Texas Law Review
See Also

Response

Presidential Control Is Better Than the Alternatives

Richard J. Pierce, Jr.*

In *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, Evan Criddle criticizes the model of the administrative state that relies to a considerable extent on presidential control of agency policy making as a source of democratic legitimacy.[1] He proposes an alternative model that relies on fiduciary representation of the public by agency heads.[2]

Criddle devotes the first half of his article to a criticism of the belief of some advocates of the presidential-control model that the President can be relied upon as a proxy for the preferences of the polity in the context of agency decision making.[3] I will not engage Criddle on that point. I agree with much of his argument. Our disagreement on this issue is a subtle matter of degree. I do not see as large a disconnect between the preferences of the electorate and the preferences the President urges on agencies as Criddle describes. I agree, however, that the agency relationship between the people and the President is highly imperfect in this context.

I am a proponent of the presidential-control model, but my support of that model is not premised on an untenable belief that the President is a consistently reliable proxy for the people in the context of agency policy making. Rather, I support the presidential-control model because I believe that it is better than the alternatives. Criddle's article has reinforced that

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1. *See* 88 TEXAS L. REV. 441, 447 (2010) (introducing the thesis challenging "presidential administration [as] an effective strategy for advancing majoritarian preferences in agency rulemaking").

2. *Id.* at 448.

3. *See id.* at 449–65 (reviewing different models of popular representation and analyzing the historical and theoretical value of the presidential-control model.).

belief. The agency fiduciary-representation model he urges seems to be based entirely on his interpretation of the writings of great philosophers with no apparent effort to relate the theories of philosophy he invokes to the facts on the ground. I have no hesitation in predicting that adoption of his alternative model would have disastrous consequences.

Criddle's model has several elements. First, he argues against presidential control of agency policy making on the basis of his belief that agency heads are more reliable fiduciaries of the public trust than the President.[4] Second, he urges dramatic changes in agency decision-making procedures and in the relationships between agencies and other institutions of government, which he believes will cause agency heads to become even better fiduciaries.[5] Specifically, he urges dramatic expansions of the scope of the notice-and-comment rulemaking procedure, analogous increases in the scope of "hard look" judicial review of agency actions and inactions, judicially enforced increases in the degree of transparency of agency decision making, and either a prohibition on presidential jawboning of agencies or at least mandatory reporting of all communications between White House personnel and agency decision makers.[6]

I. President, Agency Head, or Judge?

There are three potential sources of agency policy decisions: the President, agency heads, and judges. Criddle says that he favors an administrative state in which agency heads make policy decisions without any presidential involvement in the decision-making process.[7] On closer examination, however, he is actually proposing an administrative state in which judges play the dominant role in policy making.

Criddle argues that "agency administrators are generally more likely than Presidents to act purposefully, reasonably, and transparently in rulemaking proceedings—not necessarily because they are more virtuous than presidents but because federal administrative law compels them to do so."[8] Thus, Criddle is not arguing that agency heads are inherently more reliable agents of the public than the President. Any such argument would defy logic. There is no reason to believe that a President who cannot be trusted to act in accordance with public preferences would appoint officers who can be trusted to do so. Adding the imperfect relationship between the President and the officers he appoints to the imperfect agency relationship

4. *Id.* at 492.

5. *See id.* at 497–98 (concluding that entrusting final rulemaking authority to agency administrators would promote the ideals of fiduciary administration more effectively than presidential administration).

6. *Id.* at 480–87.

7. *Id.* at 448–49.

8. *Id.* at 493.

between the people and the President inevitably reduces the efficacy of the agency relationship between the people and agency decision makers by adding a new source of potential unfaithful-agent problems—specifically in the form of officers who act in ways that are designed to further their own interests rather than those of either the President or the public.

Criddle's argument is entirely dependent on the courts. He believes that agency heads will be more faithful agents of the public than the President because courts will make them behave as faithful agents.[9] In one important respect, I agree. Criddle says that "federal regulators may not substitute their own preferred purposes for those authoritatively designated by Congress."[10] But that is just a paraphrase of the first step of the *Chevron*[11] test, and it applies equally to the President and to agency heads, as the Court made explicit in *Chevron*. Criddle goes well beyond the universally accepted first step of *Chevron* in making his claim that courts compel agencies to be faithful agents of the public, however.

