

The Future of Progressive Regulatory Reform – A Review and Critique of Two Proposals

by

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When this symposium was organized, it was supposed to address the Trump Administration and administrative law. In the legislative sphere, with a Republican majority in the House and Senate there was a real possibility of legislation enacting some form of regulatory reform. While the Regulations from the Executive in Need of Scrutiny Act (REINS Act)¹ passed the House, it seemed a bridge too far for the Senate, as well as being of highly doubtful constitutionality.² More attention was given to the Regulatory Accountability Act,³ especially because it had nominal bipartisan support in the Senate. Professor Levin has done a masterful job in describing that bill and its major shortcomings. There were still other bills reflecting a Republican bent. The Separation of Powers Restoration Act (SOPRA)⁴ would have prohibited courts from deferring to agency interpretations of law and regulation. Although it passed the House, it was shelved in the previous Congress, perhaps in light of the expectation that the Supreme Court will address this issue, or perhaps because of a desire for courts to be able to defer to Trump Administration agency interpretations. The Injunctive Authority Clarification Act (IACA)⁵ introduced in the fall of 2018 and reported out of the House Judiciary Committee would have banned the use of nationwide (or otherwise named universal) injunctions. It too failed to be considered by the full House.

In light of the Democratic control of the House in the new Congress, one can confidently predict that none of these Republican-led regulatory reform bills will be enacted in the foreseeable future. One might stop there, but perhaps it is not out of place to raise the question of Democratic-led regulatory reform bills. While the former might be characterized as anti-regulation regulatory reform, the latter presumably would be pro-regulation regulatory reform. At least before 2021 any pro-regulation regulatory reform bills are even less likely of passage, but it may be instructive to take an initial look at what a pro-regulation regulatory reform bill might contain. To do that, this comment will address two recent proposals.

One is a bill introduced in August, 2018, by Senator Elizabeth Warren – the Anti-Corruption and Public Integrity Act (the Warren Bill).⁶ As its title suggests, its almost 300 pages focuses on potential or perceived corruption, rather than regulatory reform *per se*. Nevertheless,

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¹ H.R. 26, 115th Cong. (2017); S. 21, 115th Cong. (2017).

² See William Funk, Why the REINS Act is Unconstitutional, available at <http://www.progressivereform.org/CPRBlog.cfm?idBlog=3C5ACFC6-C222-F08F-A106B521ABA655E3>.

³ H.R. 5, tit. 1, 115th Cong. (2017); S. 951, 115th Cong. (2017).

⁴ H.R. 76, 115th Cong. (2017); S. 1577, 115th Cong. (2017).

⁵ H.R. 6730, 115th Cong. (2017).

⁶ S. 3357, 115th Cong. (2018). Congressman Pramila Jayapal introduced a companion bill in the House, H.R. 7140, 115th Cong. (2018).

it does include a title on Rulemaking Reform.⁷ The other proposal is contained in an October, 2018, American Constitutional Society Issue Brief written by Professors Daniel Farber, Lisa Heinzerling, and Peter Shane.⁸ The former is a bill with specific provisions and no explanations, although Senator Warren's office did make public a bullet-point summary of the bill that provides some explanations.⁹ The latter is more explanatory of perceived problems and generally how to attack them, but only providing a few specific recommendations. There is some overlap between the two approaches, but the differences are more notable than the similarities. This comment will first address the Warren bill and then address the Farber, Heinzerling, Shane proposal.

I. The Warren Bill

The Warren bill's regulatory reform title contains a number of discrete provisions, several of which relate to increasing transparency.

1. Disclosure of Conflicts of Interest

Section 301 of the Warren Bill would amend Section 553 of the Administrative Procedure Act (APA)¹⁰ by adding disclosure requirements to persons submitting comments in a proposed rulemaking, if those comments included the results of a scientific or technical study that was not publicly available in a peer-reviewed publication. The persons would have to disclose the source of funding for the study, the entity that sponsored the study, the extent to which the study was reviewed by an entity that might be affected by the rule, the identity of such an entity, and the nature of any financial relationship between the person conducting the study and any person with an interest in the rulemaking. Section 302 expands on this new requirement. It requires the agency to make the study available to the public unless it would be exempt from disclosure under the Freedom of Information Act (FOIA).¹¹ It then goes on to prohibit the agency from considering the study in the rulemaking if 20% or more of the funding for the study came from an entity regulated by the agency or if an entity regulated by the agency exercised editorial control over the study. This prohibition is waived if the submitter certifies under standards developed by the National Academy of Sciences that the study has undergone independent peer review. And finally the section requires agencies to describe how it considered scientific evidence in both the notice of proposed rulemaking and in the final rule.

It should be noted that while the disclosure requirement is applied even handedly, the prohibition of consideration of certain studies is one-sided. That is, the disclosure of entities behind the study applies without regard to whether the submitter or the entity behind the study is

⁷ *Id.*, at Title III.

⁸ Available at <https://www.acslaw.org/wp-content/uploads/2018/10/Oct-2018-APA-Farber-Heinzerling-Shane-issue-brief.pdf>.

⁹ Available at <https://www.warren.senate.gov/imo/media/doc/2018.08.21%20Anti%20Corruption%20Act%20Summary.pdf>.

¹⁰ 5 U.S.C. § 553.

¹¹ Interestingly, the bill actually states that the study must be made available to the public "unless disclosure is prohibited under Section 552." Section 552, of course, never prohibits disclosure, *see Chrysler Corp. v. Brown*, 441 U.S. 281 (1979), but presumably the intent was to exempt from the new disclosure requirement that which would be exempt under the FOIA.

regulated by the agency. Thus, it applies both to public interest groups as well as to industry. This is not so for the disqualification from consideration requirement. Studies funded by public interest groups, government entities, and other non-regulated entities can be considered by the agency even though they were not independently peer reviewed. However, studies funded by persons subject to regulation by the agency are disqualified unless they are independently peer reviewed. Why the distinction? The bullet-point fact sheet issued by Senator Warren's office describes these provisions as de-politicizing the rulemaking process and increasing the transparency of industry efforts to influence federal agencies. Of course, the ban on consideration of industry studies does not increase transparency, but presumably it does "restrict the ability of corporations or industry to . . . influence rulemaking."¹² Apparently, the distinction reflects a belief that industry may buy or edit studies to support their position but public interest groups and government would not. We all can understand that those subject to regulation would generally prefer less regulation and so have an interest, usually a financial interest, in providing evidence to support less regulation. Nevertheless, one may presume as well that generally an issue-oriented public interest group representing regulatory beneficiaries would desire stricter regulation and therefore have an interest in providing evidence supporting more regulation. Even if the former potential conflict were more prevalent,¹³ it is not clear why one should make an irrebuttable presumption that non-peer reviewed studies funded by representatives of regulatory beneficiaries are always worthy of consideration but those of regulated entities are never worthy of consideration. Is the Sierra Club inherently more trustworthy than Apple, the National Association of Attorneys General versus Nike?

Whether there is really a problem here requiring solution is unclear. Presumably, if anyone were serious about this bill, there would be hearings that might establish that there is a problem or an appearance of a problem. In addition, such hearings and deliberation might address some questions raised by the drafting. For example, what is "an entity regulated by the agency"? For example, states may obtain grants from the government, and those grants may be subject to conditions established by regulations. Are states "regulated by the agency" adopting the regulations? Is an association of regulated entities an entity regulated by the agency? If Exxon's funded study cannot be considered by the Environmental Protection Agency (EPA), can a study funded by the American Petroleum Institute, the national trade association of petroleum companies, be considered? The Institute is not regulated by EPA. What qualifies as a "scientific or technical study, or any other result of scientific research"? Would the results of a poll qualify?

2. OIRA Review

Sections 303, 304, and 306 of the Warren Bill would address review of agency regulations by the Office of Information and Regulatory Affairs (OIRA) under Executive Order 12866.¹⁴ Continuing the idea that more disclosure is good, the Warren Bill would require agencies to place in the rulemaking docket at the time a proposed or final rule is published the

¹² See Ella Nilsen, *Sen. Elizabeth Warren Just Unveiled a Dramatic Plan to Eradicate Washington Corruption*, available at <https://www.vox.com/2018/8/21/17760916/elizabeth-warren-anti-corruption-act-bill-lobbying-ban-president-trump>.

¹³ I am not aware of any empirical evidence on the subject, but at least in theory hearings on the bill, if they were to occur, might find such evidence.

¹⁴ Regulatory Planning and Review, E.O. 12866, 58 Fed. Reg. 51735 (September 30, 1993).

substance of any changes made between the draft sent to OIRA and the rule as published, and stating whether the change was made at the request of OIRA, another agency, or a member of Congress.

It is worth noting that the Executive Order already requires agencies, once a regulatory action has been published, to make public what it supplied to OIRA for review, identifying what changes were made to the draft provided to OIRA and what was ultimately published, and identifying which of those changes resulted from suggestions from OIRA. Apparently, the only substantive change made by the Warren Bill would be to include identification of other agencies or members of Congress who were behind changes to the action. Of course, the requirements of the Executive Order have been largely ignored in practice. Placing the requirements in statute might induce greater compliance and perhaps would be judicially enforceable.

