



# The Twin Demons of the Trump-Bannon Assault on Democracy

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By Joseph P. Tomain  
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## About the Author

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# The Twin Demons of the Trump-Bannon Assault on Democracy

## Executive Summary

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In the early days of his administration, President Donald Trump signed two executive orders directed at changing the regulatory process. One order is intended to reduce the cost of regulation. Its fatal flaw, however, is that it neglects to account for regulatory benefits. The second order is intended to reform the regulatory process. Its fatal flaw is that it *adds* useless costs to the process rather than *reducing* them. The fear about both orders is that they will roll back a range of existing environmental, health, and safety protections while blocking the development of future beneficial rules.

Together, the executive orders constitute a double-barreled assault not just on the “administrative state” that White House strategist Steve Bannon has promised to “deconstruct,” but on the Clean Water Act, Clean Air Act, Occupational Safety and Health Act, and other landmark laws regardless of the diseases they prevent, lives they save, pollution they curb or mitigate, and the other benefits they produce. In exchange, the orders may well hobble the regulatory process itself with new layers of review, making it more difficult for regulatory agencies to devote resources to enforce existing laws.

Shortly after the cost-reduction executive order was issued, Public Citizen, the Natural Resources Defense Council, and the Communications Workers of America joined in challenging it in court. Their complaint identifies several causes of action, including the charge that the order violates the constitutional direction to the president to “take care that the Laws be faithfully executed,” as well as several statutory directives. The complaint goes on to cite a number of proposed rules that, if eliminated by the order, would frustrate enabling legislation passed by Congress. For example, the Motor Vehicle Safety Act’s purpose is to “reduce traffic accidents and deaths and injuries” from traffic accidents, and as the National Highway Traffic Safety Administration implements the law, it must consider a range of relevant information on whether a proposed standard is reasonable, practicable, and appropriate. The law does not designate that costs alone be the determining factor.

The lawsuit highlights at least three infirmities in the executive order. First, the elimination of regulations must comply with statutory and constitutional procedures. Regulations cannot be eliminated by executive fiat. Second, regulatory reductions cannot be done indiscriminately; instead, regulatory

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benefits must be considered as a matter of established law. Indeed, specific legislation mandates consideration of benefits, and Supreme Court case law acknowledges the need to do so. Third, fundamental principles of democracy require government to act for the public benefit. These constitutional and political obligations are not only ignored, they are affirmatively and aggressively rejected by the executive order.

This last requirement — that government must act for the public benefit — has a long history in the United States. Over the decades, the government has gone through a number of regulatory cycles, from mercantilism to *laissez-faire* capitalism and from progressivism to deregulation. During those cycles, the issue has never been about the presence or absence of regulation. Instead, the central issue was how to use government regulation to maximize the common good, to maximize social benefits.

The growth of the regulatory state raised concerns on both sides of the political aisle. Beginning with President Jimmy Carter's administration, politicians and policymakers began to question the extent of regulation and, in fact, began to deregulate. The Carter administration deregulated airlines, trucking, energy, and the financial sector, among others. The deregulatory mood became more visible with the election of Ronald Reagan. During his administration, deregulation continued, and the Regan Revolution became synonymous with deregulation across the board.

But even as regulation has ebbed and flowed, it has always been the case that rules do not indiscriminately impose costs on blameless actors. Regulations protecting children from lead poisoning may well impose costs; so do clean air regulations directed to power plants to reduce greenhouse gas pollution. However, those compliance costs are a necessary corrective to market forces that would otherwise encourage individuals and businesses to externalize the harmful consequences of their actions or products as much as possible. Instead of simply imposing costs on bad actors, regulations require the responsible market actors to account for the harms that they have inflicted on the public. Regulation, then, is intended to avoid those harms in the first place rather than impose them on innocent persons. Polluters should not profit from causing asthma or heart disease. Regulation or its reduction is not intended to reward malfeasants; it is intended to provide compensation, avoid harm, and promote public welfare.

In some instances, agencies are permitted (and sometimes required) to use cost-benefit analysis. However, they may not do so in violation of congressional direction. Indeed, no less a conservative than Justice Antonin Scalia made the case that when a law directs an agency to set standards using some particular measure of regulatory analysis other than costs and benefits, the law means what it says. Consequently, the executive order's singular focus on regulatory costs cuts against decades of Supreme Court precedent.

In a complementary way, just as the benefits of regulation must be acknowledged, the costs of failing to regulate properly or not regulate at all are a matter of life and death, as the BP Deepwater Horizon disaster, the Upper Big Branch Mine disaster, and the Big Short mortgage debacle all demonstrate. In these and other instances, the failure to regulate results in the privatization of benefits and the socialization of costs. Homeowners, not bankers, suffered the most severe losses due to the lack of financial regulation, and mine workers and oil and gas workers, not CEOs, lost their lives for the failure to aggressively pursue safety regulations. Because the intent of these executive orders is to reduce regulation, agencies will, at the very least, be discouraged, if not thwarted, from enacting new beneficial regulations.

The executive orders have the seemingly reasonable goal of reducing regulatory costs. Their devilish methods of doing so, however, are fraught with difficulties, including that they ignore constitutional and statutory requirements and run contrary to good government practices and policies.

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### Demon 1

*The better the society, the less law there will be. In Heaven there will be no law, and the lion will lie down with the lamb. The values of an unjust society will reflect themselves in an unjust law. In Hell there will be nothing but law, and due process will be meticulously observed.*

GRANT GILMORE, *THE AGES OF AMERICAN LAW* 111 (1977)

### Demon 2

ROPER: *So now you'd give the Devil benefit of law?*

MORE: *Yes. What would you do? Cut a great road through the law to get after the Devil?*

ROPER: *I cut down every law in England to do that!*

MORE: *And when the last law was down, and the Devil turned round on you — where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast . . . and if you cut them down . . . d'you really think you could stand upright in the winds that would blow then?*

ROBERT BOLT, *A MAN FOR ALL SEASONS* 37-38 (1962)

## Introduction

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On January 30, 2017, President Donald Trump signed an executive order "Reducing Regulation and Controlling Regulatory Costs."<sup>1</sup> Then, on February 24, he signed an executive order on "Enforcing the Regulatory Reform Agenda."<sup>2</sup> Together these two executive orders constitute a severe threat to American society and the American economy. In the words of Stephen Bannon, Trump's chief strategist, they represent a plan for "the deconstruction of the administrative state."<sup>3</sup>

The purpose of the administrative state can be most simply stated this way: Unless otherwise stated in the enabling legislation, government regulation makes sense when the benefits of regulation outweigh the costs of compliance. As this paper demonstrates, social benefits consistently outweigh regulatory costs, and the regulatory state is responsive to the needs and wishes of the American people; regulation is a response to our democratic impulse. Thus, the regulatory state honors our historical and traditional constitutional values. The Trump executive orders ignore these fundamental principles. Instead of promoting the public good, they risk making it increasingly difficult, and sometimes politically impossible, to issue new rules that might be regarded as discretionary in nature. Instead, the espoused purpose of these orders is to end regulation full stop and, in the process, deny millions of Americans the benefits of government and wreak havoc on the economy.<sup>4</sup>

By doing so, the White House ignores the will of Congress; it ignores directives from the United States Supreme Court; and it deserts the American public. Simply, the order to eliminate regulations has the effect noted by both Thomas More in the above quotation and by Chief Justice Burger in *TVA v. Hill*, 437 U.S. 153, 195 (1978): It runs the risk of flattening the laws and cutting them down to the disadvantage of the public good. The order regarding so-called regulatory reform has the effect noted by Grant Gilmore: it is intended to increase regulatory oversight to the point at which due process is meticulously observed and the regulatory process crumbles of its own weight.

