Money Talks and Policy Walks: The Influence of the Campaign Funding Process Upon Administrative Agency Decisions

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MONEY TALKS AND POLICY WALKS: THE INFLUENCE OF THE CAMPAIGN FUNDING PROCESS UPON ADMINISTRATIVE AGENCY DECISIONS

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Americans live within the invisible realm of the Administrative State, which, in turn, controls their air, water, food, health, schooling, and workplaces. The power of the administrative bureaucracy is far-reaching, subject in the Executive Branch to Presidential oversight. The vast discretion of this oversight function, however, can be tainted by political campaign money. If tainted, the fidelity of the presidential advisers to their donor groups affects the ways in which this oversight can move, halt, or direct the Administrative State. This article posits a means by which disclosure can be a counterweight against undue impacts of campaign donor influence on administrative decisions.

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2 See Crolely, supra note 1, at 119 (observing that implementation of agency rules is subject to Presidential oversight); Thomas O. McGarity, Presidential Control of Regulatory Agency Decisionmaking, 36 AM. U. L. REV. 443, 447-53 (1987) (describing benefits of Presidential oversight, such as greater accountability, reduction of bureaucratic rigidity, and more functional rules).

I. THE ISSUE OF DONOR INFLUENCE

The President, the Cabinet, and the executive agencies each have roles in the formulation of national policies. President Truman's famous "The Buck Stops Here" desk sign epitomizes the President's responsibility to make tough policy decisions with respect to domestic and foreign policy. Presidents utilize Executive Branch agencies for policy implementation and to ensure that the constitutional duty to "take Care that the Laws be faithfully executed" is fulfilled. However, when the President talks with big money donors, how loudly does the echo of that conversation resonate with federal agency policy-makers? Should coordinated disclosure safeguards be used to illuminate the influence of cash contributions on the output of federal agency decisions?

The largest financial supporters of a sitting President enjoy tremendous influence. For example, the President personally phones and meets with many of the largest donors at exclusive events. Furthermore, the Vice President does the same. Even

6 See U.S. CONST. art. II, § 3. see also Steven G. Calabresi & Saikrishna B. Prakash, The President's Power to Execute the Laws, 104 YALE L.J. 541, 589 (1994) (affirming importance of executive's unitary authority in executing federal law); Rossi, supra note 1, at 221-22 (explaining Constitutional significance and practical importance of Executive's duty to ensure that laws are "faithfully executed").
Cabinet members tour cities and state capitals in order to get donors to back the presidential agenda with capital investments.\(^{10}\) Moreover, the President and his aides know that the President’s success in re-election depends on being responsive to large donors’ needs.\(^{11}\) This is American political reality, as it exists today.

Senator John McCain recently criticized the Clinton Administration in a CBS broadcast interview. He observed that the current Administration's eagerness to win re-election during the 1996 presidential campaign had resulted in mobilization of government hand-outs in favor of donors.\(^{12}\) Whether or not McCain was correct, this perception alone leaves one to wonder about the independence of the Administrative State. For example, were the satellite technology export controls waived in favor of Loral Space & Communications Corp., a company whose chairman was the largest individual donor to the Clinton re-election?\(^{13}\) Did the amount of Asian-originated contributions to the 1996 re-election effort signal an expectation that the Commerce and Defense Departments would be more receptive to export licensure for technology?\(^{14}\) Did

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\(^{10}\) See Tim Weiner, Lake Pulls Out as C.I.A. Nominee, N.Y. TIMES, Mar. 18, 1997, at A1 (discussing how Lake withdrew his nomination based on concerns regarding his status as Clinton’s National Security Advisor and possible involvement in dubious fundraising schemes).

\(^{11}\) See Jeremy Lehrer, As McCain-Feingold Awaits Final Judgment, The Debate Continues About the Merits and Finer Points of Campaign Finance Reform, 25HUM. RTS. 10, 12 (1998) (noting that campaign contributions are way of investing in legislative future); see also Bill McAllister, Wisconsin Backers of Gingrich Term’d Hill’s Biggest Patrons, WASH. POST, Sept. 10, 1998, at A19 (discussing how large donations to candidates can get big results in policy).


\(^{13}\) See Jill Abramson & Don Van Natta, Jr., A Top Clinton Donor Says Money Didn’t Buy Approval on Satellites, N.Y. TIMES, May 24, 1998, at 3 (describing Bernard L. Schwartz’s, Chairman of Loral, meeting with President Clinton to discuss Loral’s satellite work); Ruth Marcus & John Mintz, Big Donor Calls Favorable Treatment a Coincidence, WASH. POST, May 25, 1998, at A1 (discussing coincidence that Clinton administration has adopted favorable policies towards U.S. companies doing business in China while Loral Chairman Bernard L. Schwartz contributed more than $1 million to Democratic committees since Clinton has taken office); see also Brian Duffy & Bob Woodward, Senate Panel is Briefed on China Probe Figure, WASH. POST, Sept. 12, 1997, at A1 (describing evidence linking Chinese government to American elections); Bob Woodward, FBI Had Overlooked Key Files in Probe of Chinese Influence, WASH. POST, Nov. 14, 1997, at A1 (suggesting possibility of involvement of Chinese government in 1996 presidential election).

