaa/MKelly_Depo.pdf. A PEER attorney, Dan Meyer, explained the rather odd capacity in which he appeared as follows:

I just wanted the record to clarify the difference . . . to make sure that people understood my role as counsel to [Kelly] in this deposition, is primarily in the context of 5 CFR 2635, which are the regulations that govern the ethical actions of Federal employees; so I'm here as an employment counsel, not as an environmental counsel. So if you hear me object, it will be me advising my client in the context of his employment with the federal government. Now, this could just as easily have been done by, say, the agency's ethics officer. That's not routinely done by the federal government. So once in a while a PEER member will come to us and say, "Hey, I've got to give a deposition and I just don't know how my employment interest is watched out for during that process; would you sit in as my counsel." So some people are kind of confused about why is there a PEER attorney here. It's because I'm here to advise [Kelly] on the proper stance an employee takes as a member of the federal workforce in these situations.

Id.

light on impermissible political interference in the BiOp process⁸⁹ and a “gaping hole” in the record,⁹⁰ and the government defendants attempted to discredit the importance of Kelly’s opinion by arguing that internal dissent is “inevitable” and ultimately healthy for deliberating agencies.⁹¹

Originally, the district court held that one part of the proposed RPA—the plan ultimately created by NMFS—was arbitrary and capricious, but that two other components of the plan were not arbitrary and capricious despite the fact that the BiOp “does not explicitly engage in an analysis of what effect [these components of the RPA] will have on the coho salmon or their critical habitat.”⁹² On appeal, the environmental petitioners challenged this holding, arguing that flows relied on “were the same flows rejected by the NMFS as insufficient in its review of the BOR’s biological assessment.”⁹³ Applying hard look review, the Ninth Circuit concluded that the federal agencies had altogether failed to provide a missing link—indeed, the missing link flagged by Kelly throughout the process—in the regulatory logic justifying the RPA: “The BiOp contains no analysis that suggests that the agency determined that, during the eight-year period encompassed by Phases I and II, the coho would receive sufficient protection against jeopardy under the proposed plan of operations.”⁹⁴ In fact, the court noted that “the agency’s decision appears to conflict with the analysis in the BiOp.”⁹⁵ In the end, Mike Kelly played a critical role in

⁸⁹ Brief for Plaintiff-Appellants, *supra* note 87, at 28 (“Kelly’s accusations provide insider evidence from a scientist who was involved in the decision-making process that the opinions of [NMFS]’s biologists may have been sidestepped and ignored -evidence [sic] that relevant factors were not considered. This is not a case of an outside third party making accusations based on speculation. Kelly, who was directly involved in the agency’s decision-making process, offers evidence that improper political pressure led an agency to ignore its own scientists and implement a plan which jeopardizes a threatened species and violates federal law.”).

⁹⁰ *Id.* at 27 (“The gaping hole in the record is explained by the testimony of Michael S. Kelly, NMFS’s former lead biologist working on the Klamath BiOp. In late October 2002, Mr. Kelly filed a formal whistleblower complaint with the U.S. Office of Special Counsel, asserting that the agency failed to follow its mandate to pursue scientifically based decision-making. Mr. Kelly alleged that pressure from BOR prevented NMFS from applying the best available science and from properly analyzing the final RPA.”).

⁹¹ Brief for Defendants-Appellees at 35-36, *Pac. Coast Fed’n of Fishermen’s Assocs. v. U.S. Bureau of Reclamation*, 426 F.3d 1082 (9th Cir. 2005) (No. 03-16718), 2004 WL 1125519 (quoting *Nat’l Fisheries Inst. v. Mosbacher*, 732 F. Supp. 210, 227 (D.C. Cir. 1990)) (“[A] certain amount of disagreement among the countless individuals involved in developing or commenting on the [agency’s decision] is inevitable and indicates that the debate was as open and vigorous as Congress intended.”). An intervenor, the Klamath Water Users Association, also discussed the Kelly deposition, attacking Kelly as a “disgruntled former NMFS employee.” Brief for Defendant-Intervenor-Appellees at 20-21, *Pac. Coast Fed’n*, 426 F.3d 1082 (9th Cir. 2005), 2004 WL 1125520.

⁹² *Pac. Coast Fed’n*, 426 F.3d at 1089.

⁹³ *Id.*

⁹⁴ *Id.* at 1092.

⁹⁵ *Id.*

killing this highly politicized affront to career staff by bringing evidence of the administration's steamrolling before the court and challenging the court to call the agency's bluff.

The story of Mike Kelly is but a small, and hardly abnormal, piece of evidence of the dynamics of litigation-fostered bureaucratic autonomy at work in the Department of the Interior during the Bush administration. In fact, in the year after the *Pacific Coast Federation* decision, NMFS decided to delist the coho salmon as threatened, reversing a 2004 decision to list the species as threatened under the ESA.⁹⁶ Though the decision to list the coho salmon had been primarily justified by the agency's biological review team's fifty-six percent majority position that the coho salmon was "likely to become endangered,"⁹⁷ a study conducted by the state of Oregon persuaded at least the political leadership in the agency⁹⁸ to abandon the earlier listing decision.⁹⁹ In vacating NMFS's decision to delist the coho salmon, the district court again drew heavily on evidence of internal disagreement about the proper course of action. In the process of decision-making, "Oregon's Final Assessment was criticized by the NMFS staff review, which noted that the 'generally poor condition of habitat and water quality calls into question conclusions that habitat limiting factors have been sufficiently addressed for the fish to survive future downturns in ocean survival.'"¹⁰⁰ The court also noted that the "Darm Memorandum rejected the NMFS staff review, which refuted Oregon's conclusion."¹⁰¹ The court was clearly troubled by the evidence that the agency had ignored its own scientists and "artificially creat[ed] competing inferences from the scientific evidence."¹⁰²

2. *New Source Review Litigation*

New Source Review (NSR) is the Clean Air Act program that requires existing stationary sources of air pollution to acquire a permit for

⁹⁶ Endangered and Threatened Species: Withdrawal of Proposals to List and Designate Critical Habitat for the Oregon Coast Evolutionarily Significant Unit (ESU) of Coho Salmon, 71 Fed. Reg. 3033-01 (Jan. 19, 2006).

⁹⁷ *Trout Unlimited v. Lohn*, 645 F. Supp. 2d 929, 937 (D. Or. 2007).

⁹⁸ *Id.* at 943-44 (noting that the Assistant Regional Administrator for Protected Resources for the region affected sent a memorandum to NMFS arguing that, "[g]iven the competing reasonable inferences [of the majority of BRT votes and the final Oregon Assessment], we cannot conclude that the ESU is likely to become endangered").

⁹⁹ Endangered and Threatened Species, 71 Fed. Reg. at 3033-01.

¹⁰⁰ *Trout Unlimited*, 645 F. Supp. 2d at 961.

¹⁰¹ *Id.* at 963.

¹⁰² *Id.* at 964-65.

modifications to the existing facilities.¹⁰³ Depending on where a source is located, permit applicants must comply with stringent technological and emission standards.¹⁰⁴ In the EPA's decision whether a permit is needed, the key question the agency must answer is how to understand the term *modification*, which is defined in Section 111 of the Clean Air Act as "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted."¹⁰⁵ The agency adopted regulations in 1980 to help expound the opaque statutory language and limit the potential scope of the permitting requirement.¹⁰⁶ But even the regulations' exemptions—in particular, the routine maintenance exemption—were designed to be narrow. In *Wisconsin Electric Power Co. v. Reilly*, the Seventh Circuit upheld EPA's exclusion of a "life extension project" on a Wisconsin power plant from the routine maintenance, repair, and replacement exemption to NSR.¹⁰⁷

The NSR program remained in essentially this posture until the waning months of the Clinton administration. Tipped off by complaints, the EPA stepped up enforcement against plants that were going well beyond routine maintenance without going through the permitting process.¹⁰⁸ This reinvigorated effort at enforcement ultimately led to several high-profile victories against power plants. Then, in 2001, the EPA's practice again changed abruptly. When the Bush administration took the reins, the NSR became an immediate target of deregulatory reform¹⁰⁹—a move that engendered years of litigation.

For the purposes of this article, the focus is on the ways in which EPA career staff, both in the Air Program and in the Office of General Counsel, balked at efforts to fundamentally change the NSR program and stop the Clinton-era enforcement actions in their tracks. It now seems clear that career staff in the EPA were thinking strategically well before the specific NSR rules. Professor Joel Mintz noted, as the eventual challenges to the NSR were pending in the D.C. Circuit, "Regrettably for all concerned, the first contacts between EPA's career enforcement staff and the Agency's

¹⁰³ 42 U.S.C. § 7502(c)(5) (2006).

¹⁰⁴ 42 U.S.C. §§ 7475(a)(4), 7503(a)(2) (2006).

¹⁰⁵ 42 U.S.C. § 7411 (2006).

¹⁰⁶ 40 C.F.R. § 52.24(f)(6)(i) (1980).

¹⁰⁷ *Wisconsin Electric Power Co. v. Reilly*, 893 F.2d 901 (7th Cir. 1990) (as amended on denial of rehearing *en banc* Apr. 3, 1990).

¹⁰⁸ See, e.g., Brief for Petitioners at 9, *New York v. EPA*, 443 F.3d 880 (D.D.C. 2006) (No. 03-1380), 2006 WL 123108.

¹⁰⁹ See NAT'L ENERGY POLICY DEV. GROUP, NATIONAL ENERGY POLICY REPORT: RELIABLE, AFFORDABLE, AND ENVIRONMENTALLY SOUND ENERGY FOR AMERICA'S FUTURE (2001).

new top managers did not go well. Instead, some of the staff saw in those early meetings and actions a harbinger of an era in which federal enforcement of environmental laws would be given short shrift.”¹¹⁰

Before any formal announcement of the proposal emerged, internal documents highlighting internal criticism of the proposed changes were anonymously leaked to NRDC and then forwarded by NRDC to media outlets. As NRDC attorney John Walke (a former EPA attorney himself) noted, the “documents [were] fairly damning indictments of what the Bush administration want[ed] to do to the Clean Air Act,” indicating that “the party that gave them to [NRDC] was obviously concerned about that kind of outcome.”¹¹¹ Some documents from January 2002 showed EPA officials, including EPA administrator Christine Whitman, opposing plans emerging from Vice President Richard Cheney’s Energy Taskforce and the Department of Energy.¹¹² Other documents highlighted an internal debate between political appointees in the EPA’s Office of Air and Radiation and career staff in the EPA’s Office of General Counsel. Agency attorneys in the Office of General Counsel called the proposed changes “legally vulnerable,” but the official position of the EPA was that any changes had not been finalized yet.¹¹³ On the heels of these high-profile leaks, one senior EPA official, Eric Schaeffer, the Director of the EPA’s Office of Regulatory Enforcement, resigned in highly public fashion, writing in his letter to EPA Administrator Whitman that he had “never seen that kind of political pressure applied to an enforcement issue.”¹¹⁴

After this highly publicized leak and resignation, attention to the NSR issue spiked,¹¹⁵ and both environmentalists and industry groups were highly vocal in the EPA’s nationwide public hearings on proposed NSR changes.¹¹⁶ When the Bush administration finally acted on its NSR plans, it was clear that career staff were not bluffing. The administration ultimately

¹¹⁰ Joel A. Mintz, “*Treading Water*”: *A Preliminary Assessment of EPA Enforcement During the Bush II Administration*, 34 ENVTL. L. REP. (Envtl. Law Inst.) 10933, 10935 (2004), http://www.environmentalintegrity.org/pdf/publications/ERL_Article.pdf.

¹¹¹ Neela Banerjee, *Files Detail Debate in E.P.A. on Clean Air*, N.Y. TIMES, Mar. 21, 2002, <http://www.nytimes.com/2002/03/21/us/files-detail-debate-in-epa-on-clean-air.html>.

¹¹² *Id.* See also Mintz, *supra* note 110.

¹¹³ Banerjee, *supra* note 111.

