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Cost-Benefit Analysis Under Trump: A commen on Dan Farber's Regulatory Review in Anti-Regulatory Times

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COST-BENEFIT ANALYSIS UNDER TRUMP: A COMMENT ON DAN FARBER'S *REGULATORY REVIEW IN ANTI-REGULATORY TIMES*

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INTRODUCTION

Dan Farber has written a characteristically thoughtful, informative, and incisive article on the operation of regulatory review in the Trump Administration. In particular, Farber documents the most extensive use of the Congressional Review Act (CRA) in that legislation's history. He demonstrates persuasively that Congress's approach to the CRA seems to have been driven by politics, or public opinion, rather than by any concern with the costs and benefits of the regulations being invalidated. Farber also carefully describes the ways in which the Trump Administration has used or spurned cost-benefit analysis (CBA). As Farber explains, the Trump administration has deviated from standard-practice CBA in a number of respects. It has also introduced a variety of wrinkles into agency practice that, while not precisely affecting the way in which CBA is performed, nonetheless bear on the types of regulations that agencies will promulgate—and the costs and benefits of those regulations—under Trump.

In this short response, I make three points related to Farber's discussion of regulatory review in the Trump era. First, Part I highlights the meaning underlying a number of Trump's most salient pronouncements and unpacks the message they send regarding Trump's view of the administrative state. In Part II, I examine the EPA's economic analysis of the Affordable Clean Energy rule, Trump's replacement for the Obama-era Clean Power Plan. I argue that the EPA's analysis reveals both the value and the robustness of CBA. Finally, Part III concludes with some general thoughts about what Trump's presidency means for the future of CBA and its general utility.

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I. THE TRUMP EXECUTIVE ORDERS

Certain presidents are known not just for their specific policy pronouncements, but for how they reshaped the administrative state writ large. Ronald Reagan will always be known for Executive Order 12,291 and the introduction of cost-benefit analysis into the regulatory state. Bill Clinton is "famous" (in administrative law circles) for Executive Order 12,866, on which modern CBA is based. Barack Obama, in Executive Order 13,563, introduced "equity, human dignity, fairness, and distributive impacts" into the cost-benefit calculus and called for more widespread retrospective review than any president before him. Donald Trump, for his part, has already become notorious for the "Two-for-One" rule and the $0 net regulatory budget contained in Executive Order 13,771.

Farber has done an excellent job of explaining and critiquing the logic—or, rather, the absence of any logic—behind these two "innovations." But it is worth highlighting what they demonstrate about Trump's view of the administrative state and the costs and benefits of government actions. Administrative law has been concerned, from its inception, with the agency costs created by democratically unaccountable bureaucracies. At some level, the founding question of administrative law is whether administrative agencies can be trusted to act in the best interest of their principal—the people—or even the President. Yet with respect to at least the President, this question has largely been answered. We have reached the high water mark of "Presidential Administration":[1] Trump, like many of the presidents who preceded him, has nearly complete authority, should he choose to exercise it, over the actions of the administrative state. The agency heads are his (recent) appointees. So are the heads of OMB and OIRA. Trump has demonstrated a willingness to dismiss cabinet-level officials who displease him. Whether or not there is a "deep state" working to frustrate his intentions,[2] he remains firmly in control of the production of notice-and-comment rulemaking and possesses multiple levers by which he can block any undesired rule. It is no surprise that, for all that he has criticized his subordinates, no part of his administration has yet promulgated a rule of which he did not approve.

Why, then, create an artificial two-for-one rule that hamstrings his administration? If Trump is worried about the number of regulations that his administration will promulgate, he can simply block those regulations directly. Why force agencies to find regulations for repeal in order to per-

1. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246–47 (2001).
2. Evan Osnos, *Only the Best People*, THE NEW YORKER, May 21, 2018.

mit the promulgation of new regulations, and why create incentives for them to repeal minor regulations[3] in order to increase the number of repeals, rather than concentrating on the most important regulations?[4] The same questions might be asked about Trump's $0 regulatory budget as well. If Trump is concerned that agencies will promulgate too many costly rules, he can block those rules directly. Why impose an artificial constraint on agencies' ability to promulgate rules that Trump or his supporters might find congenial?