\(^{14}\) See New Lawyer Named to Lead Donor Inquiry, L.A. TIMES, June 6, 1998, at A17 (describing Justice Department investigation into whether political donations influenced President Clinton’s decision to overrule State Department by granting waivers to two U.S. companies, allowing them to export satellite technology to China); Bill Nichols et. al., Chinese Connection has Some Missing Links a Difference of Opinion Over Gravity of Waiver for Satellite Deal, USA TODAY, May 26, 1998, at A8 (discussing waiver given to Loral for satellite launch in China even though Justice Department warned against it); see also Lieberman, supra note 8, at 456-59 (detailing instances of Asian donations funneled into 1996 elections); Bruce D. Brown, Alien Donors: The Participation of Non-Citizens in the U.S. Campaign Finance System, 15 YALE L. & POL’Y REV. 503, 503-6 (1997) (listing instances of questionable Asian donations).
selective and lucrative Indian Nation contributions influence the choice made by the Interior Secretary to award a casino license to one tribe over another?15

A. The Need for Change

Perceptions become accepted as reality faster in Washington than anywhere else in the nation. One deeply rooted perception is that large contributions amount to purchasing access to the President, thereby bringing positive regulatory outcomes to these donors. Unfortunately, the nature of the political fund-raising process is such that empirical data is never available, for no donor would care to disclose its rewards in public. Greater “sunshine” disclosure about donors’ campaign contributions and what responses they produced is needed, therefore, so that the public perception of fairness in the administrative rulemaking process is restored.16

A direct parallel to presidential contributions is the pragmatic Washington belief that access and voting outcomes will be impacted by the size of the contributions made to Senators or Representatives by political action committees.17 In Congress, the vote is recorded, financial contributions are noted, and the press can comment on the influence. Unlike Congress, however, the rulemaking process in the Executive branch is murky and ad hoc. Money can buy access to the President, but how this money affects outcomes in the administrative agencies is not transparent.18 A change in disclosure of campaign fund flows would help

15 See Jill Abramson, Money Buys a Lot More Than Access, N.Y. TIMES, Nov. 9, 1997, at 1 (discussing how group of Indian tribes trying to kill rival group’s casino project donated $270,000 to Democratic Party, and soon afterwards, Interior Department rejected rival’s casino project even though it had been approved by its regional office); Ruth Marcus, GOP Hits Gore on Temple Fund-Raiser: Senate Draft Report Accuses Democrats of Violating Campaign Laws, WASH. POST, Feb. 10, 1998, at A1 (discussing allegations of impropriety in denial of casino licenses to three tribes); Robert Suro, Reno to Omit Clinton from Casino Probe, WASH. POST, Dec. 16, 1997, at A4 (focusing on issues concerning denial of casino licenses to Indian tribes).


17 See FREDERICK SLABACH (ED.), THE CONSTITUTION AND CAMPAIGN FINANCE REFORM: AN ANTHOLOGY (1998); Graeme Browning, Web Surfing For Dollar-Vote Link, NAT’L J., Jan. 25, 1997, at 1 (discussing how Center for Responsive Politics is reporting on Internet how PAC contributions affected voting in Congress); Tony Capaccio, Northrop Grumman’s ’95 Contributions Seem Timed For B-2 Action, DEF. WK., July 31, 1995, at 1 (discussing how Northrop Grumman donated lots of money to House members right before crucial vote on B-2 spending).

considerably to improve perceptions concerning the integrity of policy decisions in the Executive branch.

B. The Challenge

This article examines and challenges the effects of presidential fundraising upon Executive branch agencies. Furthermore, this article proposes a system of focused disclosure as a solution to Executive Branch influence by presidential campaign donors. Under this system, there would be more media commentary concerning donations, resulting in both public and legal consequences for the donors. The federal appellate courts that oversee agency policymaking would be expected to hear claims that tighter scrutiny of the "tainted" agency decision is necessary. Advocates armed with facts about donor influence will be able to assert that deference should not be accorded to certain administrative agency policy outcomes, especially where rulemaking and permit decisions have been "sold" to donors by the President's political aides.

Furthermore, the forced disclosure system would shed light into the administrative agencies that act by processes that are less than fully transparent, such as rulemaking. Even though, in notice-and-comment rulemaking, all commentators are ostensibly equal, political contributors who have the personal attention of the President's staff are perhaps more equal than others.

II. THE ROLE OF THE COURTS

A. Questioning Deference

Federal appellate courts need to reexamine the deference accorded to political choices made in major rulemaking proceedings.


Moreover, the District of Columbia Circuit ("D.C. Circuit") should revisit its decision in *Sierra Club v. Costle*. In this case, the D.C. Circuit encouraged agency managers to act with "openness, accessibility and amenability... to the needs and ideas of the public from which their ultimate authority derives, and upon whom their commands must fall." This noble ideal, unfortunately, has been tainted and manipulated by excessive responsiveness to political campaign donors.

However, since it is the courts that can invalidate agencies' rules, it is the courts that can keep agencies "honest" about the motivation underlying their rules. If donors "capture" and kill an agency rulemaking project, judicial review could determine whether donor influence led to the policy choice. If the contributions-for-access system becomes more transparent, courts could apply a harsher scrutiny of agencies' rationales, especially where factual assertions of political donor influence are presented in challenges to an agency rule or policy. Ultimately, the courts will need to re-evaluate the impact of the creeping phenomenon of campaign fundraising on officials promising more responsive or friendlier administrative decisions towards those who gave large campaign contributions.

### B. Providing Data for Appellate Courts

Appellate courts need data in order to effectively respond to claims of improper donor influence. To provide this data, exist-
ing information need only be marshaled into a standard reporting format within the agencies. This can be done voluntarily by an agency or by a Presidential Executive Order which directed the agencies to routinely disclose the data revealing financial influence. However, such a presidential order is counter-intuitive for his advisors to recommend. Therefore, a statutory form of sunshine disclosure setting forth the key data elements of the connection between executive branch decisions and the systems of presidential fundraising is needed.

The strong perception of undue donor influence upon administrative policy outcomes in the administrative state is a valid concern. Presently, once data supporting a final agency rule is assembled by the agency in the administrative record, the courts do not wish to probe further. If disclosure of major donor impacts on major rules were accessible, advocates could urge courts to examine whether the executive branch discretion was tainted, not by valid constituency representation, but by donor pressure. Scholars of Congress have already examined the negative effect of elected representatives serving their donors, and not their broader constituency. Disclosure backed by appellate court scrutiny of discretionary choices will deter inappropriate action. Reaching this goal, with only minimal paperwork burdens for the agencies, is the challenge this article confronts.


29 See Vincent Blasi, Free Speech and the Widening Gyre of Fundraising, Why Campaign Spending Limits may not Violate the First Amendment After all, 94COLUM. L. REV. 1281, 1282-83 (1994) (stating constituent representation suffers when legislators are more concerned with fundraising for re-election then with legislative business).

