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ESSAY

THE ONE-IN, TWO-OUT EXECUTIVE ORDER IS A ZERO

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On January 30, 2017, President Donald J. Trump signed Executive Order 13,771, which directs each agency to repeal at least two existing regulations before issuing a new regulation (referred to as the "one-in-two-out" requirement) and imposes a regulatory budget that sets a cap on total incremental regulatory costs (set at zero for fiscal year 2017).[1] The regulatory budget concept has been kicked around for decades, while the one-in-two-out requirement is more recent and has been implemented in Canada, the United Kingdom, and Australia to various extents.[2] Legal scholars and commentators have been quick to opine on the Order, with some pointing out ways in which

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1 Exec. Order No. 13,771, 82 Fed. Reg. 9,339 (Feb. 3, 2017).

2 We discuss these requirements in Parts I.A and IV.

it is irrational or impractical[3] and others defending aspects of the Order such as the imposition of a regulatory budget.[4]

In this Essay, we take a somewhat different approach by evaluating how well the Order is likely to achieve its purpose of helping agencies "be prudent and financially responsible in the expenditure of funds."[5] Although vaguely laudable, this purpose is illaudably vague. We will therefore ground our analysis by defining the goal (or goals) of the Order according to priorities that have been adopted by prior administrations or promoted by scholars, commentators, or interest groups. For purposes of this analysis, we take no normative position on whether these end goals are desirable.

The three potential goals that we evaluate the Order against are: (1) increasing the net benefits of regulations, (2) decreasing regulatory burdens, and (3) increasing presidential control over agencies. We then compare the Order against regulatory reform efforts in other countries. We conclude that the Order is unlikely to sensibly (much less prudently or responsibly) achieve any of these goals without significant changes.

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3 *See, e.g.*, Dan Farber, *Trump's Anti-Regulation Executive Order*, LEGAL PLANET (Jan. 30, 2017), http://legal-planet.org/2017/01/30/trumps-anti-regulation-executive-order/ ("What it *will* do is cause chaos and uncertainty.")[https://perma.cc/G976-4UNG]; Nicholas Ashford, *Trump Rejects Science, Technology, Economics, and the Constitution With His Two-for-One Executive Order*, HUFFPOST THE BLOG (Feb. 1, 2017, 12:35 pm), http://www.huffingtonpost.com/nicholas-ashford/trump-rejects-science-tec_b_14552756.html [https://perma.cc/VWU6-ZHBK] (describing "the folly of abandoning regulation as a means of stimulating technology and employment"); Michael C. Dorf, *Trump's Cut-Regulations Order is Plain Stupid*, NEWSWEEK (Feb. 5, 2017, 7:10 am), http://www.newsweek.com/michael-dorf-trumps-cut-regulations-order-plain-stupid-551293 [https://perma.cc/MHG3-3Q8U] (pointing out the illogical elements and the means of evading the Order); Dan Farber, *Trump's 2-for-1 Order: Legal Issues*, LEGAL PLANET (Feb. 6, 2017), http://legal-planet.org/2017/02/06/trumps-2-for-1-order-legal-issues/ [https://perma.cc/FP5S-XDGX] (explaining five different administrative law issues arising under the Order); Amit Narang, *The Stunning Triumph of Cost-Cost Analysis*, REG. REV. (Feb. 19, 2017), http://www.regblog.org/2017/02/19/narang-stunning-triumph-cost-cost-analysis/ [https://perma.cc/S4MJ-GCWW] ("[T]he [Order] spells the end of cost-benefit analysis and the rise of a new form of analysis that focuses only on regulatory costs while ignoring benefits."); David A. Dana & Michael R. Barsa, *The High Cost of Cutting Regulatory Costs*, CHI. TRIB. (Feb. 24, 2017, 1:37pm), http://www.chicagotribune.com/news/opinion/commentary/ct-epa-anti-regulatory-trump-epa-executive-order-perspec-0227-jm-20170223-story.html [https://perma.cc/G6ZG-BSLT?type=image] ("By focusing on only the costs of complying with the regulation, and not on the costs that the regulation is trying to prevent, Trump's order puts us all at grave risk."); *see also* Sally Katzen, *Cutting Federal Regulations? Let's Be Smart About It*, THE HILL (Dec. 12, 2016, 12:55pm), http://thehill.com/blogs/congress-blog/economy-budget/309941-cutting-federal-regulations-lets-be-smart-about-it [https://perma.cc/MN9F-S9BL] (pointing out that a two-for-one requirement could affect uncontroversial regulations that "enable the government to function and Americans to go about their lives").