If after sending a proposed or final rule to OIRA, the agency decides not to adopt the proposed or final rule, the Warren Bill, going beyond the Executive Order, would require the agency to publish in the Federal Register a statement explaining why it decided not to adopt the proposed or final rule and whether its decision was based in any way on a request by or input from OIRA, another agency, a member of Congress, any organization or person, or a state, local, or tribal government. An agency would be required to make the same statement with respect to any decision not to finally adopt a rule that had been proposed, even if it had not been sent to OIRA for review.

This requirement would appear to require agencies to provide the equivalent of a preamble to an adopted rule when it decides not to adopt a rule. In so doing, it would likely make it easier for persons to challenge the failure to act by attacking the reasoning in the explanation for why no action was taken. Presumably, agencies will be adverse to such a requirement, and the Warren Bill, as drafted, seems to provide a major loophole. The requirement is triggered only when an agency “withdraws a regulatory action.”¹⁵ Thus, if an agency just sits on its hands indefinitely and takes no action affirmatively “withdrawing” the action, the requirement to explain itself is not triggered. Although agencies occasionally do formally withdraw rulemakings, more common is just abandonment or assigning a priority that effectively assures it will never be adopted.

Section 306 would prohibit OIRA personnel from engaging in communications or meeting with any person concerning a regulatory action unless that person is “employed by the Executive Branch of the Federal Government.” In addition, OIRA personnel may not engage in communications or meet with agency personnel concerning a regulatory action before the agency submits the action to OIRA for review. The Warren Bill would set deadlines for OIRA reviews of *significant* regulatory actions. OIRA would be required to complete its review within 45 days from when OIRA receives the rule with the possibility of one 30-day extension if justified by a written public statement. If OIRA waives review of the significant regulatory action, “or does not notify the agency in writing of the results of the review” within the time frame allowed, the agency “may” publish the significant regulatory action.¹⁶

¹⁵ S. 3357, Sec. 304 (b)(1).

¹⁶ S. 3357, Sec. 306 (c)(3).

The bullet-point fact sheet explains that this section “eliminate[s] loopholes that allow corporations to tilt the rules in their favor and against the public interest.”¹⁷ Specifically, it suggests that inter-agency review is “a tool for corporate abuse” and that this provision would address that abuse by “establishing a maximum 45-day review period, and blocking closed-door industry lobbying at [OIRA].”¹⁸

This section raises a number of questions. Assuming that “closed door” industry meetings with OIRA regarding proposed rules is contrary to the public interest,¹⁹ the Warren Bill would abandon its usual tactic of requiring disclosure in favor of a flat ban. This would certainly change current practices. Whether it would have the effect desired is another question. Today, if Exxon’s lobbyist wants to skip over EPA and go higher up, she could attempt to persuade OIRA. If, however, OIRA is banned from communicating with Exxon (and presumably it means not reading a letter from Exxon, once it is recognized that the letter concerns a particular regulatory action – and how do you police that?), the lobbyist may simply go to someone else in the Executive Office of the President or to the Secretary of Energy or Interior and have them carry the message to OIRA. Here it would seem disclosure of the fact and substance of communications with anyone outside the executive branch regarding a particular regulatory action would have more salutary effects. Indeed, although not required by the Executive Order, under current practices OIRA places on a publicly available website who meets with whom and includes any written material that was presented. This information has been used by watch dog public interest groups.²⁰ This could be codified in law and strengthened to require a description of any oral communications. Moreover, it would be beneficial to codify current practice of requiring the presence of personnel from the agency involved in the regulatory action in any OIRA meeting with persons outside the agency.

It is not clear what the purpose is of the ban on OIRA meeting or communicating with agency personnel regarding a regulatory action before the action is submitted to OIRA. Perhaps it is designed to keep OIRA from nipping a regulatory action in the bud or to keep OIRA from influencing even the draft sent to it. But, again it would seem disclosure of the meeting or communication would be preferable to a flat ban. Agency personnel might well like to know ahead of time what issues OIRA is concerned about, so that the agency can address them rather than be caught blind sided. Such pre-submission communication might well expedite the later review.

The deadlines in the Warren Bill make a modest change to what Executive Order 12866 already provides.²¹ The Order allows OIRA 90 days, with a possible one time 30-day extension, to review significant regulatory actions. The Warren Bill would reduce the 90 days to 45 days. The difference between 45 and 90 days for normal consideration is relatively insignificant in the timeline for significant regulatory actions, which are invariably extended affairs without even

¹⁷ *Supra* note 9, at 3.

¹⁸ *Id.*

¹⁹ See Center for Progressive Reform, *Politicizing the Regulatory Process: OIRA's Meetings with Industry Skew Its Review of Regulations*, available at <http://www.progressivereform.org/OIRASpecInterests.cfm>.

²⁰ See *id.*

²¹ E.O. 12866, Sec. 6 (b)(2).

considering OIRA review. The real problem has been meeting even the 90-day deadlines in the Order. In the Bush and Obama administrations, it was not uncommon for rules to reside at OIRA for over a year.²²

The Warren Bill's apparent response to this problem is to provide that after the deadline for OIRA comments passes, the agency "may" publish the action notwithstanding OIRA's lack of comment. However, that adds nothing to what is already in the Executive Order, which only forbids publication until OIRA waives commenting, has finished commenting, or has missed the deadline. That is, *under the Order* agencies are free to publish their regulatory actions if OIRA does not respond by the deadline. Nevertheless, agencies almost never publish their actions when OIRA fails to comment within the deadline despite the Order's permission to then publish, and under the Warren Bill there would be no reason for them to change this way of proceeding. In one sense, this could be fixed by changing "may" to "shall" and providing for judicial review of compliance with this provision. But it is not that simple. In practice, communications between the agency and OIRA are continuing in nature. OIRA comments formally, or more frequently informally, within the deadline to the agency, asking for changes or more information. The agency responds to OIRA with more information or maybe some, but not all, of the recommended changes. OIRA responds by asking for still more information or not accepting the limited number of changes. The Warren Bill simply does not address this element of delay, which probably has been the primary source of delay. Nothing in the Warren Bill requires the agency to publish the regulatory action after OIRA has commented or requested more information. Indeed, the Warren Bill is silent on the issue altogether. In short, the Warren Bill does absolutely nothing about the problem of delay of rules resulting from the OIRA review process.

3. Submitting False Information to Agencies in Rulemaking

Interestingly, the Warren Bill adds a criminal provision to Section 553 of the APA.²³ The provision would make criminal submitting knowingly false material statements in a rulemaking. Senator Warren's prepared remarks for a speech at the National Press Club when she introduced her bill had this to say about this provision. "When someone lies to a court, we call it 'perjury.' But, too often, when companies lie to regulatory agencies during the rulemaking process, they just call it 'analysis' – and no one bats an eye. . . . Enough of this garbage. Prosecute companies that knowingly mislead government agencies."²⁴

Why such a provision might be necessary is doubtful. First, it would seem that 18 U.S.C. § 1001, which criminalizes the making of knowingly false material statements "in any matter within the jurisdiction of the executive . . . branch," already would cover knowingly false material statements made by a commenter in a rulemaking. Second, no one has identified that there have been false material statements in rulemakings. Watchdog groups have not suggested that false material statements are being made. Rather, the claim seems akin to President Trump's claim of millions of illegal votes for Hillary Clinton in the 2016 election. What has been a

²² See Curtis A. Copeland, *Improving the Timeliness of OIRA Regulatory Review* (Dec. 3, 2013), available at <http://acus.gov/report/oira-review-report>.

²³ S. 3357, Sec. 308.

²⁴ Senator Elizabeth Warren remarks at the National Press Club on August 21, 2018, at 8, available at <https://www.warren.senate.gov/imo/media/doc/2018.08.21%20Speech%20on%20Corruption.pdf>.

problem is the filing of comments under false names,²⁵ but it is doubtful whether the Warren Bill's provision would reach submitting comments under a false name, because the identity of the commenter would normally not be material to the rulemaking.

4. Establishing the Office of Public Advocate

The Warren Bill would create the Office of Public Advocate within the Office of Public Integrity created by the Ethics in Government Act of 1978.²⁶ The office would be headed by the National Public Advocate, whose job it would be to assist individuals in resolving conflicts with agencies and in participating in the rulemaking process, to assist agencies in soliciting public participation in the rulemaking process, and to propose changes to mitigate problems the public has in dealing with agencies. Unlike the Chief Counsel of the Office of Advocacy in the Small Business Administration, who directly comments in rulemakings affecting small business, the National Public Advocate would not directly comment on rulemakings. The National Public Advocate would be appointed by the President with the advice and consent of the Senate, could not have been a federal employee for the past two years, cannot be a federal employee for five years after leaving the job, and the Advocate *would not be an employee of the government* while serving as the Advocate, according to the Warren Bill.