Criddle relies on judicial application of a greatly expanded version of the hard-look doctrine as the primary basis for his claim that courts will ensure that agencies act as reliable fiduciaries for the public.[12] He seems not to be aware of the large body of evidence that courts regularly and systematically act in accordance with the political and ideological preferences of the judges and justices when they review agency policy decisions.[13] That tendency is particularly powerful when courts apply the hard-look doctrine to controversial agency policy decisions. In such cases, the political composition of a circuit court panel is the most important determinant of the outcome of a review proceeding,[14] and the Supreme Court is highly likely to divide five to four on purely ideological grounds if it decides to review the circuit court opinion. This pattern of decisions should not come as a great surprise. The hard-look doctrine requires judges and justices to decide whether the reasons an agency has given in support of a policy decision are adequate.[15] Anyone is likely to find the reasoning in support of a decision more persuasive if he or she agrees with the decision.

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9. *See id.* at 483 (discussing the use of more robust judicial review to support the fiduciary model of agency action or inaction).

10. *Id.* at 477.

11. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).

12. Criddle, *supra* note 1, at 499.

13. *See* Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 762–63 (2008) (recounting controversy over the introduction of the hard-look doctrine, including the likely effect of "judicial biases distort[ing] the inquiry into reasonableness"); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1719 (1997) (listing among a study's conclusions that "ideology significantly influences judicial decision making on the D.C. Circuit").

14. Miles & Sunstein, *supra* note 13, at 767.

15. *See id.* at 814 (concluding that hard-look review is "hardened, or softened, by the political predilections of federal judges").

Thus, while Criddle describes his preferred alternative to presidential control as a choice between agency decision makers and the President, he is actually urging adoption of a legal regime that would prefer judges to either the President or agency heads as the primary determinants of agency policy decisions. Of course, that is exactly the opposite of the holding and reasoning of the Supreme Court in *Chevron*. In the Court's words,

> Judges . . . are not part of either political branch of government. . . . 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 Government to make such policy choices . . . .[16]

I agree with the Court. That is one of the reasons I disagree with Criddle.

II. Resource Constraints

Criddle proposes dramatic increases in the scope of both notice-and-comment rulemaking and hard-look judicial review of agency rules.[17] He proposes that both apply to interpretative rules and procedural rules, as well as to the rules that the Administrative Procedure Act (APA) exempts from notice-and-comment rulemaking on the basis of their subject matter.[18] In one important context, this has already happened. The exemption for rules relating to "public property, loans, grants, benefits, or contracts" has little application today because of a combination of agency-specific statutes in which Congress has subjected many types of rules to notice-and-comment rulemaking and rules issued by agencies in which the agencies bind themselves to use notice-and-comment rulemaking.[19] I agree with Criddle that this subject-matter exemption is not justified, and I applaud the decisions of Congress and agencies that have had the effect of eliminating that exemption in most contexts.

Criddle's proposed expansion of notice-and-comment rulemaking and hard-look review to interpretative rules and procedural rules would have disastrous consequences for a reason Criddle ignores completely. As numerous studies have found, the process of issuing a major rule through use of notice and comment subject to hard-look judicial review is extremely

16. *Chevron*, 467 U.S. at 865.

17. Criddle, *supra* note 1, at 480, 482.

18. *Id.* at 483.

19. *See* Elimination of Certain Exemptions from the APA Rulemaking Requirements, 1 C.F.R. § 305.69-8 (1974) (detailing § 553(a)(2) rules pertaining to "public property, loans, grants, benefits, or contracts").

expensive, time-consuming, and resource intensive.[20] Agencies are required to issue legislative rules in this manner.[21] The results are described in detail in the literature that focuses on the ossification of the rulemaking process; in other words: it takes a long time to issue a rule; agencies never issue many of the rules that would be beneficial to the public; agencies maximize their use of procedural alternatives that are inferior to rulemaking to avoid the delay and cost of the notice-and-comment process; and agencies often decline to amend or to rescind rules that have become obsolete.[22]

The delay and cost of notice-and-comment rulemaking subject to hard-look review is illustrated well by the studies of agency compliance with statutory mandates to issue legislative rules. When Congress enacts or amends a regulatory statute, it often includes provisions in which it requires the agency to issue scores or even hundreds of legislative rules within statutorily specified time periods.[23] Agencies are never able to comply with more than a small fraction of those rulemaking mandates.[24] Thus, for instance, the EPA complies with only fifteen to twenty percent of the statutory provisions that require it to issue legislative rules within statutorily specified time periods.[25]

The causes of the ossification of the rulemaking process are well-known. Over the past several decades, Congress has imposed many new responsibilities on agencies at the same time that it has steadily reduced the resources it makes available to agencies to fulfill those responsibilities.[26] For decades, agency budgets have been reduced to accommodate the rapidly expanding spending on Medicare, Medicaid, and Social Security.[27] Over the last decade, the problem has increased as a result of spending to support the wars in Iraq and Afghanistan, and as a result of the tax cuts implemented under President Bush coupled with President Obama's pledge not to increase the taxes of anyone who makes less then $250,000.[28]

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20. A discussion on the cost and difficulty of issuing a major rule through the use of notice and comment subject to hard-look judicial review can be found in Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 60–67 (1995).

