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Government and Science: The Unitary Executive versus Freedom of Scientific Inquiry

by Lawrence O. Gostin

President Barack Obama pledged in his inaugural address to “restore science to its rightful place” and promised that federal policy would be informed by “the most complete, accurate, and honest scientific information.”¹ The president joined a chorus of condemnation against the Bush administration’s “war on science,” ranging from former surgeon generals, senior agency scientists, and the Union of Concerned Scientists to the General Accountability Office and Congress. Showing respect for science is not only crucial to affirming democratic ideals of openness and freedom of inquiry. It is also essential to the long-term well-being of society, which benefits from scientific research and innovation.

During the Bush administration, once-strong, independent agencies such as the Centers for Disease Control and Prevention, the Food and Drug Administration, the Environmental Protection Agency, and the National Institutes of Health came under political influence perhaps more than at any other time in history, threatening the effectiveness and credibility of the executive branch. Consider three examples:

In 2006, the GAO revealed that the Bush administration had spent over \$1.6 billion in a two-year span on public relations, including payments to columnists, media firms, and networks to editorialize in favor of the administration’s policies.² The Department of Health and Human Services, the Office

of National Drug Control Policy, and the FDA distributed prepackaged news clips to promote Medicare reform and antidrug messages and to warn consumers not to buy prescription drugs from Canada. Other reports placed the government in a favorable light on issues ranging from childhood obesity and drunk driving to preservation of the environment. The GAO found that federal agencies violated a congressional ban on “covert propaganda.”³

Also in 2006, a DHHS appropriations act required that scientific information “shall be transmitted [to Congress] uncensored and without delay.”⁴ But in his “signing statement,” President Bush affirmed his power to “to withhold information that could impair the workings of the executive branch.” The American Bar Association called this—and the other 750-plus presidential signing statements declaring an intent not to enforce legislation (including a torture ban, protection of whistleblowers, and the independence of an Institute of Education Sciences)—“contrary to the rule of law and our constitutional system.”⁵

In 2004 and 2005, the Union of Concerned Scientists (UCS) reported that the Bush administration systematically distorted scientific fact in the service of policy goals on the environment, health, and biomedical research.⁶ Illustrations included the FDA delaying approval of emergency contraceptives against the advice of staff scientists and two independent advisory panels, the

DHHS obscuring scientific evaluation of abstinence-only education and pressuring scientists to promote abstinence, the CDC altering its Web site to raise doubts about the effectiveness of condoms in preventing HIV transmission, and the EPA undermining climate change science by suppressing reports and publicly misrepresenting scientific consensus. Health officials even concealed scientific evidence that social and racial disparities affect health care.

In some instances, one might give a nod to the government’s benign intentions (antidrug messages on television, for example), but does beneficence justify deceit? In other instances, the government’s suppression or disregard of science seemed coldly calculated to buttress its political ideology or favor special interests. Above all, transparency and honesty are essential in setting and enforcing health policy. The public expects the state to listen carefully, be objective, and promote the common good.

Constitutional Freedoms of Scientists

President Bush justified political control over science on a theory of a “unitary executive,” according to which the president holds a tight grip on federal policy. Unitary executive theory flies in the face of the Constitution’s separation of powers. But more importantly, it stands in stark contrast to First Amendment principles of freedom of thought and expression. Defense of civil liberties in a free state is essential to the scientific enterprise.

The Constitution most assuredly safeguards private scientists’ research and dissemination of results. The Supreme Court affords a wide berth to scientific endeavor, effectively exempting it from controls on obscenity, limiting the classification of scientific findings on national security grounds, and condemning “prior restraints” on the dissemination of knowledge (when government censors scientific research before it is even published).

The Court has been much less zealous, however, in defending the freedom of government scientists and the cre-

ation of science policy. As “unitary executive,” the president can appoint whomever he chooses to senior scientific posts or advisory committees. But if his choice is influenced by the appointee’s views on abortion or whether she voted for the president (as occurred repeatedly in the Bush administration), a line has been crossed. Likewise, the president can promote the policies he chooses, but should the White House suppress or alter the findings of its scientists on these or other vital social problems of the day, such as global warming? The Court has never opined directly on the freedom of government scientists, but freedom of scientific inquiry in government must be as vital to a flourishing democracy as it is in the private sector.