30 See 5 U.S.C.S. § 706 (1996) (providing for judicial review of agency decisions to reduce inappropriate actions); Hughes Air Corp. v. Civil Aeronautics Bd., 482 F.2d 143, 145-46 (9th Cir. 1973) (holding courts can set aside agency decision courts believe to be arbitrary or abuse of discretion).
III. THE STATE OF THE CURRENT LAW

A. Status of the President

Federal administrative law presumes that the executive branch agencies will receive policy direction from the President, with a minimum of both procedural constraints and judicial oversight. In other words, the President has great discretion. The individual presidential decisions of whether to adopt policy choices are not made within the Administrative Procedure Act's rulemaking process. The writings and records of the President are not susceptible to Freedom of Information Act requests. Actions committed to presidential discretion by statute are not judicially reviewable. Furthermore, courts will not probe the mind of the Executive Branch decision-maker to allow depositions on possible political motivations.

Therefore, the courts have generally deferred to the choices made by the President, especially where the President affirms an agency policy choice that was made under a statute that is ambiguous. The courts show disinterest in how agencies choose


33 See Franklin v. Massachusetts, 505 U.S. 788, 796 (1992) (holding President is not "agency"); his actions are not reviewable under Administrative Procedure Act scope of review of "agency").

34 See 5 U.S.C. § 552(f)(1) (1996). This statute covers the Executive Office of the President but not the President and his immediate advisers. Id.; Armstrong v. Bush, 924 F.2d 282, 286 (D.C. Cir. 1991) (indicating President has authority to destroy Presidential records); see also Meyer v. Bush, 981 F.2d 1288, 1295 (D.C. Cir. 1993) (holding that Vice President and immediate advisors of President are also exempt from FOIA access requests).

35 See 5 U.S.C. § 701(a)(2) (1998) (providing that agency action is not subject to review); Dalton, 511 U.S. at 473-74 (holding that claims that President has exceeded his statutory authority are not subject to judicial review, only "constitutional" claims are reviewable); Nat'l Council for Ind. Defense, Inc. v. United States, 827 F. Supp. 794, 798-99 (D.D.C. 1993) (stating that court does not have jurisdiction over claims asserted against President).

36 See United States v. Morgan, 313 U.S. 409, 422 (1941) (stating lower court should never have reviewed Cabinet officer reasoning).

37 See Chevron USA, Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843 (1984) (stating that if statute is ambiguous, court will uphold agency decision even if different from decision court would have reached); see also Cynthia R. Farina, Statutory Interpretation and the Balance of Power in the Administrative State, 89 COLUM. L. REV. 452, 462-63 (1989) (describing Chevron as stating "the judiciary's role in interpreting regulatory statutes amounts to little more than serving as a mouthpiece
policy winners and losers so long as the record is supported by evidence that the agency has made a reasonable interpretation of its ambiguous statute. Such conduct by the courts contrasts with reports about the very hands-on attention that larger donors appear to receive from the White House political staff and the possible effects that donations can have on policy decisions.

The reform discussed in this article would impact the current presumptions routinely applied by the courts. If a Political Transparency Report were attached to the final rule, courts would be able to respond with less deference in cases where the donors’ influence on policy appears overreaching. However, judicial reversal of the agency choice would still be unlikely, unless the court is persuaded that political funding swayed the agency beyond the norms of reasoned administrative decision-making.

B. Tying Disclosure to Contributions

The Federal Election Campaign Act links the timing of mandatory disclosure of donors to specific dates during the campaign cycle. Reports are routinely made of large cash flows into the presidential reelection campaigns. Today, fundraising by the President and Vice President has become a virtually full time activity. For example, on two occasions in 1998, a President who cannot run for reelection flew to Cincinnati for no other purpose than a fundraising meal with wealthy donors at the home of the city’s most successful plaintiff’s tort lawyer.

for legislative directives that are unequivocal and directly on point. Whenever such a communication cannot be conveyed, the court must step aside to free the agency... to resolve what its statute shall mean”); Daniel B. Rodriguez, The Positive Political Dimensions of Regulatory Reform, 72 WASH. U. L.Q. 1, 136 (1994) (stating that courts have given agencies due deference when it comes to readings if statutory meaning because of agencies closeness to legislative process and continued involvement and responsibility of enforcement).


39 See Berke, supra note 8, at A6 (describing private world of White House gatherings where wealthy donors mingle with President Clinton); John M. Broder, On Tape: Clinton and Yesterday’s Old Friends, N.Y. TIMES, Oct. 16, 1997, at A4 (describing attendance of wealthy donors at variety of events such as intimate meals in White House Blue Room and meeting President Clinton in Oval Office); Marcus & Mintz, supra note 13, at A1 (discussing how large donor was twice invited to stay in Lincoln bedroom and attended state dinners with foreign heads of state).


41 See 11 C.F.R. § 104.5(b) (1998) (setting forth requirements for filing reports depending on amount of political contributions for year).

42 See R.W. Apple, Jr., Testing of a President: Tepid Welcome; In Cincinnati, the President Makes a Most Abnormal Visit, N.Y. TIMES, Sept. 18, 1998, at A22 (discussing Clinton’s attendance at
However, what happens with the requests of those who buy such access? The donors frequently want to influence post-election choices, rather than merely favoring one candidate's electoral victory. One who has achieved the Presidency must go back “on the road” soon after Inauguration to greet donors who want to discuss their policy views and how the Administration will accommodate these views.

C. Avoiding the First Amendment Minefield

Disclosure in electoral contexts is circumscribed by the rights of donors. First Amendment protected speech includes the right to participate in political campaign support. Donors are welcomed and encouraged to participate because advertising is expensive and the public has shown no willingness to fund campaigns with tax money. Furthermore, being identified as a donor is not dishonorable or suspect, and in some instances, disclosure of donors already takes place.

The Federal Election Act provides that the identities of the employers of individuals who make donations be made public. The identities of soft money sources are also generally known by the national political parties, whether or not these sources "co-

43 See Daniel Hays Lowenstein, On Campaign Finance Reform: The Root of All Evil is Deeply Rooted, 18 HOFSTRA L. REV. 301, 313 (1989) (stating that “[a] considerable amount of the money that goes to candidates from economic-group contributors is motivated by a desire to influence the perform-

44 See U.S. CONST. amend. I; see also Buckley v. Valeo, 424 U.S. 1, 1 (1976) (discussing that donor's have right to petition government by donating money).