21. 5 U.S.C. § 553(c) (2006).

22. Pierce, *supra* note 20, at 60–61 & n.4 (summarizing the literature on ossification in agency rulemaking).

23. *Id.*

24. *Id.*

25. ENVTL. & ENERGY STUDY INST. & ENVTL. LAW INST., STATUTORY DEADLINES IN ENVIRONMENTAL LEGISLATION: NECESSARY BUT NEED IMPROVEMENT (1985).

26. *See* Richard J. Pierce, Jr., *Judicial Review of Agency Actions in a Period of Diminishing Agency Resources*, 49 ADMIN. L. REV. 61, 65–66 (1997) (discussing budget cuts by Congress in 1996).

27. *Id.* at 65.

28. *See* SIDNEY SHAPIRO ET AL., CTR. FOR PROGRESSIVE REFORM, REGULATORY DYSFUNCTION: HOW INSUFFICIENT RESOURCES, OUTDATED LAWS, AND POLITICAL INTERFERENCE CRIPPLE THE 'PROTECTOR AGENCIES' 7 (2009), *available at* http://www.progressivereform.org/articles/RegDysfunction_906.pdf (noting that rising Medicaid,

Agencies simply do not have the resources they need to implement their statutory mandates effectively today, and there is no reason to expect this situation to improve. Criddle would exacerbate this situation significantly by requiring agencies to use notice-and-comment procedure to issue rules that are now exempt from that process. Interpretative rules and procedural rules outnumber legislative rules by a factor of at least 100 to 1.[29] Thus, Criddle's proposal would impose massive new costs and sources of delay on agencies, with increased ossification of the rulemaking process an inevitable result.

Criddle also urges courts to be far more willing than they now are to review agency decisions not to act and to review far more aggressively agency delay in acting.[30] Ironically, his proposed imposition of notice-and-comment procedure on large classes of rules that are now exempt from that process would require agencies to devote more of their resources to the process of issuing interpretative rules and procedural rules, thereby increasing the number of situations in which agencies would like to act expeditiously but are unable to do so because of resource constraints. Because no agency has resources sufficient to allow it to take more than a modest fraction of the actions it would like to take, Criddle's proposal for aggressive judicial review of agency inaction and agency delay would create a situation in which agencies can take even fewer actions. They would be required to devote a high proportion of their scarce resources to their attempts to explain to reviewing courts why they cannot act expeditiously in each case in which they would like to act.

It is an interesting thought experiment to imagine what would have happened if the government had relied primarily on notice-and-comment rulemaking subject to hard-look review to implement its efforts in 2007 and 2008 to save financial markets from complete collapse. In fact, Federal Reserve Chairman Bernanke and Treasury Secretaries Paulson and Geithner avoided taking any action that would be subject either to notice-and-comment rulemaking or to judicial review, and agencies with statutory powers linked to either were impotent onlookers in the process.[31] The alternative urged by Criddle—use of notice-and-comment rulemaking subject to judicial review—would have pleased some law professors. I strongly suspect, however, that it would have displeased most members of the public.

Medicare, and Social Security costs, along with increased defense spending, have left the protector agencies "fighting over table scraps").

29. *See* Connor N. Raso, Note, *Strategic or Sincere? Analyzing Agency Use of Guidance Documents*, 119 YALE L.J. 782, 805–20 (2010) (providing an empirical analysis of the use of agency guidance documents compared to legislative rules).

30. *See* Criddle, *supra* note 1, at 483 (encouraging judicial review of agency inaction).

31. *See* Steven M. Davidoff & David Zaring, *Regulation by Deal: The Government's Response to the Financial Crisis*, 61 ADMIN. L. REV. 463, 468 (2009) (explaining that the techniques used in the financial crisis were a marked departure from the normal notice-and-comment form of rulemaking).

The public would have hated 25%–30% unemployment even more than they hate 10% unemployment.[32] Notice-and-comment rulemaking subject to judicial review is too time-consuming to use for any urgent task, including saving the world from complete financial collapse.

