

PROTECTING SCIENTIFIC INTEGRITY: AN UPDATE AND ADDITIONAL LEGISLATIVE PROPOSALS

**A POSITION PAPER FROM
THE CENTER FOR INQUIRY
OFFICE OF PUBLIC POLICY**

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Protecting Scientific Integrity: An Update and Additional Legislative Proposals

Executive Summary

The Center for Inquiry has continued its examination of the set of issues relating to scientific integrity in government. In May, 2007, we recommended legislation to prohibit tampering with federally funded scientific research and to promote the impartiality of advisory committees. We also recommended repeal or reform of the Data Quality Act. We have additional recommendations on the following topics:

Communications with the media and the public. We recommend statutory language to ensure that scientists may communicate their personal views on matters of public concern to the public and media representatives, provided they do not claim to be representing the agency. Our proposed statutory language protects against the disclosure of classified information.

Re-establishing the Office of Technology Assessment (OTA). Congress should reauthorize funding for the OTA without major reorganization. If Congress does not fund OTA but transfers its functions to another agency, that organization should, like OTA, be structured so that it is insulated from politicization and should respond to a broad constituency of decision makers, stakeholders and the public.

Reforming the Data Quality Act (DQA). The objective of the DQA is to ensure the quality of scientific information. However, some believe it has been abused by interests seeking to delay regulatory action by filing frivolous requests for correction (RFCs). To ensure the DAQ can continue to serve the objective of improving data quality while at the same time reducing the incentive to file frivolous RFCs, we recommend that any RFC include a representation under penalties of perjury that the complainant has presented all relevant information of which it is aware, whether or not publicly available at the time of the RFC. Moreover, the complainant should also be required to consent to making any information it has submitted in connection with the RFC publicly available.

PROTECTING SCIENTIFIC INTEGRITY: AN UPDATE AND ADDITIONAL LEGISLATIVE PROPOSALS

INTRODUCTION

In May, 2007, the Center for Inquiry released its position paper on protecting the integrity of federally supported scientific research and analysis. That position paper recommended legislation to prohibit interference with scientific research and analysis, to ensure the objectivity and transparency of federal advisory committees, and to reform the Data Quality Act (DQA). At the time, the Center for Inquiry also observed that reinstating the Office of Technology Assessment (OTA) would assist Congress, and other policy makers, by providing impartial, expert analysis on key scientific issues. Finally, the Center for Inquiry noted that interference with government scientists' access to the media and to the public constitutes a significant hindrance to the free flow of scientific information; however, the Center did not recommend any specific legislation addressing this issue.

The Center for Inquiry has had an opportunity to consider these issues further. Set forth below are our recommendations on legislation to provide statutory protection to government scientists' communications with the media and the public and to reinstitute the OTA. We also have further recommendations concerning reform of the DQA.

We also note that since the publication of our May, 2007 position paper, Congress has enacted legislation that touches on some of the same concerns discussed in our position paper. We intentionally use the phrase "touches on" because it is not yet clear what the effect of this legislation will be. The America Competes Act, H. R. 2272, which was signed into law on August 9, 2007, is a statute that primarily aims to promote

education and research in science, engineering, and mathematics—a goal we applaud. In addition, however, Section 1009 of the Act states, in pertinent part, as follows:

SEC. 1009. RELEASE OF SCIENTIFIC RESEARCH RESULTS.

(a) **PRINCIPLES.**—Not later than 90 days after the date of the enactment of this Act, the Director of the Office of Science and Technology Policy, in consultation with the Director of the Office of Management and Budget and the heads of all Federal civilian agencies that conduct scientific research, shall develop and issue an overarching set of principles to ensure the communication and open exchange of data and results to other agencies, policymakers, and the public of research conducted by a scientist employed by a Federal civilian agency and to prevent the intentional or unintentional suppression or distortion of such research findings. . . .

(b) **IMPLEMENTATION.**—Not later than 180 days after the date of the enactment of this Act, the Director of the Office of Science and Technology Policy shall ensure that all civilian Federal agencies that conduct scientific research develop specific policies and procedures regarding the public release of data and results of research conducted by a scientist employed by such an agency consistent with the principles established under subsection (a). Such policies and procedures shall—

- (1) specifically address what is and what is not permitted or recommended under such policies and procedures;
- (2) be specifically designed for each such agency;
- (3) be applied uniformly throughout each such agency; and
- (4) be widely communicated and readily accessible to all employees of each such agency and the public.

We welcome this legislation’s mandate to government agencies to develop and issue a set of principles to protect scientific integrity and ensure the proper communication of research findings. However, because it is not yet known what the content of these principles will be, the Center for Inquiry obviously cannot take a position on the adequacy of these principles in terms of protecting and promoting integrity in government research and fostering the communication of research results.