There are two potential explanations. The first is that Executive Order 13,771 was primarily for show, meant for consumption by the news media and his supporters but not really intended to have any substantive effect. The second is that Trump so completely distrusts the rest of the executive branch, even the officials that he has installed, that he feels these types of rules are necessary to constrain their actions. This would be an extraordinary level of hostility for a sitting president to demonstrate toward his own administration, unparalleled in modern presidential history. The true explanation likely lies somewhere between the two. Regardless, it is remarkable to see an institution with such unfettered power deliberately impose limits upon itself, and particularly irrational and unproductive limits at that.

The $0 regulatory budget also lays bare the one-sided nature of Trump's approach to regulation and his lack of understanding of economics. The $0 regulatory budget instantiates a rule that "for every dollar of costs produced by a new regulation, an agency must simultaneously eliminate one dollar of costs from some other regulation."[5] But what is a regulatory cost? Any economist would understand that costs come in many different flavors. Forcing a firm to spend money reducing pollution is a cost. But premature morbidity and mortality (from pollution, for instance) are costs as well; they just aren't *monetary* costs. Suppose that a regulation required firms to spend $1 million reducing their pollution emissions but was expected to result in fewer deaths and illnesses worth $3 million. Eliminating this regulation would not "save" $1 million in costs. It would *create* $2 million in costs ($3 million - $1 million) by eliminating the health bene-

3. Daniel A. Farber, *Regulatory Review in Anti-Regulatory Times*, 94 CHI.-KENT L. REV. 383 (2019).

4. This approach dovetails with Congress's approach to the CRA. As Farber explained, Congress did not focus its attention on the most significant Obama-era regulations but instead repealed a random assortment of rules, many of them very minor.

5. Jonathan S. Masur, *The Deep Incoherence of Trump's Executive Order on Regulation*, 36 YALE J. ON REG.: NOTICE & COMMENT (Feb. 7, 2017), http://yalejreg.com/nc/the-deep-incoherence-of-trumps-executive-order-on-regulation-by-jonathan-s-masur/ [https://perma.cc/QFA6-JBGM].

fits of reducing pollution. This is basic economics, and basic cost-benefit analysis.

But this is not how Trump thinks of costs. Under the terms of Executive Order 13,771, the only costs that count are monetary costs—the monies that firms must expend to comply with regulations. Trump's Executive Order is meant to control these costs, and only these costs. The costs of people becoming sick and dying simply do not register. Farber has effectively laid out the very strong assumptions that would be necessary to justify such a restriction. As he correctly notes, those assumptions almost certainly do not hold here. But more generally, this regulatory budget should not be understood as Trump's take on CBA, or his modification to CBA. He is directing his agencies to undertake something that, for its one-sidedness, is no longer cost-benefit analysis and has become merely "cost analysis." This should tell us something about the Trump administration's relationship to economics, science, and technocracy.

II. THE CLEAN POWER PLAN[6]

To date, the "signature" regulatory initiative of Trump's presidency has been the proposed repeal of Obama's Clean Power Plan (CPP) and its replacement with the Affordable Clean Energy (ACE) initiative. Farber's article provides an excellent overview of this regulatory move, and he carefully and thoughtfully describes the impact that such a regulatory rollback would have on the environment and human health. Like any economically significant proposed rule, Trump's ACE was accompanied by a preliminary Economic Impact Analysis, which includes a cost-benefit analysis. That CBA is worth exploring in somewhat greater detail, because it sheds important light on how agencies conduct CBA and the types of discretionary choices they must make in doing so.

As Farber adeptly explained, Obama's CPP would have produced two principal types of benefits. First, it would have slowed global warming by reducing the output of greenhouse gases, particularly carbon dioxide.[7] In its final cost-benefit analysis, the Obama EPA estimated that these "climate-related" benefits from the CPP would amount to roughly $20 billion in the year 2030.[8] In addition, by forcing electric power plants to switch to fuels other than coal, the CPP would also have eliminated substantial quantities

6. This Part and the one that follows draw upon Jonathan S. Masur & Eric A. Posner, Cost-Benefit Analysis and Deregulation (Working Paper 2019) (on file with author).

7. U.S. ENVTL. PROT. AGENCY, REGULATORY IMPACT ANALYSIS FOR THE CLEAN POWER PLAN ES-10 (2015) [hereinafter EPA REGULATORY IMPACT ANALYSIS].