III. The Limits of Transparency

Criddle urges complete transparency of intragovernmental communications in virtually all contexts, including communications between White House personnel and agency decision makers.[33] He seems not to recognize that transparency has both good and bad effects. Bill Galston, President Clinton's domestic policy advisor and now a Senior Fellow at Brookings, illustrates some of the disadvantages with an evocative metaphor:

> [G]overnment should sometimes be shrouded for the same reason that middle-aged people should be clothed. . . . [T]he more government has become transparent, the less people are inclined to trust it.[34]

The public suffers from severe and chronic cognitive dissonance. We want high government spending, low taxes, and a balanced budget. We punish severely any politician who tells us the truth—we must choose among those desires. Similarly, we extol the virtues of democracy and hate politics. We want policy decisions to be made "on the merits" with no ugly deals with "special interests." We punish any politician who forces us to see the reality of the inherently political process of making policy decisions—government can do nothing important unless the President makes deals with special interests.

Drawing definitive lines between the degree of transparency that is good and the degree of transparency that is bad is an extraordinarily difficult task that is well beyond the scope of this Response. It is easy, however, to identify three contexts in which Criddle's proposals cross that line. First, he urges that Congress repeal the military and foreign-affairs exemptions from notice-and-comment rulemaking and subject policy making in those areas to public notice-and-comment rulemaking and to hard-look judicial review.[35] That change would have catastrophic effects.

Imagine, for instance, a Notice of Proposed Rulemaking in which the State Department proposes to reduce by X extent U.S. military support for Taiwan and to reduce by Y extent U.S. support for Tibetan autonomy and

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32. *See* Kelly Evans et al., *Jobs Data Lift Recovery Hopes*, WALL ST. J., Dec. 5, 2009, at A1 (noting that the unemployment rate dropped to 10% in November 2009 from a rate of 10.2% in October 2009).

33. Criddle, *supra* note 1, at 484–85.

34. David Brooks, Op-Ed., *The Power Elite*, N.Y. TIMES, Feb. 18, 2010, at A27.

35. *See* Criddle, *supra* note 1, at 481 (arguing that these exemptions are overinclusive and should be reformed).

human rights in China in an effort to obtain China's support for stronger sanctions against Iran to deter it from developing nuclear weapons. Or consider a Notice of Proposed Rulemaking in which the Department of Defense proposes a new collateral-damage rule that authorizes an air strike against a suspected al Qaeda safe house if but only if there is at least a 50% probability of killing at least one senior al Qaeda leader and no more than a 50% probability of killing 12 or fewer innocent women and children. Under Criddle's proposal, the State Department or DOD would adopt or change a policy of this type only after it issues a final rule in which it incorporates a statement of basis and purpose that necessarily would consist of hundreds of pages in which it responds to the tens of thousands of public comments. The final rules would then be subject to hard-look judicial review.

The two policy decisions I hypothesize are typical of the decisions that fall in the now-exempt military or foreign-affairs category. In fact, the State Department and DOD have made and remade those specific decisions many times over the past decade. It is hard to imagine a worse way of making those kinds of important decisions than the method urged by Criddle. This is clearly one context in which "government should be shrouded," as it has been since the beginning of the Republic.

The legislative process is another context in which decision making should be shrouded. Criddle seems not to realize that there are two types of "meetings" in Washington—photo ops and business meetings. There is no functional overlap between the two. Photo ops are public meetings at which politicians preen, display, and strut to please their respective bases. By their nature, they cannot produce substantive results. Business meetings take place behind closed doors. They are the only forum in which the kinds of deals that are essential to success in enacting major legislation can take place.

During the 2007–2008 presidential campaign, Barack Obama repeatedly pledged that all meetings to draft healthcare legislation would be conducted on C-Span.[36] Once he was elected, President Obama acted like all of his predecessors. He conducted scores of closed-door meetings in which he and congressional leaders attempted to forge compromises by trading special treatment for some groups (e.g., union members, citizens of Louisiana and Nebraska, prescription drug companies, and health insurance companies) in return for support for legislation that would further the President's policy agenda. Some of President Obama's supporters have criticized him for

36. *See* Chip Reid, *Obama Reneges on Health Care Transparency*, CBSNEWS.COM, Jan. 6, 2010, http://www.cbsnews.com/stories/2010/01/06/eveningnews/main6064298.shtml?tag=mncoljlstj1 (noting that while Obama promised to broadcast all health care reform negotiations on C-SPAN, he later called for closed-door meetings to draft an agreement between the House and Senate).

betraying his principles.[37] I see his transformation in a very different way. It is exactly what I would expect of any well-read but naïve law professor who is elected to public office and discovers the realities of the legislative process—enactment of legislation requires lots of deal making with special interest groups that cannot take place in public meetings.