Furthermore, we do not believe that the development of these mandated principles and implementing policies by the relevant agencies necessarily preempts other legislation

addressing scientific integrity. We do not mean to cast doubt on the sincerity of the commitment by agency heads to the task of developing and issuing appropriate principles and policies, but for any number of reasons their effort may fall short of what is required to remedy the set of problems associated with scientific integrity. In this regard, we note that the mandate of the America Competes Act is focused on clarification, consistency, and public dissemination of the relevant principles and policies, *not* the substantive content of these principles and policies. Implementing clear, uniform rules is a worthy goal, especially in light of the recent report from the Government Accountability Office that concluded that “the lack of clarity and consistency in the application of agency-level policies for requests to disseminate research . . . continues to generate significant concern among some agency researchers” (2007, pp. 32-33). But if the policies developed pursuant to the America Competes Act are substantively deficient, then their clarity and uniform application will not properly facilitate communications from government scientists. Indeed, they may hinder such communications.

Accordingly, the Center for Inquiry believes that legislation addressing scientific integrity remains both necessary and appropriate. In addition to the proposals described in our May, 2007 position paper, the legislation should include the proposals set forth below.

I. COMMUNICATIONS WITH THE MEDIA AND THE PUBLIC

One concern that many organizations and individual scientists have expressed is over agency interference with individual scientists’ communication with the media and the public. This concern is based, in part, on numerous alleged incidents in which agencies have forbidden scientists to discuss certain topics with members of the public or

the media, scientists have been warned or advised not to discuss certain topics with members of the public or the media, and agencies have required prior approval from management representations before government scientists are allowed to speak with members of the public or the media (Maassarani 2007; Revkin 2007).

In addition to interference with scientists' direct communications with the public and the media, other forms of alleged agency obstruction have drawn criticism. Some have objected to agency control over fact sheets describing government research, website content, and press releases, including press releases concerning publications authored by government scientists (Maassarani 2007; Union of Concerned Scientists and Government Accountability Project 2007). There have also been allegations that agencies steer media away from scientists critical of government policies (Maassarani 2007).

The Center for Inquiry believes that open communication between government scientists and the public and the media is important for these reasons:

- As a matter of policy, the public should have access to taxpayer-funded scientific knowledge and research. They should have access to this knowledge and research not just because they have financially supported the work of government scientists, but because an informed citizenry is critical for representative government.
- Most members of the public do not have access to scientific and other peer reviewed journals, nor could they easily interpret this literature if they did have access to it, as it is often written in technical language. Accordingly, they must

rely on journalists' reporting of the views of scientists or direct communications with the scientists themselves, for example, through a speech at a conference.

- Further support for open communication is found in the scientists' own right to express their views freely. The extent of the First Amendment rights of government employees, including scientists, remains a matter of some controversy, but there is no dispute that government scientists enjoy some discretion in communication with the public or matters of public concern.

Of course, government scientists are employees of particular agencies. Under American law, employers have traditionally exercised a significant amount of control over statements by employees, especially in situations where the employee is speaking about her job. As public employers, the restrictions that agencies can place on their employees, including scientists, is limited by the First Amendment. Nonetheless, there is no dispute that public employers can permissibly impose some restrictions on employee speech. Before determining what statutory protections for government employee speech may be advisable, therefore, we first must outline the scope of constitutional protections for government employee speech.

A. The Constitutional Background

Courts did not always interpret the First Amendment as limiting the government's control of its employees' speech. To the contrary, the government was treated much as any other employer. Justice Holmes succinctly summarized the former doctrine that public employers may control the speech of their employees by observing that a policeman "may have a constitutional right to talk politics but he has no constitutional right to be a policeman." *McAuliffe v. Mayor of New Bedford*, 29 N. E. 517 (Mass.1892).

In other words, the government cannot restrict a person's speech, but it can terminate that person's employment with the government.

However, the Supreme Court abandoned this doctrine in 1968 when it ruled that public employees do possess a qualified right to speak on matters of public concern. In the case of *Pickering v. Board of Education*, 391 U. S. 563, a school board terminated a teacher who wrote a letter to the local newspaper criticizing the school board's allocation of funds. The Court declined to uphold the termination. Although it recognized that the government, when it acts in its role as an employer has legitimate interests in promoting efficiency and preventing disruption in its operations, the Court reasoned that the teacher's letter provided the public with an important perspective and it did not materially affect the school district's operations. In *Pickering*, the Court established a two-part test for analyzing free speech claims by government employees. The first question is whether the employee is speaking about a matter of public concern, as opposed to an issue internal to the employer, such as a personnel matter. If the answer to this inquiry is no, then the First Amendment is not applicable. If the answer is yes, then the employee's free speech rights must be balanced against the right of the employer to manage its operations efficiently and to safeguard confidential information.