45 See Colorado Republican Fed. Campaign Comm. v. Fed. Election Comm'n, 518 U.S. 604, 604 (1996) (concluding that First Amendment prohibits application of Federal Election Campaign Act of 1971 to expenditures that political parties make independently without candidate coordination); Buckley v. Valeo, 424 U.S. 1, 47 (1976) (holding that there is fundamental constitutional difference between advertising one's views independently of candidate's campaign and direct contributions to that cam-

46 See 2 U.S.C. §§ 431 et seq. (1985). This section provides for FEC authority over campaign funding disclosure. Id.

47 See Center for Responsive Politics, Top Soft Money Donors, 1997-1998 (visited Jan. 17, 1999) <http://www.crp.org>. The top five soft money donors to the Republican Party are: Philip Morris $1,487,022; Amway Corp. $1,312,500; RJR Nabisco $568,850; AT & T $564,503; and Blue Cross/Blue Shield $562,375. Id. The top five soft money donors to the Democratic Party are: Buttenweiser & As-

Shield $562,375. Id. The top five soft money donors to the Democratic Party are: Buttenweiser & As-

and all others for a campaign. Id.
ordinating" election spending with the presidential candidate. However, full disclosure concerning soft money donors is a topic beyond the scope of this article.

Freedom of association would be chilled if the government could force every private group to register its lists of members. 48 Rather than compelling private persons to disclose their motives for contributing, or attempting an unwise ban on contributions by regulated persons, the donor transparency proposed in this article would instead balance disclosure of donors with First Amendment rights. The donor transparency would require clerks in a federal agency to collate two sets of public facts that are already known in separate corners of the federal bureaucracy: (1) companies that are likely to be affected by the rule or policy; and (2) companies whose employees paid for political campaign or party activities. This information is readily available and can be downloaded from the FEC data bases on a periodic basis.

IV. THE DONOR TRANSPARENCY PROPOSAL

A. Summary of the Proposal

This article recommends implementing a system of disclosure comprised of three tiers of information. The disclosure would consist of a list of those entities which: (1) employ individuals who contributed to the overall presidential effort; (2) would benefit from the declaration of a new agency rule, license or policy (or the formal withdrawal or revocation of a proposed or final rule); and (3) where the rule's fiscal impact classifies it as a "major" rule or action. When an agency acts, disclosure of donations by entities impacted by the new rules would either be a component of the published rule, or in readily accessible agency documents on the agency Internet website. 49 The task of having a govern-

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48 See NAACP v. Alabama, 357 U.S. 449, 462 (1958) (holding that compelled disclosure of membership lists abridged members' right of lawful association); see also Bates v. Little Rock, 361 U.S. 516, 523 (1960) (holding that refusal to disclose membership lists in order to protect freedom of association of members was protected by Due Process Clause).

49 See JAMES T. O'REILLY, ADMINISTRATIVE RULEMAKING § 7.03 (1983). The preamble is an explanation of the basis for the agency's proposed or final rule, but is not itself a part of the codified final rule. Id.
ment agency correlate major actions with incoming presidential political contributions requires no invasion of donor privacy, since the contributors have no legitimate expectation of privacy under election statutes.50

Congress should adopt a “Politically Transparent Rulemaking” amendment to section 553 of the Administrative Procedure Act.51 This amendment would compel the addition of an additional record to the agency’s file prepared by the Office of Information and Regulatory Affairs (“OIRA”), which would match contributors and persons impacted by the rule.52 The record would examine the contributions received by the presidential election campaign, and by national parties and their “soft money” affiliated accounts.53

A reportable data point would arise whenever the individual donors’ employers, identified in the party or committee Federal Election Commission (“FEC”) filings, are likely beneficiaries of a final administrative rulemaking, license issuance or waiver/exception decision. The agency would provide the list from which the matching is drawn, identifying the entities that are expected to be most financially impacted by the new agency rule.

B. Role of OIRA

The OIRA, which is within the Office of Management and Budget, is the official gatekeeper of new executive branch rules.54 OIRA reviews the substance of rules as required under Executive Order 12,866.55 It considers “major” rules with special care.56

OIRA is the highest level within the federal bureaucracy through which most executive branch rulemaking and policy

52 See 5 U.S.C. § 553 (1996). This Act provides that a general notice of proposed rule making shall be published in the Federal Register. Id.
53 See Buckley v. Valeo, 424 U.S. 1, 45 (1976). “Soft money” is the independent expenditure of funds sanctioned by this decision. Id.
54 See Exec. Order No. 12,866, 58 C.F.R. 51,735 (1993) (granting Office of Management and Budget authority to review all regulatory analysis documents in order to determine whether they comply with executive order requirements).
55 See id. (centralizing review of regulations in OIRA “to enhance planning and coordination with respect to both new and existing regulations”).
56 See id. (requiring cost-benefit analysis of “major” agency regulations).
pronouncements pass.\textsuperscript{57} It is there where Federal Election Commission donor reports and agency registrant or licensee lists can most readily be matched. Any alternative would be less efficient.

\section*{C. Role of the Federal Election Commission}

The political funding progress by the presidential campaign committee and of the party central committee is directly supervised on a daily basis by the closest advisors to the presidential candidate. Moreover, FEC donor reports are routinely submitted by accountants for the political committees.\textsuperscript{58}

If such a Political Transparency Report amendment were adopted, the OIRA could routinely receive FEC input tapes for each reporting period, and could (if such a statutory command with necessary appropriation funds were enacted) routinely obtain the printouts of re-election committee lists of campaign donations received of $1,000 or more.\textsuperscript{59} The amendment could also require that the central committee finance department of the political party must provide to the FEC and to the OIRA, lists of organizations and their individual employees who have given a party or its subsidiary entities gifts of $1,000 or more within the year preceding the amendment’s effective date. The reports would be filed for each party fielding a presidential candidate and, for a sitting president who is not a candidate for reelection, by the party for which the sitting president is a member.