Interest in increasing public participation in rulemaking is not new. In 2002, Congress passed the E-Government Act,²⁷ Section 206 of which called for agencies to enhance public participation in rulemaking through electronic means. Subsequently, the eRulemaking Program was established as an interagency initiative based in the EPA,²⁸ which led to the creation of Regulations.gov where anyone may file comments on rulemakings. But the physical ability to file comments is only the first step. The next steps are enabling members of the general public to be able as a practical matter to learn about proposed rulemakings that may affect them and then to be able to make comments that are meaningful to the agency. Both agencies²⁹ and non-governmental actors³⁰ have been working on these steps. Presumably, the National Public Advocate would be an additional resource in this endeavor, but it is not clear what the Advocate would add to the current initiatives. More problematical are the provisions designed to insulate the Advocate from possible conflicts. It is not clear why bars on past and future federal employment are necessary or advisable. The best person for the job may be someone who has been outstanding in helping the public participate in rulemaking in the person's agency. The prohibition on the Advocate being a federal employee at all, even after being appointed by the President with the advice and consent of the Senate, is unprecedented, to say the least, and probably unconstitutional.

²⁵ See, e.g., James V. Grimaldi and Paul Overberg, Millions of People Post Comments on Federal Regulations. Many Are Fake, Wall Street Journal, available at <https://www.wsj.com/articles/millions-of-people-post-comments-on-federal-regulations-many-are-fake-1513099188>.

²⁶ S. 3357, Sec. 309.

²⁷ E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899 (2002).

²⁸ See <https://www.fdms.gov/fdms/public/aboutus>.

²⁹ See, e.g., Administrative Conference of the United States, Recommendation No. 2011-8, Agency Innovations in E-Rulemaking, available at <https://www.acus.gov/recommendation/agency-innovations-e-rulemaking>.

³⁰ See, e.g., <https://www.lawschool.cornell.edu/cei/index.cfm>.

5. Private Attorneys General

Probably building off the citizen suit provisions in several environmental statutes,³¹ the Warren Bill would provide that any person may bring an action against any person violating a final rule adopted by an agency. Unlike the environmental citizen suit statutes, however, the Warren Bill states that the person may bring the action on behalf of the United States Government and in the name of the United States Government. This is of doubtful constitutionality, and it is not clear why the Warren Bill so provides. As long as the person bringing the suit has constitutional standing, allowing any person to sue any person violating a federal rule would merely make general what is now only available for certain specific laws. While the government does not have to show standing to bring suit against violators, merely saying that “any person” can sue in the name of the United States will not solve the standing problem for the private litigant.

Somewhat like the environmental citizen suit provisions, the person bringing the action must give notice to the government when it brings such a suit, and the government has 60 days within which to decide whether it wishes to take over the action. Unfortunately, from a drafting perspective, the Warren Bill does not identify what relief such a suit may obtain. There is no mention of injunctive or declaratory relief. If violation of the regulation was subject to a civil penalty, the Warren Bill implies that the person could seek that relief, because it speaks of the successful plaintiff receiving a portion of any civil penalty, as well as reasonable attorney’s fees.

The Warren Bill would also, like the environmental citizen suit provisions, allow the person to sue the government if an agency failed to comply with any requirement under the Warren Bill. Of course, the APA allows a person to challenge an agency’s failure to comply with a statute, so the question is what this provision adds. Perhaps it is intended to do away with questions of zone of interests, exhaustion, finality, and ripeness. However, it could not do away with the basic requirements of constitutional standing, which in many cases might prove fatal to a challenge. For example, if a person sued OIRA for failing to meet the statutory deadline for commenting on a regulatory action, it is not clear how the person would have standing, inasmuch as currently drafted the failure to meet the statutory deadline does not legally delay publication of the rule.

Broadening the citizen suit provision of the environmental statutes to all regulatory programs could have huge effects. Certainly, citizen enforcement of the environmental statutes has had significant effects, as has injured parties’ enforcement of the securities laws and anti-trust laws. Enabling workers to bring suit against their employers for violating Occupational Safety and Health Administration (OSHA) regulations, for example, would provide a major supplement to OSHA’s enforcement efforts. Nevertheless, this provision does not seem to have been well vetted or thought out. Nor does it do all of what the bullet-point fact sheet suggests – “to hold agencies accountable for failing to complete rules or enforce the law.”³² Nothing in the Warren Bill in this provision or elsewhere requires agencies “to complete rules or enforce the law.” Moreover, allowing persons to sue an agency for any violation of the Warren Bill would

³¹ See, e.g., 42 U.S.C. § 7604 (Clean Air Act).

³² See *supra*, note 9, at 3.

likely have unintended consequences that would not be pro-regulation. For example, a suit challenging an agency's allowance of a non-peer reviewed study to be part of the record of a rulemaking could delay the rulemaking for a considerable period of time while the court or courts decide whether the particular study could be included in the record.

6. Judicial Review

The Warren Bill would amend Section 706 of the APA.³³ First, it would purport to codify *Chevron* deference³⁴ if the statute the agency administers is “silent or ambiguous”³⁵ and the agency adopted its interpretation after following the procedures of Sections 553 or 554 of the APA. Presumably, this proposed codification is a response to rumors that the Supreme Court might overrule *Chevron*, or perhaps it is just a stick in the eye of those members of Congress supporting SOPRA. There is no comparable saving of *Auer* deference.³⁶ Interestingly, all adjudications not following the procedures of Section 554 would not be eligible for this statutorily required deference. It is not clear in the statute that the codified *Chevron* deference is exclusive. If the provision is intended to be exclusive, it is not clear why Senator Warren would wish to cut back on the situations in which *Chevron* deference could apply. If the provision is not intended to be exclusive, presumably courts could continue to grant deference to interpretations made in informal adjudications if they met the *Mead* test.³⁷

Section 706 states that a court “shall compel agency action . . . unreasonably delayed.”³⁸ Courts have struggled with how to determine whether a delay is unreasonable, even if they follow the D.C. Circuit's so-called TRAC factors.³⁹ The Warren Bill would define “unreasonably delayed” to include not publishing a notice of proposed rulemaking within one year from the date of a statute requiring the agency to adopt a rule (if the statute did not specify a time within which the rule would have to be adopted); not issuing a final rule within one year of the publication of the proposed rule; and not implementing a final rule within one year of its implementation date as published in the Federal Register or, if no implementation date was published, within one year of the publication of the final rule. A one-year deadline for proposing a rule and a one-year deadline for adopting a final rule after publication of a proposed rule is very ambitious to say the least. Many significant regulations would not make those deadlines. Of course, even if one were to sue after passage of one of these deadlines, what the court could or would order is another question. Presumably a court order could speed things along, but immediate publication of a proposed or final rule would be highly unlikely. At the same time, allowing numerous suits upon such a short deadline might increase agency costs substantially.

³³ S. 3357, Sec.311.

³⁴ See *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

³⁵ Does anyone know of a statute that is “silent”? Silent on an issue perhaps, but not just silent.

³⁶ See *Auer v. Robbins*, 519 U.S. 452 (1997).

³⁷ See *United States v. Mead Corp.*, 533 U.S. 218 (2001).

³⁸ 5 U.S.C. § 706 (a).

³⁹ See *Telecommunications Research & Action Center v. Federal Communications Commission*, 750 F.2d 70 (D.C. Cir. 1984) (identifying six factors to be considered in determining whether agency action is unreasonably delayed).

What is meant by a deadline for “implementing” a final rule is unclear. When an agency adopts a rule, a thirty-day delayed effective date is the norm for substantive regulations, and often when a regulation requires new investment and development, a much longer delayed effective date is allowed, but I am not aware of any complaints that agencies are setting effective dates that are unreasonably long. When new administrations come in, they often further delay or attempt to further the delay the effective dates of rules not yet in effect. Also, when agencies are sued, they sometimes stay the otherwise effective date of the regulation pending judicial review. Both of these have been a source of some litigation,⁴⁰ and perhaps that is what this provision is aimed at. If so, it probably should be drafted with more precision. Or perhaps the provision is aimed at lack of enforcement of a regulation. If so, it is awkwardly worded, and it is difficult to see how it would work.

