Unchecked Data: A Tool for Political Corruption?

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I. Global Warming

While the history of global warming dates back *ad infinitum*, for the purposes of this paper, we will begin the discussion in 2006. It was at this pivotal time that most Americans became interested in, and aware of, global warming. David Guggenheim directed the documentary "An Inconvenient Truth" about Al Gore's campaign against carbon dioxide and its link to global warming. This movie, which won Guggenheim an Academy Award for Best Documentary Feature, has been credited for raising international awareness of climate change and reenergizing the environmental movement.[1] Throughout the world, schools have included the data in their science curriculum, and it is frequently referenced in political campaigns and debates.[2] In addition, Al Gore received further validation for his environmental work when he received the 2007 Nobel Peace Prize.[3]

For the American public, these concerns grew in 2005-06, when the Gulf Coast was hit by repeated record hurricanes such as Katrina, Gustav, Ike and others, while the West Coast experienced unprecedented wildfires. The nation began looking for answers.

Gore became a thought-leader on the subject. NASA climatologist James E. Hansen praised Gore, claiming that while some may attack his information, he will be remembered for providing the public with the information they need to distinguish long-term wellbeing from short-term special interests.[4] Others, however, contended that the data underlying the film's content was either unsound or went too far.[5] Eric Steig, a scientific author, claimed, "[O]ne can neither see, nor detect . . . any evidence in Antarctica of the effects of the Clean Air Act."[6] MIT physicist Richard S. Lindzen wrote that Gore was using a biased presentation to exploit the fears of the public for his own political gain.[7] Even film reviewers questioned the material, calling it "blatant intellectual fraud."[8]

The White House is now implementing an unprecedented effort to regulate private industry and eliminate carbon emissions which, they assert, cause climate change. All of this is substantiated by their reliance on data from the EPA.[9]

However, the EPA's evidence detailed health and safety concerns over greenhouse gasses and stirred a firestorm from Republicans.[10] Republican Senators released a nine-page memorandum explaining that the EPA's data was a compilation of opinions made by various federal agencies and departments.[11] When pressed, the White House Office of Management and Budget (OMB) said the cost critique came only from a single federal agency and did not reflect the Administration's view.[12]

Under George W. Bush, comments from each agency regarding a proposal to use the Clean Air Act to regulate greenhouse gases were largely critical. The Bush White House ultimately decided against using the Clean Air Act, suggesting that it would be an imperfect tool and would ultimately burden the economy.[13] However, under the current Administration and Congress, the agency's opinion has shifted. The Obama White House has called on Congress to pass comprehensive energy legislation that includes a market-based cap on carbon emissions that would transition the nation to a "clean energy economy" and assertedly create green jobs.[14] However, Republicans contend that the EPA did not consider all relevant factors and question the reliability of the data, suggesting that "the EPA could have been more balanced in its analysis by also highlighting regions of the country that would benefit from global warming."[15]

Some assert that the EPA stretched the precautionary principle to support regulation despite the "unprecedented uncertainty" linking emissions of greenhouse gases and warming. Senator John Barrasso, from Wyoming, who called the document a "smoking gun," said the EPA's decision was based more on political calculation than scientific ones and repeatedly questioned the lack of scientific data and support used for the proposed findings.[16] EPA administrator Lisa Jackson responded by saying, "I have said over and over that we understand that there are costs of addressing global warming emissions and that the best way to address them is through a gradual move to a market-based program like cap and trade."[17]

Outsiders not only question the data, but whether the EPA is the most appropriate group to disseminate the information. First, political appointees, often loyal to political ideology, oversee agencies. One example is President Obama's appointment of Carol Browner, who previously served as Administrator of the EPA, and is now the Director of the White House Office of Energy and Climate Change Policy—an office created by President Obama to further the Administration's environmental agenda.[18] This new office and role in the Obama Administration does not receive, nor is required to receive, Senate confirmation.

