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Response to Professor Farber's "Regulatory Review in Anti-Regulatory Times"

Richard J. Pierce Jr
George Washington University Law School, rpierce@law.gwu.edu

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Abstract

This is a response to an article by Professor Dan Farber presented in a symposium about the Trump Administration and Administrative Law at Chicago-Kent School of Law.[2] After agreeing with Professor Farber's description, analysis and critique of the Trump Administration's use and abuse of cost benefit analysis as an aid in making regulatory decisions, Professor Pierce makes four points: (1) President Trump will fail to implement his deregulatory agenda; (2) EPA's proposed rule on transparency of scientific evidence is a good start on an important project; (3) the Clean Power Plan is a lost cause; and, (4) The Trump Administration may unintentionally end the practice of applying cost benefit analysis to regulatory decisions.

A. Professor Farber's Essay

I find much to praise and little to criticize in Professor Farber's contribution to this symposium. He does an admirable job of describing and explaining cost-benefit analysis (cba) and its role as a tool that the last five presidents have used as an aid to deciding when and how to regulate health, safety and environmental risks.[3] He includes a historical account of the ways in which the Office of Information and Regulatory Affairs (OIRA) has performed its assigned task of coordinating the application of cba to regulatory decision making.[4]

[1] Lyle T. Alverson Professor of Law, George Washington University.

[2] Daniel A; Farber, Regulatory Review in Anti-Regulatory Times, ___Chicago-Kent L. Rev. ____(2019). .
[3] Id. at ___.
[4] Id. at ___.

Professor Farber follows his historical account of the use of cba over the past thirty-five years with descriptions and critiques of the unconventional manner in which the Trump Administration is using, abusing, and ignoring cba in its single-minded attempt to further President Trump' s deregulatory agenda.[5] He describes the Executive Order in which President Trump made clear his insistence that regulatory agencies and OIRA ignore the benefits of rules and consider only their costs in the process of repealing at least twice as many rules as they issue and maintaining a zero increased regulatory cost budget.[6] He then describes the ways in which OIRA and regulatory agencies have attempted to respond to the president's demand that they make dramatic changes in their missions and in their ways of considering regulatory costs and benefits.[7]

Professor Farber does a particularly good job of describing and explaining the three principal ways in which OIRA and regulatory agencies in the Trump Administration are attempting to manipulate cba to provide a basis to repeal environmental rules in general, and rules intended to mitigate climate change in particular.[8] First, they increase the discount rate used to estimate the present value of the future harms caused by climate change. Second, they eliminate consideration of all harms that are likely to take effect outside the United States. Since most of the damage caused by climate change will take place outside the United States and well into the future, those changes reduce dramatically the estimated benefits of taking any action that has the potential to mitigate climate change. Third, they eliminate consideration all co-benefits of a

[5] Id. at ___.
[6] Id. at ___.
[7] Id. at ___.
[8] Id. at ___.

rule. Since most actions that would mitigate climate change by reducing carbon dioxide emissions would also reduce emissions of particulate matter, eliminating consideration of co-benefits eliminates the benefits to human health that any change in emissions of particulate matter would yield.

Professor Farber is appropriately cautious in his characterizations of the performance of the individuals and institutions that have played roles in the regulatory process in the Trump Administration. Given the short period of time in which OIRA has been functioning in the Trump Administration, Professor Farber characterizes any evaluation of its performance as "highly theoretical" and concludes that "it is unclear whether OIRA is performing effectively as an objective overseer of deregulation."[9] He also speculates that OIRA "might also lack as much leverage in deregulatory cases" as it has exercised in regulatory cases over the past thirty five years.[10]

I share Professor Farber's suspicion that OIRA lacks its historic degree of leverage at present. OIRA is a tiny, underfunded and understaffed agency.[11] Its roughly three dozen civil servants and two young political appointees are no match for a president who has shown unprecedented prowess as a bully.

I will add to Professor Farber's excellent analysis two causes for optimism about the future and two causes for pessimism about the future.