7. Stays of Agency Action

Section 705 of the APA⁴¹ allows agencies to stay the effective date of a rule pending judicial review. It also allows courts to stay the effective date of a rule in order to prevent irreparable injury pending conclusion of the review proceedings. The Warren Bill would repeal the authorization for agency stays. Agencies do not usually grant such stays, and recently the Trump Administration has cited this provision in ill-fated attempts to delay the effectiveness of rules adopted in the Obama administration.⁴² Thus, deleting this part of Section 705 probably is well advised. In addition, however, the Warren Bill would restrict the ability of courts to issue a stay of a rule adopted after notice and comment by saying that the only court that could issue a stay is “the reviewing court to which a case may be taken on appeal from, or on application for certiorari or other writ to a reviewing court.”⁴³ This dense, if not impenetrable, language is actually copied from Section 705 except that it omits Section 705’s authorization to the “reviewing court” to issue a stay. That is, Section 705 authorizes stays issued by not only the reviewing court (the court to which a case is brought challenging the agency action), but also the reviewing court to which an appeal may be taken from the initial reviewing court as well as the Supreme Court on application for certiorari. As drafted, the Warren Bill would deny the initial reviewing court the ability to issue a stay, and only the appellate court or the Supreme Court could issue a stay of the rule. Why? The bullet-point fact sheet states that the bill limits “abusive injunctions from rogue judges by ensuring that only Appeals Courts, not individual District Court judges, can temporarily block agencies from implementing final rules.”⁴⁴ One wonders who these rogue judges are. Presumably, from Senator Warren’s perspective, not the judges who enjoined President Trump’s travel ban, Homeland Security’s repeal of DACA, or the various attempts by agencies in the Trump administration to delay the effective date of rules already in effect. One might consider whether only three-judge courts should be able to issue injunctions against agency regulations. The theory might be that to stop an agency from enforcing its regulations is such an important act that more than one judge should be required to take that step. Indeed, for years the law required three-judge district courts whenever there was a challenge to

⁴⁰ See, e.g., *Air Alliance Houston v. EPA*, 906 F.3d 1049 (D.C. Cir. 2018).

⁴¹ 5 U.S.C. § 705.

⁴² See, e.g., *Bauer v. DeVos*, 325 F.Supp.3d 74 (D.D.C. 2018).

⁴³ S. 3357, Sec. 307.

⁴⁴ *Supra*, note 9, at 3.

the constitutionality of a state or federal law.⁴⁵ It was repealed in 1976 upon the conclusion that it was unnecessary.⁴⁶ Whatever the merits of requiring a panel of judges to decide whether to enjoin an agency's regulation, it should apply not just to requests for a stay pending judicial review but to all requests for injunctions, temporary or permanent, which have a much greater impact on the agency's regulation than a temporary stay. It is doubtful that Senator Warren or progressives generally would wish to shackle the "rogue" judges who enjoin agency regulations (or repeals of regulations) of which progressives disapprove.

8. Expanding Rulemaking Notifications

The Warren Bill would amend Section 553 of the APA to require agencies to notify "interested parties" of the publication of a proposed or final rule within two days of publication in the Federal Register.⁴⁷ It also would require the Director of the Government Printing Office⁴⁸ to establish a process by which interested parties would receive the notice by "e-mail or postal mail."⁴⁹ Section 553 currently refers to "interested persons," not "interested parties." Probably the Warren Bill's use of the latter term is inadvertent and is not intended to have substantive effect. As for the merits of such required individual notification, in this day it would seem an easy task to have an automatic electronic distribution of notice to persons who have identified themselves to the agency as wishing such notification. Absent persons identifying themselves, however, it might be difficult for the agency on a case-by-case basis to determine who might be an interested person and what their address is. Whether the Government Publishing Office is the best place to develop the process for notification is unclear.

9. Petitions for Rulemaking

Section 553 (e) of the APA provides that agencies must allow interested persons the right to petition for the issuance, amendment, or repeal of a rule.⁵⁰ As a practical matter, however, while a person may have a right to make such a petition and even eventually to receive a response,⁵¹ most petitions disappear into a black hole. The Warren Bill would amend the section to require the agency to provide a response to a petition within 30 days explaining whether it is "engaging in the requested" action or not, and if not, why not.⁵² This provision would only be triggered, however, if the agency receives more than 100,000 signatures on the petition within a 60-day period.

The timing aspects in this provision are unclear. The petitioners have 60 days to obtain 100,000 signatures, but the agency only has 30 days from when it receives the petition to provide its response. For example, on day one the agency receives a petition from the Sierra Club asking the agency to engage in a rulemaking. Over the next 60 days 100,000 members of the Sierra

⁴⁵ See Three Judge Court Act of 1910, ch. 309, § 17, 36 Stat. 557 (1910).

⁴⁶ See S.Rep. No. 94-204, 94th Cong. (1976); Pub. L. No. 94-381, 90 Stat. 1119 (1976).

⁴⁷ S. 3357, Sec. 312.

⁴⁸ The Government Printing Office has since 2014 been the Government Publishing Office.

⁴⁹ *Id.*

⁵⁰ 5 U.S.C. § 553 (e).

⁵¹ See 5 U.S.C. § 555 (e), requiring "prompt notice" of a denial of a petition.

⁵² S. 3357, Sec. 313.

Club also sign the petition. As currently drafted, the agency should have responded within 30 days of the initial petition. It would make more sense to start the 30 day period for the agency to respond upon the receipt of the 100,000 signatures. It is also unclear how a person signs a petition for purposes of this provision. Would an email to the agency saying, “I sign onto the petition filed by the Sierra Club” be sufficient?

The idea of forcing the agency to take more seriously and actually address in a timely manner a petition about which 100,000 people care enough to sign onto seems justifiable. Whether 30 days is enough time (and remember the provision providing for judicial review of any violation of the Warren Bill) for the agency to be able to make a considered response is questionable. More problematic is what happens when the agency says it is engaging in the requested action, but thereafter changes its mind or at least back burners its engagement. The Warren Bill’s definition of “unreasonably delayed” does not address this problem.

10. Congressional Review Act

The Congressional Review Act⁵³ (CRA) provides that if Congress by joint resolution vetoes an agency rule, the rule may not be reissued “in substantially the same form,” and a new rule that “is substantially the same” may not be issued.⁵⁴ The Warren Bill would repeal this restriction.⁵⁵ The idea behind the CRA restriction on reissuing the vetoed rule or issuing a new rule that is substantially the same presumably is to assure that the agency will not evade the effect of the congressional veto by simply adopting the same rule again only slightly changed. However, in practice what “substantially the same” means is unclear. What if Congress is upset by a particular aspect of the rule and so vetoes it. May the agency issue the rule minus that particular aspect? This is a real issue that agencies are facing. The Warren Bill’s repeal of the provision would solve this problem. Would it open the floodgates to the agency flouting Congress’s will by reissuing vetoed rules? Clearly not. There are lots of reasons why agencies would be extremely reluctant to go contrary to what not only Congress rejected but also what the President rejected as well. Perhaps most interesting is the Warren Bill’s otherwise acceptance of the CRA, especially when one considers that its origin was and its use is anti-regulation.

11. Cost Benefit Analysis

The Warren Bill would require that if an agency performs a cost-benefit analysis in the course of a rulemaking, the agency must take into account the benefits of the regulation to the public, including the non-quantifiable benefits.⁵⁶ Then, the Warren Bill would require the agency to “adopt a regulation that prioritizes benefits to the public, including nonquantifiable benefits.”⁵⁷

⁵³ 5 U.S.C. § 801 *et seq.*

⁵⁴ 5 U.S.C. § 801(b)(2).

⁵⁵ S. 3357, Sec. 314.

⁵⁶ S. 3357, Sec. 315.

⁵⁷ *Id.*

E.O. 12886 currently requires agencies to consider the benefits, including the non-quantifiable benefits, when they perform cost-benefit analyses,⁵⁸ and, although agencies tend to quantify what some might consider unquantifiable benefits (such as the value of a human life), agencies certainly do take account of benefits to the public in their cost-benefit analyses. Thus, the Warren Bill's requirement to take account of the benefits would simply be codifying (subject to judicial review) what is current practice. It is the second part of this provision that is new and more questionable. As an initial matter, it is not clear what it means to adopt a regulation that "prioritizes benefits to the public." Does it mean prioritize benefits to the *public* over benefits to others? If so, who is the public and who are the others? Does it mean prioritize benefits over costs? If so, does that mean that even if a regulatory alternative would impose more costs on the economy than it would provide benefits, the alternative would need to be adopted because benefits are inherently worth more than equivalent costs? Or is it an awkward way of requiring the regulatory alternative that provides the greatest amount of benefits, whatever the cost? The bullet-point fact sheet does not mention this provision.

In the past, attempts to make an across-the-board requirement to adopt the regulatory alternative that maximizes the net benefits to society, that imposes the least cost, or that is most cost effective have not been successful. Any number of political considerations may have come into play to defeat these proposals. However, any such across-the-board requirement would effectively overrule specific requirements Congress placed in various statutes applicable to particular rulemakings. This fact by itself may suggest the reluctance of Congress to create a general rule. Such a consideration would likely arise here as well, even if the provision was clarified as to its actual effect.

12. Negotiated Rulemaking

Ever since the Administrative Conference of the United States (ACUS) adopted a recommendation favoring the use of negotiated rulemaking in certain circumstances,⁵⁹ there has been a lively literature extolling the benefits of such rulemaking or doubting its benefits.⁶⁰ Congress occasionally required that particular rulemakings be conducted through negotiated rulemaking, although those requirements usually ignored the caveats contained in the ACUS recommendation. In 1990, Congress adopted the Negotiated Rulemaking Act (NRA), providing general guidelines for the use of negotiated rulemaking.⁶¹

The Warren Bill would radically alter the NRA in two ways, effectively repealing it. First, only federal, state, local, and tribal governments could participate in the negotiation. Private entities and persons could not be part of the negotiation. Second, only "information negotiations between Federal, State, local, or tribal governments" would be subject to the NRA.