\section*{D. The Agency Responsibility}

The OIRA would obtain from each Executive branch agency, when it sends forward a “major” rule or policy statement, a list of the twenty-five largest entities that are most likely to be finan-

\textsuperscript{57} See \textit{id.}

\textsuperscript{58} See \textit{2 U.S.C. § 434} (1985) (setting forth filing requirements for “[r]eceipts and disbursements by treasurers of political committee”).

\textsuperscript{59} See \textit{2 U.S.C. § 441b(a)} (1985). Corporate gifts to candidates are not permitted. This sections provides in relevant part:

\textit{It is unlawful for any bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any primary election or political convention or caucus held to select candidates for any political office. . .

\textit{id.}
cially impacted by the new rule. The agency would provide the list based on its existing awareness of the regulated community. The OIRA would then match the two lists of entities and provide a copy of the Political Transparency Report to the rulemaking agency. The agency would then attach this to the published preambles to the rule or policy.

E. Terms of the Proposed Amendment

Statutory amendment of the rulemaking provisions of the federal Administrative Procedure Act would require inclusion of only one new document into the administrative record. This “Political Transparency Report” would be required when the rule or policy statement is to be published in the Federal Register in proposed and in final form, but only if the rule is “major” in impact. Agencies and the OIRA have for the last two decades categorized certain rules as “major” depending on their cost impacts. For published decisions that are not rules, such as policy determinations and permits issued without adjudicatory hearings, a similar size or impact threshold would be applied in the statutory definitions in this amendment.

The report would accompany the proposed or final major rule or policy statement from the OIRA to the agency and to the rulemaking record. In addition, the report would be cited among the supporting documents listed in the Federal Register as being available from the agency’s reading room or docket clerk, or published in the Federal Register, and/or made accessible at the agency website. The report would be a list of: (1) any contribution over $1,000; (2) made within 18 months’ time, prior to the rule’s proposal, final promulgation, or withdrawal; (3) made to a presidential campaign or re-election committee, a national political party of which the President is a member, or an affiliated or subsidiary committee; (4) by an entity or individual whose FEC donor disclosure identifies ownership or employment by an entity affected.

Selection of a set of 25 entities is suggested for administrative efficiency; if there are many entities affected, a selectivity based on entity size appears rational, where the entities most likely to make donations are those most likely to be impacted financially.

See Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (1993). “Major” means the rule will have an impact on the national economy of $100 million or more, or will otherwise be classed as having major impacts. Id.; see also Peter A. Pfohl, Congressional Review of Agency Rulemaking: The 104th Congress and the Salvage Timber Directive, 14 J. L. & POL. 1, 6 (1998) (discussing definition of term “major”).
tity that is among the twenty-five entities known to the agency to have the largest impacts from adoption of the rule or policy.

The legislation would clarify coverage to reach the larger, impactful contributions (proposed to be $1,000) that would trigger inclusion of the donor's identity in the report. To the extent that current FEC laws do not require, the new law would require the contributor identity reports to be prepared by the presidential campaign and by the political party of which the President is a member,\textsuperscript{62} sorted by employer or similar entity. Next, the FEC would be authorized funding in order to allow timely delivery of the necessary matching lists to the OIRA. The amendment would then require that the matching lists be made available by the OIRA and the agency.

Eighteen months is a fair window of time for reporting of the potential influences, in recognition that a lag time exists between cash changing hands and major rules appearing (or disappearing) within the Executive branch. Ideally, the time span would be shorter between directive and action, but pragmatically, the time span of a year and a half is a fair estimate of the useful impact of a contributor's single contribution.\textsuperscript{63} Gratitude in the form of responsiveness depreciates rapidly in the fast-paced political fundraising climate today.

\textbf{F. What Action Should be Covered?}

It is important that the proposed rule and advance notice of proposed rulemaking stages, as well as the "policy guideline" and "statement of agency policy," be included in the legislative coverage. The latter two are pragmatic evasions of rulemaking, so it is necessary to report their influence aspects. As long as there is enough concrete agency action to have a docket or record established for the particular action, the political transparency report makes for greater accountability.

\textsuperscript{62} This concept presumes that only the party which the president leads would be affected by donations seeking to influence presidential and agency policies. If the Administration changes party control at an election, the use of the suggested 18 months' window period will capture donors who donated to the non-incumbent's campaign because of hope of a change in the top of the executive branch.

\textsuperscript{63} \textit{See} Julie Fustanio, \textit{Klug PAC Gifts Top Slogin 3-1}, \textit{Wis. St. J.}, Oct. 28, 1996, at 1A (discussing that FEC looks at period of eighteen months when reviewing contributions in election cycle).
G. An Illustrative Example

To select an illustration, assume that a proposed Federal Aviation Administration rule would adversely affect costs of aviation fuel to airlines. The OIRA review of the proposed FAA rule would look at costs to airlines and benefits in economic terms.\[64\] The political transparency objective would be fostered if the public—particularly news media and public interest organizations—would also readily observe the quantity of airline executives among the top 25 regulated air carriers licensed by the FAA who donated to the presidential re-election committee during the FAA rulemaking period.

The existence of such contributions is no stunning revelation, since it is already assumed money begets influence over policy. In some cases, the sunshine effect may yield no news, showing the irrelevance of the contributors' efforts as to rules. However, the airlines' million dollar re-election contributions in our hypothetical case might mean the rule is withdrawn or dies inside the agency. That connection is for the media and appellate advocates to assert; the Political Transparency Report is neither statistical, narrative, nor judgmental.

H. Freedom of Information Act

Traditional administrative law does not permit one to look behind the rule to find what actually motivated the agency's decision.\[65\] The actual documentation of why a rule or license was accelerated or aborted is generally not available to the public, unless the agency waives its right to protect pre-decisional memoranda privilege under the Freedom of Information Act exemption covering such internal memoranda.\[66\] The agency staff that astutely wishes to defend itself against the press inquiry about donor influence may opt, however, to disclose internal memoranda showing that the White House followed campaign donations and pressured the agency in acting a particular way.