B. Causes for optimism

[9] Id. at ___.
[10] Id. at ___.
[11] C. Jarrett Dieterle, Mulvaney Is Right to Call for More Money for OMB, The Regulatory Review (Jul. 25, 2017).

1. President Trump Will Fail to Implement his Deregulatory Agenda

President Trump has stated his intention to repeal 70% of all rules that now exist, including all rules that were issued after 1960.[12] The performance of his administration to date makes that extraordinarily ambitious claim laughable. There is a good chance that he will accomplish virtually nothing in his effort to repeal major rules. The administration has enjoyed no significant success in its efforts to implement its agenda during its first two years.

Regulatory agencies in the Trump Administration have attempted to suspend or to delay twenty rules that were issued during the Obama Administration. As Connor Raso has documented, courts rejected nineteen of those attempts—a 95% failure rate.[13] As Rob Glicksman and Emily Hammond have documented, the people who have headed the major regulatory agencies in the Trump Administration during its first two years have demonstrated such a lack of understanding of basic principles of administrative law that the vast majority of their deregulatory efforts to date have been rejected by courts.[14]

The administration claims to have repealed hundreds of rules that were issued during the Obama Administration, but the vast majority of those rules were guidance documents that have no legally-binding effect.[15] Guidance documents can influence the behavior of regulated firms, but they do not have effects that are even remotely comparable to the effects of the hundreds of major rules that were issued during the Obama Administration.

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[12] Donald Trump Says 70% of Regulations Can Go, Fortune (Oct. 7, 2016).
[13] Connor Raso, Trump's Deregulatory Efforts Keep Losing in Court—and the Losses Could Make it Harder for Future Administrations to Deregulate, Brookings (Oct. 25, 2018).
[14] Rob Glicksman & Emily Hammond, The Administrative Law of Regulatory Slop, ___Duke L. J. ___(2019).
[15] Richard Pierce, Regulatory Reform Under President Trump, __ Utilities L. Rev. ___(2019).

In its semi-annual report issued in October 2018, OIRA claimed that the administration had eliminated 57 rules between October 2017 and September 2018.[16] As Stuart Shapiro has explained, those actions were "comparable to the types of deregulatory actions taken by the Obama Administration" and are "extremely unlikely" to have "any appreciable effect on the economy."[17]

Turning to the future, I share Professor Farber's belief that the notice and comment process is far too difficult to navigate to permit the Trump Administration to enjoy any success in its attempt to repeal two rules for every one new rule it issues.[18] Consider, for instance an attempt to repeal any major rule that EPA has issued to implement the Clean Air Act. After going through the long and arduous notice and comment process, the agency would have to persuade a court that an action that will increase air pollution is consistent with the Clean Air Act, that the agency has good reasons to repeal the rule even though a court previously held that the agency had good reasons to issue the rule, and that the original EPA/OIRA estimate that the rule would have benefits that are many times greater than its costs was so far off the mark that the court should consider reasonable the new EPA/OIRA estimate that the costs of the rule exceed its benefits. Agencies in the Trump Administration will rarely, if ever, be successful in making that combination of arguments.

I also share Professor Farber's belief that the result of Trump's two-for-one Executive Order "will be that the agency will be able to issue fewer new regulations . . . ."[19] I do not consider that

[16] OIRA, Unified Agenda of Regulatory and Deregulatory Actions (Oct. 2018).
[17] Stuart Shapiro, Deregulatory Realities and Illusions, The Regulatory Review (Nov. 12, 2018).
[18] Farber, infra. Note 1, at ___.
[19] Id. at ___.

cause for despair, however. Thanks to its outstanding efforts in the past, EPA has already issued rules that have dramatically improved the quality of the environment and that produce annual net social benefits of $1.9 trillion under the Clean Air Act alone.[20] Other regulatory agencies have made similar extraordinary advances in other fields. The U.S. can survive a four-year hiatus on issuance of new rules without great hardship.