### Demon 1: Regulatory Review

The executive order on regulatory review states that it is the policy of the United States to alleviate unnecessary regulatory burdens. Not so ironically, the order then goes on to create another layer of regulation by requiring each agency to establish a Regulatory Reform Task Force. The purpose of the task force is to review regulations and "make recommendations to the agency head regarding their repeal, replacement, or modification, consistent with applicable law." At §3(d). Notice the directive does not include continuing regulations or expanding them. Rather, it is a one-way ratchet downward.

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*The executive order on regulatory reform does not streamline the regulatory process, it adds redundancies.*

The Task Force will be run by a Regulatory Reform Officer (RRO) and is required, “at a minimum,” to identify regulations that eliminate jobs, are outdated or ineffective, impose costs that exceed benefits, and create inconsistencies with existing regulatory reform initiatives, among other requirements. In carrying out its obligations, the Task Force must also consult with various entities, including states, local and tribal governments, small businesses, consumers, non-governmental organizations, and trade associations.

On the surface, regulatory review and the elimination of ineffective rules make sense. What is problematic with the new executive order, however, is that it is simply adding another layer of review to those that already exist.<sup>5</sup> Consider: (1) the Regulatory Flexibility Act requires agencies to review every rule that has “a significant economic impact upon a substantial number of small entities” within 10 years after the final rule is published; (2) Executive Order 12866 requires agencies to develop a program “under which the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified or eliminated”; and (3) Executive Order 13563 establishes a more elaborate program for agencies to review their existing regulations and adds time-consuming and resource-intensive procedures for carrying out reviews.

Further, some regulatory reviews are already part of enabling legislation. The Clean Air Act, as an example, directs the Environmental Protection Agency (EPA) to “complete a thorough review” of the agency’s existing National Ambient Air Quality Standards (NAAQSs) and “to make such revisions...as may be appropriate” at least once every five years. In addition to those reviews, consider the fact that regulations are proposed, commented on, and analyzed within individual agencies. In other words, proposed rules are critically examined and analyzed internally. Then, the White House, through the Office of Management and Budget (OMB) and the Office of Information and Regulatory Affairs (OIRA) also conducts assessments of those regulations.

The executive order on regulatory review does not streamline the regulatory process, it adds redundancies. The Trump-Bannon game plan for the regulatory process is clear. Hire Grant Gilmore’s Demon 1 and through more and more process, obfuscate, do not facilitate, regulation. Demon 1 is bad; it tries to kill the regulatory state. Demon 2, though, is the worse of two evils; it denies citizens the benefits of government.

### **Demon 2: Regulatory Cost Reduction**

Let’s start with a consensus point: Wasteful, redundant, or otherwise ineffective regulations should be eliminated. Effective regulations, however, confer demonstrable benefits on society and, therefore, must be sustained.<sup>6</sup> The cost reduction executive order does not distinguish between effective and ineffective regulations. Instead, it requires that two existing regulations



be eliminated for every new one that is adopted. The express point behind the order is, of course, the elimination of regulations. As discussed in more detail below, the executive order focuses only on costs, not on benefits. The narrow focus on costs alone means that using Trump logic, employers would never compensate employees because salary is simply a cost on the books and, therefore, must be a drag on business. The logic is there, but reason is not.

Certainly, new presidential administrations have the legitimate authority, if not the electoral obligation, to put their political and policy preferences into practice and into law. That authority, however, is not limitless and cannot be exercised without constraints. Rather, White House efforts to reduce regulation must be done according to law. More particularly, constitutional requirements, statutory directives, and basic good government practices impose legal and political obligations on the exercise of White House power.

Although guidance documents exist regarding the elimination of regulations, they do not suggest any constraints on the exercise of that power. Instead, they address procedural issues such as the scope of coverage<sup>7</sup> and how cost-benefit analysis should be applied.<sup>8</sup> Neither the executive order nor the guidance documents address either the substance or priorities regarding the types of regulations that should be eliminated. Consequently, elimination will be left to the political and policy preferences of an administration that has already exhibited its disdain for the public good perhaps best exemplified by what has been called an “immoral” “reverse Robin Hood” budget that literally takes from the poor and gives to the rich.<sup>9</sup>

The singular focus on regulatory cost-cutting presents a triple threat. First, as noted, social benefits will be severely discounted or eliminated. Second, the executive orders provide incentives for agencies to not act because they add regulatory requirements, burdens, and delays. As a direct consequence, doing nothing reduces social benefits. And, third, the reduction process will be selective and highly politicized. For example, possible federal budget cuts include such conservative targets as the EPA, Medicaid, health insurance for children, the Corporation for Public Broadcasting, the Legal Services Corporation, the National Endowment for the Arts, the National Endowment for the Humanities, and the Export-Import Bank, among others, regardless of the negligible effect these entities have on the budget.<sup>10</sup> This cost reduction platform is more than partisan antagonism toward regulation. Rather, it is an ideology of destruction all the way down.

The order, therefore, is fatally flawed because it violates established law as well as established principles of our constitutional order. It also violates fundamental principles of our modern government. Combined, these legal violations have one costly consequence — since numerous regulations will all lay flat, citizens, consumers, and the economy as a whole will suffer.

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Because the order is silent on regulatory benefits, those benefits will be lost. As explicitly noted by the Congressional Research Service, “measuring costs without also considering benefits does not provide the context for evaluating the appropriateness of the country’s amount of regulation.”<sup>11</sup> Benefits matter. Benefits matter as required by constitutional law, statutory and regulatory law, and fundamental good government policy.

### **The Public Citizen Complaint**

This white paper opposes the January 30 cost reduction executive order and is supportive of a recently filed lawsuit seeking to stop it before harm is imposed. Shortly after the order was signed, a complaint for declaratory and injunctive relief was filed in the United States District Court for the District of Columbia by two public interest organizations and a labor union (Public Citizen, the Natural Resources Defense Council, and the Communications Workers of America).<sup>12</sup> The complaint sets out several causes of action, including the charge that the executive order violates the U.S. Constitution, Art. II, §3, which states that the president “take care that the Laws be faithfully executed”; violates various specific statutory directives; and expressly and detrimentally ignores regulatory benefits in contravention of sound government, existing law, and public policy.