If *Pickering* and its progeny were the final word on the constitutional protection given to public employees' speech, then arguably there might not be a need for statutory protection of government scientists' speech. For example, it is indisputable that global climate change is a matter of public concern and a statement by a government scientist expressing his personal opinion on this issue could not plausibly be characterized as disruptive of an agency's internal operations.

Unfortunately, *Pickering* is not the last word. Just a little over a year ago, the Supreme Court ruled in *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006), that government employees do not have free speech rights when their speech can be considered part of their official duties, regardless of whether their speech can be characterized as a matter of public concern. In *Garcetti*, a deputy district attorney prepared a memorandum that detailed the deficiencies in a warrant. He alleged that the district attorney's office retaliated against him after submission of the memorandum and that this retaliation violated his constitutional rights inasmuch as the memorandum addressed a matter of public concern, namely prosecutorial misconduct. The Court disagreed, holding that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."

The exact implications of *Garcetti* for speech by government scientists remain unclear. First, the Court's majority dropped the tantalizing suggestion that its analysis might not "apply in the same manner to a case involving speech related to scholarship or teaching." Obviously, much of what government scientists do could be regarded as "scholarship," at least as broadly interpreted. Moreover, if a government scientist makes clear that she is speaking to the media or the public in her personal capacity, the logical implication would be that she is not speaking pursuant to her "official duties." On the other hand, because scientists often ask for the assistance of their agency's public affairs office in coordinating interviews, at least some media interviews might be regarded as an extension of a scientist's official duties.

In the final analysis, the Center for Inquiry concludes that fostering open communication between scientists and the public and the media is too important an objective to leave to the vagaries of constitutional interpretation. Without conceding that government scientists lack constitutional protection for such communications, we believe that the best way to active the objective of open communication is through a statute that expressly protects that right.

B. The Scope of Statutory Protection and Proposed Statutory Language

Statutory provisions should be as concise and as clear as possible to allow for ease of administration and interpretation. Policies implementing the statutory mandate should be developed by the individual agencies and the details of such policies are best left to the agencies themselves. With these criteria in mind, we recommend the following statutory provisions, which should form part of a bill dealing with the set of issues relating to scientific integrity:

OPEN COMMUNICATION WITH THE PUBLIC

(a) Scientists employed by Federal civilian agencies may express their personal views on matters of public concern to the public and to media representatives, including personal views relating to their scientific work and conclusions they believe are warranted by their scientific work, provided they specify that they are expressing these views in their personal capacity and not on behalf of, or as a representative of, the agency. The agency employing the scientists may be identified. The agency employing the scientist may require the scientist to notify the agency’s public affairs officer within seventy-two (72) hours after the scientist has communicated with a representative of the media; the agency may request, but may not require, notification prior to the communication.

(b) Scientists employed by Federal civilian agencies may not provide the public or media representatives with any document prepared in whole or in part through use of agency resources or appropriated funds, including, but not limited, to documents summarizing, containing, or derived from research supported by the agency, without the prior consent of the scientist’s supervisor, unless the scientist’s action is consistent with agency policy. “Document” includes electronic files of any sort. “Document” does not include business cards, resumes, or similar materials that are limited to providing biographical or identifying information about the scientist.

(c) Classified information and other information whose disclosure is prohibited by statute may not be released in any form, whether through documents, oral statements or otherwise. Release of such information will result in appropriate disciplinary action or other appropriate sanctions.

We believe this statutory provision should accomplish the objective of ensuring the free flow of information between government scientists and the public while protecting the legitimate interests of government agencies in their roles as employers. Given that the scientists must specify that she is speaking only for herself and not the agency, we do not believe this open communication with the public and the media threatens any disruption of agency operations or confusion in the public's mind about the agency's official position on issues. Similarly, limiting statutory protection to the occasions when the scientist speaks on matters of public concern is consistent with court decisions that have identified "matters of public concern" as the area in which the scientist's free speech rights are likely to outweigh the agency's interest in managing its operations. Furthermore, because the courts have through case law effectively delineated what constitutes a matter of public concern, there is no need to describe in detail which topics a scientist may or may not discuss. Discussing the adverse health effect of lead is a matter of public concern; discussing the content of an employee's grievance normally would not be.

With respect to matters of public concern, the Center for Inquiry notes that some agencies' media policies could be interpreted as forbidding employees to speak about "policy, programmatic, and budget issues" (NASA 2006). We understand why an agency would want only designated spokespersons to provide the official agency position on policy, programmatic, and budget issues. However, allowing individual scientists to

voice their personal opinions about such topics should not result in a significant impediment to agency operations. Moreover, the personal views of scientists may help inform public debate about important policy issues.

