RECENT DEVELOPMENTS

POLITICS, RULEMAKING, AND JUDICIAL REVIEW: A RESPONSE TO PROFESSOR WATTS

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In an article recently published by *The Yale Law Journal* titled *Proposing a Place for Politics in Arbitrary and Capricious Review*,[1] Professor Kathryn A. Watts argues for a more robust role for politics in agencies' informal rulemaking procedures under the Administrative Procedure Act (APA),[2] as well as in arbitrary and capricious judicial review of those rules.[3] However, her proposal ignores the primary function the APA envisions for the views of regulated entities in notice-and-comment rulemaking. She also minimizes the ways in which politics sets regulatory policy before an agency commences the process of adopting, rescinding, or defending a rule. In so doing, she overvalues and undervalues the effect of politics on the agency

* Associate, Covington & Burling LLP, Washington, DC. The views expressed in this Article are mine alone. Thanks to Professor Kathryn Watts for writing an important, accessible, and thought-provoking article.

1. Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2 (2009), *available at* http://www.yalelawjournal.org/images/pdfs/824.pdf.

2. 5 U.S.C. § 553 (2006) (listing the procedural requirements of informal rulemaking).

3. 5 U.S.C. § 706(2)(A) (2006) (allowing courts to overrule agency action that is arbitrary and capricious).

rulemaking process at the same time.

In Part I of this Recent Development, I discuss why the APA intentionally insulated agency rulemaking from the political branches, show that this insulation predated "hard look" review, and demonstrate why, from the perspective of regulated entities, this needs to be so. In Part II, I consider how politics sets the regulatory agenda for the Federal Communications Commission (FCC), the agency I am most familiar with as a practitioner. In Part III, I examine the Supreme Court's decision last Term in *FCC v. Fox Television Stations, Inc.*[4] and find the case is less of an invitation for agencies and courts to rely on political influence than Professor Watts believes.

I. THE APA'S SEPARATION OF POLITICS FROM RULEMAKING

The APA "established the fundamental relationship between regulatory agencies and those whom they regulate—between government, on the one hand, and private citizens, business, and the economy, on the other hand."[5] The history of its passage shows that in order for this relationship to be a balanced one, rulemaking had to be a facts-driven process. And Congress intended the entities subject to and affected by an agency's rules to be the wellsprings for those facts.

New Deal politics permeated the 1940s-era debates that led to the APA's adoption,[6] but those debates made clear that politics should be absent from agencies' procedures for adopting generally applicable regulations. The template for administrative procedure reform, and for what became the APA, was the 1941 Attorney General Committee's Report on Administrative Procedure (Final Report).[7] No less an administrative law authority than Kenneth Culp Davis noted that the Attorney General Committee's Final Report—in particular one of the draft bills attached to the Final Report—was the basis for notice-and-comment rulemaking.[8] The Final Report argued that rulemaking procedures should insulate agencies, and by extension the regulated entities subject to those agencies' purview, from politics:

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4. 129 S. Ct. 1800 (2009).

5. George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1558 (1996).

6. *See id.* at 1595 (discussing the emergence of the Administrative Procedure Act (APA)).

7. FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE (1941) [hereinafter FINAL REPORT], http://www.law.fsu.edu/library/admin/pdfdownload/apa1941.pdf.

8. K.C. Davis & Walter Gellhorn, *Present at the Creation: Regulatory Reform Before 1946*, 38 ADMIN. L. REV. 511, 520 (1986).

> An administrative agency, [unlike a legislature,] is not ordinarily a representative body. Its function is not to ascertain and register its will. . . . [I]ts members are not subject to direct political controls as are legislators. It investigates and makes discretionary choices within its field of specialization. The reason for its existence is that it is expected to bring to its task greater familiarity with the subject than legislators, dealing with many subjects, can have. But its knowledge is rarely complete, and it must always learn the frequently clashing viewpoints of those whom its regulations will affect.
>
> These differences are and should be reflected in its procedures, which should be adapted to giving adequate opportunity to all persons affected to present their views, the facts within their knowledge, and the dangers and benefits of alternative courses.[9]