Second, agencies often may not release information unfavorable to the Administration's position. Dr. Alan Carlin, known for his expertise in global warming and climate research, and who has worked for the EPA since the Nixon Administration, wrote a ninety-eight-page report to a proposed EPA finding that challenged humanity's role in climate change, and it was leaked to the press last year.[19] An EPA official responded to a staff member's email, which questioned the EPA data, in March 2009 by stating, "The administrator and administration have decided to move forward. . . . [Y]our comments do not help the legal or policy case for this decision."[20] Carlin told CBS News that his boss was being pressured: "It was his view that he either lost his job or got me working on something else. . . . That was obviously coming from higher up."[21]

The correspondence raises fundamental questions about political interference in what the law requires to be an independent review process inside a federal agency. According to the Associated Press, climate scientists at seven different

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governmental agencies have been subjected to political pressure aimed at downplaying the threat of global warming.[22] The groups presented survey responses that showed that two in five of the 279 climate scientists complained that some of their scientific papers had been edited in a way that changed their meanings; and nearly half said that at some point they had been told to delete references from their reports.[23]

A New York Times article claimed that climate scientist James E. Hansen, director of NASA's Goddard Institute for Space Studies, said that his superiors were trying to "censor" information that was disseminated to the public.[24] NASA denied this, asserting instead that they were enforcing long-standing governmental policies of protecting the information and their employees.[25] In 2008, a report by NASA's Office of the Inspector General concluded that NASA staff appointed by the White House had, in fact, censored and suppressed scientific data on global warming in order to protect the Bush Administration from controversy close to the presidential election.[26] These reports show that when data is disseminated by key agencies, like the EPA, to such influential bodies as Congress, the President, and the American people, there is a threat of wide-scale abuse.

The EPA formally announced "Phase-in" of the Clean Air Act in March 2010.[27] The EPA's final decision explained that no stationary sources will be required to obtain Clean Air Act permits that cover greenhouse gases before January 2011.[28] The announcement stated that the "EPA has pledged to take sensible steps to address the billions of tons of greenhouse gas pollution that threaten Americans' health and welfare, and is providing time for large industrial facilities and state governments to put in place cost-effective, innovative technologies to control and reduce carbon pollution."[29]

Despite concerns about the EPA's data, some legislators are calling for far-reaching congressional action and regulation for environmental issues. If, somewhere down the line, a court or independent arbiter confirms that this data is faulty, serious financial loss for American taxpayers could result. While some might argue that the judiciary remains a check to the other branches when these branches are controlled by a single party, an inherent challenge to this argument arises when the judiciary either cannot or will not review issues of interest. When anyone objects to evidence behind a federal regulation, the absence of judicial review can limit the ability to address the grievance and may indirectly create circumstances where opinions are able to supercede facts.

II. The Three Branches of Government—An Inherent "Check" on Unbridled Discretion

The Constitution enumerates, with exacting detail, the three different branches and their respective powers. James Madison penned, "[P]ower is of an encroaching nature and it ought to be effectually restrained from passing the limits assigned to it."[30]

Since America's founding, this has been a universal concern. Even the Anti-Federalists argued, "The legislative power should be in one body, the executive in another, and the judicial in one different from either—but still each should be accountable for their conduct."[31] This division of government into different but co-equal branches gave rise to the concept that the powers assigned to each branch are separate and serve as a check onto the other.[32] "Each department should have a will of its own. . . . [T]he members of each should have as little agency as possible in the appointment of the members of others."[33] The separation of powers doctrine implicitly arises from the tripartite democratic form of government and recognizes that the executive, legislative, and judicial branches of government have their own unique powers and duties that are separate and apart from the others.[34]

The Founders also acknowledged that two of these branches would be political branches—the executive and legislative—both accountable to the electorate. Since they recognized that power could corrupt even the best people,[35] the Founders tried to ensure that the third branch—the judiciary—would be more independent and thus able to thwart potential corruption. Legislators are chosen by the people and are accountable to them. As such, their conduct must comply with what the people want.[36] Judges, however, enjoy a different situation.