We will now highlight what our proposed statutory provision does *not* address. As indicated, some scientists have complained about agency refusals to issue press releases, fact sheets, or similar announcements or publicity about their publications or research. Scientists have also complained about media being directed to scientist more inclined to support official agency positions.

Although the Center for Inquiry deplores any concerted effort to ignore or bury through silence the work of any government scientists, especially when this is done for political reasons, the government has no obligation under the First Amendment to use its funds to promote views with which it disagrees. See *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 833 (1995). There is no constitutional right to a press release.

Nor do we believe that it would be advisable to impose such an obligation through a statute. Attempting to mandate fair and equal distribution of press releases and other publicity would likely intrude upon agency discretion and produce an administrative nightmare. Rationing press releases (e.g., allowing three press releases per year for each scientist) obviously makes no sense nor would a requirement to issue a press release every time a scientist publishes a paper, no matter how insignificant or how relevant the paper is to the agency's work. Questions relating to publicity inevitably involve judgments that cannot be readily reduced to a set of statutory criteria. These judgments are best left to the agency.

The best mechanism for preventing grossly unfair distribution of press releases and other publicity is to allow scientists to communicate their personal views to the media and the public. Presumably, scientists who maintain their work is not receiving proper recognition from the agency will share that view with the public and, if the scientist's view has merit, public pressure should provide sufficient incentive to the agency to modify its treatment of the scientist's work.

Our proposed statutory language also does not address dissemination of scientific papers and research results in peer-reviewed journals and other technical publications. Many agencies have procedures in place to facilitate the dissemination of such information. The recent GAO report indicates that these policies are clear and understood by most agency scientists and that there have been relatively few complaints about dissemination of such information (GAO 2007). Accordingly, we do not believe this is an issue that warrants legislative intervention.

Finally, we emphasize that our proposed statutory language protecting communications with the public and the media is a supplement to, and not a substitute for, existing and proposed statutory protections for whistleblowers. It definitely is not intended to supersede such statutory protections. Similarly, our proposed statutory language protecting communications with the public and the media supplements other statutory language we have recommended to protect scientific integrity. In particular, the Center for Inquiry continues to believe it is imperative to have legislation that expressly prohibits tampering with federally funded scientific research and analysis and that promotes the impartiality of federal advisory committees (Center for Inquiry 2007).

II. REESTABLISHING THE OFFICE OF TECHNOLOGY ASSESSMENT

The Center for Inquiry strongly supports legislation to reauthorize funding for the Office of Technology Assessment (OTA) to allow Congress to secure unbiased, expert analysis of scientific and technical claims made by the various executive agencies, the private sector, and other interested parties. In addition, the Center for Inquiry offers for consideration two possible changes for inclusion in any bill reauthorizing OTA funding: First, it might be politically expedient to rename the OTA; second, it might be useful to broaden the constituency of legislators OTA is permitted to serve under law. Finally, in the event that Congress should fail to reauthorize funding for the OTA, alternative government agencies or organs should incorporate the features that ensured the OTA's ability to provide neutral and nonpartisan analysis. Each of these points is discussed in detail below.

A. Congress Should Reauthorize Funding for the OTA

Congress established the OTA in 1972 to provide “early indications of the probable beneficial and adverse impacts of the applications of technology and to develop other coordinate information which may assist the Congress” (PL 94-484). Over time the agency broadened its analysis to technical issues in policy problems of all kinds, including health care, energy policy, environmental issues, land and resource management, trade, defense, and a host of other subjects (Bimber 1996a). Until its abolition by the 104th Congress in 1995, the OTA functioned as a highly effective means of providing Congress with impartial, expert analysis of policy issues with technological or scientific content. Over its lifetime, the OTA produced and distributed approximately

thirty major policy studies per year. Many of the OTA's reports became mainstays of the community of policy analysts, providing definition and analysis of policy problems and explorations of the costs and benefits of possible government responses. The OTA also achieved international renown for its ability to provide objective, reliable analysis to legislators (Shuger 1989). For this reason, the OTA has been widely imitated abroad. European parliaments, for example, support more than one dozen such parliamentary technology assessment agencies modeled on the OTA (Vig 2003).

At least three of the OTA's features made the agency valuable to Congress's policy process. First and most importantly, the OTA was subject to direct oversight by, and was responsive to the demands of, Congress. This helped the OTA to distill, organize, and present expert advice to Congress in politically relevant but neutral ways, independent of the opinions of interested experts in cabinet level departments, the various executive branch agencies, and the private sector (Bimber 1996b).