⁵⁸ See E.O. 12866, Sec. 6 (a)(3)(C)(i).

⁵⁹ See Administrative Conference of the United States, Recommendation 82-4, 47 Fed. Reg. 30,708 (July 15, 1982).

⁶⁰ See, e.g., Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255 (1997) (questioning whether negotiated rulemaking has been a success); Philip J. Harter, *Assessing the Assessors: The Actual Performance of Negotiated Rulemaking*, 9 N.Y.U. ENVTL. L.J. 32 (2000).

⁶¹ See 5 U.S.C. § 561 *et seq.*

The Warren Bill would also repeal every provision of law mandating the use of negotiated rulemaking.

What problem the Warren Bill thinks it is responding to here is unknown, although the bullet-point fact sheet states that the provision is “to stop industry from delaying or dominating the rulemaking process by ending the practice of inviting industry to negotiate rules they have to follow.”⁶² However, there is little or no evidence that industry delays or dominates the rulemaking process in negotiated rulemaking anymore than it does in ordinary rulemaking, and there is some evidence to the contrary. That is, the case studies of particular negotiated rulemakings, even by those skeptical of negotiated rulemaking, have found that the presence of public interest representatives with an equal vote on the negotiating committees actually resulted in lessened industry power in the rulemaking.⁶³ One article written by an industry representative, who concluded that industry generally has problems with negotiated rulemaking, flatly stated: “environmental group participants have an advantage at the negotiating table.”⁶⁴ And the literature critical of negotiated rulemaking fails to include any mention of industry domination of the negotiating process. Indeed, where agencies voluntarily choose to use negotiated rulemakings, it is usually the pro-regulation entities in the agency that support their use. For example, EPA and OSHA have both used negotiated rulemaking to adopt new rules restricting industry, where they had been unable to adopt them through traditional means.⁶⁵ The evidence would all seem to suggest that the Warren Bill’s gutting of the NRA would be counterproductive to her pro-regulation position.

Even if there were a problem with negotiated rulemakings, the Warren Bill does nothing to address it. Negotiated rulemaking occurred before the NRA was passed, and nothing in the NRA requires the use of the NRA as a condition to an agency using negotiated rulemaking. The NRA provides a suggested procedure for negotiated rulemaking, but it does not mandate the use of those procedures.⁶⁶ It specifically provides that nothing in the NRA is intended to limit agencies’ use of negotiated rulemaking outside the bounds of the act.⁶⁷ Consequently, its repeal (or its radical transformation as envisioned in the Warren Bill) would not impede any agency that wishes to use traditional negotiated rulemaking. And nothing in the Warren Bill precludes agencies from using negotiated rulemaking for substantive rules and including industry and public and private stakeholders from being members of the negotiating committee.

⁶² *Supra*, note 9, at 3.

⁶³ See, e.g., Daniel P. Selmi, *The Promise and Limits of Negotiated Rulemaking: Evaluating the Negotiation of a Regional Air Quality Rule*, 35 ENVTL. L. 415 (2005); William Funk, *When Smoke Gets in Your Eyes: Regulatory Negotiation and the Public Interest – EPA’s Woodstove Standards*, 18 ENVTL. L. 55 (1987).

⁶⁴ Ellen Siegler, *Regulatory Negotiations and Other Rulemaking Processes: Strengths and Weaknesses from Industry’s Viewpoint*, 46 DUKE L.J. 1429, 1436 (1997).

⁶⁵ See, e.g., Final Rule, Safety Standards for Steel Erection, 66 Fed. Reg. 5196 (January 18, 2001); Final Rule, Standards of Performance for New Stationary Sources; New Residential Wood Heaters, 53 Fed. Reg. 5860 (February 26, 1988).

⁶⁶ See William Funk and Jeffrey S. Lubbers, *FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK*, 5TH ED., at 968 (ABA Press 2016).

⁶⁷ See 5 U.S.C. § 561.

The Warren Bill's limitation in the NRA of regulatory negotiation to "information negotiations" is entirely unclear as to what it would apply. The bullet-point fact sheet gives no hint as to what is intended to be covered.

Finally, the Warren Bill's repeal of all statutorily mandated regulatory negotiations is probably a sound move. When an agency is required to engage in regulatory negotiation, but the agency does not wish to use regulatory negotiation, it is a recipe for disaster, because of the ease by which an agency can sabotage the negotiation.⁶⁸ Repeals of mandates would still allow agencies that wish to use negotiated rulemaking free to use it.

13. Conclusion Regarding the Warren Bill

Professor Levin has demonstrated significant problems with respect to "conservative" regulatory reform proposals. So also, are there significant problems with Senator Warren's "progressive" regulatory reform proposal. While her bill is in rather rough draft shape compared to the more developed, after years of trial and error, conservative proposals, there are fundamental problems with many of her proposals. Professor Levin has implied, or I have inferred from his paper, that much of the problem with the conservative proposals is the very conscious attempt to score political points against the opposition and to appeal to the conservative base. I believe the same accusation can be made for Senator Warren's proposal, except for her it is the liberal base.⁶⁹

II. The Farber, Heinzerling, Shane Proposal

Reforming "Regulatory Reform": A Progressive Framework for Agency Rulemaking in the Public Interest (the Progressive Framework), published as an Issue Brief by the American Constitution Society,⁷⁰ contains four separate sections: Improving Notice-and-Comment Rulemaking, Constraining White House Review of Agency Rules, Improving Judicial Review of Rulemaking, and Repealing the Congressional Review Act.

1. Improving Notice-and-Comment Rulemaking

Like the Warren Bill, the Progressive Framework proposes to enhance public participation in rulemaking. However, it recognizes the difficulties involved and does not propose a particular solution. Instead, it suggests a number of possible undertakings that might be helpful – ACUS training for agencies on how to engage groups or individuals who might be overlooked but who might provide meaningful input; agency planning before noticing a proposed rule to identify persons most likely to be interested in or affected by a proposed rule and to engage in outreach to them; generating a group of participants by random sampling to

⁶⁸ See, e.g., Danielle Holley-Walker, *The Importance of Negotiated Rulemaking to the No Child Left Behind Act*, 85 NEB. L. REV. 1015 (2007).

⁶⁹ Josh Silver, *Why Senator Warren's Anti-Corruption Bill Could be in Trouble*, available at <https://act.represent.us/sign/warren-anti-corruption-bill/>.

⁷⁰ Available at <https://www.acslaw.org/wp-content/uploads/2018/10/Oct-2018-APA-Farber-Heinzerling-Shane-issue-brief.pdf>.

engage with the agency in small group discussions; and exploring various online tools to facilitate genuine citizen deliberation. All of these sound reasonable at least as experiments.

At the same time, progressives should keep a realistic view of the limits of engaging the public at large, as well as the possible unintended consequences. The obstacles to engaging the public at large, well noted in the Progressive Framework, are formidable. Even if members of the affected public are aware of the rulemaking and know how to comment, the time and energy necessary to master the material and the technical knowledge necessary to understand it are likely to be well beyond the capacity of most members of the public. Instead, members of the public are likely to respond in essence by voting for or against the rulemaking, as they indeed have in a number of high visibility rulemakings. Such voting is almost useless to the agency and invariably irrelevant to legal issues involved in the rulemaking. When the agency in effect ignores such comments, members of the public are likely to be disillusioned with the process, and far from improving their appreciation of government is likely to make them even more cynical.

The Progressive Framework approves of the agency use of advisory committees, especially in order to ensure representation of affected stakeholders, in both setting regulatory agendas as well as with respect to particular proposals. One should note that this recommendation is directly at odds with the Warren Bill's radical amendment of the NRA. Regulatory negotiation occurs initially through the formation of a federal advisory committee, which then negotiates over a rule. While the Progressive Framework sees advisory committees as furthering the input of the public through representatives of public interest organizations, the Warren Bill sees them as dominated by industrial and corporate entities. As noted earlier, the Progressive Framework's perception seems more accurate. Of course, as the Progressive Framework recognizes, it is important that these advisory committees be "fairly balanced," as required by the regulations governing the creating of federal advisory committees⁷¹ and that there are appropriate safeguards against conflicts of interest.

Two points are worth noting here. First, currently the statutes and directives that address conflicts of interest, like the Warren Bill, are exclusively aimed at financial conflicts of interest. The fear, of course, is that persons who would benefit financially from an agency taking certain actions may be motivated to push for those actions because of the personal financial benefit, rather than urging actions because they are in the public interest. Moreover, it is widely believed that representatives of for-profit companies or industries would likewise lobby to benefit their companies or industries. It should be recognized, however, that persons from public interest organizations, while probably not motivated by financial interests, are similarly likely to urge those actions that are consonant with the policies of their organizations. That is, financial concerns should not be the only consideration when considering conflicts.