Finally, the ubiquitous process of presidential jawboning of agencies in the rulemaking process should continue to be shrouded from public view. Criddle urges Congress to prohibit, or at least to require public disclosure of, all such communications.[38] Criddle recognizes, however, that Congress is highly unlikely to take such an action because members are not willing to relinquish their own discretion to communicate with agencies.[39] As a second-best alternative, Criddle urges the Obama Administration to "voluntarily promote fiduciary administration in agency rulemaking by observing prudential principles of nonintervention" and by "directing agencies to place on the public record all communications with White House staff regarding pending informal rulemaking proceedings."[40]

The short answer to this suggestion is that neither President Obama nor any of his successors will ever implement it. If any president purported to implement either a policy of nonintervention or a policy of making all communications public, I would not believe it for a minute. The vast majority of such communications are oral, and every president since Washington has used oral communications to try to persuade agencies to act in accordance with the President's views of wise policy.

Informal nonpublic presidential jawboning in the context of informal rulemaking is, and always has been, legal. Criddle cites the D.C. Circuit's important opinion in *Sierra Club v. Costle*[41] to support his claim that "agencies are most likely to promote the public welfare if they develop regulations in *open public deliberation* with other government institutions."[42] Criddle misunderstands the facts and holding of *Sierra Club*. A brief description of the facts and holding will illustrate why the part of Criddle's description I have italicized is contradicted by the holding of the case.

In the process of deciding whether to set the maximum permissible level of emissions of sulfur dioxide from coal-fired powerplants at 0.4 lb/MMBtu or 1.2 lb/MMBtu, the EPA met repeatedly and *behind closed doors* with, inter alia, the Secretary of Energy, the Chair of the President's Council of Economic Advisors, the majority leader of the Senate (Senator Byrd of West

37. *See id.* (quoting a Republican House representative regarding the shift to closed-door meetings).

38. Criddle, *supra* note 1, at 486.

39. *Id.* at 501.

40. *Id.*

41. 657 F.2d 298 (D.C. Cir. 1981).

42. Criddle, *supra* note 1, at 498 (emphasis added).

Virginia), and President Carter's domestic policy advisor. After those meetings, the EPA chose the 1.2 lb/MMBtu limit.[43] The Sierra Club and other environmental advocacy groups challenged the EPA decision.[44] The environmental petitioners argued that: (1) the EPA would have chosen the lower limit but for the presidential jawboning; (2) the actual reasons for the decision differed dramatically from the publicly disclosed reasons; (3) it is unlawful for the White House to engage in *secret* ex parte communications with an agency in an informal rulemaking; and (4) the EPA must disclose publicly the nature of those communications.[45]

The court rejected the third and fourth arguments, but it did not dispute the first two arguments.[46] The court implicitly conceded that EPA might have chosen a lower limit but for the ex parte communications and that EPA's actual reasons for choosing the higher limit may have differed from the reasons it gave in its statement of basis and purpose.[47] Of course, neither I nor the court can know the answer to either of those questions, since the meetings were held behind closed doors and the agency said nothing about the effect of the ex parte communications. I strongly suspect that EPA chose the higher limit because of the ex parte communications. However, I consider that a reason to praise EPA rather than to criticize it.

Every time I teach administrative law, I describe to my students the relevant conditions in the United States when the EPA made the decision in 1979, and I ask them to try to recreate the ex parte communications. Thus, for instance, I tell them that: (1) there was a war in the Middle East in 1973 that led to an embargo against the United States imposed by the Arab members of OPEC;[48] (2) the embargo was followed by a four-fold increase in the price of oil;[49] (3) the pro-U.S. Shah of Iran was replaced by an anti-U.S. Islamic regime in a violent revolution in 1979, which led to an additional doubling of the price of oil;[50] (4) President Carter expressed great concern about increasing U.S. dependence on oil imports from insecure sources and made energy independence his signature issue;[51] (5) a major element of President Carter's plan to obtain energy independence was to replace imported oil with domestically produced coal wherever possible;[52] and (6) adoption of the 0.4 lb/MMBtu limit would increase U.S. dependence on

43. *Sierra Club*, 657 F.2d at 384–85.

44. *Id.* at 384–91.

45. *Id.*

46. *Id.* at 396–410.

