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New Report Highlights Constitutional Problems of Trump-Bannon Assault on Our Safeguards

Since the early days of the Trump administration, the president and his team have launched a series of assaults on safeguards that protect our health, safety, the environment, and more. The stated aim: The "deconstruction of the administrative state," as described by Trump's chief strategist Steve Bannon. The plain-language meaning of that goal: A full-fledged attack on our bedrock laws that, if successful, would endanger our health, our jobs, our financial security, and our lives. But as [a new report](#) from Center for Progressive Reform Member Scholar Joseph Tomain illustrates, the executive orders that lay the foundation for this assault suffer from significant constitutional shortcomings that may ultimately doom them.

In Tomain's view, the foundational executive orders of the Trump deregulatory assault manage to be simultaneously nefarious and ham-handed. One order requires agencies to identify two regulations to be repealed for each new regulation they propose, and the other directs agencies to establish task forces to conduct a redundant review of rules that could be candidates for repeal or weakening.

"These orders represent a double-barreled broadside against more than a century of work to better protect our health, safety, and quality of life," said Tomain, who also serves as Dean Emeritus and the Wilbert & Helen Ziegler Professor of Law at the University of Cincinnati College of Law.

As the report, [*The Twin Demons of the Trump-Bannon Assault on Democracy*](#), shows, the two executive orders suffer from significant constitutional problems. The first directive, also known as the "one-in, two-out" executive order, is particularly problematic and became the target of a public interest lawsuit shortly after it was signed. Among other things, it allows regulatory reductions to happen indiscriminately without exposing proposals to strip away protections to agency and judicial review as required by the U.S. Supreme Court. It also runs roughshod over the requirement that agencies honor enabling legislation and carry out congressional instructions in laws like the Clean Air Act and the Occupational Safety and Health Act.

In addition, the one-in, two-out order and the task force order both reject the constitutional and political obligation that government must act for the public benefit. Tomain sketches the history of regulation in the United States, noting that through various eras,

[A]s 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 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. 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.

"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," Tomain concluded.

The full text of the report is available at http://progressivereform.org/Twin_Demons.cfm. Tomain and a number of other CPR-affiliated legal experts, acting in their individual capacities, filed a related amicus brief to the public interest lawsuit in late May. That brief is available at http://progressivereform.org/articles/LawProfs_Amicus_Reg_EOs_052417.pdf. More about the history of regulation in America and how it informs connections between philosophical pragmatism, progressive government, and democracy is available in the book [*Achieving Democracy: The Future of Progressive Regulation*](#), co-authored by Tomain and fellow CPR Member Scholar Sidney Shapiro.

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