The complaint carefully and usefully provides numerous examples of proposed rules that, if eliminated by the executive order, would frustrate enabling legislation. As one example, the complaint notes that the Motor Vehicle Safety Act was enacted “to reduce traffic accidents and deaths and injuries resulting from traffic accidents.” 49 U.S.C. § 30101. In so regulating, the National Highway Traffic Safety Administration (NHTSA) must consider a range of relevant information regarding whether a proposed standard is reasonable, practicable, and appropriate. The statute does not designate costs alone as the determining factor; otherwise, any regulation that imposes costs would be subject to elimination.

The complaint also notes that a proposed rule requiring speed limiting devices on motor vehicles has estimated benefits of \$500 million to \$5 billion annually, including fuel savings and the prevention of thousands of traffic injuries and deaths. The installation costs of such a rule would be minimal but impose social costs from lower speed limits of \$200 million to \$1.5 billion annually. Thus, even accounting for social costs, the benefits significantly outweigh costs; yet, pursuant to the executive order, costs alone will be assessed to determine whether or not the proposed rule goes forward.

As another example, the Toxic Substances Control Act (TSCA) is based on congressional findings that “human beings and the environment are being exposed each year to a large number of chemical substances and mixtures” that “may present an unreasonable risk of injury to health or the environment.” 15 U.S.C. § 2601(a). The statute then directs the administrator

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of the EPA to evaluate existing chemicals under a risk-based safety standard “without consideration of costs or other nonrisk factors.” *Id.* §§ 2604(b)(4)(A), (f). On the face of the statute, then, the executive order would appear to be inapplicable. However, because the executive order and its guidance documents<sup>13</sup> allow for cost trading among agencies, it is impossible to predict how the costs of TSCA will be counted and assessed for the elimination of other regulations in other departments and agencies.

Under TSCA, the EPA proposed two rules to phase out trichloroethylene (TCE), a highly toxic volatile organic compound used in vapor degreasing, aerosol degreasing, and spot cleaning in dry cleaning facilities. The EPA estimates that one rule will impose costs of \$30 million to \$45 million annually but have net benefits (including health protection benefits) of \$35 million to \$402 million annually. The EPA estimates that the other rule will impose costs of \$170,000 annually but have annual net benefits of \$9 million to \$24.6 million. Once again, because the executive order focuses only on costs, if the rules are eliminated, then multi-million dollar losses will be imposed on society because social and economic benefits were ignored.

The complaint against the order specifies other examples of lost benefits under such legislation as the Occupational Safety and Health Act, the Mine Safety and Health Act, the Hazardous Materials Transportation Act, and the Endangered Species Act. Additionally, in its discussion of the Energy Policy and Conservation Act, the complaint specifies that the executive order precludes cost savings by frustrating cost-saving regulations. By ignoring benefits and savings, the executive order does a disservice to Congress and to all citizens.

The Public Citizen lawsuit highlights three fatal infirmities in the executive order. First, regulatory reductions cannot be done indiscriminately because the benefits of established constitutional law cannot be eliminated without the full exposure to agency and judicial review as required by the U.S. Supreme Court. *Motor Vehicle Mfrs. Ass’n v. State Farm Ins. Co.*, 463 U.S. 29 (1983). Second, agencies are required to honor enabling legislation and carry out congressional instructions. In *Massachusetts v. EPA*, 549 U.S. 497 (2007), for example, the Supreme Court rejected the assertion by the Bush administration’s Environmental Protection Agency that it lacked the authority to address carbon pollution affecting climate change. If Congress directs an agency to act, then it must act. Third, government must act for the public benefit. These constitutional and political obligations are not only ignored, they are affirmatively and aggressively rejected by the executive order.

## A History of Government Benefits

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In 1789, the first Congress of the United States passed 26 statutes that were signed into law by President George Washington.<sup>14</sup> Of those 26 laws, 20 dealt with the establishment of the executive branch and with government regulations regarding import duties, lighthouses, vessels, and pensions. The remaining laws addressed governance issues such as treaties with Native Americans, the Northwest Territories, and payments to the states. In brief, and as amply demonstrated by Yale legal historian Jerry Mashaw,<sup>15</sup> the United States has always had a regulatory function implemented by administrative agencies, and those functions were exercised for the public good.

To be sure, the United States has gone through several regulatory cycles, from mercantilism to *laissez-faire* capitalism and from progressivism to deregulation. During those cycles, the issue was never about the presence or absence of regulation. Instead, the central issue was how to use government regulation to maximize the common good, to maximize social benefits. Indeed, defining the public interest has always been open to political debate and deliberation. Yet, even the fight between Hamiltonians and Jeffersonians about the proper role of government was not a fight about the wisdom of government regulation; it was a fight about its proper locus.

Hamilton believed a central government was necessary so the newly formed United States could play on the world's economic stage. Jefferson believed an agrarian society could best protect individual liberty. Both, however, were committed to using regulation for the commonweal. This regulatory and mercantilist commitment was later dubbed the American System by Henry Clay; a system that established a three-pronged national economic policy of government support for infrastructure, nascent industries, and fiscal controls. In short, the American System was a system based on government regulation.<sup>16</sup>

Political and legal scholars, as well as economists, regularly debate the wisdom of one form of regulation or another. Whether it involved protecting corporate charters in *Dartmouth College v. Woodward*, 17 U.S. 518 (1819) or granting or withholding monopolies in *Charles River Bridge v. Warren Bridge*, 36 U.S. 420 (1837), the fundamental issue is that regulation is grounded in the public interest as a matter of constitutional law. In *Dartmouth College*, Chief Justice John Marshall explicitly noted that the corporate charter involved in that case was deemed "beneficial to the country." 17 U.S. at 638. Similarly, in *Charles River Bridge*, Chief Justice Roger Taney established a rule of construction that required statutes to be construed "in favor of the public." 36 U.S. at 544. At no time in U.S. history has the Court condoned the arbitrary and capricious elimination of regulations intended to benefit the public interest.

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As legal historian Herbert Hovenkamp has written, “American governments have always been involved in economic development and the creation of infrastructure, although both the amount and nature of the involvement change over time.”<sup>17</sup> Of particular note is the fact that with Andrew Jackson’s election, government economic policy and regulation shifted from mercantilism to *laissez-faire*. The shift to such an economic policy lessened federal government intervention, but it did not eliminate it. Jacksonian populism was aimed at federal corruption, and he looked to the states to protect economic liberty. In response to Jacksonian concerns, to ensure against cronyism and legislative capture, the Supreme Court explicitly articulated a public use test for regulatory activity. *Loan Association v. Topeka*, 87 U.S. 655 (1874) (taxation); *United States v. Gettysburg Electric Ry. Co.*, 160 U.S. 668 (1896) (takings). The public use requirement means that government action should be intended to generate public benefits.

