

Political Control Over Public Communications by Government Scientists

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Recent years have seen a great deal of controversy over political control of communications by government scientists. Legitimate interests can be found on both sides of the equation. Clearly there is a strong public interest in the free flow of scientific information. On the other hand, political leaders in any administration might need advance notice of what government scientists plan to say, and they might also seek to control the timing of their presentations and announcements. Although many important questions remain to be addressed, this essay offers a first step towards a framework that is meant to accommodate these interests and that answers a series of concrete questions about when, and what kind of, political control is appropriate. The framework allows advance notice to political officials, including the White House, and also allows control over timing, without allowing censorship of the substantive content of scientific information.

I. The Problem	74
II. The Concerns	75
III. Ten Cases.....	78
A. Straightforward Cases.....	78
B. Difficult Cases.....	78
1. Is it appropriate for public officials to seek advance notice of disclosure of scientific findings without policy relevance?	78
2. Is it appropriate for public officials to seek to control the timing of disclosure of scientific findings without policy relevance?	79
3. Is it ever appropriate for public officials to forbid the announcement of scientific findings, or to prohibit government scientists from presenting their work in public?	79
4. Is it appropriate for public officials to control the content of disclosure of scientific findings with policy relevance?	

80

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5. Is it appropriate for public officials to control the content of disclosure of scientific findings with potential policy relevance?81

III. Conclusions.....81

I. The Problem

In a free society, scientists—even those working for the government—should have the right to communicate with the public. But government employees have long been subject to restrictions on what they can say and when they can say it, even when simply presenting scientific results.¹ In recent years, both Democratic and Republican administrations have failed to develop clear principles governing political control of communications from government scientists, with potentially detrimental consequences to our nation. Our goal here is to suggest initial steps to fill this gap and answer most questions in a brief space. We emphasize that our framework is preliminary and that it leaves many open questions and a few gray areas. But in the absence of some kind of framework, we risk ad hoc judgments, inconsistency, excessive political control, and loss of the benefits that ready access to scientific information can provide.

During the Obama Administration, the effort to develop such principles produced intense internal and external controversy.² As Administrator of the White House Office of Information and Regulatory Affairs, one of the present authors (Sunstein) was directly involved in the internal debates. The defining moment came in December 2010, when Science Advisor John Holdren tried to synthesize the consensus within the White House with four defining principles.

1. In response to media requests on scientific or technological issues, agencies should offer an “objective and nonpartisan” spokesperson.

2. Federal scientists may speak to the media and the public about scientific and technological matters based on their official work, with appropriate coordination with their immediate supervisor and their public affairs office.

3. In no circumstance may public affairs officers ask or direct Federal scientists to alter scientific findings.

1. For the most elaborate public statement, see Memorandum from John P. Holden, Dir. of the Off. of Sci. and Tech. Pol’y, to the Heads of Exec. Dep’ts & Agencies (Dec. 17, 2010), <http://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/scientific-integrity-memo-12172010.pdf> [<http://perma.cc/H6VA-TU59>].

2. For one view, see *The White House’s Scientific Integrity Directive*, UNION CONCERNED SCIENTISTS, <http://www.ucsusa.org/our-work/center-science-and-democracy/promoting-scientific-integrity/SI-directive.html> [<http://perma.cc/K9UU-FD7Z>]. Additionally, consider some of the statements from agencies. *E.g.*, *Communications Policy Language: Samples from a Variety of Agencies and Departments*, OFF. SCI. & TECH. POL’Y, <http://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/SI-workshop-communications-guidance.pdf> [<http://perma.cc/4N6C-AAXN>].

Political Control Over Public Communications by Government Scientists

4. Mechanisms should be devised to resolve disputes about whether or not to proceed with public information-related activities.³

Each of these principles deserves support, but they leave many unanswered questions. Who, exactly, is an objective and nonpartisan spokesperson? What counts as “appropriate coordination” with a public affairs office? What kinds of “disputes about whether or not to proceed” are even legitimate, and what would “mechanisms” look like? Even if public affairs officers may not “alter” scientific findings, do the four principles allow such officers to forbid disclosure of such findings? How does an agency treat data not originating within its organization? And how do we guarantee that set policies are actually implemented?