According to *The Federalist*, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution because it will be least in capacity to annoy or injure them.[37] The judiciary has neither force nor will, simply judgment. "Liberty can have nothing to fear from the judiciary alone but would have everything to fear from its union with either of the other departments. . . . [T]he complete independence of the courts of justice is essential to . . . [our] constitution."[38] Thus, the independent judgment of the judiciary was created to be an essential safe-guard against the effects of occasional "ill humours" of society, which stem from the "arts of designing men or the [corrupt] influence of particular conjunctures. . . ."[39] The judiciary's independence, extensive educational background, and rational judgment were to ensure that the corruption of politics and congressional action would be kept in check and limited, when necessary.[40]

III. The Data Quality Act

Government information often forms the basis for congressional lawmaking, as well as regulation and resource allocation decisions by federal agencies. As such, it is vital that the information used be valid, as data derived from bad science or poor quality can lead to costly mistakes.[41]

In 1995, Congress passed the Paperwork Reduction Act (PRA), which was designed to improve the functioning of the federal government.[42] This law contained government data quality provisions, which directed the White House Office of Management and Budget (OMB) to implement policies, principles, standards, and guidelines to ensure the quality of information used and disseminated by the federal government. However, little was done with data quality after its passage. Congress made another attempt to ensure that federal agencies use and disseminate accurate information by passing the Data Quality Act (DQA) (also referred to as the Information Quality Act).

The DQA was a two-sentence rider inserted in Section 515 of the 2000 Consolidated Appropriations Act. The DQA, which is not codified, amends the PRA. It took effect on

October 1, 2002, which also happened to be the deadline for federal agencies to issue their final information on quality guidelines.[43] Congress enacted the DQA primarily in response to increased use of the Internet, which gave agencies the ability to communicate information quickly and easily to large audiences.[44] Congress intended to prevent the harm that can occur when government websites, which are easily and often accessed by the public, disseminate inaccurate information.[45]

Because the DQA was passed as a rider, without hearings or floor debate, there is limited guidance on how the DQA was supposed to promote the dissemination of reliable and accurate agency information or how it was to be balanced with the regulatory goals of agencies.[46] To address this, OMB—an extension of the executive and political branch—has offered its own interpretation of what Congress required.

The DQA requires OMB to establish "policy and procedural" guidelines to ensure that the information disseminated is of requisite quality, objectivity, and utility.[47] The DQA applies to all information disseminated by a federal agency. OMB has defined "disseminated" to include any "agency initiated or sponsored distribution of information to the public."[48] Agencies initiate or sponsor information when they endorse it.[49] Thus, the information can originate from a non-governmental entity but, because it is used to address particular policy issues, it is subject to the scrutiny of the legislation.

OMB has a three-tiered requirement structure.[50] The requirements address the manner in which an agency presents information and the reliability of the information presented. At a minimum, the information must meet the criteria that OMB has established for routine information.[51] Agencies must meet additional requirements if the information is "influential," meaning it has a clear and substantial impact on important public policies or important private sector decisions.[52] There is a final requirement concerning environmental, health, or safety risks.[53]

Agencies are required to present information in a clear and unbiased manner, including the presentation of other contextual information necessary to ensure a lack of bias.[54] However, this requirement can be overridden by "compelling interests," which are never fully explained by the OMB.[55] Agencies are also required to assure that their information is reliable.[56] OMB suggests that information is deemed reliable when it is subject to external, independent peer review.[57] OMB also states that if an agency disseminates influential scientific, financial, or statistical information, it must first determine that the analytical results were developed using sound methods.[58] However, OMB does not delineate what is meant by "sound methods" or "influential information."