The second point is that it is often important to have representatives of particular interests on an advisory committee precisely to represent those interests. That is, it is as important to have the coal industry's interests represented on an advisory committee dealing with a potential rule dealing with reducing carbon emissions as it is to have the interests of environmental groups. So

⁷¹ See 41 CFR § 102-3.60 (b)(3).

long as the membership is “fairly balanced,” the whole purpose of some advisory committees is to allow the disparate interests to address each other in the course of advising the agency.

The Progressive Framework does make a specific recommendation – to overrule former EPA Administrator Scott Pruitt’s banning all recipients of EPA grants from serving on EPA advisory committees. His claim was that they had financial conflicts of interest, but even to the extent that grant recipients might have a financial interest in what an advisory committee might suggest, their expertise in the subject matter should trump that financial interest. If everyone who might benefit financially, directly or indirectly, were barred from advisory committees, there would be no experts available to serve. Thus, this recommendation is well taken.

The Progressive Framework also addresses ex parte contacts in rulemaking. The APA does not address, much less prohibit, ex parte contacts in informal rulemaking. The Progressive Framework, like the D.C. Circuit and the ACUS, recognizes the values in ex parte communications.⁷² Nevertheless, ex parte communications also have detrimental effects. In order to retain the benefits and minimize the problems, the Progressive Framework proposes that the APA be amended to adopt the disclosure requirements of Section 307 of the Clean Air Act,⁷³ with two changes. That section requires the docketing of written comments and documentary information of central relevance to the rulemaking. One change would be to eliminate the limitation to written comments and documentary information; oral comments would also need to be summarized and placed in the docket. The other change would be to eliminate the limitation to ex parte comments of “central relevance” to the rulemaking; all ex parte comments related to the rulemaking should be docketed. These requirements are not unlike those voluntarily used by several agencies, so they would not be unduly burdensome. Another good recommendation.

Like the Warren Bill, the Progressive Framework addresses petitions for rulemaking. Unlike the Warren Bill, the Progressive Framework essentially proposes what ACUS recommended in 2014.⁷⁴ This would include simplifying and regularizing the procedures for receiving and processing petitions in order to enhance the ability of the public to participate in the rulemaking petition process. This recommendation, like most ACUS recommendations, is modest but advisable. Whether “the petitioning process could prove a significant tool for progressive reform if the process were more widely appreciated and pursued not just by ‘sophisticated stakeholders,’ but also by community groups and engaged citizens generally,”⁷⁵ as suggested by the Progressive Framework, is less clear.

2. Constraining White House Review of Agency Rules

⁷² See *Sierra Club v. Costle*, 657 F.2d 298, 400-401 (D.C. Cir. 1977); Recommendation 2014-4, “Ex Parte” Communications in Informal Rulemaking, available at <https://www.acus.gov/recommendation/ex-parte-communications-informal-rulemaking>.

⁷³ 42 U.S.C. § 7607 (d)(4)(B)(i).

⁷⁴ ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, *Administrative Conference Recommendation 2014-6, Petitions for Rulemaking* (Dec. 5, 2014), available at <https://www.acus.gov/sites/default/files/documents/Final%2520Petitions%2520for%2520Rulemaking%2520Recommendation%2520%255B12-9-14%255D.pdf>.

⁷⁵ *Progressive Framework*, at 8.

The Framework Proposal reviews OIRA's failure to follow the terms of the E.O. 12866 as described in an article by Professor Heinzerling.⁷⁶ It then makes the common sense but modest proposal that OIRA follow the terms of the Order. However, it says that is not enough, because it does not address the more fundamental objections that the process "unlawfully supplants the authority of the agency Congress has charged with making the relevant decisions and that the cost-benefit criterion the executive order imposes is inconsistent with many of the regulatory statutes under which the agencies operate."⁷⁷ And, finally, it says that the Order's requirements for transparency are insufficient. As a result, the Progressive Framework proposes four additional reforms.

The first reform would be to make clear that agencies delegated decisionmaking authority by statute are the sole and final deciders of what a regulation will contain. The Progressive Framework recognizes that the Order expressly states that the Order does not displace the authority of agency. However, practice under the Order has for the most part been to make the agency an advocate for its preferred regulation, with OIRA effectively making the final decision, often in light of concerns raised by other agencies.⁷⁸ The difficulty with the Progressive Framework's "reform" is how to accomplish it. As a legal matter under the Order, agencies do have the sole and final say over what is contained in their regulations, not OIRA, and other agencies do not have any particular authority over another agencies regulations. Nevertheless, as a political matter the heads of agencies have been generally willing to let OIRA play the role it does. As principal officers in the administration, agency heads do not wish to create internal friction, which invariably would become public, except in rare cases. Indeed, on some occasions heads of agencies have successfully resisted OIRA, but it is rare.⁷⁹ Generally, agency heads are complicit in the practice of having OIRA play the decisive role that it does. So long as Presidents wish to have OIRA play this role, it is difficult to see how the practice could be constrained by law. Consequently, it is not clear what effect the Progressive Framework's proposal would have.

The second reform suggested by the Progressive Framework is "to reorient the White House review process to focus on whether a proposed regulatory action is consistent with the underlying statute, and away from the current focus on satisfying a quantified cost-benefit standard."⁸⁰ This would be a major change, and one that could be made by executive order or probably by statute, but it would, I believe, be a major mistake for two reasons. The first reason is that to focus on whether the regulation is consistent with the underlying statute is to ask a legal question. While the political heads of OIRA may be lawyers, the staff who actually do the reviews of agency regulations are policy analysts trained in economics. Thus, if the regulatory review was to be refocused on legal rather than economic issues, either OIRA would have to be restaffed or the function could be given to the Office of Legal Counsel in the Department of Justice, which already reviews executive orders for form and legality before their issuance.

⁷⁶ See Lisa Heinzerling, *Inside EPA: A Former Insider's Reflections on the Relationship Between the Obama EPA and the Obama White House*, 31 PACE ENVTL. L. REV. 325 (2014).

⁷⁷ *Progressive Framework*, at 9.

⁷⁸ *See id.*, at 10.

⁷⁹ See William Funk, *David and Goliath: Taking on OIRA*, 30 J. LAND USE & ENVTL. L. 63 (2014).

⁸⁰ *Progressive Framework*, at 10.

The second, and even more important, reason why I believe this proposal is a mistake is that it would expressly put a decision as to the legal authority for the regulation in OIRA. Whether one takes a strong unitary executive approach, in which the President actually has the deciding authority notwithstanding placing a statutory authority in the head of an agency,⁸¹ or the weaker approach, in which, while the President cannot direct an agency head how to exercise discretion under the statute, he can remove the agency head if the agency head does not follow the President's suggestion,⁸² in either case the agency head is subject to the President's authority – in the one case pre-decisional and the other post-decisional. As things stand now, there is a tension between the statutory authority of an agency head to adopt a regulation and the constitutional authority of the President to take care that the law is faithfully executed, because the debate over the unitary executive's extent is unresolved. However, to place in OIRA, an office in the Executive Office of the President, the authority to review an agency's proposed regulation for its legality would signify the President's (and through him OIRA's) express pre-decisional authority over the agency head. The practice, which Professor Heinzerling's article described and decried, would, I believe, only be strengthened by adoption of this proposal. It would be better, in my view, to allow cost-benefit analysis to continue, but to diminish the emphasis on monetization of non-market costs and benefits, as well as to explicitly recognize that the result does not determine the regulatory action anymore than an environmental impact analysis decides an agency action.

The third proposal relates to the transparency of the OIRA process. The proposal would require an agency to place in the rulemaking docket all drafts of proposed and final rules submitted to OIRA, documents accompanying them, and written comments made by other agencies along with the action agency's response to them. These requirements already apply to EPA Clean Air Act regulations by statute,⁸³ so they are eminently doable. It might, however, be desirable to go farther and require docketing of *all* documents submitted by an agency to OIRA or by OIRA to an agency relevant to a particular rulemaking, as well as summaries of oral communications between the agency and OIRA relevant to a particular rulemaking.

The final recommendation relating to the OIRA process is to repeal Executive Order 13,771, in which President Trump purports to require agencies to repeal two regulations for every new regulation agencies adopt and to require a regulatory budget, capping the costs of new regulations. There is nothing to criticize about this recommendation. The Executive Order's two-for-one requirement is nonsense piled on nonsense, and a regulatory budget that ignores benefits and considers only costs is itself a violation of cost-benefit analysis.

3. Improving Judicial Review of Rulemaking

A. Review of Agency Inaction

The Progressive Framework perceives a problem in the judicial review of agency inaction. While the APA specifically provides for judicial review of "agency action unlawfully

⁸¹ See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L.REV. 2246 (2001).

⁸² See, e.g., Peter L. Strauss, *Overseer or "The Decider"?* *The President in Administrative Law*, 75 GEO. WASH. L.REV. 695 (2007).