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65 See United States v. Morgan, 313 U.S. 409, 421-22 (1941) (concluding that agency head acted within his discretion in this particular case).

on the new rule. This will occur either as a leak ("don't blame this decision on my Branch, blame it on the White House staff") or as a dissemination of internal memos when the agency is responding to a public access request.67

I. The Agency Burden

Agency managers already are well aware of who is regulated. Therefore, requiring a listing of the twenty-five most impacted entities would not be burdensome. The individuals atop the regulated companies are recognizable faces at gatherings, such as fund-raisers, where the Agency Director or Cabinet Secretary is likely to be present. Even though politics does not directly reach every decision that career employees make, there are policies that affect the granting of exceptions, permits, licenses and registrations which flow through an agency from the highest level on down, where donor influence can be at its greatest. However, the extent of higher level influence is not at all apparent. For example, new drug approvals, airline traffic streams, and electric power generation permission, are the daily output of the administrative agency staff,68 yet these policy directives are usually initiated by the high level persons in the agency.

Executives assigned by companies to interact with the agencies are familiar faces at the executive level of each agency. A competent Secretary or Director is aware of which companies will be affected by the adoption of a particular rule. In the staff briefings that precede the proposed rule's drafting, managers understand that regulations create winners and losers.

J. Impacts on the OIRA Process

Within the Office of Management and Budget, the OIRA already has responsibilities that would make undertaking any additional tasks seem quite reasonable. The OIRA is set up to do review of rules and to disclose certain contacts.69 Even though

67 See 5 U.S.C. § 552(a)(4) (1996). Such a request would be responded to with waiver of the optional power to claim exempt status under 5 U.S.C. § 552(b)(5), which provides that interoffice memoranda are not part of the Freedom of Information Act. Id.


the cross-comparison of data to produce the political transparency report might add some paperwork tracking problems for OIRA, the task will not go unnoticed as the press is an eager customer. After the first five or ten news stories are published about donor influences on rulemaking, this process would generate much greater accountability for the impacts of contributions on the perceived fairness of the agency policymaking system. In turn, agencies and the White House will be more attentive to getting their reports as correct as possible.

The OIRA-created listing would be a mechanical comparison of the publicly available contribution data with the agency-created list of affected persons and entities. The agency would then attach the list to its rulemaking record along with the other mandatory statements and analyses. Once published, the report should be public in additional ways. For example, the "Political Transparency Reports" should accompany each major rule on the agency Internet website, so that an even greater dissemination would be assured.

K. Tying in the Political Contacts

Legislation or an executive order should simultaneously require that all political appointees within the Executive branch agencies keep logs of their contacts with the White House staff, and submit them to the agency's docket clerk for inclusion in the final agency rulemaking record. This builds on Executive Order 12,866 disclosure of OMB and OIRA comments to an agency.70

Broader knowledge of the correlation between Executive branch decisions and presidential fund-raising will have a beneficial "sunshine" effect, but disclosure will not eliminate pressure from the White House on the agencies' politically appointed managers. There is virtually no Cabinet officer or agency head who can remain clueless about the political influence that shapes the agency decision. Indeed, one who reaches Cabinet level is presumptively not clueless about politics. The proposal recognizes this reality. If anyone is inhibited by disclosure, it is the political staff of the White House, and inhibition at this stage is

70 See Seidenfeld, supra note 3, at 45 (describing OIRA's role pursuant to Exec.Order No. 12,866).
not all that bad.

The end result of disclosure of money and contacts should garner greater news media questioning of the content of agency decisions, with a concomitant awareness that the political dimension exists in agency decision-making. As a side effect of the proposal, new disclosure would give advocacy groups that study corporate behavior on controversial government issues the information they need so that shareholder proxy proposals can be used to oppose the corporate patterns of donations.

L. A Pilot Test

If Congress is reluctant to impose the new system, a pilot test of such a disclosure system could be run in an executive department or agency under agreement with the FEC. Such a test could be run as an experiment on six months’ worth of “major” rules only, adopting the existing norms of classification that tie major rule safeguards to a high dollar impact of the rule. Once experience is gained with the pilot test, Congress could adopt the amendment to the law to require the entire executive branch to follow this same step in adopting rules or policy statements.

Longer term, the same disclosure approach could appropriately be considered for competitive licensing choices (casinos, broadcast frequencies, etc.). These very competitive licensing disputes that represent influence of the White House may be as much of an issue as are final agency rules and policies; these will be left for future remedy development. Classes of non-“major” rules could also be impacted. Non-executive branch agencies like the National Labor Relations Board are not covered since the presidential command influence is so attenuated for these agen-

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72 See Jayne E. Zanglein, Pensions, Proxies and Power: Recent Developments in the Use of Proxy Voting to Influence Corporate Governance, 7LAB. LAW. 771, 793 (1991) (discussing that SEC permits shareholder proposals that involve political or human rights issues); see also Amalgamated Clothing & Textile Workers v. Wal-Mart Stores, 54 F.3d 69 (2d Cir. 1995) (holding that Wal-Mart had to include shareholder proposal concerning equal employment opportunity and affirmative action policies in its proxy materials).


74 See Craig Crawford, Detain Me, Please, NAT’L J., June 21, 1997, at 7. The 1996 Democratic presidential fundraising efforts led to allegations that the fundraising agents had been “trying to trade money for Clinton Administration favors.” Id.
cies, which customarily prefer to use adjudication of fact-specific cases.

V. THE OBJECTIONS

A. Is The Disclosure Pejorative Or Chilling?

This disclosure is not a criticism of the donor. If the rule-making record at the agency contains such a listing, it is not pejorative or punitive. Corporations are already known to be active in politics, subject to a number of constitutionally permissible constraints. The disclosure is not a revelation of donors' wrongdoing. Nor does the listing cause agencies to feel more pressure. Lastly, since this ministerial function of matching lists is done by clerks, it is unlikely that the existence of the match will be a self-fulfilling prophecy, i.e. that the agency head will feel any more pressured by the donors via the White House political staff than is presently the case.