Second, the OTA leadership was structured in a way that helped to insulate the agency from politicization by partisan interests or capture by individual committee agendas. The OTA was governed by a Technology Assessment Board (TAB), consisting of six senators and six representatives, evenly divided between the two political parties, and the non-voting Director of OTA (PL 92-484). This arrangement ensured that the OTA's leadership was not tied directly to the political control of the legislature. The Technology Assessment Advisory Council, consisting of ten expert members of the public appointed by the TAB, the Comptroller General (head of the GAO), and the Director of the Congressional Research Service, advised the OTA on scientific and technical analysis (PL 92-484). The OTA's reliance on a highly qualified,

multidisciplinary staff, together with the requirement that the TAB had to approve every proposal for an assessment before the start of work, helped minimize ideological bias in analysis (Guston 2001).

Third, the OTA served a broader constituency than typical agencies in the executive branch. This further ensured the objectivity and neutrality of the OTA's assessments. Pursuant to the OTA's authorizing legislation, the agency could undertake an assessment upon the request of the TAB, the Director of OTA, or the chair of any full committee of either House of Congress (PL 94-484). In addition, the OTA developed the informal practice of consulting with ranking minority members (Bimber 1996b). The OTA's responsiveness to a broad constituency of decision-makers led to a more robust production of knowledge and facilitated the agency's establishment of a strong reputation for bringing skillful, neutral, and nonpartisan analysis to the public discourse on policy issues. Finally, the OTA's involvement of principal stakeholders and the interested public through the use of advisory panels and reviewers, while retaining full responsibility for the final published analyses, contributed to the OTA's credibility, political acceptance, and its high standing in the technical community (Gibbons 1993).

Several legislators have recognized the need to fill the vacuum left by the OTA's closure. Some have called for legislation to reauthorize funding for the OTA (Kenzo 2005). Others have suggested alternatives to reestablishing the OTA, from creating similar organs in the Government Accountability Office (GAO) or the Congressional Research Service (CRS) to increasing Congress's dependence on the National Academies, composed of the National Academy of Sciences (NAS), the National Academy of Engineering, the Institute of Medicine, and the National Research Council

(NRC). None of these options can substitute for a fully-funded, independent office dedicated to the sole purpose of supplying Congress with deep and comprehensive analysis of crucial scientific and technological issues. The GAO and the CRS have responsibilities extending well beyond scientific and technical assessment. The National Academies have played a very useful role in providing scientific advice and analysis to government agencies, but they are private organizations, dependent on ad hoc grant funding from the government for work on specific projects, as well as funding from private industry. Accordingly, they cannot substitute for a fully-funded, independent agency responsible to Congress. For this reason, the Center for Inquiry recommends nothing short of reauthorizing funding for the OTA.

Some critics have argued that the need for the OTA's analysis would be obviated by direct contacts between scientific researchers and members of Congress. This mechanism for the exchange of scientific analysis and advice is deficient in at least the following three respects:

1) [T]he exchange in direct contact is likely to be private rather than public, and it would therefore suffer from apparent if not actual politicization; 2) the exchange would not be subject to critical appraisal by peers and other concerned parties, and it would therefore likely suffer substantively even in the unlikely event that it was impartially rendered; and 3) individual researchers are likely to have some insight over narrow and near-term extensions of their work, but not over the broad array of societal consequences that would ultimately interest decision makers (Guston 2001).

Legislators' efforts to inform themselves through direct contact with individual scientists is therefore a poor substitute for the OTA's broad, rigorous analysis.

Critics of the OTA further maintain that the agency served little purpose because its book-length reports were often delayed and frequently failed to change congressional

votes. This criticism is flawed in at least three respects. First and most importantly, it ignores the full impact of the OTA's assessments on policy analysis. The very act of undertaking an assessment involving input from, and negotiation between, analysts and interested stakeholders generates valuable knowledge and reduces conflict. As science policy scholar David Guston notes, the argument that the OTA's reports failed to change congressional votes relies on a "discredited 'silver bullet' account of policy analysis":

A full evaluation of technology assessment includes not only these "actual impacts" of the study, but also its more nuanced impact on general thinking about the issue (e.g., how an issue is framed), as well as the learning engaged in by participants in the process (including both analysts and stakeholders) and non-participants (the targets of the advice as well as the general public). With OTA, it was often felt that the report was important significantly in that it represented a great deal of negotiation and learning among analysts, staff, and stakeholders that increased knowledge and reduced conflict in preparation for congressional action (Guston 2001).

Second, requiring the OTA to produce its assessments more rapidly would implicate an obvious tradeoff between the assessments' timeliness on the one hand, and their accuracy and comprehensiveness on the other. Finally, the OTA provided significant services to legislators beyond the publishing of full reports, often on an informal basis. Among other things, the OTA published smaller documents, briefed congressional staff, fielded inquiries, and provided testimony and other informal services.