The DQA further requires that agencies establish guidelines for the same purpose as OMB and establish administrative mechanisms that allow "affected persons to seek and obtain correction of information maintained and disseminated by the agency that does not comply with the [OMB] guidelines. . . ."[59] OMB asserts that these mechanisms shall be flexible, "appropriate to the nature and timeliness of the disseminated information, and incorporated into agency information resources management and administrative practices."[60]

While affected agencies have administrative appeal processes in place to review the agencies' initial decisions and time limits to resolve any requests for reconsideration, it seems inappropriate for the offending office to have responsibility over both the initial response and the resolution of the disagreement. It also seems suspect for OMB to leave room for flexibility that is subjectively limited to the "appropriate nature and timeliness of disseminated information."

IV. Judicial Review

Agencies become bound by OMB's definitions and interpretation, unless and until a court determines that OMB has misstated Congress' intent. However, this can be problematic. Sydney Shapiro, a panelist at the DQA teleconference and board member for the Center for Progressive Regulation, expressed the views of many environmentalists when he argued that OMB has attempted to model the regulatory process on the scientific process.[61] The problem, Shapiro contends, is that the two processes often have different goals—science benefits when results are accurate, while regulations are made to protect people from harm and should always err on the side of safety.[62] This inherent contradiction begs the question whether agency dissemination also properly allows for OMB rulemaking.

With no legislative history to reference, it is difficult to say how courts would rule in such a situation. Under the historic Supreme Court ruling in *Marbury v. Madison*, United States federal courts have the authority to judicially review statutes enacted by Congress and declare a statute invalid if it violates the Constitution.[63] However, the Constitution does not set any express limits on how much federal authority can be delegated to a government agency. These limits are set by statute. Thus, the courts' interpretation of these statutes becomes an important oversight function in ensuring our government's inherent system of checks and balances.

Thus, the question becomes how—or even if—the courts choose to interpret the statute. In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the United States Supreme Court deferred to agency interpretation because Congress failed to precisely define the statutory language and, in order to fill the gap, the Court held that the EPA offered a reasonable and permissible interpretation.[64] Thus, courts may defer to the agency tasked with administering the statute, so long as their interpretation is "reasonable." Of course, specifying "reasonability" offers even more room for judicial interpretation. However, even without *Chevron* deference, an agency's interpretive rules may still be given deference according to their persuasiveness under *Skidmore v. Swift & Co.*[65] *Skidmore* established a four-factor test to determine whether or not deference should be given to an agency's interpretation, including: (1) the thoroughness of the agency's investigation; (2) the validity of its reasoning; (3) the consistency of its interpretation over time; and (4) other persuasive powers of the agency.[66]

However, in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, the U.S. Supreme Court addressed the geographic scope of the Clean Water Act (CWA) and declined to afford the U.S. Army Corps of

Engineers the customary deference granted to an agency.[67] The Court claimed that deference is not appropriate when an agency's interpretation of a statute "invokes the outer limits of Congress' power," a reference to the Court's milestone decisions in recent years involving the reach of the Commerce Clause. This concern is particularly strong, said the Court, where the agency interpretation permits encroachment on a traditional state power.[68]

Thus, when a statute is unfairly deferential to the agency that penned it, not only may such an interpretation be unfair, it may also be unconstitutional. Despite necessary political constraints and limited ways to strike down unconstitutional measures, courts must still step in when there is an obvious imbalance. As Madison explained, the courts exist as an intermediate body between the people and the legislature, ensuring that enacted laws are both constitutional and fair.[69] Nowhere is this more distinctly summarized than in Federalist No. 78, where Madison stated, "If the will of the legislature stands in opposition to that of the people . . . [or] the Constitution, judges ought to be governed by the latter . . . [and] ought to regulate the decisions by the fundamental laws."[70] Thus, courts can ensure fairness without disrupting the realities of the current political landscape. One obvious way to do so would be to limit their "strike"—not necessarily eliminating the adjudicated issue altogether but instead limiting the scope of authority.[71]

While this seems to be the intended will of the Founders, courts do have another recourse—they may refuse to interpret the issue altogether. Even though *Marbury v. Madison* granted the courts judicial review, ensuring that it is "emphatically the province and duty of the judicial department to say what the law is,"[72] there are limits, and most fall under justiciability.