B. Sunshine Has Additional Costs

Costs of the proposed system are one additional objection. At the agency, data bases may need to be augmented to compile the twenty-five highest impact entities. The sunshine disclosure of the financial contributors would not be a significant new expense, since the Federal Election Commission already makes public their names, affiliated institution or employer, date and amount of contribution. The FEC delivers to OIRA a listing that sorts contributor rosters by donor's employer, at the cost of a manipulation of the FEC's existing software.

C. Risk of Errors

Functionally, creation of lists by the OIRA from the FEC data base of reports is a clerical task, while agency creation of the list

75 See Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 659-60 (1990) (stating that limiting independent corporate expenditures is justified because of corporate structure which allows access to large amounts of funds); First Nat'l Bank v. Bellotti, 435 U.S. 765, 786 (1978) (stating that corporate speech can be limited where state can show compelling subordinate interest).

of affected persons is a staff person’s responsibility. An agency’s outreach office, business liaison staff or similar entity could manage the mechanical function of compiling these listings, beginning with the identity of those who had commented on the topic, and the list of companies registered for that particular product line. The creation of such a report involves no imposition on the private sector, no added private paperwork burden, and no libelous or negative conclusion as to the listed donors. The report is not a criticism or indictment of the donor; it is a starting point for inquiry and is not a clue to some “whodunit” mystery. For example, Merck makes pharmaceuticals; if its CEO makes political donations to presidential campaigns, the Merck name is in the FEC database. Assume that the FDA proposes new rules, having “major” significant economic impact, on its criteria for approval of new pharmaceutical products. Merck would be named on the FEC lists as well as on the FDA lists of the twenty-five largest pharmaceutical companies. When the final FDA rule’s Political Transparency Report lists the contributions to presidential reelection fund-raisers by twenty Merck managers, the listings signal to news media observers that further questions to FDA and Merck may be appropriate.

To assuage any concern that errors in the matching could cast corporations in an unfavorable light, the legislation might optionally provide for advance notice of the inclusion of a company onto the agency’s twenty-five impacted entities list. This step has costs and involves agency counsel in dealing with objectors, but listing alone has no negative inference, so the possible option of notification is unlikely to add a level of unneeded additional costs.

D. Costs to the Donor

The proposed legislation requires no action by donors. Some will wish to know that their identity was being disseminated along with the text of a new rule. If the contributor merely coincidentally had earned a favorable agency decision in a rulemaking, license or exception case, the public attention to the linkage of benefit and donation could be assuaged by giving that donor entity five days advance notice prior to disclosure. This would allow the company or organization to know that its connection to
the rule would be subject to possible media scrutiny. Some notice might be provided in order to allow the entity to disavow the employee-contributor's donations, where denial can credibly be asserted. Disclosure will not chill opposition to the agency since the donor identity already is available in public FEC files.

**E. Pandering to Curiosity**

One argument against this change might be that it is a form of voyeurism, peering into the suspect linkages of money and power as if there is something wrong with a presidential decision to be "responsive and helpful" to friendly donors.\(^7\) One could allege that disclosure impairs the constitutional right to petition the government.\(^7\) That concern presupposes that administrative agencies want to act in secret. Rather, these agencies should be as open as the Administrative Procedure Act requires them to be.\(^7\) Petitioning in public is commonplace; secret special pleading runs contrary to the norms of sound administrative behavior. This claim of corporate privacy sounds very much like the dismay expressed by critics of the Freedom of Information Act,\(^8\) who scorned that law's pro-disclosure motives in the early 1960s.\(^8\)

As an example, cigarette regulation is controversial for regulatory agencies. Perhaps there is no reason to believe that tobacco

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7. See United States v. Dazier, 672 F.2d 531, 537 (5th Cir. 1982) (stating that courts do not "seek to punish every elected official who solicits a monetary contribution that represents the donor's vague expectation of future benefits"). But see United States v. Brewster, 506 F.2d 62, 81 (D.C. Cir. 1974) (stating that "[n]o politician who knows the identity and business interests of his campaign contributors is ever completely devoid of knowledge as to the inspiration behind the donation").

7. See U.S. CONST. amend. I. This amendment reads in full: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

8. See 5 U.S.C. § 553 (1996) (providing that agency during rulemaking process shall "give interested persons an opportunity to participate in the rule through submission of written data, views, or arguments with or without opportunity for oral presentation").


executives' political donations had any influence at all on federal policies about tobacco regulation prior to 1996, when FDA adopted its first rulemaking on cigarettes. However, full disclosure would aid the public in studying why there was no action taken for so many years.

F. Benefits of Policy Oversight

An additional criticism may be that any inhibition in White House political involvement with policy lessens presidential oversight of the agencies. Unsupervised managers could then choose bad policy that is misaligned with the nation's needs. The President must be able to impose intra-Administration discipline. Advocates of closer central control on formation of policy would disfavor the implied pressure against White House contacts with agencies.

One response is that serious presidential intervention to override career agency rulemaking projects is rare, but White House staff contacts seem to be a constant route of donor input. This is sound principle, as thoughtful policy development at the White House needs dialogue with the agency planners and implementers. To the extent that White House political staff provide a form of selective “constituent service” to large cash donors, these staff contacts are not beneficial to the alignment of policy with democratic constituencies—they only seek to align the federal rule or permit or policy with a private entity's objec-


83 See Federal Election Commission Panel Discussion,supra note 76, at 241 (observing that there will always be executive involvement in administrative agencies because of executive appointment of commissioners).

Contributors with a one-topic agenda should be publicly identified, but the quality of true substantive policy oversight by the President will not decrease.

G. Adding to Ossification?

Another critique is that each rule that traverses the rulemaking process already has to carry so much qualitative study, such as those of benefits and costs, so burdened in red tape that they never emerge from the rulemaking process. This argument posits that adding another paperwork burden would waste time and deter useful rules as well as disclose the influences that led to weaker or withdrawn rules.

However, this circumstance is different because there is no narrative analysis written: OIRA's quantitative match of two lists produces a Political Transparency Report. Only rules of major impact are affected. No time-consuming analytical document is generated. The listing speaks for itself and its significance can be denied (and probably will) by agencies and donors alike. So the ministerial task of matching is not expected to ossify rules.