⁸³ See 42 U.S.C. § 7607(d)(4)(B)(ii).

withheld or unreasonably delayed,”⁸⁴ courts routinely uphold agency inaction when agencies claim their inaction is due to the agency’s belief that other measures have a higher priority and the agency lacks adequate resources to pursue the particular action requested. The Progressive Framework recognizes that higher priorities and a lack of resources are a justifiable reason for inaction, but it appears to suggest that the agency should be required to compile a record justifying inaction so that such a claim would be judicially reviewable on the same basis as agency action, to wit, whether the inaction was arbitrary, capricious, or an abuse of discretion. There is, however, some tension involved in requiring an agency to prepare a record justifying inaction precisely when the agency’s claim that its resources are too limited to take the action requested.

B. Review of Guidance Documents

The Progressive Framework recognizes that there is currently a lack of clarity as to when guidance documents, including both policy statements and interpretive rules, are judicially reviewable. It recognizes that such documents are not required to go through notice-and-comment before they are adopted and consequently do not create legally binding rules. At the same time, if they do not create legally binding rules, they may not be judicially reviewable, because they might not qualify as final agency action.⁸⁵ The courts have not provided a clear rule either as to when these documents require prior notice and comment or when guidance documents are subject to judicial review. The Progressive Framework “encourages” agencies to use notice-and-comment rulemaking for “policy statements deemed significant on economic or other grounds.”⁸⁶ This is a recommendation that has long been made by the American Bar Association⁸⁷ and by ACUS.⁸⁸

With respect to judicial review, the Progressive Framework is more specific: policy statements “that genuinely bind no one, including the agency itself,” should not be subject to judicial review “in all but exceptional cases.”⁸⁹ Interpretive rules, on the other hand, it says should be categorically subject to judicial review. These suggestions are problematical. The first problem is the idea that policy statements and interpretive rules are clearly distinguishable. That is often not the case. Indeed, the modern view is that the two should be viewed interchangeably and referred to generically as guidance documents.⁹⁰ Moreover, virtually every policy statement can be rephrased as an interpretive rule and vice versa. For example, an agency might create

⁸⁴ 5 U.S.C. § 706 (1).

⁸⁵ See, e.g., *Ass’n of Flight Attendants v. Huerta*, 785 F.3d 710 (D.C. Cir. 2015) (finding guidance documents not having legal effect to be non-reviewable).

⁸⁶ *Progressive Framework*, at 14.

⁸⁷ *ABA Recommendation 120C*, 118-2 A.B.A. ANNUAL REPORT 57 (1993), available at https://www.americanbar.org/content/dam/aba/directories/policy/1993_am_120c.pdf.

⁸⁸ ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, *Administrative Conference Recommendation 76-5, Interpretive Rules of General Applicability and Statements of General Policy* (Dec. 30, 1976), available at <https://www.acus.gov/recommendation/interpretive-rules-general-applicability-and-statements-general-policy>.

⁸⁹ *Progressive Framework*, at 14.

⁹⁰ See Ronald M. Levin, *Rulemaking and the Guidance Exemption*, 70 Admin. L.Rev. 263 (2018). See also Letter from Anna Shavers, Chair, ABA Sec. of Admin. Law & Regulatory Practice, to Sens. Thomas Carper & Tom Coburn (Dec. 16, 2014), https://www.americanbar.org/content/dam/aba/administrative/administrative_law/s_1029_comments_dec_2014.pdf.

guidance regarding a regulatory requirement that large cats (e.g., lions and tigers) need to be kept in enclosures sufficient to contain the animals. The guidance could say that it interprets that regulation as requiring at least a fifteen foot fence, or it could say that its policy is to require at least a fifteen foot fence.⁹¹ Under the Progressive Framework, if the agency phrased it as an interpretive rule, it would be subject to review, but if phrased as a policy statement, it would not be subject to review. Another example might be EPA's view whether dam releases were discharges of a pollutant from a point source under the Clean Water Act.⁹² "In several policy statements made in opinion letters and reports to Congress in the 1970s and 1980s, the EPA took the position that dam releases should not be considered 'discharges' under the CWA and thus NPDES permits would not be required for those releases."⁹³ EPA could have phrased its position either as an interpretation of the statute or as a policy statement, and under the Progressive Framework, the former would be judicially reviewable but the latter would not. Thus, the proposal to make interpretive rules judicially reviewable, but policy statements not, would simply result in agencies characterizing their guidance documents as policy statements, so as to avoid judicial review.

The Progressive Framework recognizes that guidance documents, whether policy statements or interpretive rules, can effectively coerce compliance even though the documents do not have binding legal effect. As I have written elsewhere, judicial review of guidance documents, whether policy statements or interpretive rules, should be judicially reviewable if their practical impact is to coerce persons into compliance with the documents.⁹⁴ Similarly, if the practical impact of a compliance document is to relieve regulated entities of a requirement that would benefit regulatory beneficiaries, the document should be judicially reviewable. Whether characterized as policy or law interpretation, an agency's practical coercion of a person to take action the person believes is not lawfully required, or an agency's practical denial of a benefit to a person the person believes is lawfully due, should be subject to judicial review in order to protect the rule of law.

C. Venue for Review of Rules

The Progressive Framework notes that there is considerable confusion under certain statutes whether initial judicial review of particular agency action is to occur in a district court or a court of appeals.⁹⁵ It notes that there is a danger in letting a single district court judge, in a court picked by the plaintiffs, potentially issue a nationwide injunction. Moreover, where there is a complete record for the agency action, there is little need for the skills of a trial judge in reviewing that record. Accordingly, the Progressive Framework recommends that all judicial review of legislative rules, rules where there is colorable claim that notice and comment was

⁹¹ See *Hector v. U.S. Dept. of Agriculture*, 82 F.3d 165 (7th Cir. 1996) (agency claimed it was an interpretive rule).

⁹² See *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982) (upholding EPA's view).

⁹³ *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 489-490 (2d Cir. 2001).

⁹⁴ See William Funk, *Final Agency Action After Hawkes*, 11 N.Y.U. J. OF LAW & LIBERTY 285 (2017).

⁹⁵ See, e.g., *Nat'l Assn. of Manufacturers v. Dept. of Defense*, 138 S.Ct. 617 (2018) (deciding that the "Waters of the United States" rule adopted by EPA and the Corps of Engineers was to be reviewed in a district court, not a court of appeals).

required but it was not provided, or in any other case “involving a regulation of nationwide applicability” should be in courts of appeal. It is not clear what is meant by a “regulation of nationwide applicability” that would not be included in the other two categories. Other than that, this is a quite radical but practical proposal that bears close attention.

D. Remand Without Vacatur

The Progressive Framework also addresses the issue of courts remanding agency decisions to the agency without vacating the agency’s decision, usually in cases where the agency has not adequately explained its reasoning. Because the APA by its terms states only that courts should “set aside” agency decisions found to violate any of several requirements, the practice of remands without vacatur has been controversial. The Progressive Framework recommends that the APA be amended to provide explicitly for remand without vacatur, perhaps including the standard contained in *Allied Signal, Inc. v. NRC*⁹⁶ for when it should be used. Most commentators favor allowing courts to avoid invalidating the agency action when to do so would have disruptive consequences in light of the agency’s likely ability to cure the problem. As the Progressive Framework has noted, to invalidate a rule providing a certain level of protection, when the successful challengers argued for a greater level of protection, would be perverse, denying them even the lesser level of protection pending the agency’s correction. The question that deserves more consideration, however, is whether remand without vacatur is a preferable solution to a stay of the court’s mandate, the approach favored by Judge Randolph in the D.C. Circuit.⁹⁷ The former approach divests the court of jurisdiction and provides little incentive to the agency to fix the problem in any timely fashion. The latter approach continues the court jurisdiction over the case so that, if the agency is recalcitrant in fixing the problem, it is simpler for the challenger to apply to the court to step in.

E. Judicial Deference

The Supreme Court has granted certiorari in *Kisor v. Wilkie*⁹⁸ to decide whether to overrule *Auer v. Robbins*⁹⁹ and *Bowles v. Seminole Rock & Sand Co.*,¹⁰⁰ both of which require courts to defer strongly to agency interpretations of the agency’s own regulations. Most commentators believe these cases will be overruled and that the Court will apply instead *Skidmore* deference,¹⁰¹ which states that such agency interpretations: “constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade, if lacking power to control.”¹⁰² The Progressive Framework would keep *Auer/Seminole Rock* deference, viewing the attack on it coming from conservatives. While it is true that the principal questioners of

⁹⁶ 988 F.2d 146 (D.C. Cir. 1992).

⁹⁷ See *Checkosky v. SEC*, 23 F.3d 452, 493 (D.C. Cir. 1994) (Randolph, J., in a separate opinion).

⁹⁸ 2018 WL 6439837 (Dec. 10, 2018).

⁹⁹ 519 U.S. 452 (1997).

¹⁰⁰ 325 U.S. 410 (1945).