4 *See, e.g.*, Susan E. Dudley, *President Trump's Rules for Regulators*, FORBES (Feb. 3, 2017, 7:08am), https://www.forbes.com/sites/susandudley/2017/02/03/president-trumps-rules-for-regulators/#3a30e061bdbc [https://perma.cc/R6FB-WZNH] (describing the potential flexibility in the budget).

5 Exec. Order No. 13,771, *supra* note 1, § 1.

I. INCREASING NET BENEFITS?

We start by evaluating whether the Executive Order might be understood to impose oversight mechanisms that increase net regulatory benefits. For the past thirty-five years, Presidents of both parties have exercised central oversight of significant regulatory action, with a leading justification of this oversight being that it increases social welfare.[6] The current structure, adopted by President Reagan and carried forward by subsequent Presidents, places regulatory review authority in the Office of Information and Regulatory Affairs ("OIRA"), which is part of the Executive Office of the President, under the Office of Management and Budget ("OMB").[7] Two longstanding features of centralized regulatory oversight are the requirements that agencies assess the costs and benefits of their regulations and that they submit proposed regulations and analyses to OIRA for review. At least in theory, these requirements increase the likelihood that regulatory actions maximize net benefits for society.

Many scholars would now agree that Presidents can legitimately influence the development of regulations—at least when the goal is to ensure that the regulations promote societal welfare to the extent permitted by law.[8] In fact, this goal of encouraging agencies to issue only those regulations that, on net, benefit society has remained largely consistent across presidential administrations.[9] We thus first evaluate whether President Trump's Order could represent the latest iteration in this longstanding tradition. We conclude that the Order is not calibrated to maximize social welfare because it narrowly focuses on the costs of regulation to regulated entities and fails to acknowledge the benefits of regulation.

6 *See* Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1339-42.

7 *See* Exec. Order No. 12,291, 3 C.F.R. 127 (1982), *reprinted as amended in* 5 U.S.C. § 601 (1988) (imposing cost-benefit analysis on regulatory decisionmaking, issued by Reagan); Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *reprinted as amended in* 5 U.S.C. § 601 (2000) (maintaining the structure of the regulatory review process but stressing the welfare-enhancing role of the requirements, issued by Clinton); Exec. Order No. 13,563, 3 C.F.R. 215 (2011) (supplementing Clinton's executive order, issued by Obama).

8 *See, e.g.*, James F. Blumstein, *Regulatory Review by the Executive Office of the President: An Overview and Policy Analysis of Current Issues*, 51 DUKE L.J. 851, 851–52 (2001) (noting widespread support of such presidential oversight); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2385 (2001) ("[A]n era of presidential administration has arrived."). *But see, e.g.*, Alan B. Morrison, Commentary, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059, 1059-63 (1986) (expressing early skepticism of presidential oversight).

9 *See* Art Fraas & Richard Morgenstern, *Identifying the Analytical Implications of Alternative Regulatory Philosophies*, 5 J. BENEFIT-COST ANALYSIS 137, 142 (2014) (concluding that the key elements of economic analysis across presidential administrations have been "generally insulated from politics," with differences "largely in areas for which there is reasonable debate within the academic community").

