



Courts should kill Trump's price-for-1' deregulation order

BY DAN FARBER, OPINION CONTRIBUTOR - 02/09/17 01:00 PM EST

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Wednesday, two major public interest groups filed a [lawsuit](#) against one of President Trump's executive orders, an order that many people have probably never heard of.

In late January, Trump issued an [executive order](#) about the procedures for new government regulations. Understandably, this order didn't get as much publicity as the immigration order. But it could have sweeping results, nearly halting new regulations to protect the environment, public health, bank soundness, and a host of other targets.

Administrative agencies like EPA and OSHA already have to go through elaborate procedures before they can issue new rules. Trump is now raising the procedural barriers much higher.

To issue a new regulation, an agency will have to repeal two old regulations — the so-called "two for one" requirement. In addition, Trump has capped the total costs of all regulations that an agency enacts in a year. The initial cap is zero. For instance, if a new rule will cost industry

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\$100 million, the agency will have to find two old rules to eliminate that will add up to \$100 million in cost savings.

The two public interest groups — Public Citizen and the Natural Resource Defense Council (NRDC) — make a sound argument that these are irrational requirements.



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The number of regulations, apart from what they do or don't accomplish, really matters to no one except the government printing office.

The cap on compliance costs ignores the fact that existing regulations have already had to pass a cost-benefit analysis. So if an existing regulation has a cost of \$100 million, that means that the government already found the benefits were even higher — in other words, the existing regulation pays for itself in societal benefits. If you get rid of \$100 million in costs by throwing away \$120 million in benefits, just how is society better off?

The regulatory process is very elaborate, and adopting a new regulation is a very expensive, time-consuming process. This executive order effectively triples the cost, because agencies not only have to enact new regulations but go through equally complex proceedings to eliminate two old ones. Basically, agencies will be able to propose about a third as many new rules as before.

Some claims in the lawsuit seem ironclad. When there's a deadline for issuing a rule, an agency clearly can't justify missing the deadline because it needs to comply with the executive order.

Also, the agency can't legally justify eliminating an existing rule just to offset a new rule. So, the agency will need to find a different justification, like the existing rule's failure to produce the anticipated benefits. The new guidance to agencies about how to implement the order seems to concede much of this.

Much of the rule's mischief is subtler. The agency's regulatory agenda will be dominated by the need to find "sacrificial rules" to repeal, and the agency may not even try to issues new rules or will abandon rule making efforts in midstream. Such changes in regulatory priorities are difficult to challenge in court. Except where Congress has established clear priorities, judges are often reluctant to intervene in an agency's agenda.

But there is an argument — based on an [opinion](#) by Justice Scalia no less — that the new executive order goes too far.

In a case involving a new EPA rule, Justice Scalia said that it would be irrational to issue a rule without taking into account all of its costs — not just direct compliance costs but environmental impacts and other harms.

There seems to be a strong argument that Trump’s executive order violates this standard of rationality. It directs agencies to make priority decisions based on the costs of new rules without considering their benefits.

In fact, a new OMB [guidance document](#) says that if you have to pay money but get even more money back, your initial outlay is considered a cost and the later profit is ignored. If Trump is telling agencies to exercise their discretion by ignoring benefits entirely and miscalculating costs, that seems to violate Justice Scalia’s concept of rationality.

Of course, Scalia is no longer on the bench, but many other judges would probably agree that considering costs but not benefits makes no sense.

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