Moreover, even in the Trump Administration regulatory agencies will issue some important new rules. Agencies proposed three major rules during the four month period between August and November, 2018: CMS proposed a rule that is intended to reduce the price of prescription drugs;[21] EPA proposed a rule that would reduce emissions of pollutants from trucks;[22] and, FDA proposed a rule that is intended to slow the growing epidemic of smoking and vaping that is having significant adverse effects on the health of young people.[23]

A temporary slowdown in the rate at which agencies issue new rules may also have unintended beneficial effects. As one senior agency scientist described the situation to me recently "At last I will have some time to devote to the research I have been putting off for years."

2. EPA's Proposed Rule to Improve the Transparency of Scientific Evidence Is a Good Start on an Important Project

My second reason for optimism relates to one of the few areas in which I disagree with Professor Farber. He discusses with obvious concern the proposed rule that EPA describes as an effort to

[20] EPA, The Benefits and Costs of the Clean Air Act: 1990-2020 (2011).
[21] Simone Hussussian, Proposed Rule Aims to Drug Pricing More Transparent, The Regulatory Review (Nov. 16, 2018).
[22] Sarah Madigan & Stefanie Ramirez, The Week in Review, The Regulatory Review (August 3, 2018).
[23] U.S. to Restrict e-Cigarette Flavors to Fight Teenage Vaping Epidemic, Reuters (Nov. 9, 2018).

increase the transparency of EPA's use of scientific evidence.[24] I share Professor Farber's fear that the actual motive for the proposed rule is to undermine "key studies that have helped to justify stricter limits on air pollution."[25] Thus, for instance, the findings in a six-city study conducted by researchers at Harvard provided much of the scientific support for the rule that EPA issued in 1997 to reduce emissions of particulate matter.[26] The researchers refused to provide to anyone, including EPA, the data on which the study was based or the codes and models the researchers used to derive their findings from that data. Regulated firms argued unsuccessfully that EPA should not consider the findings in the study because of that refusal. If EPA had not been able to consider the six-city study, it probably would not have been able to support adequately the reduction in the permissible level of emissions of particulate matter that the Supreme Court upheld.

Notwithstanding my concern about the motives of EPA in the Trump Administration, I think we need to consider seriously the need for a rule of the type EPA has proposed. Congress was sufficiently concerned about the problem of lack of transparency of scientific evidence that it enacted the Information Quality Act in 2001.[27] That statute is intended to encourage agencies to rely only on scientific evidence that can be verified.

While there is no reason to doubt the validity of the six-city study, there is increasing evidence that many studies produced by highly regarded researchers and research institutions are not reliable and should not be the basis for any important government decision. In 2018 alone,

[24] Farber, infra. Note 1, at ___.
[25] Id. at ___.
[26] The Supreme Court upheld the rule in Whitman v. American Trucking Assn's, 531 U.S. 457 (2001), discussed in Richard Pierce, The Appropriate Role of Costs in Environmental Regulation, 54 Admin. L. Rev. 1237 (2002).
[27] Pub. L. 106-554, §515 (2001).

Harvard, Cornell, Dartmouth, and Sloan Kettering have admitted that some of their top researchers committed academic fraud in conducting some of the most important studies that those institutions have produced.[28] Moreover, attempts to replicate the findings of many other important studies have been unsuccessful.[29] That is powerful evidence that the scientific community has not been doing an adequate job of ensuring that the science it produces is reliable. A study with findings that cannot be replicated is not a scientific study. The ability to replicate the findings of a study is a core part of the definition of the scientific method.

It will be difficult to craft workable rules to govern the need to assure that regulatory decisions are based on reliable scientific evidence. The concern that is mentioned most frequently is potential invasion of the privacy of the individuals who are the subjects of a study. That problem is relatively easy to manage, however. Researchers rarely need information that identifies the subjects of a study to attempt to replicate the findings of the study. It is easy to redact all such information from the material that is made available to the agency and to other parties who have an interest in attempting to replicate the findings of a study.