47. *Id.* at 400–02.

48. *See generally* JAMES PHILLIPS, THE HERITAGE FOUND., THE IRANIAN OIL CRISIS (1979), *available at* http://www.heritage.org/Research/Reports/1979/02/The-Iranian-Oil-Crisis.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

imported oil by forcing utilities to switch many powerplants from coal to imported oil.[53] I then ask them to imagine what the Secretary of Energy said to EPA Administrator Costle.

I follow that description of the energy policy implications of the decision with a description of the economic conditions relevant to the decision. The United States was experiencing high and rising inflation and high and rising unemployment attributable to a considerable extent to the large increases in the price of oil coupled with increased imports of oil.[54] Adoption of the 0.4 lb/MMBtu limit would force utilities to switch from inexpensive high sulfur Appalachian coal to either low sulfur coal from the Powder River Basin or oil imported from the Middle East, both of which were much more expensive than Appalachian coal.[55] I then ask students to imagine what the Chair of the President's Council of Economic Advisors said to Administrator Costle.

I follow that with a description of Majority Leader Byrd and his state of West Virginia. West Virginia had the highest level of unemployment and one of the highest poverty rates in the country.[56] Adoption of the 0.4 lb/MMBtu limit would force the closure of many coal mines in West Virginia, with large resulting increases in unemployment and poverty.[57] Senator Byrd also had more power over EPA's budget than any other member of Congress. I then ask students to imagine what Senator Byrd said to Administrator Costle.

Finally, I describe the political circumstances at the time the EPA made the decision. A general election was scheduled for a few months after the decision.[58] Polls showed dissatisfaction with the level of inflation and unemployment.[59] They also showed Ronald Reagan with an edge over President Carter and Republican candidates running ahead of Democratic candidates for Congress.[60] A decision to adopt the 0.4 lb/MMBtu limit would increase unemployment across Appalachia and increase electricity rates across the Midwest, two regions that President Carter and Democratic candidates for Congress had to carry to retain control of the White House and

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53. *Id.*

54. *Id.*

55. *See generally* RORY MCILMOIL & EVAN HANSEN, DOWNSTREAM STRATEGIES, THE DECLINE OF CENTRAL APPALACHIAN COAL AND THE NEED FOR ECONOMIC DIVERSIFICATION (2010), *available at* http://www.downstreamstrategies.com/Documents/reports_publication/DownstreamStrategies-DeclineOfCentralAppalachianCoal-FINAL-1-19-10.pdf.

56. Susan Elizabeth Shank, *Changes in Regional Employment Over the Last Decade*, MONTHLY LAB. REV., Mar. 1985, at 17, 20.

57. *See generally* PHILLIPS, *supra* note 48; MCILMOIL & HANSEN, *supra* note 55.

58. *See* John F. Stacks, *Where the Polls Went Wrong*, TIME, Dec. 1, 1980, at 21, *available at* http://www.time.com/time/magazine/article/0,9171,924541-1,00.html (discussing the situation leading up to the Reagan versus Carter election).

59. *Id.*

60. *Id.*

Congress.[61] I also remind students that Administrator Costle was a loyal Democrat supporter of President Carter and that he was an at-will employee of the President. I then ask them to imagine what President Carter's domestic policy advisor said to Administrator Costle.

It does not take a genius to use circumstantial evidence to recreate the most important ex parte communications with Administrator Costle. I have no doubt that those communications influenced his choice of a 1.2 lb/MMBtu limit rather than a 0.4 lb/MMBtu limit. I also think that any EPA Administrator *should* consider all of the factors raised in those meetings in making any important decision. However, the EPA did not include discussion of any of those factors in the statement of basis and purpose it incorporated with its final rule, for good reasons. A reviewing court almost certainly would have rejected the EPA decision if the EPA had been candid in disclosing the nature and effect of the ex parte communications.[62] It is impossible for an agency to engage in candid explanations of an invariably complicated and inherently political policy decision in our legal culture without taking a high risk that a court will reverse the decision or that a naïve public will react negatively to the political nature of the decision-making process.

IV. Conclusion

Thus, I end this Response where I started. I support presidential control of agency policy making not because I believe that the President can be relied upon as a consistent fiduciary of the public interest. I support presidential control only because I believe it to be better than the alternatives, including the alternative proposed by Criddle.

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61. *Id.*

62. *See generally* Richard J. Pierce, Jr., *What Factors Can an Agency Consider in Making a Decision?*, 2009 MICH. ST. L. REV. 67.