¹¹⁴ Tony Freemantle, *EPA Official Quits, Criticizes White House on Air-Pollution Regulations*, Hous. CHRON. (March 1, 2002), available at 2002 WLNR 9010399. Schaeffer immediately co-founded an interest group called the “Environmental Integrity Project,” which sought to combine “policy analysis, media outreach and litigation to advocate for more effective enforcement of environmental laws.” *Environmental Integrity Project Staff*, Environmental Integrity Project, (Nov. 21, 2011), http://www.environmentalintegrity.org/abouteip/abouteip_staff.php.

¹¹⁵ For a sampling, see the sources collected in Mintz, *supra* note 110, at 10940 n.4.

¹¹⁶ *Emissions Polarize Business, Environment*, WASTE NEWS, Apr. 14, 2003, at 10.

promulgated two NSR rules, one primarily establishing a new framework for evaluating baselines for estimating emissions and the other modifying the routine maintenance, repair, and replacement exemption to exempt projects that cost twenty percent or less of the replacement value of the unit being maintained, repaired, or replaced, even if they result in a significant net increase in emissions.¹¹⁷ In the case of the routine maintenance, repair, and replacement “twenty percent” rule, the effect of the rule was to immediately withdraw authority in most of the EPA’s ongoing enforcement actions against electric power plants¹¹⁸ and to allow projected increased emissions well in excess of the de minimis increases that the EPA had traditionally allowed.¹¹⁹

NRDC and other groups spared no time in developing a comprehensive litigation strategy to challenge the EPA’s NSR revisions,¹²⁰ and, in doing so, they made explicit use of the evidence of the political manipulation provided to them in the early stages of the NSR saga. In *New York II*, the consolidated brief of the environmental petitioners drew heavily on a 2004 report issued by the EPA’s Office of Inspector General (OIG).¹²¹ The report discussed the division that developed between EPA’s Office of Air Regulation (OAR), which drafted the NSR 20-percent rule, and the Office of Enforcement and Compliance Assurance (OECA), which opposed the rule, and suggested that EPA reconsider the basis for the rule and seek greater cooperation with OECA.¹²² Altogether, the OIG report built a substantial case of political manipulation, noting the thin basis for the twenty percent rule, the OECA career staff’s suggestion of a 0.75-percent rule,¹²³ and the OECA’s opinion that the 20-percent rule would “eviscerate the air enforcement program.”¹²⁴ Further indicating the extent of the rift,

¹¹⁷ Jonathan Remy Nash & Richard L. Revesz, *Grandfathering and Environmental Regulation: The Law and Economics of New Source Review*, 101 NW. U. L. REV. 1677, 1696-1705 (2007).

¹¹⁸ Brief for Petitioners, *supra* note 108, at 14.

¹¹⁹ *Id.* at 15.

¹²⁰ Bruce Geiselman, *Council Warns of Additional NSR Lawsuit: Indiana, Ohio or Louisiana May Face Court Date with Groups Over Air Regulation Reform*, WASTE NEWS, July 5, 2004, at 16 (noting that the NRDC supported two suits challenging NSR rule changes and planned to file suit to challenge states’ implementation of NSR reforms).

¹²¹ Brief for Petitioners, *supra* note 108, at 16-18.

¹²² OFFICE OF INSPECTOR GEN., ENVTL. PROTECTION AGENCY, REP. NO. 2004-P-00034, EVALUATION REPORT: NEW SOURCE REVIEW RULE CHANGE HARMS EPA’S ABILITY TO ENFORCE AGAINST COAL-FIRED ELECTRIC UTILITIES (2004) available at <http://www.epa.gov/oig/reports/2004/20040930-2004-P-00034.pdf>[hereinafter OIG REPORT].

¹²³ The memorandum in which the career staff had suggested the 0.75 percent number, in addition to being a primary point of emphasis in the OIG report, was itself leaked to the press by a former official “critical of the administration” while controversy raged on. Bruce Barcott, *Changing All the Rules*, N.Y. TIMES MAG., Apr. 4, 2004, <http://www.nytimes.com/2004/04/04/magazine/04BUSH.html>.

¹²⁴ OIG REPORT, *supra* note 122, at 11.

the OIG report noted that the new heads of the OECA supported the rule, but that the OIG based its findings largely on comments by career staff in the OECA.¹²⁵

The OIG report was itself something of a controversial confrontation with the Bush administration, as the OIG had to defend its use of much of the information—in particular, its use of a 2002 memorandum between OECA and OAR—against claims by the administration that the information was part of the deliberative process of the agency and should be withheld from the public.¹²⁶ The environmental petitioners also noted evidence that the head of EPA’s enforcement office during the promulgation of the NSR rules had disagreed with the administration and concluded that the administration had pushed through a rule that did not “pass the laugh test.”¹²⁷

While the D.C. Circuit did not specifically cite any of the evidence of dissensus in its decision vacating the 20-percent rule, it would be difficult to maintain that the court was not influenced by it. The NSR saga is the prototype for litigation-fostered bureaucratic autonomy. Career staff, sensing that their programs were on the chopping block, used a variety of mechanisms—leaks to interest groups, interviews with media, complaints to the OIG—to highlight dissensus and signal interested actors that litigation was possible. This informal campaign was started early enough that litigants had almost four years to prepare a narrative. These outside actors followed through, incorporating the story of political manipulation and dissensus directly into their merits briefs.¹²⁸ If there is one thing to take away from the NSR saga, it is that agency career staff and litigants outside the agency were able to effectively paint the entire NSR program revision as inherently arbitrary and unsupported by much of the agency itself by providing the court with an avenue to vacatur of the 20-percent rule.

¹²⁵ *Id.* at 8 n.7.

¹²⁶ *Id.* at 44 (“The report also makes much of a June 2002 memo from OECA to OAR. This memo is a deliberative agency document that should not be disclosed in this report. In any event, the report mischaracterizes its content. The report also implies in several places that the rule was not developed using an ‘open, public, and transparent’ process, which is simply not the case. These major errors create a vastly different picture of the ERP rulemaking process than the one that actually occurred, and must be corrected.”).

¹²⁷ Brief for Petitioners, *supra* note 108, at 18 (citing Mintz, *supra* note 110, at 10939).

¹²⁸ See Brief for Petitioners, *supra* note 108, at 16-17.

C. Synthesizing Litigation-Fostered Bureaucratic Autonomy: The Idea of Dissonance

The case studies collected here offer a core insight: “losing” constituencies within an agency are not completely out of luck when political officials push through a final rule that departs from the preferences of those constituencies. Though the case studies do not exhaust the potential catalogue of strategic agency behaviors,¹²⁹ they nevertheless strongly suggest that bureaucratic agents possess both the incentives and the wherewithal to press their policy preferences in a variety of legal fora, and, most importantly, ultimately in judicial review of agency rulemaking. Of course, some of the dynamics of resistance outlined in the case studies presuppose a symbiotic partner—perhaps the media, interest groups, watchdog groups, or oversight institutions within agencies—and therefore might not be true self-governance. As Part III makes clear, it is less important to bicker about the semantics of *autonomy* than it is to understand that the phenomenon presents a challenge to dominant understandings of administrative law and conventional accounts of the legitimacy of the administrative state.

It is worth taking some time to theorize about the common features of the mechanisms of litigation-fostered bureaucratic autonomy. One place to look for a theoretical framework is in a theory of reputational power and networks. Looking to the history of American political development, Professor Carpenter argues that autonomous agencies—i.e., agencies that are able to “take actions consistent with their own wishes” even when politicians and other organized interests “would prefer that other actions (or no action at all) be taken”¹³⁰—emerge when agencies have organizational reputations based on talent, cohesion, and efficiency and are able to “marshal the varied forces of American politics into coalitions, coalitions that are unique and irreducible to lines of party, class, or parochial interest.”¹³¹ Focusing on reputational power

allows for strategic regulatory officials who respond to incentives of a kind. It allows for the possibility and narration of dysfunction and systematic regulatory error (including too much responsiveness to regulated industry,

¹²⁹ This Article only purports to explore the strategic use of dissent in litigation. Much has been written about dissent and resistance in agencies generally, *see supra* Part I.A, but the role of administrative law in supporting such dissent and resistance is not well understood.

¹³⁰ CARPENTER, *supra* note 23, at 4.

¹³¹ *Id.* at 4-5.

as well as too much cautiousness). It allows for prediction of systematic regulatory successes, including pursuit of the public interest. It can incorporate differences within a regulatory organization, and it can incorporate the multiplicity of constituencies and networks that suffuse regulatory politics. It can bring both flexibility and intellectual order to the study of regulation as it is performed by the various organizations of state.¹³²

We might understand litigation-fostered bureaucratic autonomy as one manifestation of reputational power and networking of this sort. What is central in this account is an agency staff's cashing in on the reputational and network capital of the agency by reaching out to its symbiotic partners in the press, interest groups, the public, and, ultimately, the courts and by appealing to its claim to represent competence or expertise on a matter. But Carpenter does not disaggregate agencies along the political/professional axis, and instead treats agencies as generally cohesive organizations. Thus, Carpenter does not clearly speak to the effect of division within an agency; his concern is with the ways that a relatively cohesive agency (including political appointees) can resist the political imperatives of the White House by harnessing reputational power.

In some ways, and in contrast with Carpenter's study of the use of reputation and expertise to promote autonomy, the specific mechanism that emerges from the case studies in Part I.B involves the deliberate destruction of an agency's reputation insofar as career staff attempt to build a record of internal inconsistency and myopia in the institution in order to resist the imperatives of both the President and his loyal political appointees. In other words, Carpenter's account of reputational power seems most on point in an agency environment not plagued by politicization and division, but at least since the 1970s, Congress and especially presidents have been much more proactive about controlling political appointees as part of a strategy of reining in administrative agencies.¹³³ If the dominant story of the last forty years is about division and efforts to control that division, then the idea of reputational power as a

¹³² DANIEL CARPENTER, *REPUTATION AND POWER: ORGANIZATIONAL IMAGE AND PHARMACEUTICAL REGULATION AT THE FDA* 70 (2010).

¹³³ See Shapiro & Wright, *supra* note 35, at 577 ("The administrative presidency seeks to rein in bureaucratic discretion by centralizing decision-making in the White House and by sending vast numbers of political appointees into the agencies to monitor and control the bureaucrats.").

means of bureaucratic autonomy (at least insofar as it relies on an agency acting as a relatively cohesive unit) is seemingly incomplete.

A more appropriate metaphor for the specific dynamics of litigation-fostered bureaucratic autonomy is the idea of dissonance. Judges are used to approaching concepts like “reasonableness” and “non-arbitrariness” in the way one approaches a piece of music. While in any composition there are undoubtedly manifold parts working relatively independently, the foundational assumption is that these constituent elements of a composition come together cohesively. Commonsense notions of rationality or reasonableness presuppose harmony. Judges rely on this notion frequently and in a variety of contexts. For instance, while courts do not consider mere evidence of conflict between an agency’s final action and internal, preliminary opinions to be inconsistent with healthy deliberation,¹³⁴ they do nevertheless factor in this difference when considering whether the agency “considered the relevant factors and articulated a rational connection between the facts found and the choices made.”¹³⁵ Likewise, it is black letter administrative law that, at least when a court applies *Skidmore* deference, an agency interpretation of law that modifies a previous interpretation is entitled to less deference than a completely new interpretation.¹³⁶ Finally, courts can properly find agency action unreasonable if it apparently ignores the opinions of other agencies with expertise in the matter.¹³⁷ These standards are difficult to justify under a reasonableness standard that is inattentive to harmony; they are much easier to understand if they show that part of what courts are looking for in evaluating “reasonable” agency action is evidence that the action is internally and temporally consistent.

Moreover, in the context of the ESA, at least, a whole line of cases has found agency action arbitrary when there was clear evidence that the agency ignored evidence of differing opinion within the agency.¹³⁸ In *Trout*

¹³⁴ *Nw. Ecosystem Alliance v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1145 (9th Cir. 2007) (noting that an agency “may change its mind after internal deliberation”).