In response to this guidance, a number of government agencies developed implementation policies, some of which tried to address these issues through formal, publicly available documents or through other informal practices.⁴ Even so, critical gaps remain in understanding policy and practice. Under President Donald Trump, the White House has yet to announce its own principles, and many people are concerned by what they see as a precipitous trend toward severe restrictions on communications from government scientists.⁵ We think that a few important distinctions, not yet part of the debate, can cut through the fog – and show how to accommodate legitimate concerns of both government scientists and political officials.

II. The Concerns

Communications offices and other public officials—in, say, the White House or the office of a cabinet head—are often concerned about the potentially negative consequences of communications between government scientists and the public. This concern is sometimes legitimate. Issues range from those with obvious political valence to those that are more abstract; they may involve avian flu, particulate matter, asteroid collisions, artificial intelligence, distracted driving, the origins of life, or nuclear material, for example. Government officials who oversee federal agencies might ask for one of four things from government scientists.

3. See Holden, *supra* note 1, at 2-3.

4. The public documents may be found online. *Scientific Integrity*, OFF. SCI. & TECH. POL’Y, <http://obamawhitehouse.archives.gov/administration/eop/ostp/library/scientificintegrity> [http://perma.cc/R29Q-WVBE].

5. See, e.g., Dina Fine Maron, *Trump Administration Restricts News from Federal Scientists at USDA, EPA*, SCI. AM. (Jan. 24, 2017), <http://www.scientificamerican.com/article/trump-administration-restricts-news-from-federal-scientists-at-usda-epa/> [http://perma.cc/L6UU-84FD]; Juliet Eliperin & Brady Dennis, *Federal Agencies Ordered to Restrict their Communications*, WASH. POST (Jan. 24, 2017), http://www.washingtonpost.com/politics/federal-agencies-ordered-to-restrict-their-communications/2017/01/24/9daa6aa4-e26f-11e6-ba11-63c4b4fb5a63_story.html [http://perma.cc/MAD3-STF9?type=image]; Angela Chen, *Trump Silences Government Scientists with Gag Orders*, VERGE (Jan. 24, 2017, 3:58 PM), <http://www.theverge.com/2017/1/24/14372940/trump-gag-order-epa-environmental-protection-agency-health-agriculture> [http://perma.cc/U9ME-W8QZ].

A notation before we begin: we deliberately phrase the concerns in abstract terms, without reference to particular cases. Claims about any such cases will be contestable. But for identifiable reasons, the concerns are manifested in numerous real-world controversies.⁶

1. Public officials might insist on *advance notice* of public communications from government scientists. They might fear surprises. They might not want to have to address questions from the press or the public without having time to prepare. They might need to work with scientists to learn what to say and how to say it.

2. Public officials might want to control *the timing* of those communications. A disclosure of a scientific finding might disrupt a policy announcement scheduled for that same day. Perhaps the disclosure would distract attention from the announcement or be in some tension with it. For reasons that are not self-evidently illegitimate, political officials, including the White House communications team or even the president personally, might want the announcement to occur only after some kind of specified delay.

3. They might want to control *the content* of those communications, in extreme circumstances by forbidding their disclosure altogether (a “gag rule”). Such restrictions might range from political officials who insist that government scientists describe their findings in a particular way, perhaps to ensure clarity and to avoid confusion or to more troublesome cases in which officials think that the disclosure of the findings, even if valid, risk jeopardizing some identifiable political position or goal. For that reason, they might tell government scientists that they may not speak publicly at all.