By the mid-19<sup>th</sup> century, the U.S. economy was evolving rapidly through northern migration, immigration, urbanization, and, most importantly, industrialization. One dramatic consequence of all of those trends was that corporate concentration began to have negative effects on the economy and on the citizenry. Increased economic inequality led to the Gilded Age, increased poverty and illness, and increased risks to consumers. These trends, in turn, had the pernicious effect of creating an economic underclass that felt powerless to combat growing social and economic ills. In response, a new form of countervailing power was needed to balance industrial strength. The federal government was seen as the institution to counterbalance private power, to protect markets from abuse, and to relieve citizen suffering.

By way of example, *Munn v. Illinois*, 94 U.S. 113 (1877) is generally considered to be the first modern administrative law case, and it demonstrates the power of government to correct market abuses. Shortly thereafter, the Interstate Commerce Commission (ICC) was created in 1887 as the first modern administrative agency. These two developments emphasize the combined role of Congress and the executive branch in adopting and implementing public-regarding regulatory initiatives.

*Munn* is significant precisely for setting out the contours for modern regulation. At issue in the case was an Illinois statute setting the prices for grain elevators because they were exercising both monopoly and monopsony power. Farmers who sold grain to the elevators were underpaid, and consumers who bought that grain paid too much for it because of the market power exercised by the elevators. In reviewing the constitutionality of the Illinois legislation, the Supreme Court established two principles for modern regulation. First, the Court recognized that governments have long regulated industries that exercised monopoly power, even to the point of allowing government to set a private firm’s prices. In short, the first element necessary before a regulation is adopted is to identify a market failure.

Second, the subject to be regulated must be determined to be in the public interest. In *Munn*, the Court acknowledged that setting fair and reasonable grain prices in the country's breadbasket was clearly in the public interest.

The ICC complemented the regulatory principles of *Munn*. The agency was created to monitor abuses of railroad rates. It was seen as an institution that was nonpolitical, expert, technically proficient, and could correct economic dislocations. After the creation of the ICC, and in response to corporate and industrial concentration, similar legislation was passed to correct for the abuses of monopoly power (Sherman Anti-Trust Act, Pub. L. No. 26 Stat. 209 and the Federal Trade Commission Act, 38 Stat. 717); provide for hydropower (the Federal Power Act, 41 Stat. 1063); address airline safety (the Air Commerce Act of 1926, 44 Stat. 568); and the like.

This legislation led to the establishment of administrative agencies including the Food and Drug Administration, the Federal Trade Commission, the Federal Power Commission, and others. These agencies, like the ICC before them, were seen as technically proficient expert administrators that were tasked by Congress to address social and economic problems in the public interest and for the benefit of all. In addition to market corrections, agencies were also created to protect citizens from social harms. Congress specifically identified problems such as tainted meat (the Federal Meat Inspection Act of 1906, 34 Stat. 1256) and adulterated food and drugs (the Pure Food and Drug Act of 1906, 34 Stat. 768) and passed legislation to provide government protection from those dangers.

All of this legislative and administrative activity took place before the proliferation of New Deal and Great Society agencies. The New Deal and the Great Society created new sets of agencies and expanded the scope and reach of government. Although they were directed to address different sets of problems, both were created in the public interest and directed to advance the public benefit. New Deal economic legislation was intended to accomplish three things — develop a national infrastructure, particularly in energy (the Federal Power Act, 49 Stat. 847, and the Natural Gas Act, 52 Stat. 821); regulate and stabilize markets, particularly through disclosure and financial reporting (Securities Act of 1933, 48 Stat. 74 and the Securities Exchange Act of 1934, 48 Stat. 881); and promote and support a middle class, particularly through the creation of safety nets and by empowering labor organizations (Social Security Act of 1935, 49 Stat. 620, and the National Labor Relations Act, 49 Stat. 449), among other legislation.

Rather than focusing on economy-wide reforms, Great Society legislation was directed at solving social problems, especially those affecting health, safety, and welfare. Most notably, the Great Society directed attention to and the federal protection of civil rights (Civil Rights Act of 1964, 78 Stat. 241, and the Voting Rights Act of 1965, 79 Stat. 437). Additionally, legislation of that period addressed problems of the environment (National

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Environmental Policy Act of 1969, 83 Stat. 852), worker safety (Occupational Safety and Health Act, 84 Stat. 1590), consumer protection (Consumer Product Safety Act, 81 Stat. 466), and poverty (Economic Opportunity Act of 1964, 78 Stat. 508). What distinguishes the New Deal from the Great Society, then, is that New Deal legislation and agencies buoyed the economy while Great Society legislation and agencies improved social welfare.

In both instances, new agencies were created and new regulations were adopted to implement legislation intended to generate public benefits. In each case, the legislation was expressly directed to serving the “public interest” in general or individual statutes identified a more specific public interest such as preventing racial discrimination, fighting poverty, protecting workers, or preserving the environment.

Any legal transition comes with some costs as clearly articulated by Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922): “Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.” Holmes’ argument is that regulation in the public interest can impose costs on select private individuals in exchange for overall benefits to society. More significantly, however, those costs are imposed on those actors who caused social harms. Regulation, as Holmes knew, is based on a principle of cost causation.

The reality of regulation is that regulations do not indiscriminately impose costs on blameless actors. Regulations protecting children from lead poisoning may well impose costs; so do clean air regulations directed to power plants to reduce greenhouse gas pollution. However, those compliance costs are imposed on the culpable; they require bad actors to account for the harms that they have inflicted on the public. Regulation, then, is intended to avoid those harms in the first place rather than impose them on innocent persons. Polluter profits should not be made at the expense of citizen asthma or heart disease.<sup>18</sup> Regulation or its reduction is not intended to reward malfeasants; it is intended to provide compensation, avoid harm, and promote public welfare.

The executive order at issue does exactly the opposite. By its very terms, the order is directed to protecting “private expenditures” at the expense of public benefits. The order should be struck down because by neglecting benefits, it contravenes the political history and constitutional values of the United States.

### **Protecting Market and Nonmarket Values through Regulation**

After the spate of New Deal economic regulation, policymakers perceived a need for uniformity among agency procedures. In order to bring that uniformity, Congress passed the Administrative Procedure Act of 1946, 60 Stat. 237. Then, after the passage of Great Society social legislation,

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administrative law scholars and economists sought uniformity among substantive agency actions.

The work of economist Alfred Kahn<sup>19</sup> and Justice Stephen Breyer<sup>20</sup> responded to that call for regulatory uniformity. Both authors identified a model of regulation that was based on a straightforward and simple idea. Government regulation had been and should be used to correct market failures. Most often, those failures resulted from economic dislocations in malfunctioning or inefficient markets. The same principles of market failure, though, also apply to nonmarket values. Individuals can be disadvantaged as a result of an unfair economic distribution or as a result of illegitimate discrimination. Government regulation, then, can be used to correct market failures, and it can be used to protect nonmarket values such as civil and political rights and liberties.<sup>21</sup>

Regulation can address cases of both market and nonmarket failures, and the goal of that regulation, as leading regulatory casebooks demonstrate, is to further public benefits either by reducing harms or by providing publicly valuable goods and services. Economic regulation is design to promote economy-wide efficiency, and social regulation is designed to promote nationwide fairness and equality.<sup>22</sup> Both approaches, economic and social, are intended to improve the lives of the citizenry and to enable them to participate in political and economic markets. Such participation advances our democracy.