¹³⁵ *Id.*, citing *Nat’l Assoc. of Home Builders v. Norton*, 340 F.3d 835, 841 (9th Cir. 2003).

¹³⁶ *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (citing *Skidmore v. Swift*, 323 U.S. 134, 139-40 (1944)). Originally, this consistency principle in administrative law arguably applied across the board. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987). However, the Court has recently narrowed that position, at least with respect to exercises of agency policy-making discretion. See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009); but see *id.* at 505 (noting that even if change is not per se impermissible, an agency must at least openly acknowledge it is changing and not merely operate “sub silentio”).

¹³⁷ See *Sierra Club v. U.S. Army Corps of Eng’rs*, 701 F.2d 1011, 1030 (2d Cir. 1983).

¹³⁸ See, e.g., *In re Consol. Salmonid Cases*, 791 F. Supp. 2d 802, 823 (E.D. Cal. 2011) (“A court should ‘reject conclusory assertions of agency ‘expertise’ where the agency spurns unrebutted expert opinions without itself offering a credible alternative explanation.’”); *Ctr. for Biological Diversity v.*

Unlimited v. Lohn, the district court faced a record that was strikingly divided—the review team had split nearly fifty-fifty on the propriety of listing the coho salmon as a threatened species¹³⁹—but the court nevertheless found the agency’s decision arbitrary and capricious, focusing on NMFS’s failure to give weight to the agency’s own staff’s narrow majority position. This is hardly consistent with a stripped-down notion of reasonableness, for in this case, it appears to be perfectly reasonable to go either way. Instead, these standards and cases are clear evidence that courts are, at least occasionally, attentive to something like “harmony” in arbitrary and capricious review.

To be sure, judges know that the issues they confront in any regulatory policy are likely to be complex, but they nevertheless must assume that a reasonable and non-arbitrary decision is one that manages to attain some level of internal consistency, coherence, and discipline. Just as one or two dissonant notes can ruin a musical composition,¹⁴⁰ one or two dissonant notes can shatter the image of reasonableness on which a regulatory policy’s legitimacy under the Administrative Procedure Act hinges.¹⁴¹

II. LACK OF DETERRENT PRESSURE

One reason to doubt that litigation-fostered bureaucratic autonomy is a widespread phenomenon is the possibility that sufficient deterrents exist to discourage career staff from active resistance. For instance, career staff, though at least on paper protected by civil service laws entitling them to

Lohn, 296 F. Supp. 2d 1223, 1239 (W.D. Wash. 2003) (“A court must defer to an agency’s expertise. However, such deference is warranted only when the agency utilizes, rather than ignores, the analysis of its experts.” (citing *N. Spotted Owl v. Hodel*, 716 F. Supp. 479, 483 (W.D. Wash. 1988)), *vacated*, 511 F.3d 960 (9th Cir. 2007); *Am. Wildlands v. Norton*, 193 F. Supp. 2d 244, 253, 257 (D.D.C. 2002); *Friends of the Wild Swan, Inc. v. U.S. Fish & Wildlife Serv.*, 12 F. Supp. 2d 1121, 1135 (D. Or. 1997); *Defenders of Wildlife v. Babbitt*, 958 F. Supp. 670, 683-85 (D.D.C. 1997); *Res. Ltd., Inc. v. Robertson*, 35 F.3d 1300, 1305 (9th Cir. 1993).

¹³⁹ *Trout Unlimited v. Lohn*, 645 F. Supp. 2d 929, 937 (D. Or. 2007). See *supra* note 97 and accompanying text.

¹⁴⁰ Of course, dissonance might make a musical composition more compelling. I must assume that judges do not enjoy dissonance in the administrative state the same way they might occasionally enjoy dissonance in a classical composition. In most cases, the analogy makes sense.

¹⁴¹ It is important to note that this dissonance need not depend on the assumption that career staff represent greater “expertise.” Recent scholarship has argued that the current Supreme Court seems to be reinvigorating an expertise-based strand of doctrine in such cases as *Massachusetts v. EPA*. See Freeman & Vermeule, *supra* note 41. Though much of the evidence reviewed in this paper happens to involve scientists, the theory suggested here ultimately does not depend on ideas of expertise, but rather on the idea that evidence of dissonance (without regard to relative expertise of any one position) affects judicial review. This theory is thus distinct from the theory of resurgence of expertise offered by Professors Freeman and Vermeule.

some procedure in the case of retaliatory termination, are still subject to dismissal for insubordination, poor performance, or any other conduct amounting to “cause.”¹⁴² Moreover, throughout most of the history of whistleblower protection, paper rights have been difficult to translate into practice.¹⁴³ Whistleblower protections are undoubtedly less robust than they were in a pre-*Garcetti v. Ceballos*¹⁴⁴ world,¹⁴⁵ and countless scholars have criticized the agencies responsible for policing compliance with civil service laws—the Office of Special Counsel (OSC) and the Merit Systems Protection Board (MSPB)—for their general ineffectiveness.¹⁴⁶ Adverse employment actions taken in response to whistleblowing (such as diminution of responsibility or transfer to less desirable units or projects) are certainly not unheard of, and most probably go unaddressed. More seriously, career staff may subject themselves to criminal liability by releasing information in some circumstances involving confidential national security documents.

While it is worthwhile to consider some of these prophylactic limits on the litigation-fostered bureaucratic autonomy, I argue that these deterrent pressures are not enough to control the behavior of career staff. The law surrounding dissent in agencies, as some have noted, reflects a “love-hate” relationship.¹⁴⁷ For one thing, the Code of Ethics for Government Service can be read to not only permit some dissent but also impose a duty to dissent in certain circumstances.¹⁴⁸ Moreover, President Obama’s 2009 memorandum on “scientific integrity” in administrative agencies directed the White House’s Office of Science and Technology Policy (OSTP) to

¹⁴² 5 C.F.R. § 752.301 (2003); Mendelson, *supra* note 10, at 615 (“[T]rue subversion probably would constitute sufficient cause to fire a civil servant.”).

¹⁴³ Thomas M. Devine, *The Whistleblower Protection Act of 1989: Foundation for the Modern Law of Employment Dissent*, 51 ADMIN. L. REV. 531, 535 (1999).

¹⁴⁴ *Garcetti v. Ceballos*, 547 U.S. 410 (2006) (holding that the First Amendment does not insulate public employees from employer discipline when employees make statements pursuant to official duties).

¹⁴⁵ See Orly Lobel, *Citizenship, Organizational Citizenship, and the Laws of Overlapping Obligations*, 97 CALIF. L. REV. 433, 433 (2009) (noting that “*Garcetti* exemplifies a distorted meeting of citizenship and organizational citizenship, driving a wedge between actions of the individual as citizen and as an employee”).

¹⁴⁶ Devine, *supra* note 143, at 534 (noting that “for extended periods [OSC’s] approach [to whistleblower claims] ranged from neglect to overt hostility” and that results were only “marginally better” in the MSPB). *But see id.* at 573 (noting that the MSPB has become a much more favorable forum for whistleblower complainants since 1996).

¹⁴⁷ *Id.* at 553; see also Lobel, *supra* note 145, at 434 (describing a “deep ambivalence within judicial and statutory doctrines about the role of individuals in resisting illegality in their group settings,” and noting that at times we call government informers “patriotic” and at other times “snitches” and “rats”).

¹⁴⁸ See, e.g., 5 C.F.R. § 2635.101 (1997) (“Public service is a public trust, requiring employees to place loyalty to the Constitution, the laws and ethical principles above private gain.”).

develop recommendations for the drafting of “appropriate rules and procedures to ensure the integrity of the scientific process,” to create “procedures to identify and address instances in which the scientific process or the integrity of scientific and technological information may be compromised,” and to “adopt such additional procedures, including any appropriate whistleblower protections, as are necessary to ensure the integrity of scientific and technological information and processes on which the agency relies in its decision making or otherwise uses or prepares.”¹⁴⁹ Though OSTP is still reviewing agencies’ proposed implementation of these reform policies nearly three years after the Obama memorandum, and though some agencies’ proposed implementing policies have come under attack for failing to fully implement protections,¹⁵⁰ the formal stance of the Obama administration in support of scientific integrity indicates that the politics of retaliation are tricky, thus giving agency dissenters plenty of moral, if not legal, support.

A. Internal Disclosure of Political Manipulation

As demonstrated by the examples in Part I, career staff actually have a variety of protected internal avenues to voice their dissent.¹⁵¹ Featured most prominently in the case studies above are the agencies’ offices of inspector general, or something similar. These offices are billed as independent watchdogs, and that is typically how they function. Formally, they have no power to alter the agency’s decision, but to focus on this feature of the offices is to ignore the critical role that they can play in amplifying dissent for later use in litigation. Because participation in investigations run by offices of inspector general is typically anonymous, disclosing dissent through these officers is a low-cost, low-risk way for career staff to vocalize their concerns. Moreover, once things are set in motion by a formal request for investigation, a snowball effect can take place as the investigation lends legitimacy to and lowers the barriers for those who have complaints about the administration. Similarly, the

¹⁴⁹ Memorandum of President Barack Obama for the Heads of Exec. Dep’ts and Agencies (Mar. 9, 2009), available at <http://www.whitehouse.gov/the-press-office/memorandum-heads-executive-departments-and-agencies-3-9-09>.

¹⁵⁰ See, e.g., Press Release, Union of Concerned Scientists, Interior Department’s New Scientific Integrity Policy Must Trigger Significant Changes To Be Effective (Feb. 1, 2011), http://www.ucsusa.org/news/press_release/interior-departments-new-SI-policy-0495.html.

¹⁵¹ Devine, *supra* note 143, at 552-53 (noting that Congress in 1989 amended the Civil Service Reform Act to increase protected disclosures beyond conventional “whistleblowing” to more informal means of dissent, including “complaints or grievances, testimony or assistance to anyone else exercising appeal rights, cooperating with or disclosing information to the Special Counsel or an Inspector General, or ‘for refusing to obey an order that would require an individual to violate a law’”).

commencement of a formal investigation can put political appointees on their heels; rather than stifling an investigation or retaliating against complainants, political appointees will be forced to minimize the damage by disclaiming the office's investigation on the merits. This may be too little, too late for the political appointees, as the mere existence of the office's report will nevertheless strongly suggest a fractured agency.

A less categorically acceptable method of internal dissent is whistleblowing. Whistleblower protections for federal employees are codified in the Civil Service Reform Act¹⁵² and, at least theoretically, afford a remedy whenever there is a "prohibited personnel practice."¹⁵³ The Act specifies several categories of protected disclosures¹⁵⁴ and allows federal employees who are the subject of retaliatory action for a protected disclosure to bring a claim before the Merit Systems Protection Board (MSPB).¹⁵⁵ Early iterations of the CSRA were widely criticized as ineffectual,¹⁵⁶ and Congress consequently revisited the law twice (in 1989 and 1994). By 1999, it appeared that Congress' efforts were paying some dividends, largely because of newly formed laws which made it so that, "[f]or the first time, agency bullies realistically may have something to lose by doing the dirty work of retaliation."¹⁵⁷

Though there was still work to be done,¹⁵⁸ the 1989 and 1994 revisions clearly set whistleblower protection on a positive trajectory. The MSPB has collected longitudinal survey data from 1992 through 2010 on the perception of retaliation among those who engaged in a statutorily

¹⁵² Civil Service Reform Act of 1978, Pub. L. No. 95-454, §101, 92 Stat. 1111 (1978); *id.* at 553.

¹⁵³ 5 U.S.C. § 2302 (2006).

¹⁵⁴ Of particular interest here are three such protected activities. First, there can be no personnel action because of "any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences . . . a violation of any law, rule, or regulation," or which evidences "gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." 5 U.S.C. § 2302(b)(8)(A). Second, there can be no personnel action relating to "any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures" of evidence suggesting violation of the laws or gross mismanagement, etc. 5 U.S.C. § 2302(b)(8)(B). Third, there can be no personnel action "for refusing to obey an order that would require the individual to violate a law." 5 U.S.C. § 2302(b)(9)(D). All of the protected activities can be found at 5 U.S.C. § 2302(b). See generally U.S. MERIT SYS. PROT. BD., WHISTLEBLOWER PROTECTIONS FOR FEDERAL EMPLOYEES (2010), available at <http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=557972&version=559604&application=ACROBAT> [hereinafter, WHISTLEBLOWER PROTECTIONS].