Professor Watts claims that the emphasis on data over politics in agency procedure is a product of the court-made hard look doctrine,[10] but as the Final Report demonstrates, a data-driven rulemaking process predates even the APA, let alone hard look review. Pre-APA agency-specific procedural statutes compelled agencies to base their decisions upon evidence presented by regulated entities.[11] The Food and Drug Administration's and the Wage and Hour Division's enabling statutes required findings of fact to support any regulations the agencies imposed, and those findings had to be based exclusively on evidence put before the agency.[12] And as noted, the Final Report argued that rules could be legitimate only if the agencies promulgating them took serious account of input from regulated entities.[13] Participation in an agency's rulemaking procedure by "those upon whom [an agency's] authority bore" was considered "essential in order to permit administrative agencies to inform themselves and to afford adequate safeguards to private interests."[14]

A careful reader of Professor Watts's article might respond that hers is not an argument to allow agencies to go whole hog in relying on political influence over data when making rules. Rather, her claim is that courts should be more tolerant of agencies' reliance on record evidence of that influence, and that political considerations should play the same kind of role as data provided by parties potentially affected by a rule.[15] In other

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9. FINAL REPORT, *supra* note 7, at 101–02.

10. Watts, *supra* note 1, at 16 (describing the development of hard look review by the D.C. Circuit).

11. *See* FINAL REPORT, *supra* note 7, at 106.

12. *See id.* at 109 (citing the Federal Food, Drug, and Cosmetic Act of 1938, 21 U.S.C. § 371(e) (1940), and Fair Labor Standards Act of 1938, 29 U.S.C. §§ 208, 210(a) (1940)).

13. *Id.* at 101–02.

14. *Id.* at 103.

15. *See* Watts, *supra* note 1, at 73 ("[I]f . . . the evidence would equally support the selection of either Rule A, B, *or* C, then it would be entirely rational for the agency to rely upon political influences in explaining why it chose Rule C over Rules A or B.").

words, in the rulemaking context both the agency and reviewing court should essentially treat the politician or political body as a commenter, not a policymaker. But this is not a meaningful distinction. Agencies are expert in their areas of delegated authority, not in assessing the strength and direction of political winds. And the notion that an agency would give political "evidence" a weight comparable to empirical evidence in a rulemaking—that political influence would be used only as a "tiebreaker" when an agency record would support several proposed courses of action[16]—is specious. If a client considered spending upwards of several thousand dollars to commission a feasibility analysis or white paper in support of its position in a rulemaking proceeding, and that position could be trumped or even canceled out at the agency level and upon judicial review by a simple "reference to the President's clearly expressed executive priorities"[17] or to "a group of congressmen's comments on the substance of a proposed rule,"[18] any decent administrative law attorney would have to consider advising the client to save its money—or to spend it on lobbying.[19]

So the reign of the technocrats that Professor Watts laments is not a product of courts' coarsening of arbitrary and capricious analysis via hard look review; rather, it is entirely consistent with the agency independence and fairness rationales underlying the APA. But politics' absence from rulemaking *procedure* is by no means a sign that it is also absent from rulemaking *policy*. Two recent proceedings before the FCC demonstrate this point.

II. HOW POLITICS SETS THE RULEMAKING AGENDA: TWO EXAMPLES

Agencies do not make or defend rules on a blank slate. Professor Watts accuses agencies of "failing to disclose or affirmatively hiding political

16. *Id.* at 82.

17. *Id.* at 58.

18. *Id.* at 65.

19. Professor Watts seems confident that reviewing courts could distinguish political influence that "maximize[d] the public good" from "backdoor political tactics." *Id.* at 82–84. I am not sure that this is as simple a task as she sets out. Professor Watts hypothesizes that under her conception of arbitrary and capricious review, an Environmental Protection Agency (EPA) rule that was justified as "consistent with the President's foreign policy initiatives" on global warming would likely survive judicial review, while a Food and Drug Administration (FDA) that supports a final rule by stating "[t]he President directed us to rescind the preemption regulations in order to reward the trial lawyers" would suffer a remand. *Id.* at 54, 56. The general counsel of an FDA that allowed such a statement to sneak into his agency's final order would probably be fired. To support her claim that judicial review could distinguish "public good"-maximizing political influence from "backdoor political tactics," Professor Watts has staffed her hypothetical FDA with straw men.

influences that factor into the mix,"[20] but agencies often appeal to politics when adopting or changing course. And when they do leave politics out of the mix, it is because the APA compels them to do so.