To be more concrete: Political officials might believe that a new finding—for example, involving the carcinogenic properties of some commonly used product, or other health risks associated with using it—might create public alarm. They might judge that the finding is too preliminary, or in conflict with other findings. They might believe that even if the finding is neither preliminary nor contested, it might produce a kind of panic, unjustified by the science at such.⁷ Alternatively, they might believe that some finding has an obvious or potential policy implication—say, that greenhouse gases should be regulated, that some chemical should be banned, or that the argument for some proposed law, opposed by the President, is actually quite strong. Political officials might want to prevent the public announcement of findings with such unwelcome implications, which may disrupt ongoing debates, and give fuel to political adversaries.

6. See, e.g., KENNETH R. FOSTER ET AL., *PHANTOM RISK* (1993) (exploring the public concerns and tort litigation that results from preliminary, inadequate, or inconclusive evidence of risks); KENNETH L. MOSSMAN, *RADIATION RISKS IN PERSPECTIVE* (2007) (exploring the public overestimation of radiation risks); Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 *STAN. L. REV.* 683 (1999) (tracing the cases of excessive public fear in response to scientific findings).

7. On why this might be so, see Cass R. Sunstein, *Probability Neglect: Emotions, Worst Cases, and Law*, 112 *YALE L.J.* 61 (2002) (arguing that people tend to focus on the adverse outcome, not on its likelihood).

Political Control Over Public Communications by Government Scientists

4. They might want to control what agency employees say, even when not speaking on the agency's behalf. It is true that some high-level public officials believe that whenever government employees speak in public, they speak for government; they never speak in their private capacity. And that is undoubtedly true for some officials (such as the Secretary of State and the Secretary of Defense). But by tradition, government scientists have sometimes had the authority to say that they do not speak on behalf of their agency.⁸ Even so, the White House, or offices of Cabinet heads, might want to limit what they say in public.

For its part, science that comes from the government can be categorized in three ways:

1. *Policy relevance.* Some scientific findings are tightly connected with high-level policy debates. For example, a government scientist might conclude that the climate change problem is likely to be far more (or less) serious than existing research suggests, in the sense that anticipated warming, by 2100, will be higher (or lower) than previously projected.⁹ Or a government scientist might conclude that some chemical, now in widespread use, poses serious health risks for children; public disclosure of that finding will predictably produce a market reaction, with economic consequences, and trigger a demand (and perhaps a legal requirement) for regulatory action.

2. *No policy relevance.* Some scientific findings have no evident connection with high-level policy debates. For example, a government scientist might make some new finding about black holes, or might offer fresh information about a new species of dinosaur or bird. In such cases, let us simply stipulate that public disclosure of the relevant findings will not raise issues or produce concerns that could possibly be of interest to policymakers.

3. *Potential policy relevance.* Some scientific findings might seem to government scientists and to most people to have no connection with high-level policy debates, even when those who work in the White House or an office of an official in the Cabinet might not find that entirely clear. In fact, this kind of disconnect—between political leadership and scientists—is quite common. For example, some findings with respect to dwindling fish populations, ocean acidification, or the spread of influenza might seem technical, but they might be invoked in debates about policy issues.

8. The National Science Foundation has made this explicit in the context of NSF scientists and recipients of federal funds. See *NSF Public Communications & Media Policy*, NAT'L SCI. FOUND., http://www.nsf.gov/news/policies_for_media.jsp[<http://perma.cc/LNS3-W2F5>] (“NSF-funded scientists and NSF staff have the fundamental right to express their personal views, provided they specify that they are not speaking on behalf of, or as a representative of, the agency but rather in their private capacity.”).

9. On public reactions to such findings, see Cass R. Sunstein et al., *How People Update Beliefs about Climate Change: Good News and Bad News*, 102 CORNELL L. REV. 1431 (2017) (arguing that people who are not sure human-made climate change is occurring and oppose an international climate agreement update their beliefs in response to unexpected good news but not unexpected bad news, and people who strongly believe human-made climate change is occurring and favor an international climate agreement update their beliefs far more in response to unexpected bad news than in response to unexpected good news).

III. Ten Cases

With these distinctions in mind, we can identify ten kinds of cases, five of which seem straightforward.