There is regulation at every level of government, and its scope is ubiquitous. It touches our lives, from federal and local taxes to environmental rules and regulations, and from local school requirements to interstate oil pipelines. Despite the ubiquity, however, government intervenes in private markets for only a handful of reasons, and it uses only a handful of regulatory tools to do so.

By way of example, regulations are used to assure the public that services are safe and reliable and that assurance can be given through licensing. Licenses, in turn, can be used to certify lawyers, doctors, and other professionals, and licenses can be used to market potentially dangerous drugs or even authorize a nuclear power plant to generate electricity.

As other examples, to the extent that a market may be subject to monopolization, regulations can ensure that electricity and gas prices are fair and reasonable through ratemaking. To the extent that as consumers, we lack information about drugs or about what is contained in the foods we eat, then regulations can require that information be provided to better inform our consumer choices.

The simple point is that as varied and as extensive as government regulation is, there are only a limited number of regulatory tools, and they are all



intended to either improve economic markets or protect us from either economic harm or other from forms of disadvantages and social pain. Regulations are not intended to protect private expenditures alone; they are intended to promote the public good.

## Counting Regulatory Benefits

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The growth of the regulatory state raised concerns on both sides of the political aisle. Beginning with President Jimmy Carter's administration, politicians and policymakers began to question the extent of regulation and, in fact, began to deregulate. The Carter administration deregulated airlines, trucking, energy, and the financial sector, among others. The deregulatory mood became more visible with the election of Ronald Reagan. During his administration, deregulation continued, and the Regan Revolution became synonymous with deregulation across the board.<sup>23</sup>

The deregulatory efforts of the Carter and Reagan presidencies, however, are distinguishable. Carter's deregulatory initiatives started with the proposition that regulation should fix broken markets. If the cost of regulation exceeded the benefits of the regulatory checks, then competitive markets were preferable. However, if government regulation could improve efficiency, then regulation was preferable to unconstrained markets. In short, regulation under Carter assessed costs and benefits for the purpose of promoting competition.

As noted, Reagan deregulated across the board. Instead of asking whether or not regulation facilitated or inhibited competitive markets, Reagan's deregulation was based on an anti-government animus as revealed in such slogans as "trickle-down economics," and "don't tax, don't spend." Those simple slogans gave way to a more full-throated ideology known as neoliberalism.

Neoliberalism was more concerned about the size, reach, and cost of government than it was about competitive markets. It was based on two principles: promote markets and demonize government. That neoliberal spirit infuses the Trump executive order that is directed at regulatory cost reduction in favor of free markets in name only.

The qualification about markets "in name only" is to indicate that there is no such thing as a free market in a mixed market economy. Neoliberal sloganeers proselytized as if there was a choice between "free markets" and "big government." This choice is as simplistic as it is wrong. Instead, government involvement with markets is as extensive as it is necessary. Government regulation can be seen in the common law baseline of contracts, torts, and property law, and it can be seen in macroeconomic

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controls such as central banking and rules regarding the amount of credit available at any one time.

In other words, the proper mix of government and markets generates economic and social benefits. Focusing on regulatory costs without accounting for benefits upsets the balance between government and markets and may do so not only to the detriment of markets themselves, but also to individual lives. Problematically, this narrow focus on costs is based on flawed research and a fundamental analytic error.

### **The False Concern about Regulatory Costs**

The concern, one might even say obsession, with regulatory costs has long been a staple of government critics. Most notably, critics argue that regulation costs the U.S. economy \$2 trillion per year. That figure is based upon a study prepared for the National Association of Manufacturers and authored by two Lafayette College economists, Nicole C. Crain and W. Mark Crain, who based their \$2 trillion estimate by simply updating a previous study.<sup>24</sup> That previous study was widely cited by neoliberals both inside and outside of government. Two glaring problems with the Crain & Crain analysis render it defective.

First, the report relies on a “top-down” methodology for 75 percent of its cost calculation rather than relying on the actual cost estimates used by agencies. The methodology relies upon macroeconomic variables and modeling techniques to measure the effect of regulation on the economy as a whole.<sup>25</sup>

To reach their trillion dollar estimates, Crain & Crain used information from the Organization of Economic Cooperation and Development to compare national economies and to infer the cost of regulation from that information. They employed a proxy measure of the amount of regulation based upon the Global Competitive Index, which is a component of the Global Competitiveness Report that measures various aspects of the institutions, policies, and other factors to determine a country’s productivity level.

The cost comparisons from that report are based upon an Executive Opinion Survey from which Crain & Crain extracted only three questions. They relied upon responses to questions asking executives to comment on the burden of government regulation, the efficiency of the legal framework used to challenge regulation, and the regulation of a country’s securities exchanges. Executives were asked to measure those indicia on a 1 to 7 point scale. Crain & Crain then accumulated the survey results, determined mean values, ran regression analyses, and, after using a hypothetical benchmark, concluded that their findings were “statistically significant.”<sup>26</sup> Regardless of that conclusion, executive perception is a proxy data point; it is not based upon accurate or actual empirical evidence.

Official concerns were raised about the reliability of the report, including one by the Office of Advocacy, the entity which granted the Crains the contract for this research. The Office of Advocacy posted the report on its website with the following caveat: “the findings of the study have been taken out of context and certain theoretical estimates of costs have been presented publicly as verifiable facts.”<sup>27</sup> In addition to criticism by the Office of Advocacy, the Congressional Research Service<sup>28</sup> and the Government Accountability Office<sup>29</sup> also questioned the reliability of the Crain & Crain analysis.

The second fatal flaw in the Crain & Crain analysis is even more damning. They did not look at the economic value of regulatory benefits. By their own admission, they failed to account for benefits because they were not asked to do so.<sup>30</sup> The Crain & Crain report may have fared better if it was based on solid cost-benefit analysis.

### **The Importance of Regulatory Benefits**

Since the Reagan administration, such influences as the law and economics movement, neoliberalism or market liberalization, free market fundamentalism, and the like have promoted quantitative analysis, more specifically cost-benefit analysis, as a methodology to assess government programs, reduce costs, and deregulate. Indeed, some scholars believe that our administrative government constitutes a cost-benefit state,<sup>31</sup> although our analysis need not take us that far.

The history and development of cost-benefit analysis (CBA) is continuing, and agencies have significant flexibility in how to use this methodology. It must be noted and emphasized, however, that many, if not most, environmental, health, and safety statutes direct agencies to use some alternative such as feasibility or specific health or technology standards.