¹⁰¹ *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

¹⁰² *Id.*, at 140.

Auer/Seminole Rock doctrine have been conservative judges and justices, the doctrine itself is neither conservative nor progressive; it simply favors agencies. When agencies are controlled by conservatives, *Auer/Seminole Rock* doctrine favors conservatives; when agencies are controlled by progressives, the doctrine favors progressives. In any case, it is doubtful that substitution of *Skidmore* deference for *Auer/Seminole Rock* deference would have much difference in the outcome of actual cases, because cases in which courts disagree with the agency's interpretation, but uphold it under strong deference, are relatively rare.

While *Auer/Seminole Rock* are on the block, *Chevron* deference has also been questioned by some of the sitting Justices. Because the analytical basis for *Chevron* deference is much more robust than that of *Auer/Seminole Rock*, it is much less likely to be overruled. Nevertheless, to be on the safe side the Progressive Framework suggests that the APA be amended to codify it. In such a codification, however, the Progressive Framework would make a change from current case law. Under current case law, *Chevron* does not apply to issues of great social importance, or stated otherwise, to issues where it is unlikely Congress intended to delegate to the agency the authority to make the particular decision at issue.¹⁰³ This exception has been called the "major questions" exception. Because the theoretical foundation of *Chevron* is an implicit congressional delegation of authority to an agency to decide the substance of ambiguous statutory provisions it is responsible for administering, it makes sense to ask in particular cases whether it is reasonable to believe that Congress would have wanted the issue in those cases to be decided by the agency rather than by a court. Nevertheless, the invocation of the major questions exception has always occurred in the context of progressive regulation, so it may be appropriate for progressives to seek to eliminate that exception.

F. Review of Policy Reversals

The Progressive Framework takes issue with portions of the concurring and dissenting opinion by Chief Justice Rehnquist in *Motor Vehicles Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*¹⁰⁴ and Justice Scalia's decision for the Court in *FCC v. Fox Television Stations, Inc.*¹⁰⁵ It believes that those portions suggest that it is legitimate for agencies to take political considerations into account in regulatory decisions, so that with a change of administrations agencies could find it easier to reverse earlier agency regulations. The Progressive Framework clearly reads too much into the portions of those opinions. First, Chief Justice Rehnquist indeed wrote in his opinion concurring in part and dissenting in part in *State Farm* that "a change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations."¹⁰⁶ But that statement is then footnoted with "Of course, a new administration may not choose not to enforce laws of which it does not approve, or to ignore statutory standards in carrying out its regulatory functions."¹⁰⁷ And the very next sentence states "As long as the agency remains within the bounds established by Congress, it is entitled to assess

¹⁰³ See, e.g., *King v. Burwell*, 135 S.Ct. 2480 (2015).

¹⁰⁴ 463 U.S. 29 (1983).

¹⁰⁵ 556 U.S. 502 (2009).

¹⁰⁶ *State Farm*, 463 U.S. at 59.

¹⁰⁷ *Id.*

administrative records and evaluate priorities in light of the philosophy of the administration.”¹⁰⁸ Moreover, he concurred in overturning the agency’s elimination of the airbag standard. This is slim support for making it easier for a new administration to be able to overrule the regulations adopted by a previous administration.

There is simply nothing in Justice Scalia’s opinion in *Fox Television* suggesting the “legitimacy of ‘political’ considerations in regulatory decisions.”¹⁰⁹ Nor does Justice Scalia anywhere cite to Chief Justice Rehnquist’s opinion in *State Farm* mentioning political considerations. Rather Justice Scalia cites repeatedly to the majority opinion in *State Farm*, the opinion that the Progressive Framework supports. What he did write for the Court was that there is no heightened judicial scrutiny simply because an agency reverses direction.¹¹⁰ This, however, was nothing new; it was also what the Court in *State Farm* said,¹¹¹ in an opinion viewed applauded by the Progressive Framework.

In other words, political considerations may justify an agency’s reconsideration of its prior policies, but in order to change any regulations based on those prior policies, the agency will have to justify the change on the record without relying simply on a politically based change in policies. Indeed, it would be passing strange for progressives to object to this. Hopefully, the Trump administration will be voted out of office in 2020, and we would expect progressives to reconsider the policies adopted by agencies under the Trump administration and in many cases to seek to reverse them. There is nothing wrong or nefarious about that, but progressive agencies will have to justify on the record any changes they make. In short, the majority’s approach in *State Farm*, which has come to be known as the “hard look doctrine,” fully applies to agency reversals of policy. What *State Farm* and *Fox Television* both held was that reversals of policy were not subject to stricter scrutiny than any other rulemaking endeavor.¹¹²

G. Review in light of White House Intervention in Agency Rulemaking

The Progressive Framework recognizes that Presidential involvement in important policy decisions seems inevitable and healthy, but at the same time if the Presidential involvement in effect results in decisions being made for reasons unrelated to the statutory mandate or the public explanation, there is a problem. The suggested solution is to allow inquiry into Presidential involvement if there is a strong showing of improper influence from publicly available information. If further inquiry then reveals the decision was based on legally irrelevant factors, the rule should be sent back to the agency for reconsideration.

Delving into the mind of a decisionmaker is a risky business, but if properly cabined, as the Progressive Framework proposal appears to be, it can further the rule of law. The devil in the details may be determining what is a legally irrelevant factor. While some statutes preclude consideration of the cost effect of a regulation, most do not, and many impliedly or expressly suggest it is a relevant consideration. The agency may consider the cost acceptable, while the

¹⁰⁸ *Id.*

¹⁰⁹ *Progressive Framework*, at 17.

¹¹⁰ *Fox Television*, 556 U.S. at 514.

¹¹¹ *State Farm*, 463 U.S. at 41.

¹¹² *See State Farm*, 463 U.S. at 41; *Fox Television*, 556 U.S. at 514-515 (citing *State Farm*).

President may not. If the agency bows to his view, it would not seem to be a legally irrelevant factor justifying reversal of the agency's rule.

4. Repealing the Congressional Review Act

Unlike the Warren Bill that would only make a minor tweak to the CRA, the Progressive Framework would repeal the law altogether. Given its origin as an anti-regulatory initiative and its application in practice, the repeal of the CRA is an appropriate response for progressives. It is argued by supporters of the CRA that it is entirely legitimate for Congress, by law, to be able to override what it believes to be an improper exercise of an agency's delegation of authority. However, as a practical matter, the fast track process of the CRA does not enable Congress in fact to exercise any considered judgment on the merits of the regulation under consideration. Instead, the vote is more likely an unreflected reaction to political considerations at best and to the pressure of affected regulated entities at worst. The apparent reach of the CRA to non-legislative rules is causing a number of problems. The best response would be its total repeal.

III. Conclusion

Clearly, progressives are not all on the same page yet, but they do have some commonalities. Both proposals share a desire for increased transparency in the rulemaking process and particularly with respect to agency interactions with OIRA. Both proposals seek to involve the public more significantly in agency rulemaking, although their approaches are different. Both show concern for private entities' conflicts of interest if they are involved in formulating agency rules, and both seem to view such conflicts as only arising from financial interests. Both would attempt to codify *Chevron* deference. Both would make improvements to agency handling of petitions for rulemaking. Both would address the problem of judicial review of agency inaction or delay, albeit proposing different solutions.

At the same time, there are some fundamental differences. One proposal would keep the Congressional Review Act; the other would repeal it. Both demonstrate concern with OIRA review, but the Warren bill essentially tinkers with the process, while the Progressive Framework would make a radical change to the process. Although the subject of regulatory negotiation is not of major significance, the difference between the Warren bill's total rejection of regulatory negotiation and the Progressive Framework's support of the use of advisory committees is notable. The Warren bill's proposed authorization of private attorneys general is a radical concept unaddressed by the Progressive Framework. While several of the Progressive Framework's proposals regarding judicial review are mainstream, two are not. The proposal for no judicial review of statements of policy and always judicial review of interpretive rules is not "progressive,"¹¹³ but, as ill-considered as I believe it to be, would at least create clarity where today there is none. The proposal that all judicial review of legislative rules should be had initially in courts of appeal is relatively radical, but again not progressive in nature. None of these Progressive Framework proposals are addressed by the Warren bill.

¹¹³ That is, it is not pro-regulation in nature.

Perhaps what is most surprising about the Warren bill and the Progressive Framework proposals is how limited they are. With few exceptions (such as the proposal to repeal the Congressional Review Act) these “progressive” proposals do not really address the fundamental hurdles that agency rulemaking faces – the need to engage in extensive environmental, economic, and scientific analyses before even proposing a rule, any centralized review of agency rules, and the “hard look” doctrine used by courts in reviewing agency rules to determine if they are arbitrary, capricious, or an abuse of discretion.¹¹⁴ All of these hurdles may be necessary to assure that rules with significant effects are well considered, but it is perhaps surprising that those with a pro-regulation agenda would accept them without discussion.

¹¹⁴ See 5 U.S.C. § 706 (2)(c).