Imagine a factory that produces a valuable product. In its manufacturing process, the factory also produces a harmful substance that it discards onto land where it leaches into groundwaters and ultimately contaminates local drinking water wells. The pollution makes a number of local residents sick. The factory could discard its waste properly at an additional cost. But a rational profit-maximizing factory would not unless it were given incentives to do so.

Classically, if transaction costs are small, bargaining between the residents and the factory could lead to an efficient expenditure of resources on waste disposal.[10] If transaction costs are high—for example, if there are a sufficiently large number of residents that bargaining between them and the factory is impossible—then government intervention is needed. Perhaps a tax could be placed on the pollution, leading the firm to adopt proper waste disposal practices to avoid paying the tax.[11] Or a regulation could require proper waste disposal.[12] If the tax is set at (or at least close to) the marginal social cost of the pollution or if the regulation requires efficient waste disposal practices, then the benefits of reduced incidence of illness will more than offset the costs. This classic economic justification for environmental regulation has been long recognized.

Application of these basic economic principles to the world of regulation is fairly straightforward. Congress has authorized the Environmental Protection Agency ("EPA") to identify harmful substances and regulate them under certain conditions. In many cases, Congress has not specified, with any great precision, either the stringency of environmental regulation or the regulatory tools that the EPA should adopt, leaving the agency with substantial discretion. Presidents since Reagan have required agencies to exercise this discretion in such a way as to ensure that the regulation's benefits are greater than its costs.[13] Ideally, the agency would regulate to the point where the net benefit of the regulation is maximized. Cost-benefit analysis is the technique that agencies use to estimate and to weigh the positive and negative effects of regulation with the aim of determining whether

10 *See generally* R.H. Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960).

11 *See generally* William J. Baumol, *On Taxation and the Control of Externalities*, 62 AM. ECON. REV. 307 (1972) (discussing the advantages and disadvantages of a "Pigouvian" tax, meaning a tax equal to the social cost of the negative externality).

12 *See generally* James M. Buchanan & Gordon Tullock, *Polluters' Profits and Political Response: Direct Controls Versus Taxes*, 65 AM. ECON. REV. 139 (1975) ("Our purpose in this paper is to present a positive theory of externality control that explains the observed frequency of direct regulation as opposed to penalty taxes or charges."); Martin L. Weitzman, *Prices vs. Quantities*, 41 REV. ECON. STUD. 477 (1974) (describing, theoretically, the circumstances under which it would be better to control pollution by setting emission standards instead of charging the appropriate pollution taxes).

13 *See supra* note 7; *see also* Michigan v. EPA, 135 S. Ct. 2699, 2707 (2015) (holding that some statutory provisions require the agency to consider cost).

regulations are net beneficial and, at least some of the time, revising rules to increase their net benefits.

In our factory example, a regulation that prevents the factory from discarding its waste without proper disposal would change and reallocate costs. The regulation might reduce the factory's profits, lower employment, or raise the price of the product. But it would benefit nearby residents, who would be made healthier. Other groups would also benefit, including the company that helps the factory properly dispose of its waste. The cost-benefit principle would ensure that the benefits that accrue to the winners are greater than the costs that fall on the losers so that society, in the aggregate, is better off in a world *with* this regulation than in a world *without* this regulation.

A. *Increasing Net Benefits Through the Regulatory Budget*

One of the features of this Executive Order is that it imposes a regulatory budget on agencies, requiring them to offset any costs imposed on regulated entities above a specified limit with cost savings from repealing regulations.[14] The Order does not mention benefits of regulation at all. In theory, a budget constraint would require an agency wishing to issue a costly regulation to forgo other regulatory initiatives. But foregoing these other regulations (assuming these regulations would also be net beneficial, as required by previous executive orders or the law) would mean foregoing net benefits to society.[15] In other words, inaction, from a societal perspective, is costly.