A. *Straightforward Cases*

1. There is no reasonable objection when political officials merely seek advance notice of a scientific finding that has policy relevance. Both communications offices and policy officials can legitimately contend that in order to do their jobs, they need to have a clear sense of scientific announcements that bear on policy. The issue here is only how far in advance the notice should be.

2. Political officials may appropriately control the *timing* of release of a scientific finding with manifest policy relevance. Officials can legitimately argue that they are entitled to control the policy agenda and that it is appropriate to ensure that scientific announcements from government employees do not compromise that agenda. Outside of the most unusual circumstances, there is an important qualification: There should be a fixed limit to the delay.

3. If a scientific finding has potential policy relevance, political officials can appropriately seek advance notice of its disclosure. Officials should be entitled to have a clear sense of scientific announcements that might bear on policy discussions, even if we emphasize the word “might.”

4. If a scientific finding has even potential policy relevance, it remains legitimate for political officials to control the timing of its disclosure. The considerations in point 2 above apply here as well.

5. No democratic government should seek to control the content of disclosure of scientific findings that lack policy relevance. Such findings might be intriguing, controversial, or disturbing, but policy officials, not versed in science, have no business altering them in any way.

B. *Difficult Cases*

Five cases might be viewed as more controversial, and so we approach them with questions, to which we offer our preferred answers:

1. Is it appropriate for public officials to seek advance notice of disclosure of scientific findings without policy relevance?

At first glance, the answer would seem to be no. Why should officials receive advance notice of findings that lack policy relevance? But there are two complications, which make a negative answer too simple. The first is that officials might not trust the scientists’ judgment about policy relevance; they might want advance notice of a very broad set of disclosures in order to test that judgment and to ensure that it is reasonable or right. The second complication is that

Political Control Over Public Communications by Government Scientists

some such findings might attract public attention, which means that communications offices and policy officials might want advance notice. For some and perhaps many agencies, it would be simplest to have no clearance process for scientific findings that fall in this category. But a more general clearance process might be justified, so long as it is defended and administered with the single goal of preventing surprises and allowing preparation for questions from the public.

2. Is it appropriate for public officials to seek to control the timing of disclosure of scientific findings without policy relevance?

At first glance, the answer again would seem to be no. By hypothesis, the disclosure will not produce real concerns from the standpoint of officials themselves. But if the findings are potentially newsworthy and might attract public attention, it would not necessarily be inappropriate for public officials to say: tomorrow, not today. Again, the debate would center on what the timing should be.

3. Is it ever appropriate for public officials to forbid the announcement of scientific findings, or to prohibit government scientists from presenting their work in public?

At first glance, the answer to this question is also no. Recall, however, that the principles announced during the Obama Administration do not seem to offer an answer. They forbid political interference with the substance of the science, with the ban on alteration of scientific findings. But they do not clearly forbid political officials from saying: you may not appear in public, or you may not say that in public.¹⁰

In some cases, such prohibitions might be legitimate. Suppose, for example, that political officials want scientists to *do science*—and not to travel to various places, to appear on panels, or to become public figures. Within any administration, the public appearances of high-level officials are policed (it is to be hoped for legitimate reasons). If controls on public appearances are based on a neutral principle (“do your job”), they are unexceptionable.

The most challenging cases arise when a ban on a public announcement grows out of some kind of political uneasiness with its content. If a scientist will say something in tension with a political commitment of the administration—for example, that genetically modified foods are dangerous, that secondhand smoking is not so dangerous, that depletion of the ozone layer is not such a problem—political officials might say: *we will not alter what you say, but we do not want you to say it*. It is not entirely implausible to suggest that while there should be a flat rule against political interference with content, there should be no such flat rule against political interference with public appearances or announcements.

10. See Holdren, *supra* note 1.

We think that in a free society, such interference is clearly legitimate only when it is based on a neutral principle, and that it should be presumed to be illegitimate if it is based on political uneasiness with its content. In such cases, a prohibition on public appearances or announcements should be treated as analogous to interference with content, and should be governed by similar principles—to which we now turn.