For example, the FCC is required to review its structural media ownership rules every four years to ensure they remain in the public interest.[21] After its most recent review, more than a dozen parties challenged the Commission's decision to change one rule and retain others as arbitrary and capricious (public interest groups challenged the changes as too deregulatory, while media parties claimed the changes did not go far enough) in the U.S. Court of Appeals for the Third Circuit.[22] The proceeding has been circuitous to say the least. Most relevant for the present discussion, however, was the FCC's request to the Third Circuit that any judicial review of the rules be stayed because the administration, and the FCC's makeup, had changed; the rules as adopted therefore no longer "reflect[ed] the views of a majority of the current members of the Commission."[23] In other words, the politics changed.[24] Nothing in the *rulemaking record* had changed, of course; the proceeding was closed, the rules had already been promulgated, and petitions for review had already been filed with the court. So to claim, as Professor Watts does, that agencies "sweep political influences under the rug"[25] when making rules, or even when defending them upon judicial review, is to tell a selective story.

Similarly, and at the front end of the rulemaking process rather than the back, the FCC recently published a notice of proposed rulemaking regarding net neutrality, or the general principle that Internet access providers should be barred from discriminating among the content or

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20. *Id.* at 23.

21. 47 U.S.C. § 303 note (2006) ("The Commission shall review . . . all of its ownership rules quadrennially . . . . The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.").

22. *See, e.g.*, Petition for Review at 1, Prometheus Radio Project v. FCC, No. 08-3078 (3d Cir. July 15, 2009). I represent one of the parties in this proceeding.

23. Letter from P. Michele Ellison, Acting Gen. Counsel, FCC, to Marcia M. Waldron, Clerk, U.S. Court of Appeals for the Third Circuit (May 5, 2009) (on file with author); *see also* Status Report of the Federal Communications at 3, Prometheus Radio Project v. FCC, No. 08-3078 (3d Cir. Oct. 1, 2009) (the rule under review, "[*o*]*f necessity*, . . . does not incorporate" the views of post-election appointed commissioners (emphasis added)). Indeed, one Commissioner who was in the majority when the rules under review were promulgated filed his own letter, stating he disagreed with the "alter[ation] of the agency's litigation procedural posture." Letter from Robert M. McDowell, Comm'r, FCC, to Clerk of the Court, U.S. Court of Appeals for the Third Circuit (April 3, 2009), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-289974A1.pdf.

24. The Third Circuit rejected the FCC's argument, and the agency must soon defend the rules adopted by the previous majority. *See* Order, Prometheus Radio Project v. FCC, No. 08-3078 (3d Cir. March 23, 2010).

25. Watts, *supra* note 1, at 29.

applications accessed by their users.[26] The questions concerning the proposed rules that the agency asked of potentially affected parties were highly technical and data driven in nature.[27] But the principle of an open Internet was a primary pillar in then-candidate Obama's technology platform.[28] It was therefore only natural, indeed self-evident, that his FCC would seek to put this policy into effect via informal rulemaking. However, the fact that the agency's notice did not attribute the policy to the new President was no obfuscation. Rather, it failed to do so because administrative law disconnects policy from procedure as a matter of fairness to affected parties.[29]

The requirement that net neutrality policy must still go through the "technocratic" wringer demanded by the APA, and that the FCC or any other agency must justify any eventual rule's adoption to a reviewing court without regard to the politics from which it was birthed, insulates affected parties from the political drivers of agency decisions. This procedural requirement serves a number of due process values that Professor Watts ignores. Politics-free process and politics-free arbitrary and capricious review ensure regulated entities, to the greatest degree possible, that their positions and concerns regarding a rule-related course of action will be heard and addressed by the agency. Regulated entities participate in rulemakings—even when the political deck is stacked against them—

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26. Preserving the Open Internet, Broadband Industry Practices, 74 Fed. Reg. 62,638 (proposed Nov. 30, 2009) (to be codified at 47 C.F.R. pt. 8). The notice of proposed rulemaking and other documents can also be found at the proceeding's home page, http://www.openinternet.gov.

27. *See, e.g.*, *id.* at 62,640–43 (requesting comment on how to "promote and protect the legitimate business needs of broadband Internet access service providers"; how to "defin[e] the scope" of Internet service-providing "entities covered by our proposals"; and on the "effects of . . . technolog[y] on the content, applications, and services being provided—or capable of being provided—over the Internet"; further, seeking "qualitative or quantitative evidence and analysis" and "specific examples" illuminating, inter alia, "economic theory" on "benefits [that] can arise from price and quality discrimination").