Science holds a privileged constitutional position, even above the freedom of religion. Science has the liberty to explore, but unlike religion, it also enjoys state financial support. Can government fund science in a way that limits its basic freedoms? According to the “unconstitutional conditions” doctrine, which is longstanding and well accepted, government cannot grant resources on the condition that scientists, or others, curb their constitutional freedoms. But that is exactly what the Supreme Court has allowed. In its 1991 decision in *Rust v. Sullivan*, the Rehnquist Court upheld a so-called gag rule that forbids clinics receiving federal family planning funds from counseling or referring women for abortion and from encouraging, promoting, or advocating abortion.⁷ Similarly, in *Forum for Academic and Institutional Rights, Inc.*, the Roberts Court upheld the Solomon Amendment, which requires universities, as a condition of federal funding, to grant access to military recruiters, in violation of university policy that prospective employers must not discriminate on the basis of sexual orientation.⁸

The Respective Roles of Science and Policy

Science is a positivistic pursuit. It is descriptive and explanatory, and its accuracy is based on the quality and

rigor of the methods used. Scientific findings can establish a factual base for political discourse, but scientific research cannot arrive at any particular normative conclusion without reference to outside systems of thought. Science can describe the maternal risks of pregnancy and elucidate fetal development, for example, but it cannot resolve the debate over abortion. Policy-making, on the other hand, is a normative endeavor. It is informed by scientific research, but it ultimately relies on political ideology and electoral calculations. If the public disagrees with the results of scientific research, it has no recourse. But if the public disagrees with policy decisions, it has recourse through the ballot box.

Unfortunately, the normative and positive too often blend into one another.⁹ Positive assertions are presented in a normative light—for example, that the cost of treating a given condition surpasses a benchmark of cost-effectiveness and hence should not be used. Such a position really consists of separate assertions: the cost of treatment equals a particular amount (a positive claim) and cost-effectiveness should guide the allocation of health care resources (a normative claim). Even more problematic is the converse—when normative views are passed off as positive assertions, as happened in the Bush administration’s well-documented handling of the putative association between abortion and breast cancer. Multiple well-designed and analyzed studies had found no evidence of its existence. Nonetheless, from 2002 to 2003, the National Cancer Institute Web site suggested that there was indeed a link between abortion and breast cancer. The suggestion relied largely on older epidemiologic studies that failed to sufficiently control for recall bias.

A wall of separation is needed between science and politics. Science should inform normative discussions and provide the evidentiary base for political choices. Likewise, values will always be important in deciding how science is applied for human benefit. But neither should be permitted to distort the other—limits on the outer boundaries of what questions each can answer

must be respected when making public policy. Medical science, and the health of patients who depend on it, are too important to be subjected to political ideologies.

1. “Investing in America’s Future: Barack Obama and Joe Biden’s Plan for Science and Innovation,” available at <http://www.barack-obama.com>.

2. U.S. Government Accountability Office, “Media Contracts: Activities and Financial Obligations for Seven Federal Departments,” GAO-06-305, January 2006.

3. U.S. Government Accountability Office, “Prepackaged News Stories,” B-304-272, February 17, 2005.

4. Department of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, H.R. 3010, 109th Cong. (2006).

5. American Bar Association, “Task Force on Presidential Signing Statements and the Separation of Powers Doctrine,” 2006, http://www.abanet.org/op/signingstatements/aba_final_signing_statements_recommendation-report_7-24-06.pdf.

6. Union of Concerned Scientists, “Scientific Integrity in Policy Making: Investigation of the Bush Administration’s Abuse of Science,” 2004; Union of Concerned Scientists, “Scientific Integrity in Policy Making: Further Investigation of the Bush Administration’s Abuse of Science,” 2005.

7. *Rust v. Sullivan*, 500 U.S. 173 (1991).

8. *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 126 S. Ct. 1297, 1307 (2006).

9. J.D. Kraemer and L.O. Gostin, “Science, Politics, and Values: The Politicization of Professional Practice Guidelines,” *Journal of the American Medical Association* 301 (2009): 665-67.

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