Early proponents of the idea of a regulatory budget, however, had imagined that it *would* take into account the benefits of regulation.[16] John Graham, a former OIRA administrator, explained that "programs with a strong benefit justification should receive more generous treatment under a regulatory budget [than other programs]."[17] The process of setting the budget,

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14 Exec. Order No. 13,771, *supra* note 1, §§ 2, 3; *see also* Memorandum from Dominic J. Mancini, Acting Adm'r, Office of Info. & Regulatory Affairs, Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, titled "Reducing Regulation and Controlling Regulatory Costs," (Feb. 2, 2017), https://www.whitehouse.gov/the-press-office/2017/02/02/interim-guidance-implementing-section-2-executive-order-january-30-2017 [https://perma.cc/DS7K-URS3] (explaining how to implement the order in practice).

15 *See, e.g.*, Richard J. Pierce, Jr., *The Regulatory Budget Debate*, 19 N.Y.U. J. LEGIS. & PUB. POL'Y 249, 251–52 (2016) ("[I]t would be irrational. Any regulatory process that ignores either costs or benefits would cause great harm to society."); Sidney A. Shapiro, *Political Oversight and the Deterioration of Regulatory Policy*, 46 ADMIN. L. REV. 1, 33–34 (1994) (calling the imposition of arbitrary binding constraint on an agency incoherent).

16 *See* Christopher C. DeMuth, *Constraining Regulatory Costs Part Two: The Regulatory Budget*, 4 AEI J. ON GOV'T & SOC'Y 29, 32 (1980) ("[B]enefits would indeed be taken into account—but early in the process, when the President and Congress determined the *size* of each agency's budget.").

17 John D. Graham et al., *Managing the Regulatory State: The Experience of the Bush Administration*, 33 FORDHAM URB. L.J. 101, 132 (2005).

according to proponents, would "inform priority setting and enhance economic efficiency of regulation across agencies and programs."[18] Of course, this Order made no attempt at such nuanced treatment when it set the budget at zero across all agencies for fiscal year 2017. But such treatment is *possible* under the Order for fiscal years beyond 2017, during which the director of OMB is required to designate a regulatory budget for each agency after considering the agency's regulatory plan.[19]

If a regulatory budget is set at a value that takes into account the benefits of planned regulations, it might solve a specific type of problem that arises if the regulatory agency values the benefits of regulation more highly than does society in general.[20] By simply adhering to the principles of cost-benefit analysis while applying its idiosyncratic valuation, the agency would regulate too much and too stringently.[21] Cost-benefit analysis combined with a regulatory budget could align the agency's preferences with society's preferences. For this to makes sense, the director of OMB or, more likely, the administrator of OIRA would have to know how much society will benefit from various regulatory objectives in a given year. For example, imagine that the EPA values clean air twice as much as does society. If OIRA imposed a regulatory budget at the level of the costs of society's preferred set of regulations, then the EPA, without more direction, would implement those same regulations because it would "choose the regulations that provide the cleanest air possible subject to the budget constraint imposed by [OIRA]."[22]

In practice, however, this regulatory budget is unlikely to benefit society overall for several reasons.

First, it would be extremely difficult to set the efficient budget. The process would require a vast amount of information and analysis when agencies have the least amount of information about costs and benefits. The uncertainty around setting the budget will create opportunities for "partisan wrangling because opponents and supporters of regulation would advocate budget levels based on ulterior motives concerning the scope of federal regulation."[23] The practical difficulty of creating a sensible budget might be why President Reagan picked cost-benefit analysis over a budget when he was

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18 Jeffrey A. Rosen & Brian Callanan, *The Regulatory Budget Revisited*, 66 ADMIN. L. REV. 835, 839 (2014).

19 Exec. Order No. 13,771, *supra* note 1, § 3(d).

20 *See* Yair Listokin, *Bounded Institutions*, 124 YALE L.J. 336, 366–69 (2014) (focusing on Congress, instead of society, in his example); *see also id.* at 369-70 (explaining why other forms of oversight would not correct this type of bias).