28. *See* Obama–Biden Technology Agenda, http://change.gov/agenda/technology_agenda/ (last visited Jan. 29, 2010) (supporting "the principle of network neutrality to preserve the benefits of open competition on the Internet"); John Eggerton, *Obama Makes Network-Neutrality Pledge*, BROADCASTING & CABLE, Oct. 29, 2007, http://www.broadcastingcable.com/article/110976-Obama_Makes_Network_Neutrality_Pledge.php.

29. The D.C. Circuit recently held that the FCC exceeded its jurisdictional authority when it FCC cited Comcast for the company's management of Internet traffic. The decision, Comcast v. FCC, No. 08-1291 (D.C. Cir. Apr. 6, 2010), has obvious implications for the Administration's policy goals in this area. However, I do not believe Professor Watts's argument could be extended to grant agencies politics-based deference when the agency asserts jurisdiction over areas where a political priority has been expressly stated since an agency's interpretation of its jurisdiction is a legal question rather than an evidentiary one.

precisely because the APA contemplates agency procedures and judicial review that are evidentiary, not political. Regulated entities also participate in notice-and-comment rulemaking to develop an appellate record in the event the agency promulgates a rule contrary to their interest or position.[30] And their increased participation leads to better rules.

III. *FCC V. FOX TELEVISION STATIONS, INC.*

Upon an initial read, Justice Scalia's opinion in *Fox* sent a tiny shiver down the collective spine of the communications bar (or at least the spine of my practice group when we discussed the decision over lunch). But the opening it creates for courts to consider politics when engaged in arbitrary and capricious review of agency rulemakings is smaller than Professor Watts makes it appear to be.

Fox involved an arbitrary and capricious review of the FCC's ratcheting up of its indecency policy to find isolated utterances of the F-word and S-word indecent. The FCC took two steps in defending its new policy that met the Court's satisfaction: (1) it "forthrightly acknowledged that its recent actions have broken new ground" (in that previously it did not find isolated utterances to be indecent) and "explicitly disavow[ed]" its prior inconsistent decisions as "no longer good law"; and (2) it gave "reasons for expanding the scope of its enforcement activity [that] were entirely rational."[31]

To be sure, *Fox* might add more branches to an agency's decision tree, but not to allow it to openly consider politics during rulemakings. First, the portion of Justice Scalia's opinion joined by the full Court analyzed the agency's reasoning in changing its indecency *policy*, not on its lack of reliance on record data in changing an agency *rule*.[32] Justice Scalia's arbitrary and capricious analysis noted that the FCC's indecency policy was an adjudication, not a rulemaking, stating, "there is no basis for

30. *See* Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin., 429 F.3d 1136, 1150 (D.C. Cir. 2005) ("[A] party will normally forfeit an opportunity to challenge an agency rulemaking on a ground that was not first presented to the agency for its initial consideration.").

31. FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1812 (2009) (internal quotation marks omitted). Indeed, Justice Scalia paid little mind to the FCC's feeble attempt to reconcile its new policy with its prior regime, which the agency viewed as necessary under its view of arbitrary and capricious review, but which he viewed as irrelevant under the APA's text. *Id.* (characterizing the Commission's attempt to reconcile the old and new fleeting expletives policies as "superfluous," "irrelevant," an "unnecessary detour," and not "entirely convincing").

32. Not every Justice appreciated the rule–policy distinction in the case's particular context. *See id.* at 1825 (Stevens, J., dissenting) ("[T]he Court espouses the novel proposition that the Commission need not explain its decision to discard a longstanding rule in favor of a dramatically different approach to regulation.").