Since CBA was first used by the Army Corps of Engineers to evaluate which public projects to pursue in the 1930s,<sup>32</sup> through the development of environmental economics, to current attempts to assess the value of human life and calculate the current value of future benefits, CBA has had its proponents as well as its critics.<sup>33</sup> Regardless of the controversies surrounding the application of CBA, two things are clear. First, CBA is now a part of the regulatory state as a matter of administrative practice, executive orders, and judicial decisions. Critically, though, there are many “kinds” of CBA (*i.e.*, CBA is a broad term that describes a wide variety of methodologies for considering a rule’s costs and benefits and does not necessarily require the conversion of all the rule’s costs and benefits into monetary values and then directly balancing the two to find the economically “optimal” level of regulation), and the type that agencies use will vary greatly depending on the statute they are implementing. Indeed, as explained, the Supreme Court has consistently endorsed the notion that agencies retain a great deal of discretion in determining how to perform CBA for particular rules.

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Second, exactly as its name indicates, CBA involves the consideration of both a rule's costs and benefits, and the failure to consider either renders the methodology meaningless. Yet, the executive order on reducing regulatory costs conspicuously departs from this approach by focusing exclusively on costs without addressing benefits.<sup>34</sup> To be sure, since the executive order's issuance, OIRA, which is taking the lead in overseeing agency compliance with the order's requirements, has published guidance that instructs agencies to continue subjecting their new rules as well as the repealed ones to CBA.<sup>35</sup> This guidance, however, directly contradicts the cost-only focus of the executive order, which raises significant questions of whether and to what extent agencies would be able to take it seriously when attempting to comply with the order.)

The executive branch has relied on CBA as a principal assessment tool for over 40 years. President Reagan, with Executive Orders 12291 and 12498, required agencies to utilize CBA and to issue an annual regulatory plan for review by the Office of Management and Budget. President Bill Clinton, through Executive Order 12866, and President Barack Obama, through Executive Order 13563, adopted the essential features of the earlier CBA orders and required agencies to assess both costs and benefits of regulation and to proceed with them only when benefits "justify" the regulatory costs.

Questions about the proper scope and application of CBA, however, remain, and those questions continue to be addressed by the judiciary. In short, though, the direction is clear. Subject to statutory limitations, the Supreme Court generally regards some form of agency consideration of regulatory costs and benefits to be part of a rational decision-making process, though it has been careful to leave the precise manner in which this consideration takes place to the discretion of the rulemaking agencies. Significantly, even while endorsing this discretion, Justices across the political spectrum continue to maintain a presumption against the use of the most formal approach to CBA, which involves the attempt to quantify and monetize all regulatory costs and benefits and then to precisely balance those monetized costs and benefits to identify the level of regulatory stringency that achieves social optimality.<sup>36</sup>

The key to understanding the permissible use of CBA starts with the statute. A statute can require or permit some form of CBA or it may limit its application. Where the statute is silent or ambiguous on the issue — which is the bulk of the cases — the agency retains considerable discretion over how costs and benefits are assessed and considered.

The central case for limiting an agency's use of CBA is *American Textile Manufacturers Institute, Inc. v. Donovan*, 452 U.S. 490 (1981). The Court was asked to decide whether the Occupational Safety and Health Administration (OSHA) needed to cost-justify a cotton dust regulation. Enabling legislation directs OSHA to establish standards for toxic materials "which most

adequately ensures, to the extent feasible . . . that no employee will suffer material impairment of health or functional capacity.” 29 U.S.C §655(b)(5) (2012). The Court rejected the use of CBA as inconsistent with that statutory requirement:

“[C]ongress itself defined the basic relationship between costs and benefits, by placing the ‘benefit’ of worker health above all other considerations save those making the attainment of this ‘benefit’ unachievable. Any standard based on a balancing of costs and benefits by the Secretary that strikes a different balance than that struck by Congress inconsistent with the command set forth in §6 (b) (5). Thus, cost-benefit analysis by OSHA is not required by the statute because feasibility analysis is.” 427 U.S. at 509.

*American Textile* remains good law and its significance to the executive order must be underscored. Specifically, Congress can require an agency to regulate according to a standard other than formal, economic CBA. Most importantly, that standard is one that serves the public interest and not the interest of any private industry or concern.

Since *American Textile*, the Court has addressed other CBA issues particularly relevant to environmental regulation. The strongest statement regarding a limitation on CBA comes from Justice Scalia in *Whitman v. American Trucking Ass’ns, Inc.*, 531 U.S. 457 (2001), a case dealing with the Clean Air Act. Pursuant to the act, the EPA administrator is required to set ambient air standards for certain common air pollutants. The industry argued that when reviewing or revising standards, the administrator must consider costs. Justice Scalia rejected that argument:

“Section 109(b)(1) instructs the EPA to set primary ambient air quality standards ‘the attainment and maintenance of which . . . are requisite to protect the public health’ with ‘an adequate margin of safety.’ [O]ne would have thought it fairly clear that this text does not permit the EPA to consider costs in setting the standards. . . . Nowhere are the costs of achieving such a standard made part of that initial decision.” 531 U.S. at 465.

Again, the point should be clear. When a statute sets out public benefits as the determinative decision-making criterion, then costs are not to be considered. Consequently, for those statutes that specify regulatory standards that forbid consideration of costs, then the singular focus on regulatory costs of the executive order directly violates Supreme Court rulings.

Since *American Trucking*, the Court has provided agencies with additional guidance on the use of CBA and the consideration of regulatory costs consistent with different statutory mandates. The essential thrust of these cases is that where not specifically prohibited by law, agencies generally must undertake some assessment of costs and benefits as part of their

regulatory decision-making, though the manner in which this consideration is undertaken is committed to agency discretion. Notably, though, the Court has indicated one potential caveat to this broader grant of discretion — namely, it has consistently expressed a strong skepticism of the kind of formal CBA endorsed by neoliberal economists, preferring instead more informal approaches to measuring and comparing a rule’s advantages and disadvantages.

In *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208 (2009), for example, the EPA declined to require the use of a particular technology for cooling power plants because of its expense. The statute required that a regulation reflect the “best technology available for minimizing adverse environmental impact,” Clean Water Act §316(b), 33 U.S.C. §1326(b) (2012). Justice Scalia noted that the enabling legislation did not “tie the agency’s hands as to whether cost-benefit analysis should be used.”

Justice Scalia then distinguished *American Textile* and *American Trucking* and ruled that if the statute is silent about CBA, that does not mean that an agency is not permitted to use it. He did, however, make it clear that the Court might well take a different view were the agency to engage in a more formal cost-benefit analysis, noting that more “rigorous form[s] of cost-effective benefit analysis” might be “preclude[d].” 556 U.S. 223; *see also at* 235 (Breyer, J. concurring) (“The EPA’s reading of the statute seems to permit it to describe environmental benefits in non-monetized terms and to evaluate both costs and benefits in accordance with its expert judgment and scientific knowledge. The Agency can thereby avoid lengthy formal cost-benefit proceedings and futile attempts at comprehensive monetization [and] take account of Congress’ technology-forcing objectives.”)

*EPA v. EME Homer City Generation, L.P.*, 134 S.Ct. 1584 (2014) is in accord. In that case, the Court, in an opinion by Justice Ginsburg, ruled that the EPA may consider costs along with benefits in setting rules regarding interstate air pollution for the express intent of improving air quality across state borders thus generating health benefits.