21 *See id.* at 370 (giving the example of EPA valuing clean air more than does Congress).

22 *Id.* at 368-69; *see also* ROBERT LITAN & WILLIAM NORDHAUS, REFORMING FEDERAL REGULATION 1, 140 (1983) (discussing how fixed ceilings would induce agencies to make tradeoffs among regulatory options by choosing the most cost-effective ones).

23 Shapiro, *supra* note 15, at 34.

evaluating various regulatory reforms. It is far better to evaluate rules on an individual basis than to engage in the enormously difficult practical challenge of trying to decide ex ante what the overall efficient regulatory expenditure is.[24] Of course, any errors in setting the budget at the right level will be costly to society.

Second, there is little actual evidence that agencies are biased toward overregulation.[25] In fact, agencies may just as often *under*regulate as *over*regulate.[26] This calls into question one of the fundamental justifications for the regulatory budget. Relatedly, defenders of regulatory budgets also rely on agencies to maximize benefits subject to the budget constraint. But, nothing in the Order requires agencies to do so. The idea relies on strong assumptions about what agencies actually do. Instead, agencies might simply minimize costs, which would not necessarily maximize net benefits.[27] Thus, society might further lose out on important, cost-benefit justified protections.

Finally, if there really were an issue with agencies systematically overvaluing benefits, there are a number of more direct and transparent solutions than imposing a regulatory budget. For example, the President

24 It is perhaps worth noting that, since at least 1997, OIRA has produced an annual report on the anticipated costs and benefits associated with new rules. *See OIRA Reports to Congress*, OFF. MGMT. & BUDGET, https://obamawhitehouse.archives.gov/omb/inforeg_regpol_reports_congress/ [https://perma.cc/GE7Q-LDLN]. Information in this report could be used to set a regulatory budget that would replicate, for example, the average regulatory costs that were imposed in prior years. There are a number of problems with this approach. There is no particular reason to think that prior costs represent an efficient future-looking budget: there may be more or less demand for regulation going forward than in the past. More important is the substantial year-to-year variation in rulemaking—locking in a budget at any particular level will unjustifiably hinder agency discretion. One might consider, by analogy, using such a method to set the overall federal budget. An imaginary policy that set federal expenditures at some fixed level based on prior budgets would hamstring the ability of Congress to tailor the budget to the needs of the day, requiring too much spending at times (during, say, periods of peace and prosperity), and not enough at others (for example, during a wartime or an economic crisis).

25 Although critics argue that such a bias exists, *see, e.g.*, Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1080 (1986) (lamenting that regulation "tends to be excessively cautious (forcing investments in risk reduction far in excess of the value that individuals place on avoiding the risks involved)"), many of the perceived mechanisms for such a bias could work in the opposite direction, *see* Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1283-1305 (2006) (critically evaluating various theories of supposed tendencies of agencies to overregulate); Livermore & Revesz, *supra* note 6, at 1352 ("[F]or each claim there is a 'counter-cannon' that weighs in the opposite direction.").

26 *See* Livermore & Revesz, *supra* note 6, at 1353 ("There are as many reasons to believe bureaucrats will not regulate important risks as there are to predict they will go too far.").

27 *See* Eric A. Posner, *Using Net Benefit Accounts to Discipline Agencies: A Thought Experiment*, 150 U. PA. L. REV. 1473, 1487 (2002) ("The problem with regulatory budgets, then, is that they reward agencies only for minimizing regulatory costs when we want to reward agencies for maximizing net benefits."); Jeffrey A. Rosen & Brian Callanan, *supra* note 18, at 847 (2014) (acknowledging the argument that "cost-only budgeting creates a bias towards low-cost regulatory options at the expense of solutions that may be more costly but that deliver greater economic benefits") (internal quotation marks omitted).