incorporating all of the Administrative Procedure Act's notice-and-comment procedural requirements into arbitrary-and-capricious review of adjudicatory decisions."[33] Therefore, Justice Breyer's argument that the FCC had acted arbitrarily by failing to address a scenario raised by a party to the proceeding was unavailing.[34] There was "scant empirical evidence" supporting the FCC's change to a more aggressive indecency policy, but unlike as in a rulemaking, this was no fatal flaw.[35] In other words, the FCC in indecency-regulating mode is engaged in a regulatory activity that is procedurally distinct from a carbon-emissions rulemaking before the Environmental Protection Agency (EPA).[36] In the former case, it is enough for the agency to articulate a coherent rationale for its policy, and a reviewing court will test for the "coherence of the rationale the agency gave."[37] *Fox*, therefore, is an application of arbitrary and capricious review to an adjudicatory proceeding that by definition lacked a notice-and-comment record; because there was no such record, there could be no error in the agency's neglect of record data. The case's greatest impact may be to encourage agencies to take up "soft" regulatory topics like indecency in adjudications rather than rulemakings, where the agency (1) can avoid the burden of "respond[ing] to all significant comments" by regulated entities and the public,[38] and (2) may more freely draw its own conclusions based on its reasoning and expertise, so long as it makes a rational effort to justify those conclusions.

The part of the opinion joined only by Chief Justice Roberts and Justices Thomas and Alito, and that Professor Watts focuses on, noted that the FCC's change in policy was "spurred by significant political pressure from Congress."[39] However, Justice Scalia also wrote that Congress's influence is an "extrastatutory" one.[40] Addressing Justice Stevens's claim in dissent that Congress exercises political influence over the FCC and arbitrary and

33. *Id.* at 1819 n.8 (plurality opinion).

34. *Id.* at 1837–38 (Breyer, J., dissenting).

35. *Id.* at 1813 (majority opinion) ("There are some propositions for which scant empirical evidence can be marshaled, and the harmful effect of broadcast profanity on children is one of them. . . . It is one thing to set aside agency action under the Administrative Procedure Act because of failure to adduce empirical data that can readily be obtained [such as data regarding the passive restraints in *State Farm*]. It is something else to insist upon obtaining the unobtainable." (citation omitted)).

36. *See id.* at 1824 (Kennedy, J., concurring in part and concurring in the judgment) ("The FCC did not base its prior policy on factual findings.").

37. *Id.* at 1817 (plurality opinion).

38. *Id.* at 1837 (Breyer, J., dissenting) (quoting ACLU v. FCC, 823 F.2d 1554, 1581 (D.C. Cir. 1987)) (emphasis omitted).

39. *Id.* at 1815–16 & 1816 n.4 (plurality opinion).

40. *Id.* at 1816 n.5.

capricious review should therefore operate as a check upon that influence, Justice Scalia argued that "[*i*]*f the FCC is indeed an agent of Congress*, it would seem an adequate explanation of its change of position that Congress made clear its wishes for stricter enforcement" because "[*t*]*he Administrative Procedure Act . . . does not apply to Congress and its agencies.*"[41] Political pressure or political branch policy concerns are thus matters exogenous not only to arbitrary and capricious review of agency rulemakings, but to the APA itself.

So at most, *Fox* means that (1) the APA does not require an agency to harmonize its past policies when undertaking a new policy direction outside of notice-and-comment rulemaking and that (2) four Justices noted that Congress sometimes exerts extrastatutory influence that can bear upon agency policy. Even under Justice Scalia and his three concurring colleagues' interpretation of arbitrary and capricious review, an agency must still show that action taken pursuant to a new policy is "permissible under the statute" and "that there are good reasons for it."[42] Nothing indicates that these "reasons" can or should include considerations of political influence. If *Fox* were applied to a rulemaking, the relevant record need reach back only to the record of the proceeding adopting the change, not to every Administration-spanning step the agency has taken in a particular area.[43] This may lower the burden on agency rule changes, but it does not necessarily open the door for the agency to cite political branch influence as justification for the change. An Obama FTC need only justify its own rule, not its departure from the Bush FTC's rule on the same issue—but it is still insufficient for arbitrary and capricious review purposes for the agency to justify the new rule by declaring, "This is no longer the Bush FTC."

CONCLUSION

None of us—judges included—are willfully ignorant of the fact that political branch priorities play a dominant, and much of the time dispositive, role in agency policymaking. But the rulemaking process, as contemplated by the APA and as recognized by arbitrary and capricious judicial review, envisions a procedure that insulates affected parties from that role. If, on the other hand, expert-based decisionmaking is, as Professor Watts posits, a product of judicial preference as expressed through arbitrary and capricious review, then let that preference serve as

41. *Id.* at 1816–17 (emphases added).

42. *Id.* at 1811 (majority opinion).

43. *See id.* ("The statute makes no distinction . . . between initial agency action and subsequent agency action undoing or revising that action.").

the last line of defense protecting regulated entities from political caprice.