8. *Id.* at ES-20, tbl. ES-7.

of other air pollutants that are produced whenever coal is burned.[9] These other pollutants—especially what is known as "particulate matter"—are extremely hazardous to human health. Reducing their emission could lead to reductions many types of fatal and non-fatal respiratory and circulatory conditions. As Farber explained, these types of benefits are referred to as "co-benefits" or "ancillary benefits" because the pollutants involved are not the primary target of the regulation.[10] The Obama EPA estimated that the co-benefits of the CPP would total $24 billion in year 2030, for total benefits of $44 billion.[11] Against an estimated cost of $8.4 billion, the CPP appeared very favorable from a cost-benefit perspective.[12]

In formulating the ACE, the Trump EPA considered and analyzed a variety of options, one of which was a simple repeal of the CPP. This meant that the Trump EPA undertook the task of recalculating all of the costs and benefits of the CPP in order to analyze the economic effects of repealing that rule. This economic analysis thus provides an opportunity to consider how the Trump EPA's evaluation of the CPP's benefits differed from the Obama EPA's evaluation.

There were two primary differences. First, as Farber explained, the Trump EPA decided that it would consider only *domestic* climate benefits—those accruing to people living in the United States—instead of global climate benefits.[13] This move reduced the expected climate benefits of the CPP by approximately 95%, to $500 million.[14]

Second, Trump's EPA changed how it would count the co-benefits from reducing particulate matter, sulfur dioxide, and other ancillary pollutants. Many of those pollutants are separately regulated by other EPA rules, but there are some areas of the country where pollution levels nonetheless exceed the standards set by regulation. In its cost-benefit analysis of the CPP, Obama's EPA had counted *all* reductions in these co-pollutants as benefits. Trump's EPA, by contrast, reasoned that even without the CPP,

9. *Id.* at ES-10.

10. Farber, *supra* note 3, at 412.

11. EPA REGULATORY IMPACT ANALYSIS, *supra* note 7, at ES-20, tbl. ES-7.

12. *Id.* at ES-22, tbl. ES-9.

13. U.S. ENVTL. PROT. AGENCY, REGULATORY IMPACT ANALYSIS FOR THE PROPOSED EMISSION GUIDELINES FOR GREENHOUSE GAS EMISSIONS FROM EXISTING ELECTRIC UTILITY GENERATING UNITS ES-10 (2018) [hereinafter RIA FOR PROPOSED EMISSION GUIDELINES]. It is worth noting, apropos of the previous section, that this decision was almost certainly driven by the newly appointed political heads of the EPA, rather than the career staff who had worked on the CPP. It stands as further evidence that the president has the capacity to control executive agencies without resort to artificial rules.

14. *Id.* at ES-13, tbl. ES-9. Approximately 90% of the costs of climate change will likely be borne by people living outside of the United States. Jonathan S. Masur & Eric A. Posner, *Climate Regulation and the Limits of Cost-Benefit Analysis*, 99 CALIF. L. REV. 1557, 1561–62 (2011).

polluters would eventually be obligated to reduce emissions of these air pollutants in order to comply with other existing regulations.[15] It thus only counted as benefits those marginal reductions that would necessarily take place under the CPP but would not take place under existing law.[16] This reduced the EPA's estimate of the co-benefits from $24 billion (in the CPP) to approximately $8.2 billion.[17]

And yet, even under this negatively revised estimate from the Trump EPA, the CPP turns out to be cost-benefit justified. According to the Trump EPA, repealing the CPP would yield net *costs* of approximately $4.5 billion in the year 2030.[18] The various options presented in the ACE also all fail a cost-benefit test. Repealing the CPP and replacing it with the ACE would yield average net costs ranging from $2.6 to $4.5 billion, depending upon the option selected and the discount rate used.[19] All of this is to say: Trump's own estimate of his own repeal of the Clean Power Plan reveals that the CPP is producing net benefits for American citizens and that repealing it would do far more harm than good. This is a remarkable "admission" by any administration, in any context, and even more remarkable here in the context of Trump's signature regulatory initiative. Without a requirement that agencies conduct CBA, this information might never have been revealed.

III. THE RAMIFICATIONS OF TRUMP FOR COST-BENEFIT ANALYSIS

What, then, does all of this mean for the future of cost-benefit analysis under the Trump administration and beyond? Farber, who has always been one of the most thoughtful critics of CBA, suggests that the Trump experience demonstrates the weaknesses of CBA and confirms that concerns of CBA critics. In the conclusion to his article, he writes:

> Still, for those who were already skeptical of cost-benefit analysis and considered it merely a façade for blocking regulation whenever possible, the Trump experience may do little to quiet their fears. On the contrary, the experience of the Trump Administration may strengthen the argu-

15. RIA FOR THE PROPOSED EMISSION GUIDELINES, *supra* note 13, at tbl. ES-11, 12.

16. To be clear, this might very well be the better approach. The point here is not to assess the merits of these competing approaches but to illustrate the robustness of the analysis of the Clean Power Plan to these discretionary alternatives.