The more difficult problems lie in the area of intellectual property. Many researchers and research institutions consider the data on which a study is based, as well as the model that was used in conducting the study and the computer code that represents that model, to be valuable

[28] Benedict Carey, Prominent Cancer Researcher Resigns from Dartmouth Amid Plagiarism Charges, New York Times (Sep. 4, 2018); Anahad O'Connor, More Evidence that Nutrition Studies Don't Always Add Up: A Cornell Scientist's Downfall Could Reveal a Bigger Problem in Nutrition Research, New York Times (Sep. 29, 2018); Charles Ornstein & Katie Thomas, Top Cancer Researcher Fails to Disclose Corporate Financial Ties in Major Research Journals, New York Times (Sep. 8, 2018); Gina Kolata, He Promised to Repair Damaged Hearts: Harvard Says His Lab Fabricated Research, New York Times (Oct. 29, 2018).

[29] Paul Basken, In the Age of Trump, Scientists See Reproducibility as Risky Business, The Chronicle of Higher Education (Mar. 21, 2017).

intellectual property that they own. It will be difficult to draft rules in this area that reconcile the need for transparency with the intellectual property rights of the individuals and institutions that perform the scientific research that agencies need to be able to rely on in making decisions.

That task is so important, however, that we must undertake it. It should be made a bit easier by the fact that most of the findings on which agencies rely are the result of studies that were conducted through the use of government funds provided in research grants. The granting agencies can add transparency conditions to their grants, albeit at some cost in the form of reduced enthusiasm to obtain research grants. The EPA's proposed rule on transparency in scientific evidence provides a good starting point to embark on this difficult decision making process.

C. Causes for Pessimism

I. The Clean Power Plan Is a Lost Cause

My causes for pessimism also arise with respect to issues on which I differ with Professor Farber. Professor Farber briefly describes the Clean Power Plan (CPP) that EPA issued during the Obama Administration and the Affordable Clean Energy Plan (ACE) that EPA in the Trump Administration has proposed to replace the CPP.[30] He compares the expected significant effects of the CPP as a means of mitigating climate change with the uncertain and undoubtedly much lower beneficial effects of the ACE.[31] He goes on to criticize the proposal to replace the CPP with the ACE on the

[30] Farber, infra. Note 1, at ___.
[31] Id. at ___.

basis that the cba that EPA conducted to support its decision to replace the CPP with the ACE is severely flawed.[32]

I agree with Professor Farber's views that the CPP would have produced large net benefits, that the ACE has the potential to produce much lower benefits if it produces any benefits at all. I also agree that the cba that EPA conducted to support its decision to replace the CPP with the ACE is badly flawed. This is a good case to illustrate one of the most important limits on cba, however. It makes no difference whether an agency action will produce large net benefits if the agency lacks the power to take the action.

Professor Farber accurately states that EPA in the Trump Administration decided to propose to replace the CPP with the ACE based on its adoption of the argument by the opponents of the CPP that EPA lacks the statutory authority to issue the CPP.[33] The opponents of the CPP argued that it exceeds EPA's power because it required action "beyond the fence line" of a generating plant. Specifically, it required owners of electricity generating plants to switch from heavy reliance on plants that use high carbon content coal to increased use of a combination of plants that use lower carbon content natural gas and plants that use zero carbon content wind and solar.

It is highly likely that a five-Justice majority of the Supreme Court also adopted that argument, however. The Supreme Court took the unprecedented action of staying the CPP before any court had occasion to consider its merits.[34] The five-Justice majority did not state its reasons for issuing

[32] Id. at ___.
[33] Id. at ___.
[34] North Dakota v. EPA, 136 S.Ct. 999 (2016).

the stay, but the majority necessarily concluded that the petitioners were likely to prevail on the merits.[35]

As Emily Hammond and I have explained, the strongest argument the petitioners made in support of the stay was the argument that the CPP exceeded EPA's power because it required actions "beyond the fence line."[36] It is highly likely that a majority of Supreme Court Justices concluded that the "beyond the fence line" argument was likely to prevail on the merits. It is theoretically possible but highly unlikely that a member of the majority will change his mind if the Court ever has occasion to address the merits of the CPP.

Without the ability to regulate conduct beyond the fence line, EPA can take no action that would have a significant effect on emissions of carbon dioxide from generating plants—the most important of the greenhouse gases that cause anthropogenic climate change. Congress is unlikely to give EPA greater power to mitigate climate change or to take any other action that would be effective for that purpose.