For the reasons stated above, the Center for Inquiry endorses the reauthorization of funding for the OTA as part of any legislative reform relating to federally funded scientific research. Although a reestablished OTA will not substitute for the work of advisory committees within the executive branch, it could supplement their work. Furthermore, the reestablishment of the OTA could reduce the alleged need for outside peer review of the work of regulatory agencies. Regulatory peer review is a controversial

process for assessing the scientific and technical work of regulatory agencies through the use of outside experts and consultants. Many are concerned that regulatory peer review allows private interests to interfere with and delay the work of regulatory agencies.

Reestablishment of the OTA would help to avoid this danger.

B. Potential Modifications of the OTA

A bill reauthorizing funding for the OTA would provide opportunity to modify the agency's structure in response to particular concerns. During its lifetime, however, the OTA earned acclaim in the scientific community and abroad for providing objective, reliable science analysis to legislators. In light of this success story, the Center for Inquiry does not recommend any major reorganization of the OTA.

The Center for Inquiry nonetheless offers two modest changes for consideration. First, it might be politically expedient to change the agency's name. The name "Office of Technology Assessment" could provoke resistance from some members of Congress, given their prior opposition to this agency. Moreover, this name also fails to signify the agency's full role in analyzing scientific and technical issues within a broad range of policy problems.

Second, the agency's long term political security might be protected by allowing a wider constituency of legislators to access its services. In large part because of limitations in the OTA's authorizing statute, the agency's services did not extend much beyond the offices of the chairs and ranking minority members of full committees. It has been suggested that the OTA's failure to establish a broader constituency facilitated the 104th Congress's abolition of the agency by creating an appearance of irrelevance (Bimber 1996b). Perhaps in anticipation of this problem reoccurring, Representative

Rush Holt introduced H.R. 4670 in 2004 to establish a “Center for Scientific and Technical Assessment” (CSTA) within the GAO. The CSTA would have been modeled on the OTA, but would have accepted requests from any member of Congress. Pursuant to the bill, requests would have had priority as follows: “requests with bipartisan and bicameral support; requests with bipartisan support; requests from other members.” Although the Center for Inquiry neither endorses nor objects to this particular proposal, the Center for Inquiry offers it for consideration as one possible means of broadening the OTA’s legislative constituency.

C. Any Alternative Government Organ Should Be Modeled on the OTA

In the event that Congress fails to reauthorize funding for the OTA, but instead transfers its duties to a similar organ within another agency (e.g., the GAO or CRS), the Center for Inquiry provides a final recommendation. Any such organ should possess the structure and responsibilities outlined above that ensured the OTA’s reputation for skillful, neutral, nonpartisan analysis: namely, responsiveness to the legislative rather than the executive branch; a leadership structure modeled on the OTA’s that insulates the organ from politicization by partisan interests or capture by individual committee agendas; and responsiveness to a broad constituency of decision makers, to principal stakeholders, and to the interested public.

III. REFORMING THE DATA QUALITY ACT

Our previous position paper contained proposals for reforming the DQA (Center for Inquiry 2007). We have continued to examine the DQA, focusing on modifications to the statute that would ensure it does not inhibit regulatory action. However, we have also

examined ways in which the DQA might be modified both to promote its underlying goal of correcting problems with the quality of information being utilized by agencies and of providing the public with appropriate access to agency information. We believe we have proposals that will advance all three objectives.

To review briefly: The DQA requires the Office of Management and Budget (OMB) and other federal agencies to issue guidelines to ensure the quality of information they disseminate and to allow affected persons to seek correction of this information.*

The Center for Inquiry, along with several other public interest organizations, is concerned that improper implementation of the DQA could cause delay in agency action with serious harmful consequences for the public. The need for definitive research findings must be balanced and reconciled with the substantive mission of the agency. As they now stand, the DQA and the extensive OMB and agency guidelines promulgated under the DQA have significant potential for imposing excessive procedural obstacles to effective federal agency action. (For a more extensive discussion of our concerns with the DQA, please refer to pages 25–27 of our May, 2007 position paper.)

A. Requiring Complete Disclosure in DQA Requests for Correction

Defenders of the DQA maintain that the DQA provides a useful service by, among other things, helping to ensure the accuracy, reliability, and completeness of information disseminated by federal agencies. Indeed, the working paper that outlined the objectives of the DQA specified these goals, along with the goals of promoting public input into agency guidance and access to and sharing of data underlying agency action

* The DQA, also known as the Information Quality Act or IQA, is codified at 44 U.S.C. § 3504(d)(1) and § 3516; it is set forth in full in Appendix B to CFI's May 2007 position paper.

(Center for Regulatory Effectiveness 1997). Is it possible to achieve these goals without also causing undue delay to regulatory action as a result of DQA complaints by interested parties, who may have an incentive to file complaints about allegedly inaccurate information as a means of delaying regulation? We suggest there may be a way to reconcile these competing objectives.