¹⁵⁵ See 5 U.S.C. § 1221(a) (1994); Devine, *supra* note 143, at 541 ("The opportunity to nip harassment in the bud is highly significant. Through a hearing to challenge the first tangible manifestations of the reprisal cycle, a whistleblower can shrink the drawn out struggle for career survival by an earlier litigation victory.")

¹⁵⁶ Devine, *supra* note 143, at 535.

¹⁵⁷ *Id.* at 566.

¹⁵⁸ *Id.*

protected activity such as disclosing an unlawful order. These statistics indicate across-the-board decreases in the rate of perception of retaliation—from 8.3% in 1992 to 3.2% in 2010.¹⁵⁹ Part of this is driven by the fact that when employees do make a disclosure, they are more able to protect their anonymity than at any time before: Only 42.5% of respondents in 2010 believed they had been identified through the disclosure, as compared to 53.1% in 1992.¹⁶⁰ Respondents in 2010 were much more likely to take some kind of action in response to perceived problems than they were to do so in 1992; the number of respondents saying they took no action fell from 45.2% to 26.4%.¹⁶¹ However, the respondents in 2010 did indicate much greater perceptions of threatened and actual retaliation as well.¹⁶² As the report concludes, agency employees seem to be much more knowledgeable about their rights and more capable of exercising them than they were in the past.¹⁶³

For the most part, whistleblower protections are designed for much more serious situations (e.g., when an agency employee engages in illegal or fraudulent activities) than those presented by mere disagreement about the requirements of law or by manipulation of a career staff's work by political appointees. Nevertheless, the improvement in protection over the years reflects some increasing level of societal approval of dissent in agencies and may very well encourage whistleblowing.

B. External Disclosure

A more extreme, subversive, and extra-legal (though potentially less dangerous) avenue of dissent is to simply bypass offices of inspector general or whistleblowing within an agency and to instead voice complaints outside the agency, perhaps to interest groups or the media. Part of the formal whistleblower protection law is a requirement that disclosure of prohibited activities be made to specific parties within the

¹⁵⁹ U.S. MERIT SYS. PROT. BD., PROHIBITED PERSONNEL PRACTICES: EMPLOYEE PERCEPTIONS 33 & tbl. 7 (2011), available at <http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=634680&version=636592&application=ACROBAT>.

¹⁶⁰ *Id.* at 32.

¹⁶¹ U.S. MERIT SYS. PROT. BD., BLOWING THE WHISTLE: BARRIERS TO FEDERAL EMPLOYEES MAKING DISCLOSURES 13 & tbl.8 (2011), available at <http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=662503&version=664475&application=ACROBAT>.

¹⁶² *Id.* at 12 & tbl.7 (“[P]erceived denials of promotions, opportunities for training, transfers to a new location, suspensions, and demotions all more than doubled in both threats and experienced actions.”).

¹⁶³ *See id.* at 14.

government,¹⁶⁴ so at least on the face of things, external avenues of dissent seem sub-optimal. In essence, the disgruntled civil servant who decides to go outside the agency usually foregoes all protections that might otherwise apply.¹⁶⁵

Despite this gamble, it appears that external disclosure is a viable option. The news is replete with reports of leaked documents and information. Several high-profile national security leaks during the George W. Bush administration led the administration to initiate what some believed to be the most aggressive effort since the Nixon administration to crack down on the persistent problem of leaks.¹⁶⁶ Nevertheless, the effort consisted mostly of efforts to control the demand side of leaking arrangements—i.e., those in the media—by threatening prosecution under the Espionage Act.¹⁶⁷ While this effort might have had some temporary chilling effect on the practice of leaking (especially in cases of leaks by national security agencies such as the Central Intelligence Agency or the State Department, where cases prosecuting leaks of classified information are sometimes brought¹⁶⁸), the sheer volume of evidence of leaking suggests that both career staff and external actors engage in the practice with impunity. In many cases, there is not even an effort to truly conceal the identity of the leaker.

During the Clinton and George W. Bush administrations, the watchdog group Public Employees for Environmental Responsibility (PEER), regularly published “white papers” that were actually written by anonymous employees within agencies and criticized the management of

¹⁶⁴ WHISTLEBLOWER PROTECTIONS, *supra* note 154, at 17 (“If the report was made to an ‘incorrect’ party, it will prevent the potential whistleblower from being protected. If the report was made to a ‘correct’ party, then the potential whistleblower may or may not be protected, depending upon other factors.”). A disclosure is generally not protected if it is made to the wrongdoer or if it violates a law (including regulations) or Executive Orders. *Id.* at 18-21. Of crucial importance, however, a disclosure to the media is not always prohibited: “[I]n some cases, the disclosure is protected only if it is made to the agency’s Inspector General, to another employee designated by the head of the agency to receive such disclosures, or to the Office of the Special Counsel. In other cases, however, a disclosure to a different party, such as the media, would still be protected.” *Id.* at 20.

¹⁶⁵ However, the MSPB has indicated that it will only exempt such communications to the media from Whistleblower Protection Act protection if the communication was in violation of a specific regulation tethered to an “explicit Congressional mandate . . . to prohibit such disclosures.” *See MacLean v. Dep’t of Homeland Sec.*, 2011 M.S.P.B. 70, ¶ 17 (2011). The MSPB thus seems to be rather hesitant about excluding whistleblower protection on the basis of communication to the media.

¹⁶⁶ Dan Eggen, *White House Trains Efforts on Media Leaks*, WASH. POST, Mar. 5, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/03/04/AR2006030400867.html>.

¹⁶⁷ *Id.* Of course, this crackdown, even in theory, only affected national security-related leaks.

¹⁶⁸ Michael Isikoff, ‘Double Standard’ in White House Leak Inquiries?, MSNBC, Oct. 18, 2010, http://www.msnbc.msn.com/id/39693850/ns/us_news-security/t/double-standard-white-house-leak-inquiries/#.Tr6Slkco3eU; Jane Mayer, *The Secret Sharer: Is Thomas Drake an Enemy of the State?*, NEW YORKER, May 23, 2011, http://www.newyorker.com/reporting/2011/05/23/110523fa_fact_mayer.

those agencies. For example, PEER released a 2005 report by scientists in the Bureau of Land Management (BLM) charging that BLM was responsible for “gross mismanagement” of public lands under its charge.¹⁶⁹ The scientists claimed that the agency had systematically allowed overgrazing on these lands and that a proposed program for grazing fee incentives (under which the agency would waive up to 75% of grazing fees in exchange for “good rangeland practices”) was misguided and impossible for the agency to manage.¹⁷⁰ In releasing the report, PEER noted that the report “was painstakingly prepared by over a dozen current [BLM] employees in the inter-mountain west,” including “district managers, fisheries and wildlife biologists, and range conservationists,” and had been “peer reviewed by over thirty other grazing specialists and scientists in other federal and state land management agencies, academia, and other knowledgeable people in the private sector.”¹⁷¹ PEER also noted that the authors “have had to stay anonymous, in order to avoid the inevitable retaliation that would be taken against them.”¹⁷² While these employees were clearly reticent to completely reveal their identities, it seems difficult to believe that BLM could not have discovered the identities of the authors with some investigative effort. All of this suggests that political appointees lack the institutional capacity or perhaps even the political capital to discover and control methods of external disclosure.

Formal agency policies on communication with outside parties vary widely. Many agencies routinely send memoranda reminding agency staff that they are not to release intra- and inter-agency memoranda, policymaking documents, draft rules and Federal Register documents, and legal opinions.¹⁷³ However, the Food and Drug Administration’s effort to minimize criticism of one such memo by referring to it as simply a “prudent reminder” of some of the agency’s responsibilities¹⁷⁴ suggests that these methods are rather toothless. In sharp contrast, as part of the Obama administration’s scientific integrity policy reforms, the National Science Foundation (NSF) has proposed a right of NSF employees and funded researchers to

¹⁶⁹ PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY, PUBLIC TRUST BETRAYED: EMPLOYEE CRITIQUE OF THE BUREAU OF LAND MANAGEMENT RANGELAND MANAGEMENT, at ii (2005), available at http://www.peer.org/pubs/whitepapers/public_trust_betrayed.pdf.

¹⁷⁰ *Id.* at ii, 6-7.

¹⁷¹ *Id.* at i.

¹⁷² *Id.*

¹⁷³ Alicia Mundy, *Memo to FDA Staff: Don't Leak This*, WALL ST. J. HEALTH BLOG (Mar. 17, 2009, 2:13 PM), <http://blogs.wsj.com/health/2009/03/17/memo-to-fda-staff-dont-leak-this/>.

¹⁷⁴ *Id.*

express their personal views, provided they specify that they are not speaking on behalf of, or as a representative of, the agency but rather in their private capacity. So long as this disclaimer is made, the employee is permitted to mention his or her institutional affiliation and position if this has helped inform his or her views on the matter.¹⁷⁵

In a study of agency policies and practices regarding communication with media and the public, the Union of Concerned Scientists found wide variation in the freedoms of agency staff both across agencies and sometimes even within agencies.¹⁷⁶ Even when an agency has policies against unauthorized communications, such policies do not seem to effectively deter anonymous leaks. For instance, the EPA and the BLM ranked among the most repressive on the UCS report card,¹⁷⁷ but as we have seen in Part II, those agencies have had incidents of anonymous and highly effective dissenting behavior.

Ultimately, the relatively informal route of disclosing dissent through external avenues can be extraordinarily useful and appears generally to be relatively costless because of the lack of a credible threat of discovery or enforcement, or perhaps because full-fledged enforcement might reveal information that the agency would rather control. Moreover, at least for more senior career staff members, the potential consequences of being discovered may be softened by the promise of employment in the public interest groups that most frequently work with the agency.¹⁷⁸

III. THEORETICAL IMPLICATIONS: THE CHALLENGE TO “CONTROL” MODELS AND THE DEMOCRATIC LEGITIMACY OF THE ADMINISTRATIVE STATE

If bureaucrats who lose in the policy-making process can use administrative law instrumentally to move policy away from the administration’s formal policy choice, this reality carries implications for both the empirical underpinnings of administrative law scholarship and the

¹⁷⁵ Implementation of Scientific Integrity Principles: Draft Plan for Public Comment, 76 Fed. Reg. 47,271 (Aug. 4, 2011).

¹⁷⁶ UNION OF CONCERNED SCIENTISTS, FREEDOM TO SPEAK? A REPORT CARD ON FEDERAL AGENCY MEDIA POLICIES (2008), http://www.ucusa.org/assets/documents/scientific_integrity/Freedom-to-Speak.pdf.

¹⁷⁷ *Id.*

¹⁷⁸ See, e.g., *supra* note 114 and accompanying text.

normative justifications of the administrative state. This section represents an initial excursus on these themes, but more work, both empirical and normative, will have to be done to completely understand what the concept of litigation-fostered bureaucratic autonomy and similar accounts of bureaucratic resistance mean for these literatures and administrative law writ large.

A. A Challenge to the Political Control Consensus

At root, the phenomenon of litigation-fostered bureaucratic autonomy is a challenge to conventional notions of the operation of administrative law in the American constitutional framework. In its simplest form, the political control model is built on the assumption that “democratic governance presumes that officials are the servants of the people, and for that normative proposition to be true, ‘the people’ must be able to hold officials accountable for their actions.”¹⁷⁹ Whatever power agencies have, it is thought, must come from a limited delegation of power by the elected branches of government, and administrative law helps ensure that agencies act within the confines of this delegation. While this idea existed in tension with the expertise-based justifications of the rise of the modern administrative state in the late nineteenth and early twentieth centuries,¹⁸⁰ the idea that delegations of authority must or should ultimately be traceable to the action of some democratically elected authority has firmly cemented itself as the leading understanding underpinning administrative law.¹⁸¹ Of course, this simple delegation model is a caricature.¹⁸² Delegations of authority are often capacious, and, for at least some, highly problematic in

¹⁷⁹ Jerry L. Mashaw, *Bureaucracy, Democracy, and Judicial Review*, in *THE OXFORD HANDBOOK OF AMERICAN BUREAUCRACY*, 569, 569 (Robert F. Durant ed., 2010).