Even when the Democrats controlled the White House, the House of Representatives and the Senate, they were unsuccessful in their attempt to enact a statute that would have created a cap and trade system for carbon dioxide—the primary mitigation mechanism that the European Union relied on in its unsuccessful attempt to mitigate climate change. The Democratically-controlled Congress was unwilling even to consider imposing a large carbon tax—the mitigation

[35] A court can issue a temporary stay of a rule pending review only if it determines that the petitioners are likely to prevail on the merits. See Kristin Hickman & Richard Pierce, Administrative Law Treatise §20.2 (6th ed. 2019).
[36] Emily Hammond & Richard Pierce, The Clean Power Plan: Testing the Limits of Administrative Law and the Electric Grid, 7 G.W. J. En. & Env. L. 1, 4-5 (2016).

mechanism that would have the greatest beneficial effect.[37] Climate change rarely breaks into the list of the top ten public concerns in opinion polls—it is far below healthcare, immigration, jobs or national security in the list of concerns of the public. The overwhelming rejection of a modest carbon tax in a referendum conducted in environmentally friendly Washington State on November 6, 2018, reflects the reality that the U.S. electorate does not support effective means of mitigating climate change.[38]

The prospects for effective mitigation of climate change are far worse in other countries. Even without the CPP, the U.S. has been far more effective than any other country in mitigating climate change.[39] That success has been driven primarily by the fracking revolution that has made available a large supply of natural gas at low prices. By switching many generating plants from coal to less expensive natural gas, the U.S. has reduced its emissions of carbon dioxide by far more than any other country.

The increasingly hopeless nature of efforts to mitigate climate change is illustrated by a comparison of the global emission trajectory the United Nations (UN) recently found to be required to mitigate climate change with the actual global emissions trajectory predicted by the International Energy Agency (IEA). The UN found that global emissions of carbon dioxide would have to decrease dramatically every year to have a realistic prospect of mitigating climate change.[40] By contrast, the IEA predicts that global emissions will increase every year until 2040.

[37] See David chandler, Carbon Taxes Could Make a Significant Dent in Climate Change, Study Finds, MIT News (Apr. 6, 2018).
[38] Brad Plumer & Lisa Friedman, Climate Change and the Mid-Terms; Five Take Aways, New York Times (Nov. 7, 2018).
[39] See Energy Information Agency, IEA Finds CO2 Emissions Flat for Third Straight Year Even as Global Economy Grew in 2016 (Mar. 17, 2017).
[40] Intergovernmental Panel on Climate Change, Special Report on Global Warming 1.5° C (Oct. 8, 2018).

Most of the increase is expected to come from developing countries that are just beginning to introduce energy-intensive innovations like automobiles and air conditioning that we have long taken for granted.[41]

It is time to refocus our attention from an increasingly futile attempt to mitigate climate change to an increasingly essential attempt to adapt to climate change. It will take a lot of hard work over many years to devise and to implement measures that will allow us to live with the increases in the frequency and severity of forest fires, storms, droughts, floods, and regional famines that will come with climate change.

2. The Trump Administration May Kill CBA

As Professor Farber explains, the cost-only regulatory budget that President Trump is attempting to implement necessarily is based on the assumption that the cba estimates that OIRA and regulatory agencies have relied on for the last thirty-five years were seriously in error. He argues that, "if those assumptions are valid, it would seem to make more sense to abolish cba."[42] He concludes that "the status of cba at present is shaky."[43]

To illustrate the situation, consider the Trump Administration's treatment of the cost of carbon. As Professor Farber describes, an inter-agency task force developed an estimate of the cost of carbon that has been used as the basis for many regulatory actions.[44] Given the high social costs caused by emissions of carbon dioxide, OIRA and the regulatory agencies estimated that the

[41] International Energy Agency, World Energy Outlook 2018.
[42] Farber, infra. Note 1, at ___.
[43] Id. at ___.
[44] Id. at ___.

benefits of many actions that would reduce emissions of carbon dioxide would vastly exceed the costs of the actions. The Trump Administration has expressed the view that the inter-agency estimate overstated the cost of carbon by as much as 96%.[45] If the new estimate is accurate, all of the actions that regulatory agencies have taken to reduce emissions of carbon dioxide required regulated firms to incur costs that are many times greater than the benefits of the actions.