The most recent and most significant case to weigh in on agency use of CBA is *Michigan v. EPA*, 135 S. Ct. 2699 (2015). The Court was asked to review EPA regulations limiting toxic emissions from power plants. The EPA determined that given a statutory ambiguity, it was not required to consider costs in making a threshold determination about *whether* to limit the toxic emissions, but later incorporated cost considerations into its final determination of *how* to set the actual limits on the toxic air pollutants.

In the opinion for a 5-4 Court, Justice Scalia wrote that it is not “even rational, never mind ‘appropriate,’ to impose billions of dollars of economic costs in return for a few dollars in health or environmental benefits.” 135 S. Ct. at 2707. In dissent, Justice Kagan argued that the EPA had adequately

considered costs, just at the second step in its two-step decision-making process. Regarding that aspect of the agency's decision-making, she wrote that "[c]ost is almost always a relevant — and usually, a highly important — factor in regulation." 135 S. Ct. at 2716-17. The important point to emphasize is that cost considerations are weighed against beneficial ones. In other words, an agency's consideration of costs does not occur in a vacuum. Instead, cost considerations occur with a thorough and detailed consideration of public benefits, which constitutes the very purpose of the statute. Indeed, the EPA finding in that case was based on an 800-page report that cataloged the public health harms caused by power plant emissions of mercury and other toxic air pollutants.

In *Michigan v. EPA*, both Justice Scalia and Justice Kagan recognized that the EPA was obliged to consider costs and benefits. Most importantly, though, Justice Scalia wrote that while an agency had to account for costs in some way, "a formal cost-benefit analysis in which each advantage and disadvantage is assigned a monetary value" was not required (135 S. Ct. at 2711). Thus the majority and the dissent determined that the manner in which the costs must be weighed against the benefits should be left to the discretion of the EPA, while both Justices indicated their skepticism about the use of formal CBA.

Although open issues remain concerning the use of CBA, there is universal agreement about its application when it is used to assess regulations: Costs and benefits must be weighed against each other in some manner. Benefits cannot be ignored because benefits matter; they matter in promoting the public interest as identified by Congress. Such consideration of benefits and concern for the public interest is ignored by the executive order and, therefore, it is constitutionally infirm.

To complete the point, it must be added that by ignoring benefits, not only is the will of Congress ignored but with it so is the public interest and the public good of the country because regulations produce public benefits.<sup>37</sup>

### **Benefits Matter as a Matter of Law and as a Matter of Good Policy**

The executive order mandating the elimination of two regulations for every new one adopted without considering benefits is an extreme form of what is known as the "pay-go" approach to regulation, an approach that the Center for Progressive Reform has criticized in the past.<sup>38</sup> In the "pay-go" approach, there can be a 1-to-1, 2-to-1, or even 3-to-1 trade-off between old and new regulations. In other words, for every one new regulation, one or two or three old ones must be eliminated as cost-reduction measures. However, if the focus is exclusively on costs, then such an approach is something that law and policy do not allow.

In contrast to past efforts at so-called regulatory reform, the objective of a cost-only pay-go approach is not to improve the quality of individual

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regulatory decisions, but rather to put an arbitrary cap on the total amount of regulation through the establishment of a regulatory budget. However, regulatory budgets can constrain agencies and impede their ability to carry out congressional directives at the risk of increasing public harm.<sup>39</sup> The executive order has the same intent; it also has the same defect in that benefits are ignored when calculating the trade-offs. Some countries, such as the United Kingdom and Australia, have adopted “pay-go” that does not completely ignore benefits.<sup>40</sup> Instead, they measure “*net* direct costs,” that is, the remaining costs imposed on businesses after all the benefits that the regulation provides those businesses have been subtracted out. Of course, it is easy to argue that regulations are too burdensome and they should be reduced. Paperwork and reporting requirements, as examples, as well as reducing the amount of time spent in regulatory review can reduce regulatory costs with little or no impact on benefits delivered. Unfortunately, the executive order is not limited to paperwork reduction or to streamlining regulatory processes. Rather, given the rhetoric surrounding the signing of the executive order, substantive regulations, most notably environmental regulations, are the targets.<sup>41</sup>

The importance of regulatory benefits must be underscored.<sup>42</sup> OMB, for example, estimates that regulatory benefits exceed regulatory costs by 7-to-1 for significant regulations,<sup>43</sup> and that for 2014, the total costs of federal regulation ranged from between \$68.5 to \$101.8 billion while total benefits ranged from \$261.7 to \$1,042.1 billion.<sup>44</sup> The EPA estimates that the regulatory benefits of the Clean Air Act exceed costs by a 25-to-1 ratio,<sup>45</sup> and another EPA study found that regulatory benefits exceeded costs by ratios as high as 22-to-1.<sup>46</sup> And, as noted earlier, the Congressional Research Service is in accord with the EPA’s positive assessment of regulation.<sup>47</sup> By way of simple example, the EPA estimates that vehicle fuel standards will provide net benefits to society estimated at \$100 billion.<sup>48</sup>

Just as the benefits of regulation must be acknowledged, the costs of failing to regulate properly or not regulate at all are a matter of life and death. Simply consider that the BP Deepwater Horizon<sup>49</sup> and the Upper Big Branch Mine disasters<sup>50</sup> and the Big Short mortgage debacle<sup>51</sup> have all been attributed to the failure to regulate; they were not attributable to over-regulation. And they cost society considerably.

Most harshly, the failure to regulate has resulted in the privatization of benefits and the socialization of costs. Homeowners, not bankers, suffered the most severe losses due to the lack of financial regulation, and mine workers and oil and gas workers, not CEOs, lost their lives for the failure to aggressively pursue safety regulations. Indeed, while one coal mine owner was sentenced to a meager year in prison for persistently failing to address hazardous conditions that led to the Upper Big Branch Mine disaster that cost the lives of 29 workers,<sup>52</sup> other CEOs escaped any sanction at all<sup>53</sup> and their companies thrived. The bank executives who were responsible for



bringing the world economy to the brink of a global depression were rewarded with bonuses, and their banks have never been richer. Something is wrong with a society that tolerates such injustice, and that is the type of society that will be perpetuated, not reversed, by the executive order.

## Conclusion

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The Trump administration's two main deregulatory executive orders have the reasonable goal of reducing regulatory costs. Their devilish methods of doing so, however, are fraught with difficulties, and the difficulties are literally fatal. The regulatory review measures of Demon 1 threaten to collapse the regulatory process by micromanagement, and the regulatory cost-reduction measures of Demon 2 threaten to extract valuable benefits from good government regulation. These twin threats raise risks to our lives as well as to the economy as a whole.