¹⁸⁰ STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920* (1982) (describing the rise of progressive notions of expertise as a justification of the expansion of the administrative state).

¹⁸¹ Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 *J.L. ECON. & ORG.* 81 (1985) (arguing that broad delegation of administrative authority by Congress is optimal in the sense that it leaves control in the hands of the more politically responsive and accountable executive branch); Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 *YALE L.J.* 2, 35 (2009) (noting that the “political control” model has “gained widespread acceptance”).

¹⁸² For a long time, the legitimizing imagery was the “transmission belt” or “input/output machine” model, under which agencies simply implement the already well-defined policy decisions of Congress. JERRY L. MASHAW, *GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW* 111 (1997); Stewart, *supra* note 9, at 1675-76. As Professor Mendelson notes, the transmission belt model has fallen into disrepute in light of ever-broader statutory delegations of authority, which leave agencies with considerable policy-making discretion. Mendelson, *supra* note 10, at 580.

their breadth¹⁸³ – hence, the importance of administrative law, which, in theory, exists to effectuate political control over agents bestowed with a delegation of authority.¹⁸⁴

Ultimately, administrative law may effectuate political control by tracing a line of authority back to one of two actors: Congress or the President. The literature of administrative law and political science has certainly ebbed and flowed in its choice of primary principal. On the congressional side, a school collectively known as “positive political theory” posits that Congress in fact exercises primary control over the administrative state through a variety of mechanisms. The “congressional dominance” theory starts with the assumption that Congress needs to delegate authority to administrative agencies because it is institutionally incapable of micromanaging policymaking and because it must “overcome collective action, coordination, and social choice instability problems” resulting especially from the recent growth of partisanship in Congress.¹⁸⁵

This principal-agent arrangement creates a potential problem for political accountability in that an informational asymmetry may develop between Congress (the principal) and agencies (the agents), leading to a danger that the agent may exploit the delegation.¹⁸⁶ But contrary to some who argue that this delegation is an entirely unprincipled dump of power to a completely unaccountable branch of government,¹⁸⁷ positive political theorists argue that Congress can delegate while still maintaining effective control over agencies by using a variety of mechanisms. Early models emphasized an ex post method of control, wherein Congress would use committee oversight hearings to police agency policy-making.¹⁸⁸ Congress could rely on “fire alarm” oversight, wherein interested parties with the time, money, and interest in monitoring agencies in the minutiae of

¹⁸³ See DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1995).

¹⁸⁴ See Bressman, *Beyond Accountability*, *supra* note 9 (arguing that administrative law can and does simultaneously serve to enhance rationality of decisions and to serve political accountability purposes).

¹⁸⁵ Kiewiet & McCubbins, *supra* note 39, at 232.

¹⁸⁶ Mathew McCubbins, Roger G. Noll, & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 247 (1987).

¹⁸⁷ LOWI, *supra* note 48; SCHOENBROD, *supra* note 183. For a helpful critique of the non-delegation arguments, see Mashaw, *supra* note 179.

¹⁸⁸ JOEL D. ABERBACH, *KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT* (1990); McCubbins, Noll, & Weingast, *supra* note 186, at 249-51; Mathew McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 AM. J. OF POL. SCI. 165, 165-79 (1984).

policymaking could alert Congress to departures from Congressional intent.¹⁸⁹

Later, positive political theorists refined their theory and shifted their emphasis to ex ante controls. Under this account, it is more efficient for Congress to use administrative procedures to ensure that agencies make acceptable policy in the first place than it is to rely on ex post oversight.¹⁹⁰ The argument is that by “enfranchising” interested parties in the administrative policymaking process—e.g., by notice and comment procedures—Congress essentially “stack[s] the deck” in favor of the bargained-for policy, preventing any administrative drift.¹⁹¹ Better yet, if the interested beneficiaries of legislation change their preferences, administrative procedures allow them to pull the agencies along with them.¹⁹² Hence, Congress achieves control primarily through enhancing the oversight and control faculties of the concentrated interests that were the intended beneficiaries of the legislative deal.

While positive political theory has been extraordinarily influential, administrative law scholars have grown somewhat skeptical of the capacity of Congress to control administrative action. Some of the more promising methods of congressional review—e.g., substantive congressional review of agency rules or methods of congressional oversight—tend to be “sporadic,” “fragmented,” and “reactive,” leaving the “prospects for in-depth and systematic oversight . . . limited.”¹⁹³ By and large, the idea of Congress playing a central role in controlling the administrative state has

¹⁸⁹ McCubbins & Schwartz, *supra* note 188, at 164-79.

¹⁹⁰ McCubbins, Noll, & Weingast, *supra* note 186.

¹⁹¹ Steven J. Balla, *Administrative Procedures and Political Control of the Bureaucracy*, 92 AM. POL. SCI. REV. 663, 664 (1998). The “stacking the deck” hypothesis works regardless of whether the process is generic notice and comment rulemaking or a more specialized consultation procedure (e.g., NEPA review or ESA listing petitions) on the assumption that select interests dominate notice and comment rulemaking. That seems to be the case. See Jason W. Yackee & Susan W. Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. OF POL. 128 (2006).

¹⁹² Balla, *supra* note 191 at 664.

¹⁹³ Mendelson, *supra* note 10, at 570; see also BERNARD ROSEN, HOLDING GOVERNMENT BUREAUCRACIES ACCOUNTABLE 87 (3d ed. 1998) (“Unless [oversight activity] reveals a scandalous situation, the work is . . . considered dull, with the potential to be troublesome politically.”); Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1450 (1992); Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429, 482 (1999) (“Legislative inertia and the gatekeeping function of congressional committees can prevent Congress from responding even when there is a general consensus on the need for legislative action.”); Mark Seidenfeld, *A Big Picture Approach to Presidential Influence on Agency Policy-Making*, 80 IOWA L. REV. 1, 8-9 (1994) [*hereinafter* *Big Picture Approach*].

been replaced by a President-centric model of political control.¹⁹⁴ Even so, administrative law scholars have begun to sense a “turn to Congress” in administrative law,¹⁹⁵ and have even begun to rediscover some of the hidden connections between common administrative law doctrines and congressional control.

Professor Lisa Bressman argues that the Supreme Court has “developed a law of administrative procedures that is consistent with the [positive political theory] account.”¹⁹⁶ She points to the “hard look” doctrine,¹⁹⁷ the “hybrid rulemaking” requirements imposed by the D.C. Circuit,¹⁹⁸ the ban on ex parte contacts,¹⁹⁹ recent developments in the *Chevron* doctrine,²⁰⁰ and the liberalization of standing doctrines after the high-water mark of stingy standing doctrine in *Lujan*²⁰¹ to argue that, on the whole, “[i]t is possible to view the Court’s procedural cases as sensitive to the needs of Congress for monitoring agency action, while minimizing the potential for reviewing courts to impose their own views of wise policy.”²⁰² In short, Bressman argues that we can learn a lot about administrative law and its procedural focus by taking seriously the idea that such procedural rules at least indirectly help further congressional monitoring of bureaucratic performance.

Nevertheless, from the 1980s through the 1990s, the President’s control of administrative agencies was the focus of most administrative law scholarship.²⁰³ Presidents possess broad discretion in removal of agency heads, at least in executive agencies,²⁰⁴ thus allowing for relatively nimble

¹⁹⁴ See, e.g., Mendelson, *supra* note 10, at 569 (“The relative lack of control by other branches would seem to make the President’s role more important as a source of legitimacy for the administrative state.”). See also sources cited *infra* notes 204-213.

¹⁹⁵ Jack M. Beermann, *The Turn Toward Congress in Administrative Law*, 89 B.U. L. REV. 727 (2009).

¹⁹⁶ Bressman, *Procedures*, *supra* note 8, at 1776.

¹⁹⁷ *Id.* at 1777-83.

¹⁹⁸ *Id.* at 1783-85. See also Thomas J. Fraser, *Interpretive Rules: Can the Amount of Deference Accorded Them Offer Insight into the Procedural Inquiry?*, 90 B.U. L. REV. 1303, 1305 (2010).

¹⁹⁹ Bressman, *Procedures*, *supra* note 9, at 1786-88.

²⁰⁰ *Id.* at 1788-96.

²⁰¹ *Id.* at 1796-1804.

²⁰² *Id.* at 1804.

²⁰³ Mendelson, *supra* note 10, at 580 (“[T]he dominant version of the principal-agent approach to the democratic legitimacy of administrative agencies is now the presidential control model.”).

²⁰⁴ *Myers v. United States*, 272 U.S. 52 (1926). *But see* *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3165-66 (2010) (recognizing *Myers* as overruled in part and reaffirming that “Congress sometimes may, consistent with the Constitution, limit the President’s authority to remove an officer from his post”); *Morrison v. Olson*, 487 U.S. 654 (1988); *Humphrey’s Ex’r v. United States*, 295 U.S. 602 (1935). Of course, the President rarely exercises this authority in a formal sense. Perhaps this is because the threat of removal is sufficient to deter insubordinate action on

reactions to undesirable regulatory action compared with Congress' responses, and Presidents have inserted themselves directly in agency policymaking in a variety of ways.²⁰⁵

The rise of centralized White House regulatory review,²⁰⁶ in particular, has raised constitutional eyebrows insofar as it argues for presidential authority to direct agency heads to implement decisions.²⁰⁷ But nobody can doubt that, as an empirical matter, centralized review has, in general, dramatically expanded presidential control over many regulatory programs.²⁰⁸ Administrative law doctrines articulated by courts followed this shift, at least in part. For instance, the familiar *Chevron* doctrine purports to give deference to agencies when they reasonably interpret ambiguous statutes.²⁰⁹ Since the formal policy promulgated by an agency will usually be the product of direction by political appointees, deference doctrines like *Chevron*, to the extent that they have any teeth, are reflections of a growing feature of administrative law to allow room for presidential management.²¹⁰ Coupled with calls from some scholars urging yet more direct presidential involvement in the regulatory process,²¹¹ all of

the part of agency heads, or perhaps it reflects the success of more nuanced forms of executive control such as OIRA review.

²⁰⁵ Cass R. Sunstein, *Changing Conceptions of Administration*, 1987 BYU L. REV. 927, 938.

²⁰⁶ Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260 (2006); Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 55, n.36 (2006).

²⁰⁷ See, e.g., Robert V. Percival, *Who's in Charge? Does the President Have Directive Authority over Agency Regulatory Decisions?*, 79 FORDHAM L. REV. 2487, 2488 (2011); Peter L. Strauss, *Overseer, or "the Decider"?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007).

²⁰⁸ See Percival, *supra* note 207, at 2533.

²⁰⁹ *Chevron U.S.A. v. NRDC, Inc.*, 467 U.S. 837, 844 (1984).

²¹⁰ Indeed, allowing for more direct presidential control of agency rulemaking was part of the Court's motivation in *Chevron*. *Chevron*, 467 U.S. at 865-66 (1984) ("Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policy-making 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 choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.").

²¹¹ See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994) (arguing that the Constitution compels presidential control of the administrative state); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2339 (2001) (lauding the ways that presidents can develop better policy by taking an active role in administration). *But see* Percival, *supra* note 207 (arguing against the historical and textual basis for the President's authority to issue directives to agency heads); Strauss, *supra* note 207 (arguing that the constitution does not require that unitary executive thesis with regard to administration of the regulatory state).

these reflections of presidential power in the administrative state suggest that the presidential version of the political control model has been nothing less than a paradigm shift.²¹²

While the debate rages on among those who see administrative law as furthering political control by one branch or another, there is little scholarship extending beyond either the congressional or the presidential version of the political accountability model.²¹³ Yet the existence of litigation-fostered bureaucratic autonomy may pose descriptive difficulties for the political control model.