could direct OMB to develop a budget proposal that would increase OIRA's staff, allowing OIRA to better monitor agencies' cost-benefit analyses;[28] OIRA could also issue more guidance on benefit estimates, default numbers, and general cost-benefit analysis principles; and the President could support proper funding of rulemaking offices at agencies to allow for more in-depth analysis and consideration of a wider range of regulatory alternatives. (Of course, any changes to cost or benefit estimates should be well justified on economic or scientific grounds.[29])

B. *Increasing Net Benefits Through Repealing Regulations*

In addition to the regulatory budget requirement, the Executive Order requires each agency to identify two regulations to repeal whenever it issues a regulation. We next evaluate whether the incentives for deregulation that exist in these requirements could increase net regulatory benefits.

To be sure, repealing or modifying regulations could be beneficial in certain cases. Some regulations may have been misguided when issued. Others may have become outdated or ineffective over time, even if they were net beneficial when issued. Changing economic conditions, new technological innovations, or emerging scientific understandings can cause a regulation's actual costs and benefits to diverge from the agency's original estimates. A more or less stringent regulation might better maximize net benefits; a regulation based on antiquated technology may now seem too lax or obsolete; other government actions and external events may render a rule redundant or overly narrow in scope. In fact, every President since Carter has sought to identify and address inefficient existing regulations, through a process of retrospective review of regulatory costs and benefits.[30] Most recently, President Obama's Executive Order 13,563 called on each agency to "periodically review its existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives."[31] To the extent that the

28 *See also* Listokin, *supra* note 20, at 370 (noting that effective monitoring is needed to correct overvaluation).

29 *See* Richard L. Revesz, *A Subtle Attack on the Environment*, U.S. NEWS (Mar. 2, 2017, 6:00AM), https://www.usnews.com/opinion/articles/2017-03-02/donald-trump-and-scott-pruitt-could-gut-epa-rules-using-regulatory-anaylsis [https://perma.cc/7UJP-TC2Q] (deriding the dangers of "cook[ing] the books" when rewriting regulations).

30 Curtis W. Copeland, *The Role of the Office of Information and Regulatory Affairs in Federal Rulemaking*, 33 FORDHAM URB. L.J. 1257, 1264-66 (2005).

31 Exec. Order No. 13,563, *supra* note 7, § 6(b). *See also* Exec. Order No. 13,579, 3 C.F.R. 256 (2012) (urging independent agencies to establish plans for periodic review); Exec. Order No. 13,610, 77 Fed. Reg. 28,469 (May 14, 2012) (setting policies to reduce "unjustified regulatory burdens").

Order encourages agencies to look closely at their existing stock of regulations to identify such regulations to repeal or adjust, it could improve social welfare.

Susan Dudley, another former OIRA administrator, has defended regulatory budgets by arguing that they could create an internal incentive for agencies to remove outdated or inefficient existing regulations in order to offset new regulatory costs.[32] According to Dudley, "despite broad support, initiatives to require ex post evaluation of regulations have met with limited success, largely because they did not change underlying incentives."[33] But "[i]f the issuance of new regulations were contingent on finding a regulatory offset, agencies would have incentives to evaluate both the costs and effectiveness of existing programs."[34] President Trump, too, has suggested that the purpose of his regulatory executive orders has not been to eliminate environmental and safety regulations, but rather to eliminate "the repetitive, horrible regulations that hurt companies, hurt jobs."[35] He has expressed support for "strong and [] tough" environmental and health regulations, presumably meaning those that are net beneficial.[36]

If the Order's goal was to ensure that existing ineffective or net costly rules are identified and repealed, however, then the Order still misses the mark.

First, the Order does not require agencies to prioritize net costly regulations for repeal. As discussed earlier, the Order does not require any consideration of benefits at all. But repealing a net beneficial regulation would actually impose costs on society. One can again make a strong (and probably unwarranted) assumption that an agency will choose to repeal only net costly rules because it cares about maximizing net benefits. But even that assumption does not work well with respect to the one-in-two-out requirement if you believe that agencies systematically undervalue costs to industries. Such agencies would always want to repeal two unimportant rules and leave in place perceived "beneficial" rules that might actually be net costly had the agencies accurately taken into account industry costs.