4. Is it appropriate for public officials to control the content of disclosure of scientific findings with policy relevance?

This may well be the most important and challenging question. We think that the answer depends on the meaning of “control the content.”

(a) It would never be appropriate for policymakers to direct government scientists to misreport or misrepresent the science. Policymakers have no business distorting the evidence and the facts. This conclusion is consistent with that offered during the Obama Administration.¹¹

(b) It can be appropriate for policymakers to direct government scientists not to venture into policymaking domains that do not involve the science, strictly speaking. If policymakers want to restrict government scientists to science, and to direct scientists not to offer judgments about regulation or legislation, they are entitled to do that so long as there is no conflict with their scientific integrity.

(c) So long as there is no violation of (a), it would be appropriate for communications offices and policy officials to consult with scientists to ensure clarity and intelligibility, and to work to prevent public misunderstandings of what the science shows. This might be justified (for example) to ensure against excessive or unjustified public fear. It is important, however, that a consultation is just that, and not an order to government scientists with respect to science itself. If the question is how to present the science accurately, scientists should have the final say, so long as the question is genuinely limited to science, broadly applied.

(d) Apart from (b) and (c), there should be a very strong presumption against political interference with the *content* of scientific communication by government scientists, or of scientists’ decisions about how to present their results. We recognize that some circumstances can test the strength of this presumption and that reasonable people might disagree on when, if ever, it might well deserve special treatment. More difficult examples would arise when a finding might have an adverse effect on some portion of the economy, or might conflict, in some sense, with the administration’s policy positions and goals. Policymakers might not welcome disclosure of new evidence that some widely used product might be carcinogenic, not because they distrust the science, but because they believe that the evidence might create an excessive public reaction that will

11. *Id.*

Political Control Over Public Communications by Government Scientists

have serious adverse consequences on millions of people. In imaginable circumstances, a desire to avoid an excessive public reaction could justify a stronger role for policymaking officials.

It would of course be entirely acceptable for policymakers to present their own interpretation of how to construe results, or of how they believe those results should inform policy. So too, policymakers might legitimately disapprove of a presentation because they think it has not been suitably qualified. It is also critical that agencies dealing with scientific topics include scientists with expertise, and do not exclude them on the basis of prior association with the agency under previous administrations.

5. Is it appropriate for public officials to control the content of disclosure of scientific findings with potential policy relevance?

The answer is the same as for (9). To be sure, we are speaking here of merely potential, rather than clear, policy relevance, but the relevant considerations are not different.

III. Conclusions

The following matrix summarizes our conclusions:

Table 1

	Policy Relevance	Potential Policy Relevance	No Policy Relevance
Advance Notice	Yes	Yes	A qualified no
Control Timing	Yes (with deadline)	Yes (with deadline)	A qualified no
Suggest (but not require) Content Changes	Yes, but with limitations, e.g., for clarity and with the understanding that scientists can reject changes that they believe incorrectly alter or suppress scientific content	Yes, but with limitations, e.g., for clarity and with the understanding that scientists can reject changes that they believe incorrectly alter or suppress scientific content	No

Important questions remain, such as how to guarantee information flows in accordance with the foregoing guidelines. Our hope is that at a minimum, a clear set of principles can provide a framework under which any disputes can be set-

tled or at least addressed in a systematic and well-defined fashion. Another question is whether and when government employees are entitled to speak in their individual capacity, even when disagreeing with the policy of the agency to which they belong. This is not our central concern here, and it is too complex to resolve in this brief Essay, but agencies should work to develop clear guidelines so that their employees can have clear expectations.

Free societies are deeply skeptical, and properly so, about any efforts to control the flow of scientific information, even when that information comes from government employees. We have attempted to vindicate that skepticism here, while also identifying the most legitimate bases for political coordination and intervention. Gray areas remain, but we are hopeful that the foregoing categories and distinctions provide a promising start toward achieving the ideal of maintaining the most transparent and robust uses of science in an open and democratic society.