Since positive political theory and studies of presidential control have largely ignored the career staff and their possible uses of administrative law and process to resist political control, perhaps the political control model can simply be adapted to incorporate a more nuanced understanding of the conflicted nature of administrative law as both an instrument of control and an instrument of empowerment. This response to litigation-fostered bureaucratic autonomy is closely related to the obvious problems in showing the extensiveness of such subversive dynamics. The argument is that, even if litigation-fostered bureaucratic autonomy exists, if it exists at the margins, it does not pose a serious threat to the theoretical integrity of the political control model and most certainly does not compel a basic rethinking of our modern notions of what it is that administrative law does. Instead, litigation-fostered bureaucratic autonomy could simply be absorbed by the political control model.

While I have no good answer to this concern, given the relatively inchoate understanding of the extent of the dynamics of litigation-fostered bureaucratic autonomy and other related (and here unexplored) means of bureaucratic resistance, the seemingly perfectly developed incentive structure for such behavior,²¹⁴ coupled with many examples, ought to be enough to: 1) infer that such behavior may be widespread, and

²¹² Indeed, it seems that many scholars who would not claim to be presidential control theorists have nevertheless acknowledged the theory's empirical validity and its potential contribution to democratic legitimacy. See, e.g., Seidenfeld, *Big Picture Approach*, *supra* note 193, at 12 ("[I]f any single institution is well suited for monitoring overall government policy, it is the White House.").

²¹³ One semi-successful counter-narrative to the political control model, at least in the last few years, is the growing expertise model. Some have recently suggested that the current Supreme Court has indicated some interest in promoting the values of "expertise," as demonstrated by the decisions in *Massachusetts v. EPA* and *Gonzales v. Oregon*. Freeman & Vermeule, *supra* note 41. Just how permanent this emphasis on expertise will be is uncertain: Freeman and Vermeule suggest that these decisions may be temporary responses to evidence of exceptional disregard of expert judgment by the George W. Bush administration. *Id.* Overall, the expertise-based understanding of administrative law has, at least since the 1980s, struggled against the political control model.

²¹⁴ That is, the differentiation of career staff from political officials discussed in Part I combined with the lack of oversight of means of accessing the litigation process covertly discussed in Part II.

2) demonstrate the need for those writing in the political control tradition to broaden their inquiry into the potential limits of the political control model. In other words, I view this article not as tearing down the political control model completely, but rather as satisfying a burden of production. The burden is now on administrative law scholars to take seriously the idea of career agency staff resistance to political control and begin the task of uncovering the empirical profile of such behaviors.

If future research confirms the preliminary findings of this article, however, we should not shy away from directly facing the implications of broad-based subversive behavior in the administrative state. To the extent that subversive dynamics are fairly common, they could require significant revision of the political control model's core assumptions and point the way to a new research agenda attentive to the conflicted nature of administrative law and its development. Our understanding of judicially developed doctrines in administrative law may need to be changed to accommodate the fact that such doctrines might ultimately reflect tension between political officials and agency staff. For instance, traditional hard look review and *Chevron* review both entail requirements that the agency have acted reasonably.²¹⁵ While the conventional understanding of these doctrines centers on the vacillation between expertise (in the case of hard look review) and politics (in the case of *Chevron* review),²¹⁶ the former the province of career staff and the latter the province of political appointees, litigation-fostered bureaucratic autonomy suggests that these doctrines actually both reflect an internal consistency principle and give losing constituencies a substantial bargaining chip in forcing reconciliation of divisions in policymaking. Attending to this possible understanding of the function of the "reasonableness" element in both of these doctrines may shed light on several recent developments of these doctrines.²¹⁷

²¹⁵ *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43, (1983) (articulating the reasonableness standard in hard look review); *Chevron, U.S.A. v. NRDC*, 467 U.S. 837, 843-44, (1984) (holding that agencies are entitled to reasonable interpretations of ambiguous statutory provisions).

²¹⁶ *Watts*, *supra* note 181, at 37-38.

²¹⁷ For instance, the Supreme Court has recently done much to limit the application of the *Chevron* deference principle. See Daniel J. Gifford, *The Emerging Outlines of a Revised Chevron Doctrine: Congressional Intent, Judicial Judgment, and Administrative Autonomy*, 59 ADMIN. L. REV. 783, 784 (2007) ("Within the last several years, the Court began rewriting the so-called *Chevron* doctrine in ways that are not yet fully understood, but whose broad outlines are becoming increasingly clear."). Though most of that action has not been in so-called *Chevron* step 2 (i.e., the part of the test that requires an agency's interpretation of a statute to be reasonable), the Court's growing skepticism of the broad understanding of deference that *Chevron* was originally thought to stand for could potentially be explained in part by the Court's growing awareness that there may not be "one" agency to defer to. The same idea could also shed light on the Court's recent decision in *Massachusetts v. EPA*, in which the

At this point, it is difficult to know how prevalent the dynamics of litigation-fostered bureaucratic autonomy are, as much of such behavior is informal and eludes easy systematic study. Indeed, it is difficult to know how much to focus on the clear instances of information leaked by agencies being used in briefs and other litigation documents since the practice might actually come into play before the agency promulgates a final rule. That is, strategic leaks may put such pressure on the agency that it simply reverses course and either revisits the policy or decides not to pursue the policy at all, suggesting that we actually risk underestimating the effect of litigation-fostered bureaucratic autonomy if we focus solely on actual litigation. This article is ultimately merely a first cut at what will have to be a substantial empirical research agenda. However, what this article has demonstrated is that there is at least some concrete evidence of the strategic use of administrative law by career staff and that there is also a relatively favorable incentive structure for such behavior. That insight alone extends far beyond any temporary vacillation between expertise and politics and flags a thoroughgoing, structural deficiency in models of administrative law that focus mostly on political control of the administrative state.

B. The Challenge to Agency Process Models of Democratic Legitimacy

Assuming that one is convinced that, at least part of the time, the political control model is empirically incomplete and that the concept of litigation-fostered bureaucratic autonomy can highlight its potential gaps, we are left with a vexing normative challenge: can litigation-fostered bureaucratic autonomy be reconciled with our expectation that the administrative state will operate in a democratically legitimate fashion? This Part explores possible means of justifying the practice of litigation-fostered bureaucratic autonomy, ultimately concluding that the practice is generally consistent with democratic expectations.

1. Analogizing to Agency Process Models of Democratic Legitimacy

One possible but ultimately unavailing means of justifying litigation-fostered bureaucratic autonomy centers on an analogy to agency process

Court declined to defer to the EPA's decision not to initiate a rulemaking for CO₂ emissions after receiving a petition. *Massachusetts v. EPA*, 549 U.S. 497, 534 (2007). While this decision has been hypothesized to have arisen due to the court's growing concern about scientific bullying in agencies during the Bush administration, see Freeman & Vermeule, *supra* note 41, at 52, it might be more plausible to see that decision as merely one example of the Court's difficulties in applying concepts of reasonableness in the face of pervasive dissent, whether expertise driven or not.

models. These models start from the assumption that, even if Congress and the President maintain control over administrative agencies when they want to, the elected branches may intentionally delegate discretion to the agencies.²¹⁸ Thus, agency process models start from the same place where the recognition of litigation-fostered bureaucratic autonomy leaves us—Congress and the President are out of the picture. When the elected branches delegate in this fashion, they nevertheless do so on the assumption that the agencies' decision-making process will still be democratically responsive. Whereas the political control model resolves the agency problem by tracing authority to one of two elected branches, "agency-centered" conceptions of legitimacy locate democratic control in the agency's processes, which constrain agencies and ensure that the public interest is directly represented in the policy-making process.²¹⁹ It might therefore be possible to view the deprivation of political control by the dynamics of litigation-fostered bureaucratic autonomy as justifiable insofar as the process is sufficiently democratic itself.

Recognizing that elected officials frequently do not directly involve themselves in regulatory matters, scholars have developed several "theories of regulation" to classify and assess the various ways that agency processes democratically legitimize agency action even when the agency is virtually untethered by the other elected branches.²²⁰ One such theory—public choice theory—is profoundly pessimistic about the regulatory process, assuming that "agencies deliver regulatory benefits to well organized political interest groups, which profit at the expense of the general, unorganized public."²²¹ The three other major theories are more optimistic and argue that agency processes are able to further or at least approximate the public interest, however that concept is defined.

First, neopluralist theories begin from the assumption that there is no such thing as an independent "public interest," but they nevertheless argue

²¹⁸ Bressman, *Schechter*, *supra* note 5, at 1406 (noting that Congress may delegate simply because it wants to avoid the electoral repercussions of choosing a side). Congress may also formally commit issues to agency discretion by law, thereby avoiding judicial review under the Administrative Procedure Act. *See, e.g., Heckler v. Chaney*, 470 U.S. 821, 837-38 (1985). However, such formal absolute delegation is unnecessary in most situations, as broad delegations to executive agencies are the norm. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516 ("Broad delegation to the Executive is the hallmark of the modern administrative state.").

²¹⁹ Mendelson, *supra* note 10, at 585-86. *See also* Shapiro & Wright, *supra* note 35, at 578 (arguing that scholarship has generally overlooked "inside-out" strategies of administrative control such as relying on internal rules and professionalism to constrain bureaucratic discretion).

²²⁰ Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 4 (1998).

²²¹ *Id.* at 5.

that agency action is democratically legitimate to the extent that it adequately absorbs inputs from interested constituencies.²²² Many features of the “reformation of administrative law” in the 1960s and 1970s reflect this basic understanding of democratic legitimacy. For instance, the development of extra-textual informal rulemaking procedure doctrines and relaxed standing doctrines of this period can be seen as efforts to encourage or at least validate the participation of a variety of interested parties in the administrative process.²²³

Second, public interest theory posits that, even if the role of the public in agency decision making is more limited than the role of special interest groups or purposive actors within agencies, “[regulatory] outcomes . . . will more frequently than not be characterized as general interest” because of a variety of mechanisms that “reduce principal-agent slack by putting regulatory issues on the public agenda.”²²⁴

Third, civic republican theories generally argue that deliberative processes can reveal the public interest, provided that they are taken sufficiently seriously and are not simply a sham. As applied to agencies, various steps in the policy-making process—pre-rulemaking information gathering,²²⁵ notice-and-comment rulemaking,²²⁶ and even post-rulemaking judicial review²²⁷—can be sites of deliberation, thus lending democratic legitimacy and providing epistemic benefits to the quality of decision making.

The question, then, is whether litigation-fostered bureaucratic autonomy is similar enough to the processes identified by these various literatures that it can absorb legitimacy from them. Unfortunately, it does not appear that it is. The ability of career civil servants to use administrative law to further their policy preferences at the expense of elected officials seems patently offensive to most of the theories of democratic justification of the administrative process. This follows because independent strategic action by career staff is likely to be unrepresentative or skewed in systematic

²²² Stewart, *supra* note 9, at 1712.

²²³ *Id.*

²²⁴ Croley, *supra* note 220, at 69-70.

²²⁵ Daniel E. Walters, Note, *The Justiciability of Fair Balance Under the Federal Advisory Committee Act: Toward a Deliberative Process Approach*, 110 MICH. L. REV. 677, 679-80 (2012).

²²⁶ Mendelson, *supra* note 10, at 586 (“[A]gencies can discern the polity’s values through public participation in agency decisionmaking, including through the notice-and comment rulemaking requirements.”); Seidenfeld, *supra* note 9, at 1560-61.

²²⁷ Seidenfeld, *supra* note 10, at 1560.

ways²²⁸ (thus disqualifying it under neopluralist theories, which emphasize interest representation), can be characterized as self-interested (thus disqualifying it under public interest theory, which emphasizes that agents generally do not take advantage of principal-agent slack), and is relatively informal, insulated, and even hidden (thus disqualifying it under civic republican theories, which emphasize open deliberation²²⁹).