I agree with Professor Farber that the Trump Administration's attempts to manipulate cba to yield estimates of large net costs, rather than large net benefits, attributable to most regulatory actions casts doubt on the future viability of cba as a regulatory tool. As a long-time skeptic about the value of using cba to aid in making regulatory decisions, Professor Farber may welcome this effect of the Trump Administration's idiosyncratic approach to cba. As a long-time supporter of the use of cba as a regulatory tool, I strongly dislike this potential unintended effect of President Trump's deregulatory efforts.

Professor Farber illustrates the potential beneficial effects of cba in his description and analysis of the actions that the Republican Congress took through use of the Congressional Review Act (CRA) to repeal fourteen rules that were recently issued by the Obama Administration. He searched for some reasoning process that could explain why Congress decided to repeal some rules and to leave other rules in effect.[46] He expressed surprise that he could identify no reasoning process that could explain those decisions.[47]

[45] Id. at ___.
[46] Id. at ___.
[47] Id. at ___.

I am not surprised by the apparent irrationality of the congressional process of deciding which rules to repeal. My decades of experience in dealing with politicians in both Congress and the Executive Branch has left me with the firm belief that most politicians make decisions solely based on political salience. If something has happened recently to cause some important constituency to become upset over either arguable underregulation or arguable overregulation in some context, politicians act in response to the views expressed by those constituencies.

Politicians rarely use any rational decision making process to decide whether to act or how to act. Since the political salience of a regulatory dispute does not vary systematically depending on the actual costs and benefits of a potential regulatory action, politicians often make irrational decisions that can be identified easily by cba as either overregulation or underregulation of a risk.

I share the belief of Richard Revesz and Michael Livermore that cba provides a "way of disciplining the wide discretion given to administrative agencies, thereby ensuring that decisions are made based on reasoned analysis and uniform criteria."[48] When presidents required agencies to subject their decisions to cba and to review by the economists at OIRA, agencies responded by giving economists a voice in the decision making process and by retaining the services of some of the best regulatory economists in the world.[49] The introduction of cba as a regulatory tool did not produce an environment in which agencies ceased regulating, as the critics of cba predicted. It produced instead an environment in which the quality of agency decision making improved

[48] Id. at ___. See Richard Revesz & Michael Livermore, Retaking Rationality: How Cost Benefit Analysis Can Better Protect the Environment and Our Health (2008).
[49] Michael Livermore, Cost Benefit Analysis and Agency Independence, 81 U. Chi. L. Rev. 609 (2014).

and in which agencies have issued rules that produce well over a trillion dollars in annual net benefits to society.

The Trump Administration is trying to portray cba as a process that has produced government estimates that a regulatory action will result in hundreds of billions of dollars in net benefits when the action actually will produce hundreds of billions of dollars in net costs. I fear that any success it enjoys in persuading courts or the public that cba is that prone to error will have the effect of eroding public support for cba and encouraging future presidents to abandon the use of cba as an aid to making regulatory decisions.

Conclusion

I hope that some of my predictions will prove to be accurate. I would like to see President Trump fail in his attempt to return the U.S. to its dangerously polluted state in 1960, and I would like to see EPA solve the difficult problems that are posed by its attempt to improve the quality of the scientific evidence on which it relies.

I hope that my pessimistic predictions prove to be inaccurate. I hope that the global community is successful in devising and implementing methods of effectively mitigating climate change, and I hope that the Trump Administration's abuse of cba does not have the unintended effect of eliminating cba as a tool for use in making regulatory decisions.

In any event, I am confident that Professor Farber's excellent discussion of the many issues that are raised by the Trump Administration's deregulatory program will be extremely useful in the process of ensuring that we retain effective means of making rational regulatory decisions.