17. RIA FOR THE PROPOSED EMISSION GUIDELINES, *supra* note 13, at ES-12, tbl. ES-9.

18. *Id.* at ES-16, tbl. ES-12. In between the promulgation of the CPP and Trump's re-estimation of its costs and benefits, the estimated costs also fell.

19. *Id.*

> ment that cost-benefit analysis is too malleable to be considered reliable.[20]

At first glance, many readers might be inclined to agree.

Yet with all due respect to Farber, who expertise on this subject is beyond cavil, that assessment seems precisely backwards. Begin with the second sentence of the quoted passage. To be sure, Trump's treatment of the Clean Power Plan makes clear that CBA will almost always require some types of discretionary or theoretical choices and assumptions. It is not a purely mechanistic procedure, divorced from human decision-making. For instance, Eric Posner and I wrote eight years ago that the Obama administration should have more carefully considered its decision to use a global cost of carbon;[21] the same objection applies with equal force to Trump's decision to use a domestic cost of carbon.

However, this does not mean that CBA is infinitely malleable or that it can always be manipulated to fit the political needs of the administrators applying it. Few presidents have had as much incentive or desire to manipulate the results of a cost-benefit analysis as did Trump with the CPP. Nonetheless, the EPA could not devise a credible formulation that would make repealing the CPP appear cost-benefit justified. However much the agency sliced the numbers, it could not help but reveal the undeniable value of Obama's CPP and the harm that would be done from repealing or scaling it back. The information-forcing advantages of CBA were resilient to the Trump administration's machinations.

Next, consider the first sentence of the quoted passage. Whatever else one might say about the Trump EPA's cost-benefit analysis, it most certainly *has not* succeeded in blocking regulation. Trump is proceeding with the CPP rollback and ACE implementation despite the fact that his own EPA's analysis is counseling him to do the exact opposite. Repealing and replacing the CPP is every bit a regulation: it is being promulgated by the EPA as a regulation pursuant to standard notice-and-comment rulemaking procedures.[22] If the point of CBA were to block regulations that are not cost-benefit justified, it should block this regulation. But of course it has not.

A cynic might observe that CBA has been cited as the basis for rejecting regulations that would promote public health and safety—Obama's

20. Farber, *supra* note 3, at 432.

21. Masur & Posner, *supra* note 14, at 1593.

22. *See* Jonathan S. Masur & Eric A. Posner, *Cost-Benefit Analysis and the Judicial Role*, 85 U. CHI. L. REV. 935, 950 (2018).

initial rejection of an ozone regulation is one example[23]—but is not now preventing Trump from issuing a deregulatory regulation that will harm public health and safety. Such a cynic might thus suggest that CBA is really just a one-way ratchet: it prevents agencies from taking actions that will save lives or protect the environment but does not block agencies from taking action that will cost lives or harm the environment.

I do not believe this precise version of cynicism is warranted, however. Instead, the past two years—and the past two decades—have made clear that there are some presidential administrations that take CBA seriously, and some that do not. Obama's administration falls into the former category, Trump's into the latter. But this does not support the case for eliminating CBA; it supports the case for strengthening it. CBA should be judicially enforceable, rather than being left to the whims of the implementing administration.[24] It is not much of a constraint if it can be ignored by the president whenever it is inconvenient. If CBA were backed by the force of law, the Clean Power Plan—and many other regulations like it—might have a shot at surviving the Trump administration.

CONCLUSION

Dan Farber has written a characteristically thoughtful and valuable analysis of the operation of CBA under the Trump administration. As he documents, the Trump Administration has imposed some strange limitations on agency action while ignoring others—most notably cost-benefit analysis. Yet contrary to Farber's argument, this does not provide a reason for discarding cost-benefit analysis. Instead, cost-benefit analysis should be strengthened; it should be given real legal bite and should be enforceable in the courts. The result would be a regulatory state that is guided more by technocratic considerations of what rules will actually increase welfare, and less by the vicissitudes of whoever happens to occupy the Oval Office.

23. John M. Broder, *Obama abandons A Stricter Limit On Air Pollution*, N.Y. TIMES, Sept. 3, 2011, at A1.

24. Masur & Posner, *supra* note 22, at 40.