As Part III.B.2 argues, something like the civic republican model comes the closest to providing a justification for the kind of career staff resistance we see in litigation-fostered bureaucratic autonomy dynamics. Such resistance may produce deliberation that in some sense approximates the public interest because it increases the range of viewpoints that are seriously considered by the agency, even if these additional viewpoints are opposed by political appointees and the President. Yet it seems clear that even civic republican theorists would probably balk at the idea of insulated regulators resisting political control, even if that ultimately leads to something like the deliberative process that civic republican theorists prefer. Seidenfeld's influential civic republican theory views bureaucratic agents' discretion as a symptom of a civic republican framework that needs to be remedied: such a framework has an inherent "inability to ensure that decisionmakers act with the public interest rather than personal gain in mind" and, crucially, autonomy may allow the publicly minded regulator to nevertheless thwart the public interest by "impos[ing] unintentionally her unique conception of the public good on the polity."²³⁰ In response to these worries, "[c]ivic republicanism . . . must also look to the politically accountable branches to constrain well-meaning but despotic agencies."²³¹ Thus, Seidenfeld's civic republican theory, while explicitly acknowledging the benefits of agent discretion,²³² nevertheless falls back on a distinction between professional or expert capacity of career staff on the one hand and strategic capacity on the other.²³³

²²⁸ Career staff could, however, be "thought to act as agents of constituent stakeholders in a dialogue on what serves the public interest." Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of E-mail*, 79 GEO. WASH. L. REV. 1343, 1351 (2011).

²²⁹ Mendelson, *supra* note 10, at 586 (noting that civic republican or deliberative process theories view "insulated" decision-making processes as posing a danger of "straying" from democratic control, and suggesting that a modified civic republican view could view some level of presidential control "not as the central source of legitimacy, but as a safeguard against poor outcomes or skewed deliberation").

²³⁰ Seidenfeld, *supra* note 9, at 1562-63.

²³¹ *Id.* at 1572.

²³² *Id.* at 1528 ("Civic republicanism . . . posits that no individual acting in her political capacity should be subservient to other political actors.").

²³³ *Id.* at 1554-58 (describing the career staff as deriving its power from "professional training" and "job-specific expertise"), 1562-76 (describing various ways that regulators can nevertheless deviate

The problem is that litigation-fostered bureaucratic autonomy might look like strategic capacity: it might be just another example of agencies' self-interested tendencies to deliver rents to organized interests under a public choice account. It is therefore difficult to argue for the democratic legitimacy of litigation-fostered bureaucratic autonomy under any of the *pure* versions of the most common theories of regulation.²³⁴ In short, agency process justifications fail to capture the dynamics of litigation-fostered bureaucratic autonomy because they are unwilling to go where the empirical analysis takes us—that is, to the idea that litigation-fostered bureaucratic autonomy is value neutral. It is simply a tool and can theoretically be wielded for any purpose. Agency process models, which all focus on the public interest, however that is defined, do not purport to embrace any kind of strategic or even subversive behavior that the litigation-fostered bureaucratic autonomy hypothesis suggests exists at least some of the time.

2. The Internal Separation of Power and the Legitimizing Function of Litigation-Fostered Bureaucratic Autonomy

Though agency process models come close to providing a democratic justification of litigation-fostered bureaucratic autonomy, they ultimately reject the idea of overtly self-interested, strategic behavior by career staff in agencies. Although litigation-fostered bureaucratic autonomy seems antithetical to these theories, this section of the article argues that administrative law's empowerment of career constituencies is a welcome feature and can be justified by a theory of legitimacy that emphasizes the benefits of widely diffused, overlapping power within the government. I argue that this is sometimes true even when career agents act solely because of their own idiosyncratic notions of the public good. In the end, litigation-fostered bureaucratic autonomy can contribute to moderating the overreaching control of the administrative presidency, enhance deliberation, and force transparency and accountability, and though it has clear costs—namely, possible obstruction and delay—such costs are

from the public interest to the point that other means of political control are necessary to limit autonomy).

²³⁴ This is not terribly surprising. As Professor Steven Croley has noted, these theories “fail to incorporate any well developed vision of the administrative process” and “routinely generalize on a plane of abstraction far above the administrative process, without much attention to the legal institutions that shape regulatory decisionmaking.” Croley, *supra* note 220, at 6.

limited by the fact that litigation-fostered bureaucratic autonomy is only selectively employed.²³⁵

a. Checking Executive Overreach

In deconstructing classical accounts of the separation of powers as a division of authority among the three branches of government, Professor Elizabeth Magill points out that, to a large extent, the real separation of power occurs within branches.²³⁶ A critical look at the administrative state reveals that “state power is widely distributed, albeit not only on the three-branch metric” and that “[g]overnment authority is dispersed among many decisionmakers, and, given their varied incentives, the likelihood of that authority being consolidated in just a few hands is very small.”²³⁷ Wide diffusion of power has both costs and advantages; it may be “chaotic” and make it “difficult to translate an overwhelming electoral mandate into dramatic policy change,”²³⁸ but those same qualities are decidedly positive in their tendency to moderate overreaching or misinterpretation of the public interest by elected officials.

Picking up on these ideas and writing in the context of Congress’ near complete abdication of authority to the President in the debate about military detention during the George W. Bush administration, Professor Neal Kumar Katyal argued that scholars must begin to seek vindication of the democracy-promoting values of the separation of powers by moving from the “first-best concept of ‘legislature v. executive’ checks and balances” to the “second-best ‘executive v. executive’ divisions.”²³⁹ Though Katyal’s focus was on divisions and overlapping missions among agencies, his critical observation—that widely diffused power within the executive branch could constrain the excesses of otherwise unconstrained presidential administrations by balancing the expertise and institutional knowledge of career staff against the legitimate political imperatives of

²³⁵ Litigation-fostered bureaucratic autonomy can thus be seen as beneficial in much the same way that states’ means of resistance within the context of cooperative federalism arrangements is beneficial. Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1284-95 (2009) (describing the benefits of states’ resistance within the context of cooperative federalism). Both phenomena, in addition to being underexplored in the literature, emphasize the deliberation generating benefits of some level of friction, while also emphasizing that excesses lead to the familiar problems of principal-agent slack and “petty parochialism.” *Id.* at 1284-85 (noting that the benefits and costs of states’ resistance within the context of cooperative federalism).

²³⁶ Magill, *supra* note 48.

²³⁷ *Id.* at 654.

²³⁸ *Id.* at 651-52.

²³⁹ Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2316 (2006).

political appointees—is an insight worth building on and applying to the phenomenon of litigation-fostered bureaucratic autonomy. Indeed, one of Katyal’s suggestions for building a system of internal separation of powers is to strengthen civil service protections and the relative power of career staff within agencies, which is precisely what the litigation-fostered bureaucratic autonomy thesis asserts has already functionally occurred.²⁴⁰

In short, litigation-fostered bureaucratic autonomy represents a real-life manifestation of the “internal separation of powers,” and it ultimately realizes the same benefits that Katyal and Magill focus on—i.e., the limitation of aggregation of power in one branch. For those who are skeptical of the move to more presidential control of the administrative state, litigation-fostered bureaucratic autonomy can be seen as taking the edge off this trend. Providing a meaningful check on presidential control may do more to honor the rule of law because, even under a robust political control model, it takes both Congress and the President to create law, so internal checks on the President’s power may in some circumstances actually produce policy that is more in line with the bargained-for legal deal. Professor Lisa Bressman has shown that judicial review of agency action sometimes has this Congress-reinforcing effect, limiting presidential departures from the legislative deal;²⁴¹ litigation-fostered bureaucratic autonomy can contribute to this function of judicial review by helping to flag instances of overreaching or violation of the law.

Of course, the internal separation of powers is not without costs. As Dean Magill notes, wide diffusion and fragmentation of power—of which litigation-fostered bureaucratic autonomy is a clear example—can result in paralysis. Yet, as long as the diffusion of power falls short of an absolute veto power or a means of government actors to pursue their parochial self-interest at everyone’s expense, such wide diffusion and fragmentation may create an optimal balance of governmental capacity and limitation of power. Moreover, as the next section argues, the check provided by the dynamics of litigation-fostered bureaucratic autonomy is likely to further democratic and deliberative values because of the special perspectives of career staff. Litigation-fostered bureaucratic autonomy is, in that sense, far from a check for checks’ sake, though it does retain value in slowing down overreaching in presidential administration.

²⁴⁰ *Id.* at 2328-35.

²⁴¹ See Lisa Schultz Bressman, *Deference and Democracy*, 75 GEO. WASH. L. REV. 761 (2007).

b. Bolstering Democratic Processes

While meaningfully limiting aggregation of power is important, especially given the evidence of overreaching in presidential administration in recent years, I am also interested here in the way in which internal separation of power can dovetail with alternative democratic theories of legitimacy. In particular, it can help stimulate genuine recognition of the unique insights and knowledge of career staff. This kind of acknowledgment is a critical component of deliberative process theory. As Professor Amy Gutmann and Professor Dennis Thompson have argued,

Most fundamentally, deliberative democracy affirms the need to justify decisions made by citizens and their representatives. Both are expected to justify the laws they would impose on one another. In a democracy, leaders should therefore give reasons for their decisions, and respond to the reasons that citizens give in return.²⁴²

Litigation-fostered bureaucratic autonomy can force elected officials and political appointees to engage in this reason-giving process that is the essence of deliberative democratic legitimacy. And, unlike the democratic theories addressed above, which all turned on some notion of the public interest or on accountability, the deliberative process forced by litigation-fostered bureaucratic autonomy can accommodate instrumental, self-interested behavior on the part of career bureaucrats insofar as it merely forces political officials to go public with their reasoning or pay the price in a vacated rule.²⁴³ Thus, I argue that litigation-fostered bureaucratic autonomy potentially improves democratic legitimacy: It can improve the quality of deliberation by putting pressure on elected officials and political appointees to provide reasons for their actions, which might, perhaps counterintuitively, increase the transparency and accountability of agency policymaking.

Differentiation within agencies that occurs naturally²⁴⁴ and is heightened through practices of “agency burrowing” can provide

²⁴² AMY GUTMANN & DENNIS THOMPSON, *WHY DELIBERATIVE DEMOCRACY?* 3 (2004).

²⁴³ *Cf. id.* (“[N]ot all issues, all the time, require deliberation. Deliberative democracy makes room for many other forms of decision-making (including bargaining among groups, and secret operations ordered by executives), as long as the use of these forms themselves is justified at some point in a deliberative process.”).

²⁴⁴ *See supra* Part I.

meaningful epistemic, deliberative benefits to agency decision making because of its creation of a “greater assurance of political viewpoint diversity.”²⁴⁵ Litigation-fostered bureaucratic autonomy can contribute to this viewpoint diversity because career staff have important and unique perspectives. To the extent that career staff have unique experiences and institutional knowledge that cannot be simulated or provided by ordinary notice-and-comment rulemaking, a mechanism that empowers agency staff and ensures that its voice is heard in the policy-making process will enrich the informational environment in which a final decision is made.

Clearly, something changes when career staff are more empowered than presidential appointees, as is demonstrated in Professor David Lewis’s recent empirical study of political appointments and bureaucratic performance.²⁴⁶ Lewis finds that bureaucratic performance in regulatory programs, as measured by OMB’s Program Assessment Rating Tool (PART), decreases with greater numbers of political appointments²⁴⁷ and that survey data indicate that having greater numbers of political appointees in agencies lowers perceptions of agency performance compared with lodging most management tasks in career staffs.²⁴⁸ It is easy to think of reasons why we might see these patterns: The politicization of administrative agencies trades off institutional knowledge for political control, a particularly costly trade in eras of partisan polarization and frequently changing administrations.²⁴⁹ For instance, agency staff may have seen efforts to implement a certain idea fail in implementation, and their insights could help redirect a misguided or shortsighted political administration before it wastes precious time and resources pursuing that policy.²⁵⁰ Empowering or giving voice to career staff can thus provide the administrative process with a viewpoint that might not otherwise be provided and can contribute to better policy as a result.²⁵¹

²⁴⁵ Mendelson, *supra* note 10, at 644.