It is unclear whether the Founders intended these safeguards, as neither the text of the Constitution nor the framers expressly mention any of these limitations. However, the Founders did intend for the Supreme Court to have enough influence over the actions of lower courts, to ensure no undue corruption of power or influence.

The justiciability doctrines are closely tied to the inherent concept of separation of powers, by defining when it is appropriate for the federal courts to review matters and when it is necessary to defer to other branches of government. It is often said that the justiciability doctrines are intended to improve judicial decision making by providing the federal courts with concrete controversies best suited for judicial resolution.[73] The Supreme Court has reasoned that the requirements limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process.[74]

Of course, even these limits are not absolute. The debate over justiciability also centers on an issue of methodology: Should the rules be clear and predictable or should doctrines remain flexible, permitting courts to have discretion to choose which cases they hear and which they decline?[75] Some contend that if courts are able to manipulate justiciability doctrines to avoid cases or make decisions about merits of disputes under the guise of rulings about justiciability, it equates to avoidance rather than justice.[76]

This concept of avoidance is at the very heart of the current debate with the DQA. Some contend that the courts are right to avoid judicial review for a number of important reasons. First, nothing in the text of the DQA requires judicial review of denied requests for correction. Second, there may be inherent dangers in pushing for judicial review, including the reality that judges might be ill-equipped to make determinations on the reliability of hyper-technical scientific data. Third, agencies might anticipate court action and become timid, limiting information dissemination to Congress, industry, or the public at large. Fourth, enabling judicial review may provide a tool for industry or other groups to bias people against important governmental regulations, by slowing agency action or restricting public access to government information.[77] Not only would this be inappropriate, since the legislation has never been debated or reviewed by Congress, it would also potentially allow for corrupt governmental practices.

However, would-be plaintiffs suggest that without proper judicial review, oversight will cease to exist and agencies will maintain unbridled discretion.[78] At the very least, the omission of stated oversight requirements has certainly not helped these potential litigants.

The first lawsuit to allege compliance failure with the DQA was *Competitive Enterprise Institute v. Bush*. Filed in August 2003, it involved potentially inaccurate data used in the White House Office of Science and Technology Policy's report to the President and Congress on climate change.[79] However, the lawsuit was dismissed when the White House offered to issue a disclaimer stating that the national assessment had not been subject to a review under the data quality standards requirement.[80] Thus, the prospect of potential litigation seemed to "check" the agency's actions, encouraging them to "come clean" about their inability to review the disclosed information.

Since *Competitive Enterprise Institute*, United States district courts have rejected two subsequent attempts to seek judicial review in DQA decisions: *Salt Institute v. Thompson* and *re: Operation of the Missouri River System Litigation*. In both cases, the district courts concluded that the DQA was unreviewable because the Act does not subject the dissemination of data by an agency to court supervision.[81] According to attorney Margaret Pak:

> Congressional intent to preclude judicial review is implicit in the DQA's structure and objectives and in the nature of administrative action involved. In the absence of an express statement on judicial review and with almost no legislative history, these factors control the determination of congressional intent to preclude judicial review.[82]

On the other hand, those seeking review could argue that the court could use the definitions established by the agency to effectuate the review, even if Congress failed to define the terms. In fact, their review may be required because of the gaps created by legislative inaction.