Second, in requiring agencies to offset the costs of any new regulation by repealing two or more existing regulations, the Order would also delay or prevent agencies from passing new regulations. This, too, can impose costs on society. By excluding certain categories of regulations, such as security regulations, from the Order's requirements, President Trump understood

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32 *See* Susan E. Dudley, *Can Fiscal Budget Concepts Improve Regulation?*, 19 N.Y.U. J. LEGIS. & PUB. POL'Y 259, 267–68 (2016); *see also* Rosen & Callanan, *supra* note 18, at 842-43.

33 Dudley, *supra* note 32, at 267–68 (footnote omitted).

34 *Id.* at 268.

35 *Trump Signs Executive Order on Regulatory Reform*, BREITBART (Feb. 24, 2017), http://www.breitbart.com/news/trump-signs-executive-order-on-regulatory-reform/ [https://perma/cc/3WUE-62T8].

36 *Id.*

that costs of delay, inaction, or repeal could be significant.[37] But he failed to acknowledge that the same is true with health, safety, and environmental regulations, the same regulations that he purportedly "want[s]."[38] As we discussed earlier, inaction, from a societal perspective, is costly and could offset any gains from repealing ineffective rules.

II. REDUCING REGULATORY BURDENS?

Alternatively, despite his public statements,[39] President Trump may have sought to simply reduce regulatory burdens on businesses, full stop. In the last several years, some scholars have concluded that the current system of accounting for costs and benefits does not sufficiently restrain agencies.[40] They point to the number of pages published in the Federal Register and in the Code of Federal Regulations as an indicator of the purported growth in the regulatory burden.[41] In their view, it is simply too easy to pass costly regulations, notwithstanding cost-benefit analysis and other requirements.[42] Therefore, businesses are burdened by too much regulation, even if each regulation is net beneficial to society overall.

Of course, figuring out the optimal level of regulation is very difficult. The Executive Order certainly makes no attempt to justify the assumption that the current level of regulation is too high.

But even if we assume regulatory burdens are too high, the Order is unlikely to meaningfully help businesses. For one, it doesn't prioritize the repeal of the most costly or burdensome regulations.[43] In fact, by requiring

37 Exec. Order No. 13,771, *supra* note 1, § 4.

38 *Trump Signs Executive Order on Regulatory Reform*, *supra* note 35.

39 *See id.*

40 *See, e.g.*, Dudley, *supra* note 32, at 265 ("As important as BCA is for developing regulations, it may not provide sufficient discipline for ensuring that tradeoffs are realistically considered.") (footnote omitted); Rosen & Callanan, *supra* note 18, at 837 (suggesting a regulatory budget as a possible way to force agencies to consider the costs they impose as the equivalent of tax dollars).

41 *See* Dudley, *supra* note 32, at 280 (displaying graphical representations of the page counts).

42 To be sure, issuing a regulation is no easy task: it requires analysis, deliberation, and public comment, a process that can take years, not including the years of litigation that often follow. *See, e.g.*, Peter Shane, *The GOP's Radical Assault on Regulations Has Already Begun*, WASHINGTON MONTHLY (Feb. 27, 2017), http://washingtonmonthly.com/2017/02/27/the-gops-radical-assault-on-regulations-has-already-begun/ [http://perma.cc/FL9G-3QEK] (describing the eight years of deliberation that went into the Stream Protection Rule). But critics have claimed that, politically, it is easier for an agency to require private expenditures to comply with regulations than it is for the government to tax the public. *See, e.g.*, Dudley, *supra* note 32, at 267 ("By constraining the private sector resources that can be committed to achieving regulatory mandates, a regulatory budget could impose internal discipline on regulatory agencies."); Rosen & Callanan, *supra* note 18, at 837 (worrying that political actors are relying on regulation to "fund" new government initiatives).