H. Chilling Donor Participation

Disclosure of the entities that encourage employees to make very large contributions to presidential campaigns might make some entities more cautious. Disclosed donations can be explained if they are misunderstood in the news media. Since it is constitutional for Congress to place limits on fundraising, any indirect deterrence will not

85 See Ayres & Bulow, supra note 18, at 850 (stating that large donors expect their contributions to yield benefits on policy matters).
86 See Federal Election Commission Panel Discussion, supra note 76, at 241 (discussing that President will always be involved in agency rulemaking).
88 See Mark Seidenfeld, Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking, 75 TEX. L. REV. 483, 483-90 (1997) (describing ossification of agency rules); Recent Articles of Interest, 23 ADMIN. & REG. L. NEWS 8, 9-10 (1998) (defining ossification as "judicially caused inefficiencies in the adoption of new rules by agencies").
89 See Federal Election Campaign Act, 2 U.S.C. §§ 431 et seq. (1985) (setting forth Congression-
make public disclosure any less legitimate.

I. Beyond Naivete

Another critique is the jaded Washington sigh, "you just don't understand how politics works around here." The proposed legislation on transparency of the political money process would be doomed if the idea of targeted disclosure is dismissed as naïve. Transparency of the political input will never appeal to those who prefer shadows to sunshine.

Perhaps the perspective of persons who examine the ways of Washington from the outside appears naïve and unsophisticated, or perhaps, the idea of sunshine will never earn cynics' support. The belittling and disdain accorded to the Freedom of Information Act serves as a historical model. The controversies over election contributions disclosure are another model. As Edward Kennedy eulogized his brother Robert Kennedy, "some men see things as they are and ask 'why'; he saw things as they could be and asked, 'why not?'"

J. Is It Newsworthy?

For some observers, the political tradeoffs of future policy for today's campaign cash are not newsworthy. It may be true that jaded inside-the-Beltway correspondents already know who has access to whom, and what rules are likely to wither or suddenly blossom when the green manure is spread in the Rose Garden. However, it is likely to be very interesting news, for example, that an EPA rule granting the steel industry's air pollution exclusion -- rescuing steelmakers X, Y and Z from a year of lost productivity -- arrived after X, Y and Z political action committees hosted a fund-raiser for the presidential reelection and that the agency's permit overseer was queried by White House staffers on the very next day. The usual ardent denials would


90 See Wald, supra note 81, at 658 (discussing negative political reaction to Freedom of Information Act).

91 See generally SLABACH, supra note 17.

follow. Disclosure can be of benefit even if the news media does not pursue the news value of disclosed connections with campaign funding.\textsuperscript{93}

\textbf{K. Death By In-Box}

The proposal has an admitted flaw, for it cannot catch the political act of aborting ideas before they reach the rulemaking or policy declaration level. After a long career of working with administrative agencies, I have observed the phenomenon of "death by in-box" numerous times.\textsuperscript{94} An idea bubbles up to the political level of the administrative agency; the agency head receives calls or visits from White House political operatives; the proposal is smothered, and gathers dust in the in-box of the political official. The systemic problem is that the agency idea is aborted quietly and never rises to a level at which action is taken;\textsuperscript{95} so the subtle killing remains invisible.\textsuperscript{96}

By contrast, agency withdrawal of a regulation is subject to close scrutiny.\textsuperscript{97} The agency refusal to proceed with a formal proposed rule in the face of overwhelming evidence is reviewable\textsuperscript{98} and sometimes reversed. And in rare cases, granting of a petition for rulemaking can be ordered by a court to be followed with a schedule for mandatory adoption of new rules.\textsuperscript{99}

But the languishing of a rulemaking idea opposed by insider contributors, left twisting slowly in the wind after the White House political staff's phone call, is a part of Washington's political landscape for which there is no remedy available. The pro-

\textsuperscript{93} See David Schultz, \textit{Proving Political Corruption: Documenting the Evidence Required to Sustain Campaign Finance Reform Laws}, 18 \textit{REV. LITIG.} 85, 96 (1999) (stating that preventing even appearance of corruption is compelling government interest).


\textsuperscript{95} The public's first awareness of a rulemaking project is the agency's listing in the semi-annual Agenda of Regulations, where the projects intended by the agency to become rules are listed, briefly described, and a timeline is provided.

\textsuperscript{96} See generally Fred Wertheimer & Susan Manes, \textit{Campaign Finance Reform: A Key to Restoring the Health of Our Democracy}, 94 \textit{COLUM. L. REV.} 1126, 1126 (1996) (stating that by contrast, when piece of legislation dies after proposal, its demise is duly chronicled and news media criticism falls on party controlling that House or Senate committee).


\textsuperscript{98} See Farmworker Justice Fund Inc. v. Brock, 811 F.2d 613, 614 (D.C. Cir. 1987) (requiring agency to issue rule it had been resisting), \textit{vac. as moot}, 817 F.2d 890 (D.C. Cir. 1987).

\textsuperscript{99} See Public Citizen v. Steed, 733 F.2d 93 (D.C. Cir. 1984) (ordering agency to re-enact previously suspended rule).
posed reform legislation cannot reach and cannot thus illuminate influences against an idea until the idea has taken on some visible life. In these cases, the idea's friends within the agency staff, and advocacy groups outside may combine to re-offer the aborted rulemaking idea in the form of a petition for agency action. Then the influence of donors toward denial of a petition for rulemaking would become reportable, and perhaps actionable on judicial review.

CONCLUSION

Changes to the federal rulemaking process, to enhance transparency of political donor responsibility for action or inaction, may seem counter-intuitive to cynics who are comfortable with agency "capture" and policy decisions premised upon the current political financing systems.

Reform measures cannot inhibit the First Amendment protections of donors; one must instead expose donor influence to scrutiny by the press. With scrutiny, the agencies will be more careful and the donors will be more hesitant to pour cash into an agency to obtain the death of an idea. The Political Transparency Report is a device that may alter the news media coverage of the administrative bureaucracy's hidden underside. Time will tell if this novel approach is a success.