The U.S. Chamber of Commerce and the Salt Institute took their case to the U.S. Court of Appeals for the Fourth Circuit, arguing that the Health and Human Services Department refused to change its position, despite the copious

amounts of data they had presented which suggested inapposite views of those taken. The court upheld the rights of federal agencies to have the final word on the quality of their facts, figures, and research used in rulemaking and other decisions.[83] The court determined that the DQA does not create a legal right to information or information correctness and referred complaints back to the agency.[84] "By its terms, this statute creates no legal rights in any third parties—it orders the OMB to draft guidelines concerning information quality and specifies what those guidelines should contain."[85]

William Kovacs, the Chamber of Commerce's Vice President for Environment, Technology and Regulatory Affairs, said the ruling obliterated the federal law: "[W]e're left with the arrogance of the agency and have essentially been told that no one can challenge them."[86] This bold statement may prove to be true, considering that there were eighty-five requests for correction in 2003 and 2004 alone, and only ten of those requests led to some sort of change by the agency.[87]

V. The Administrative Procedure Act

One of the inherent difficulties for judicial review is that courts have previously refused to engage in review of agency dissemination of information on the ground that it is not final agency action—a prerequisite for judicial review under section 702 of the Federal Administrative Procedure Act (APA).[88] However, under section 701 of the APA, resolution of an information quality complaint is committed to agency discretion by law.[89] If courts reject this argument, the availability of judicial review might turn on whether a plaintiff has standing to seek judicial review of the information quality complaints, which reverts back to many of the issues addressed earlier under the justiciability doctrines.

Ultimately, this will turn on whether or not the litigant has an appropriate cause of action under the APA. As long as the injury suffered is "arguably within the zone of interests protected, the potential plaintiff satisfies the provisions of the section."[90] However, despite this, courts have routinely refused to subject agency information activities to judicial review, claiming that section 704 of the APA limits judicial review to final agency action and dissemination of information does not fit as agency action.[91]

In *Industrial Safety Equipment Association v. EPA*, the court held that publication of a guide on respirators by the National Institute of Occupational Safety and Health was not final agency action despite the report's impact of decertifying most respirators.[92] The Fourth Circuit held that the APA statute barred the agency from imposing any regulation because the report produced by the EPA on second-hand smoke carried no legally binding effect.[93] This position discounts the harmful effect on businesses that suffer from these actions, limits their ability to dispute the findings before an impartial judicial body, and restricts their ability to present equally convincing scientific data.

The DQA does not seem to fall under either the finality requirement or the "not committed to agency discretion by law" requirement of the APA. Regarding finality, past Supreme Court rulings require that to be final, agency action must (1) mark the consummation of the agency's decision making process and (2) be one from which legal consequences flow or by which rights and obligations are determined.[94]

Regarding the second requirement, *Salt Institute* opposed claims on the National Heart Lung and Blood Institute's website and filed a DQA complaint requesting review of the data underlying the study.[95] The suit was rejected, though, on the grounds that "without a meaningful standard against with to judge the agency's exercise of discretion . . . meaningful judicial review is impossible."[96] Thus, the court found that DQA oversight is designated to agencies such as the OMB, not the judiciary. However, this logic may be faulty. Under sections 701 and 702 of the APA, if a person has cause and standing, judicial review should be allowed and the rejection of a complaint under the DQA is likely a final agency action since there is no other defined recourse for a litigant.[97]

VI. If the Judiciary Refuses to Review, What Other Options Are There?

Returning to the issue of global warming, many claim that the EPA's recent "endangerment finding" that greenhouse gas emissions threaten human health—a finding that is a precursor to potential regulation—violates the DQA.[98] Senator John Barrasso (Wyoming), Senator David Vitter (Louisiana), Representative Darrell Issa (California), and Representative James Sensenbrenner, Jr. (Wisconsin) made the allegation in a letter to EPA Administrator Lisa Jackson.[99] The lawmakers claim that the practices of prominent climate scientists have clouded a major report written by the United Nations' Intergovernmental Panel on Climate Change that the EPA relied on when crafting the endangerment finding.[100] These lawmakers hold leadership positions on various related committees, including the House Oversight and Government Reform Committee and the Select Committee on Energy Independence and Global Warming as well as the Senate Environment and Public Works Committee. The lawmakers fear political corruption since the courts have been reluctant to review the issue and suggest that there may be alternatives. Senator Lisa Murkowski from Alaska has suggested involving the legislature in an effort to overturn the endangerment finding using the Congressional Review Act (CRA).[101]