²⁴⁶ DAVID E. LEWIS, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE* (2008).

²⁴⁷ *Id.* at ch. 7.

²⁴⁸ *Id.*

²⁴⁹ See Mendelson, *supra* note 10, at 649 (“Agency employees are uniquely positioned to know and evaluate agency activities.”); Shapiro & Wright, *supra* note 35, at 611 (“Because of frequent turnover, political appointees often do not have time to learn enough about their agencies to become effective managers.”).

²⁵⁰ Shapiro & Wright, *supra* note 13335, at 588 (“Professionalism creates ‘neutral competence’ because civil servants are constrained by their training, socialization, and peer relationships to think beyond the political values of the current White House.”).

²⁵¹ To be sure, civic republican theories can be stretched to cover just this kind of epistemic benefit, although this would require a relaxation of the usual civic republican requirement that parties aim for consensus through deliberation and be driven by “public-spiritedness” rather than self-interest. See

What the internal separation of power adds to the deliberative benefit of greater career staff participation is a credible threat of resistance. For deliberation to work, the parties must be partners and must give reasons for their actions at some point, and as long as there is simply diversity of viewpoint without a credible threat, deliberation may be thwarted by political officials. If, on the other hand, career staff are empowered by administrative litigation in the manner suggested in this article, political appointees have powerful incentives to commit themselves to genuine negotiation and deliberation with career staff, thereby ensuring that the career staff's unique knowledge is not only spoken, but also heard and incorporated into the final decision. Political actors may also have powerful incentives to commit themselves to encouraging more robust public participation in the administrative process in order to validate their electoral mandate.

The product of the diffusion of power attendant to litigation-fostered bureaucratic autonomy could thus very well be that all interested parties face greater incentives to engage with one another and take account of every group's perspective. To the extent that agency decision-making processes "take[] place against a backdrop of public preferences that may be, at the outset, poorly informed or poorly formed,"²⁵² and especially when the message of public preferences and public interest has not been effectively absorbed by elected political actors,²⁵³ the credible threat of litigation-fostered bureaucratic autonomy forces political actors to take account of the range of viewpoints and perspectives of a variety of interested constituencies.

Moreover, litigation-fostered bureaucratic autonomy and other forms of bureaucratic resistance may ultimately further public transparency and accountability. Though the disputes are typically private, the specific mechanisms hypothesized as part of litigation-fostered bureaucratic autonomy—disclosure and litigation—are both public activities in which almost anyone with resources can participate. More fundamentally, litigation-fostered bureaucratic autonomy has the potential to encourage more public operation of administrative agencies in general because it may discourage reliance on informal means of political control. All else equal, presidents will usually prefer to operate agencies primarily through

Croley, *supra* note 220, at 78; Seidenfeld, *supra* note 9, at 1538 ("[T]he human propensity to pursue self-interest is not fatal to civic republican theory. Civic republicanism explicitly recognizes this propensity and responds by demanding institutional constraints that discourage such pursuits.").

²⁵² Mendelson, *supra* note 10, at 642.

²⁵³ *Id.* at 642-43.

informal, internal guidances and other nonbinding means because of the flexibility and relative cost-efficiency that those means provide.²⁵⁴ Litigation-fostered bureaucratic autonomy discourages this practice because informal methods do not provide the same level of control of staff that formal rules do; hence, a president, feeling some resistance from career staffs at agencies, may decide to (1) utilize more publicly accountable notice-and-comment rulemaking, and (2) go public with policy initiatives in an effort to re-claim his electoral mandate.²⁵⁵ In either case, the public benefits from information and attention that it might not have received if presidents felt like they could informally push through policy initiatives.

3. Justifying the Costs

To be sure, there are costs accompanying these benefits. Most crucial here is the danger that the very fracturing that can ensure deliberation will make governance impossible. This danger is arguably baked right into deliberative-process-oriented theories. As Professor Steven Croley notes:

[Civic republican theory] seems to allow little room for irreconcilable differences among participants in regulatory decisionmaking. What happens, in other words, when decisionmakers reach an impasse? Here again, merely positing other-regarding motivations is insufficient. Participants in regulatory decisionmaking might disagree about what constitutes desirable regulatory policy, even taking others' interests and concerns to heart.²⁵⁶

This impasse might be more the norm than the exception, and it is worse when, as in litigation-fostered bureaucratic autonomy, we have to acknowledge that there may be self-interested elements. If agency staff are self-interested or have a strongly held and idiosyncratic view of optimal public policy, are dissatisfied with the range of options presented by other deliberators, have a credible threat in litigation-fostered bureaucratic autonomy, and are able to simply wait out a political administration with which they disagree, then perhaps the dynamics of litigation-fostered bureaucratic autonomy will be more obstructive than constructive. This

²⁵⁴ *Id.* at 653.

²⁵⁵ This dynamic is strengthened in light of the more stringent *Skidmore* review that informal actions receive.

²⁵⁶ Croley, *supra* note 220, at 82 (footnote omitted).

obstructive effect might be all the worse because of the disparity in time horizons:²⁵⁷ Especially in the case of a one-term President, litigation challenging a rule promulgated even immediately upon the President's taking office could last the entire term.²⁵⁸ This delay and uncertainty could impose serious costs on industry, and, again, it is worth pointing out that the dangers of obstruction potentially fall on presidential administrations promoting sensible policy as well as those which are promoting senseless policy.²⁵⁹

Admittedly, the possibility of obstruction is a legitimate concern²⁶⁰ with support in some literature that presupposes that agency staffs are inherently unaccountable and self-interested,²⁶¹ but it is not unanswerable.

First, litigation-fostered bureaucratic autonomy is a fragile tool. When it works, it works because a judge hears a note that seems *out of place*. But judges are anything but unsophisticated listeners, and the strength of the dissonance can be diluted if the strategy in some way becomes *commonplace*. For instance, discord can become so commonplace in a particular agency that a judge begins to expect dissonance when a case comes up out of that agency's action. Or perhaps it might even be obvious in a single case that career staff's disagreement was less than a good faith effort to contribute to reasoned policymaking, and was instead an effort to obstruct the policy-making process. Knowing that crying wolf too many times could alienate even the most willing audience, career staff will almost certainly temper their use of the strategy, reserving it for only the most serious occasions of political manipulation. There are many similar, imaginable ways that litigation-fostered bureaucratic autonomy can lose its

²⁵⁷ See GOLDEN, *supra* note 28, at 20-25 (synthesizing research suggesting that bureaucrats are uniquely motivated by the public interest and a desire to "do the right thing").

²⁵⁸ For example, the NSR litigation lasted well into the second term of the Bush administration. See *supra* Part I.B.2.

²⁵⁹ In this sense, litigation-fostered bureaucratic autonomy might be viewed as a particularly senseless contributing cause of the "ossification" of rulemaking that occurs when courts ratchet up arbitrary and capricious review. For a classic explication of this phenomenon, see Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525 (1997).

²⁶⁰ See PAUL C. LIGHT, THICKENING GOVERNMENT: FEDERAL HIERARCHY AND THE DIFFUSION OF ACCOUNTABILITY (1995) for a general argument about the dangers of creating multiple layers of authority.

²⁶¹ See, e.g., JOHN BREHM & SCOTT GATES, WORKING, SHIRKING, AND SABOTAGE: BUREAUCRATIC RESPONSE TO A DEMOCRATIC REPUBLIC (1999); RONALD N. JOHNSON & GARY D. LIBECAP, THE FEDERAL CIVIL SERVICE SYSTEM AND THE PROBLEM OF BUREAUCRACY: THE ECONOMICS AND POLITICS OF INSTITUTIONAL CHANGE 164-66 (1994); Shapiro & Wright, *supra* note 13335, at 595 ("In [the economic perspective that dominates the legal and political science literatures], the bureaucracy cannot be trusted because government employees are rational utility-maximizing actors who seek, first and foremost, to further their own self-interests.").

functional force, so while it is undoubtedly a danger that the tool will be used for costly and unproductive reasons, there is good reason to believe that it will have an effect only where it should have an effect.

Second, the picture of career agency staff as obstructive and overly self-interested is in large part misleading. Just because there are self-interested elements in litigation-fostered bureaucratic autonomy does not mean that the practice is impossible to reconcile with public-spiritedness: Properly understood, civic republican theories view “the relationship between civic virtue and self-interest [as] symbiotic rather than dichotomous.”²⁶² There is plenty of evidence that agency staffs are, for the most part, deeply committed to professionalism, the mission of their agency, and the public interest.²⁶³ Agency employees are thus not likely to completely sabotage the operation of their agency.

Finally, there is a critical difference between civic republican theories, on the one hand, and deliberative process theories on the other. The former requires something like consensus approximating the public interest, and the danger of impasse is not simply a cost to the theory, but potentially undermines the entire enterprise. The latter, however, does not *require* consensus.²⁶⁴ To be sure, the hope is that the reason-giving requirement will naturally lead to consensus, but there is nothing problematic about agencies ultimately losing in this process, so long as reasons are given. Litigation-fostered bureaucratic autonomy, if it is functioning properly, will be democratically legitimate if it forces political officials to take account of career staff’s demands for reasoning but does not allow the conflict to collapse into an impasse when there is no consensus. There is no reason to believe that judges deciding administrative law cases are incapable of finding this equilibrium and requiring nothing more than that political officials engage in good faith in a deliberative process with career staff.²⁶⁵

²⁶² Christopher Duncan, Comment, *Civic Virtue and Self-Interest*, 89 AM. POL. SCI. REV. 147, 147 (1995).

²⁶³ See, e.g., Shapiro & Wright, *supra* note 35, at 599-603 (reviewing evidence from the public administration literature, which overwhelmingly finds that agency staff are capable of and in fact do operate with other-regarding or public-spirited motivations). Shapiro and Wright conclude that, taking all of the available information into account, “the evidence of bureaucratic behavior suggests that self-interested behavior and public-interested behavior exist side by side in administrative agencies. The self-interested behavior does not crowd out other employee conduct. Public-regarding behavior exists in the bureaucracies, and even persists in administrations hostile to an agency’s mission.” *Id.* at 603. See generally *supra* notes 25-39 and accompanying text.

²⁶⁴ See *supra* notes 242-243 and accompanying text.

²⁶⁵ Cf. Walters, *supra* note 225, at 702-05 (arguing that judges hearing run-of-the-mill hard look cases practice precisely this kind of balanced deliberative process).

Ultimately, the appropriate balance between the three main benefits of litigation-fostered bureaucratic autonomy—checks on executive overreach, enhanced deliberation, and greater public transparency and accountability—and the clear costs—primarily, the potentially unlimited capacity for obstruction—is virtually unknowable in the abstract. Recognizing a place for litigation-fostered bureaucratic autonomy despite these costs is much easier when we place the practice in context and understand the strategy’s inherent functional limits. Litigation will usually be employed to further autonomy very selectively: enough to recognize the benefits in cases of executive overreaching or myopia, but not enough to seriously interfere with governance.

CONCLUSION

This article represents a first step toward a greater understanding of the ways that career staff in administrative agencies can and do use litigation-based mechanisms to resist political control. Scholars of administrative law, public administration, and political science have focused mostly on the ways that the elected branches are able to control the actions of agents—the familiar principal-agent model of administrative control. The implications of the dynamic identified in this article, litigation-fostered bureaucratic autonomy (as well as other means of bureaucratic resistance), are worth taking much more seriously than they have been taken. I have argued that, if they are sufficiently widespread, these dynamics of bureaucratic resistance and autonomy suggest limits upon the dominant theoretical paradigms—the political control model and theories of democratic legitimacy of discretion in agency processes—and simultaneously point the way to a conception of administrative law and procedures that embraces conflict as a means to greater deliberation and democratic legitimacy. At any rate, scholars must be more attentive to the potential implications of an administrative state that is not so neatly controlled as most have assumed.