Currently, parties who believe disseminated agency information is inaccurate may file a request for correction (RFC) with the agency. To be successful, a person requesting a correction of federal agency information must demonstrate that the correction would be appropriate. For instance, the Environmental Protection Agency DQA Guidelines state that "EPA considers that the complainant has the burden of demonstrating that the information does not comply with EPA or OMB guidelines and that a particular corrective action would be appropriate." Accordingly, RFCs are often supported by studies or analyses submitted by the complainant. The DQA, however, does not require that a RFC include all relevant information. This allows a complainant to present in its RFC only information that supports its request and to ignore or suppress contrary information.

We believe that allowing parties to submit a RFC while withholding relevant information does not serve the underlying goals of the DQA or the public interest in general. Any correction made under the DQA should be based on an analysis of all relevant information, and this information should be publicly available. A "correction" based on incomplete information may actually be erroneous, and consequently may inappropriately subject the public to health or safety risks. If a complainant has

knowledge of information relevant to its RFC but withholds this information because it is prejudicial to its interests, the “quality” of agency data will be degraded, not improved.

To ensure the integrity, accuracy, and transparency of the RFC process, and to further the underlying objectives of the DQA, we suggest an amendment to the DQA requiring that any RFC include a representation under penalties of perjury that the complainant has presented all relevant information of which it is aware, whether or not publicly available at the time of the RFC, including information that is or may be contrary to the complainant’s position. Information submitted with the RFC should include the identity of the sponsor of any study presented, and the relationship of the sponsor to the requester as well as any interest the sponsor may have in the outcome of the RFC. Moreover, the complainant should also be required to consent to making any information it has submitted in connection with the RFC publicly available.

Amending the statute in this fashion will reduce frivolous RFCs, ensure that all relevant information is considered in connection with the RFC, and provide the public with access to important scientific and technical information. For these reasons, we recommend that if the DQA is retained, it be amended by adding the following provision:

REQUESTS FOR CORRECTION

Any request for correction of information disseminated by a federal agency shall include:

- (a) A representation under penalties of perjury that the complainant has presented all relevant information of which it is aware, whether or not publicly available at the time of the request for correction, including information that is or may be contrary to the complainant’s position;
- (b) The identity of the sponsor of any study presented by the complainant, the relationship of the sponsor to the complainant, and any interest the sponsor may have in the outcome of the request; and

- (c) The consent of the complainant to making any information it has submitted in connection with its request for correction publicly available.

B. Facilitating Use of the DQA

There have been some complaints that the public has been prevented from using the DQA effectively, which arguably accounts for the preponderance of RFCs being filed by business interests. A recent GAO report provides some support for this concern. That report states, in pertinent part:

The Department of Homeland Security . . . does not have department-level guidelines covering its 22 component agencies. Also, . . . [at least] 44 . . . independent agencies . . . have not posted their guidelines [on agency websites] and may not have them in place. As a result, users of information from these agencies may not know whether agencies have guidelines or know how to request correction of agency information. . . . Of the 19 cabinet and independent agencies with guidelines, 4 had “information quality” links on their home pages, but others’ IQA information online was difficult to locate. [Moreover, [e]ven when agencies posted IQA information on their Web sites . . . , such information was hard to access, making it difficult for information users to know whether agencies have IQA guidelines or how to request correction of agency information (GAO 2006, p.12).

Based on the GAO report, there seem to be two types of problem: (1) the failure of some agencies to issue DQA guidelines and procedures for challenging agency information; and (2) the failure of other agencies to provide well-publicized, easy access to guidelines and procedures that have been issued.

The Center for Inquiry believes that the first problem would be best addressed, at least initially, through increased congressional oversight rather than new statutory mandates. Those agencies which have not issued DQA guidelines and procedures are already failing to comply with the OMB guidelines published pursuant to the DQA

statutory mandate. It is not clear what kinds of additional statutory rules would cause them to comply. Moreover, enacting additional rules addressing this issue in the context of an overall reexamination of the DQA is likely to divert attention from more pressing issues. To the extent this issue needs to be addressed, it may be more efficient, therefore, to hold congressional hearings in the near future to examine the operation of the DQA and how it should be modified. At these hearings, the noncompliant agencies could be directed to testify, among other things, about their failure to issue DQA guidelines and procedures and to provide future updates about their progress towards compliance. We are hopeful that this type of congressional oversight will solve the problem.

Similar congressional oversight may also be the best way to deal with the second problem—the failure of other agencies to adequately publicize and provide easy access to their DQA guidelines. On the other hand, the existing statute mandates only the issuance of DQA guidelines and procedures; it does not expressly mandate publicity and easy access. For this reason, it might be helpful—in addition to directing agencies to testify about their efforts to publicize and ease access to these guidelines and procedures—to amend the DQA to require agencies to make such efforts; for instance, by providing links on website home pages.