VII. The Congressional Review Act

The CRA was signed into law as part of the Small Business Regulatory Enforcement Fairness Act of 1996. The CRA establishes special congressional procedures that allow Congress to enact a resolution of disapproval to overturn rules instituted by federal administrative agencies.[102] Before the rule can take effect, the federal agency that promulgates the rule must submit it to Congress.[103]

Additionally, a CRA resolution must pass both houses of Congress and be signed by the President or pass by a two-thirds majority in both houses in case of a presidential veto. If Congress passes a joint resolution disapproving the rule, and the resolution becomes law, the rule cannot take effect or continue in effect. The agency may not reissue that rule or a substantially similar one except under authority of a subsequently enacted law.[104]

Since its passage in 1996, the Comptroller General has submitted reports to Congress on nearly 800 major rules. The Government Accountability Office has catalogued the submission of almost 50,000 non-major rules and to date, only forty-seven joint resolutions of disapproval have been introduced on thirty-five different rules.[105] And only one of these, the Department of Labor's ergonomics rule, has been disapproved by Congress using the CRA.[106] Two others were disapproved by the Senate but were never acted upon by the House. These include the Federal Communications Commission's (FCC) 2003 rule relating to broadcast media ownership and the Department of Agriculture's 2005 rule relating to the establishment of minimal risk zones for introduction of Mad Cow Disease.[107]

Recently, Senator Murkowski introduced Senate Joint Resolution twenty-six under the CRA to disapprove the EPA's cap-and-trade regulations.[108] However, since the CRA requires a majority of votes in both houses and/or the signature of the President, the CRA is unlikely to help any challenge to data quality claims under the DQA.

VIII. Is This a Problem in Need of a Solution or Are There Other Options?

Maybe the real question is whether this is a problem in need of a solution. Should a minority party have recourse options when the same party controls both houses of Congress and the executive, and the federal judiciary refuses to intervene?

Perhaps no, since Congress has other alternatives for overseeing agency action, including the addition of provisions to agency appropriations bills that restrict federal rulemaking and/or regulatory activities.[109] However, no appropriation provisions are designed to reverse rules, as the CRA was originally intended to permit.[110] But, the number and variety of the provisions discussed does illustrate that Congress' scope of control over agencies is potentially wider than CRA resolutions of disapproval.

In testimony before Congress, William Kovacs suggested that administrative law judges within agencies might be a better adjudicative body to hear DQA issues and settle disputes.[111] Kovacs also suggested that the OMB could establish an ombudsman[112] to act as a trusted intermediary between the organization and the internal or external constituency while representing the OMB's broad scope of interests.[113] On the other hand, it would be hard to ensure that the selection of this person would be unbiased.

Perhaps one of the most obvious alternatives is to let the people decide. While this may be a slow answer and may not offer immediate solutions, it is certainly one way to ensure that the people have the final say. However, even if elections were an appropriate response to this situation, they would not eliminate the underlying problem for a myriad of reasons.

First, the DQA is a small, obscure piece of legislation of which most Americans are unaware. Therefore, it is unlikely that the potentially corrupt practices allowable by the DQA will ever hit most people's radar.

Second, the impact of elections on congressional accountability has been dramatically reduced over the years through the ascendancy of incumbents, gerrymandered congressional districts, and special interest money, which targets those isolated few contested seats in any given election cycle.

Third, many Americans may not understand or differentiate between accurate, quality data and unreliable, inaccurate information in a political campaign. Judges, on the other hand, may be in a better position to sift through the information, and weigh its credibility.

When issues are hotly contested and highly combative, elections simply "flip" the party in charge. This does little, if anything, to curb the dilemmas posited in this paper.