As troubling as the so-called regulatory reforms and the cost-cutting measures are, even more troubling is the reality that the regulatory cuts will be used politically to advance the Trump administration's social agenda. The reforms and the cuts will not be used for the economic benefit of the United States let alone for the benefit of all of its citizens. Instead, the reforms and the cuts will be visited on those least in a position to protect themselves. Consider actions already taken and contemplated:

- Reducing protections for transgender students<sup>54</sup> and consumers;<sup>55</sup>
- Eliminating environmental protections generally;<sup>56</sup>
- Reversing the Obama's administration's clean energy efforts more specifically;<sup>57</sup>
- Even more specifically, withdrawing the United States from the international Paris Climate Agreement signed by nearly 200 countries;<sup>58</sup>
- Aggressively ignoring science to the benefit of insecticide manufacturers;<sup>59</sup>
- Arrogantly ignoring forensic science in the Department of Justice;<sup>60</sup>
- Defunding legal services<sup>61</sup> and the arts;<sup>62</sup>
- Fouling streams and endangering drinking water;<sup>63</sup>
- Rolling back privacy protections by the FCC;<sup>64</sup>

- The Attorney General's skepticism about official reports of police racism;<sup>65</sup>
- Overturning the Obama administration's gun restrictions for the mentally ill;<sup>66</sup>
- Pursuing an immigration ban unrelated to any identified harms;<sup>67</sup>
- Promoting inhumane private prisons;<sup>68</sup>
- Demonizing the media as the enemy of the people;<sup>69</sup>
- Reducing privacy rights for citizens<sup>70</sup> and non-citizens;<sup>71</sup> reducing healthcare coverage while raising healthcare prices;<sup>72</sup>
- Halting investigations of methane leaks<sup>73</sup> and efforts to promote competition in the communications industry;<sup>74</sup>
- Financing private charter schools at the expense of public education;<sup>75</sup> and,
- Most insipidly and hatefully, building a multi-billion dollar spite fence,<sup>76</sup> among other actions.

Instead of issuing executive orders that ignore constitutional and statutory requirements and run contrary to good government practices and policies, the Trump administration, and other presidential administrations to follow, should identify reforms that will strengthen the regulatory system so that executive agencies are better able to carry out their missions of protecting people and the environment.

## Endnotes

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- <sup>1</sup> Exec. Order No. 13771, 82 Fed. Reg. 9339 (Jan. 30, 2017), available at <https://www.gpo.gov/fdsys/pkg/FR-2017-02-03/pdf/2017-02451.pdf>.
- <sup>2</sup> Exec. Order 13777, 82 Fed. Reg. 12285 (Feb. 24, 2017), available at <https://www.gpo.gov/fdsys/pkg/FR-2017-03-01/pdf/2017-04107.pdf>.
- <sup>3</sup> Philip Rucker & Robert Costa, *Bannon Vows a Daily Fight for 'Deconstruction of the Administrative State'*, WASH. POST, Feb. 23, 2017, available at [https://www.washingtonpost.com/politics/top-wh-strategist-vows-a-daily-fight-for-deconstruction-of-the-administrative-state/2017/02/23/03f6b8da-f9ea-11e6-bf01-d47f8cf9b643\\_story.html?utm\\_term=.df8265a52ccf](https://www.washingtonpost.com/politics/top-wh-strategist-vows-a-daily-fight-for-deconstruction-of-the-administrative-state/2017/02/23/03f6b8da-f9ea-11e6-bf01-d47f8cf9b643_story.html?utm_term=.df8265a52ccf); Jeremy W. Peters, *Stephen Bannon Reassures Conservative Uneasy About Trump*, N.Y. TIMES, Feb. 23, 2017, available at <https://www.nytimes.com/2017/02/23/us/politics/cpac-stephen-bannon-reince-priebus.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=first-column-region&region=top-news&WT.nav=top-news&r=0>.
- <sup>4</sup> Nicholas Kristof, *Trump Voters, Your Savior is Betraying You*, N.Y. TIMES, Feb. 25, 2017, available at <https://www.nytimes.com/2017/02/25/opinion/sunday/trump-voters-your-savior-is-betraying-you.html?action=click&pgtype=Homepage&clickSource=story-heading&module=opinion-c-col-left-region&region=opinion-c-col-left-region&WT.nav=opinion-c-col-left-region>.
- <sup>5</sup> See Rena Steinzor, *The Real 'Tsunami' in Federal Regulatory Policy*, REG BLOG, May 22, 2014, <http://www.regblog.org/2014/05/22/22-steinzor-the-real-tsunami-in-federal-regulatory-policy/> (providing examples of existing regulatory review programs) (last visited Apr. 20, 2017); see also Ctr. for Progressive Reform, Letter to Acting Administrator Dominic J. Mancini, Office of Information and Regulatory Affairs: Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, Titled "Reducing Regulation and Controlling Regulatory Costs," (February 10, 2017) available at [http://progressivereform.org/articles/CPR\\_Comments\\_2-for-1\\_EO\\_Guidance\\_021017.pdf](http://progressivereform.org/articles/CPR_Comments_2-for-1_EO_Guidance_021017.pdf).
- <sup>6</sup> Sidney Shapiro et al., *Saving Lives, Preserving the Environment, Growing the Economy: The Truth About Regulation* (Ctr. for Progressive Reform, Issue Alert 1109, 2011), available at [http://www.progressivereform.org/articles/RegBenefits\\_1109.pdf](http://www.progressivereform.org/articles/RegBenefits_1109.pdf).
- <sup>7</sup> Memorandum on Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, Titled "Reducing Regulation and Controlling Regulatory Costs" (Feb. 2, 2017), available at <https://www.whitehouse.gov/the-press-office/2017/02/02/interim-guidance-implementing-section-2-executive-order-january-30-2017>.
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- <sup>12</sup> Complaint of Plaintiff, Public Citizen v. Trump, No 1:17-cv-00253 (D.D.C. Feb. 8, 2017), available at <http://www.citizen.org/documents/Complaint-Public-Citizen-NRDC-CWA-v-Donald-Trump.pdf>.
- <sup>13</sup> Memorandum on Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, Titled "Reducing Regulation and Controlling Regulatory Costs" (Feb. 2, 2017), available at <https://www.whitehouse.gov/the-press-office/2017/02/02/interim-guidance-implementing-section-2-executive-order-january-30-2017>.
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- <sup>17</sup> Herbert Hovenkamp, *Inventing the Classical Constitution*, 101 IOWA L. REV. 1 (2015).
- <sup>18</sup> Ctr. for Progressive Reform, Letter to Acting Administrator Dominic J. Mancini, Office of Information and Regulatory Affairs: Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, Titled "Reducing Regulation and Controlling Regulatory Costs," (February 10, 2017) *available at* [http://progressivereform.org/articles/CPR\\_Comments\\_2-for-1\\_EO\\_Guidance\\_021017.pdf](http://progressivereform.org/articles/CPR_Comments_2-for-1_EO_Guidance_021017.pdf).
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- <sup>20</sup> STEPHEN BREYER, REGULATION AND ITS REFORM (1982).
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- <sup>23</sup> SHAPIRO & TOMAIN, ACHIEVING DEMOCRACY, *supra* note 16, at ch. 2.
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- <sup>25</sup> CAREY, *supra* note 11, at 15.
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