C. Preventing Undue Interference with Agency Action

We remain convinced, following our reexamination of the DQA, that if the statute is retained (and, as we stated in our prior paper, one alternative would be to repeal the statute), substantial modifications to the statute are necessary. Our prior paper discusses our recommendations at greater length (Center for Inquiry 2007, pp. 29-34); we summarize them here.

- Congress should clarify that the DQA does not subject agency actions to judicial review. The DQA does not specify whether a court may review a federal agency's compliance with its provisions. Although the only cases addressing the issue have held that no judicial review is available, the issue has not been definitively resolved. Rulemaking procedures, the most important agency actions, are already subject to judicial review under the Administrative Procedures Act (APA), and the creation of a new cause of action under the DQA would be duplicative. Other agency actions—for instance, the issuance of scientific reports—are generally not subject to judicial review for reasons that are equally applicable to agency actions taken under the DQA.
- Congress should clarify that in the context of past, present or possible future rulemaking, the DQA does not require any administrative mechanisms or safeguards beyond those provided by the APA. The DQA is silent about how its procedural requirements relate to those of the APA. In the context of rulemaking, the APA's public notice and comment procedures already provide a sound mechanism for carrying out the DQA's directive that agencies allow "affected persons to seek and obtain correction of information." Accordingly, there is no need for additional mechanisms under the DQA. It is important that this approach apply to possible future rulemaking, as well as past and present, so that the rulemaking process is not unnecessarily delayed. The GAO's 2006 report notes that DQA "correction requests could affect rulemaking outside of the formal rulemaking process. . . . correction requests that are filed before an agency's

formal rulemaking process begins could affect when or if an agency initiates a rulemaking” (2006, p. 24).

- Congress should clarify that the DQA does not prevent an agency from taking (or refraining from taking) action based on a reasonable weighing of the best available evidence. Issues of public health, safety and protection of the environment are often complex. While there is a risk that agencies will impose undue costs by acting without sufficient supporting evidence, there is also a risk that the public will be unduly harmed or endangered if near or absolute certainty is required before any action is taken or any report is issued. The DQA should strike an appropriate balance between these valid concerns.
- Congress should clarify that the DQA applies only to data underlying major agency actions, and does not apply to data underlying less significant agency actions or to policy decisions (as opposed to the data underlying such decisions). The scope of the DQA is not explicitly limited to data underlying major agency actions, such as the publication of agency reports. Some such limitation is needed to prevent agencies from becoming mired in the process of responding to challenges regarding relatively insignificant agency actions. In addition, although the DQA refers only to “information,” it has been used to challenge policy decisions made by federal agencies as opposed to the quality of data underlying those decisions. Policy decisions, however debatable they may be, are not properly within the purview of the DQA.

To implement the above recommendations, the DQA should be amended by inserting after subsection (b) a new subsection to read substantially as follows:

Additional Rules.

- (1) Any request for correction of information disseminated by a federal agency shall include:
 - (A) A representation under penalties of perjury that the complainant has presented all relevant information of which it is aware, whether or not publicly available at the time of the request for correction, including information that is or may be contrary to the complainant's position;
 - (B) The identity of the sponsor of any study presented by the complainant, the relationship of the sponsor to the complainant, and any interest the sponsor may have in the outcome of the request; and
 - (C) The consent of the complainant to making any information it has submitted in connection with its request for correction publicly available.
 - (2) Federal agencies shall make the guidelines issued under this section readily available to the public through publication in the Federal Register, links on agency website homepages and other appropriate means.
 - (3) No act or failure to act by a Federal agency shall be subject to review by any court by reason of this section.
 - (4) Guidelines issued pursuant to this section shall not require any administrative mechanism beyond those required by the Administrative Procedure Act with respect to information that has or may be considered by a Federal agency in the context of past, present or possible future rulemaking, regardless of whether a rule is promulgated pursuant to that consideration.
 - (5) This section shall not prevent a Federal agency from taking, or refraining from taking, any action based on a reasonable weighing of the best available evidence.
- This section –
- (A) shall apply only to data underlying rulemaking by a Federal agency or contained in a report published by a Federal agency and not to data underlying any other action; and

- (B) shall not apply to any action or decision of a Federal agency, as opposed to the data underlying such an action or decision.

CONCLUSION

Determining how best to protect scientific integrity is an ongoing, fallible process, not unlike science itself. This is one reason we have continued to study this set of issues. The Center for Inquiry does not claim to have the definitive solution to the problems that have arisen as a result of the censorship and suppression of scientific research, attempts to circumvent legislation on federal advisory committees, interference with communications between government scientists and the public, misuse of the Data Quality Act, or the short-sighted abolition of the Office of Technology Assessment. However, our legislative recommendations should prove a major step towards resolving these problems.

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