IX. Conclusion

Despite these various options, and because of the reasons outlined, court involvement in policing data disputes is the inevitable and most reasonable recourse, despite their current inaction.[114] In fact, many suggest that Congress intended the DQA to provoke a revolution about how decisions are made, and meant to provide a means to force agencies and departments into court at any stage of the rule-making process if an affected party believed that inaccurate or unreliable information had been considered.[115] Representative Candice S. Miller, chairwoman of the House Government Reform subcommittee, with jurisdiction over the DQA, said, "The Act is an important, good government statute ensuring that government information be of the highest quality before it is disseminated. . . . [Despite the court rulings], Congress intended that agency decisions under this Act be reviewed by the courts."[116] She even contended that other cases might bring different results and, if not, Congress might well need to make important legislative changes.[117]

The DQA represents a classic case of "slipping through the cracks." Congress passed legislation that it failed to define, held no hearings on it, and developed no legislative history for it, leaving the details and their implementation to the very agency tasked with overseeing it. However, when that agency can be seen as a "tool" of the executive, and in turn a "tool" of the majority party, the only reasonable alternative is for the interpretation of the legislation to be left in the hands of the courts. An agency cannot be held to police itself.

While the DQA has largely fallen by the wayside, it could be a source of legitimate government oversight if courts would agree to review it and, even potentially limit it, to avoid unnecessary impositions on information dissemination. As government regulation and oversight expand, and the use of evidence and statistics become proof sources to legitimize these actions, the ability to demonstrate and validate the accuracy and reliability of the evidence data is critical. Without objective review, the disseminated data by key governmental agencies could easily become subject to statistical manipulation, or even worse, those agencies could actively suppress efforts to improve the data utilized by regulators due to political pressures.

As the initial example of global warming suggested, once an executive agency disseminates data, the data can become the basis for documentaries, legislation, business practice, and public opinion. When an agency has a particular interest in the data being collected and is receiving substantial political pressure to ensure that the data looks and sounds a particular way, the data becomes subject to manipulation. When agencies

are tasked to serve those same political or ideological needs, it is highly unlikely that the *Chevron* deference to agency discretion is appropriate, regardless of whether or not the agency's interpretations are "reasonable." It is not difficult to see why the American people need an objective body to step in and ensure that the information being disclosed is both reliable and accurate. In the absence of objective third-party review and debate, the likelihood of political corruption and wide-scale abuse increases. Not only could this negatively affect costly legislation, but it will also affect the pocketbooks of all tax-paying Americans.

Endnotes

1 "An Inconvenient Truth – About the Film," http://www.climatecrisis.net.

2 *Id.*

3 "The Nobel Peace Prize 2007," http://nobelprize.org/nobel_prizes/peace/laureates/2007.

4 Ronald Bailey, *Gore as Climate Exaggerator*, Reason, June 16, 2006.

5 *Id.*

6 Eric Steig, *Another Look at An Inconvenient Truth*, GeoJournal 70 (Sept. 2007).

7 Richard S. Lindzen, *There Is No 'Consensus' on Global Warming*, Wall St. J., Jan. 7, 2007.

8 Phil Hall, *An Inconvenient Truth*, Film Threat, May 15, 2006.

9 Patrick Wintour and Larry Elliott, *G8 Summit: Barack Obama Says World Can Close the Carbon Emissions Gap*, The Guardian, July 9, 2009 (suggesting that not only is this part of Obama's domestic agenda, but that "every nation is responsible for climate change and no one nation can solve it alone.")

10 *White House Memo Challenges EPA Finding on Global Warming*, http://www.foxnews.com/politics/2009/05/12/white-house-memo-challenges-epa-finding-global-warming/. May 12, 2009. (A condensed version of the same AP article is available at http://m.cnbc.com/us_news/30705611/1?refresh=true.)

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.*

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17 *Id.*

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32 *See* Brown v. Owen, 165 Wash. 2d 706 (2009).

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35 The Federalist, *supra* note 30, at 269 ("But what is government itself, but the greatest of all reflects on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. A dependence of the people is, no doubt, the primary control of the government; but experience has taught mankind the necessity of auxiliary precautions.").

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68 *Id.*

69 *Id.* at 404.

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