43 In a later executive order, President Trump directed agencies to prioritize "outdated, unnecessary, or ineffective" regulations for repeal. *See* Exec. Order No. 13,777, 82 Fed. Reg. 12,285, 12,286 (Feb. 24, 2017).

that "any new incremental costs . . . be offset by the elimination of existing costs associated with at least two prior regulations," and without allowing agencies to bank offsetting credits, the Order could lead agencies to prioritize repealing low-cost rules, in which the sum of "at least two" would approximate the costs of a proposed rule, rather than prioritizing the *most* costly rules.[44] The agency would not want to waste repealing its most costly rules; it might need those rules later, when it needs to issue a costly regulation. Thus, under the Order, the most costly rules might stay on the books.

Even more fundamental, the Order might not have *any impact* on total regulatory burdens. The Trump administration was already not going to issue many new regulations (aside from exempted national security regulations).[45] If agencies issue no regulations, then the Order's requirements to repeal at least two existing regulations would not get triggered at all.

Of course, there are some regulations that President Trump's agencies are required, by statute or court order, to issue. In those cases, the Executive Order is unlikely to have any effect.[46] Above all, agencies are required to adhere to statutory requirements and must not make arbitrary or capricious decisions.[47] The Order cannot overrule these preexisting requirements, which are codified in statutory law. An agency will not be able to excuse its failure to issue a required rule by reference to the Order's requirements.[48] In truth, the Order might not even include these nondiscretionary rules in its regulatory budget, which requires "the total incremental cost of all new regulations, including repealed regulations, to be finalized this year" to "be no greater than zero, unless otherwise required by law . . . ."[49]

There is a similar concern with repealing regulations in general. In order to "eliminat[e] existing costs associated with at least two prior regulations . . .

44 Exec. Order No. 13,771, *supra* note 1, § 2.

45 *Id.* § 4 (exempting national security regulations). *See, e.g.*, Jacob Pramuk, *Trump Tells Business Leaders He Wants To Cut Regulations By 75% or 'Maybe More'*, CNBC (Jan. 23, 2017), http://www.cnbc.com/2017/01/23/trump-tells-business-leaders-he-wants-to-cut-regulations-by-75-percent-or-maybe-more.html [https://perma.cc/Y27K-QHL5]; *see also* Farber, *Trump's Anti-Regulation Executive Order*, *supra* note 3 ("It's already clear that the Trump Administration wasn't planning to issue any new rules protecting health, safety, or the environment if they could avoid it.").

46 *See* Farber, *Trump's Anti-Regulation Executive Order*, *supra* note 3 ("Simply put, statutes trump Executive Orders."); *see also* E. Donald Elliott, *President Trump Establishes Regulatory Budgets by Executive Order*, COVINGTON (Feb. 1, 2017), https://www.insideenergyandenvironment.com/2017/02/president-trump-establishes-regulatory-budgets-by-executive-order/ [http://perma.cc/US7Y-75W6] (questioning how courts will react "when agencies begin to turn down petitions for new rules because there is no room for them in the agency's regulatory budget, or because the agency judges them to be less important than existing rules that would have to be eliminated to pay for the new regulations").

47 *See* Administrative Procedure Act, 5 U.S.C. § 706(2).

48 *See* Interim Guidance, *supra* note 14 (acknowledging as much).

49 Exec. Order No. 13,771, *supra* note 1, § 2.

in accordance with the Administrative Procedure Act and other applicable law,"[50] as required by the Order, the agency would have to follow statutory obligations for repealing specific regulations. No statute explicitly allows an agency to repeal a regulation to serve a larger goal of overall cost budgeting, and eliminating a regulation just to pass another unrelated one sounds awfully arbitrary.[51] The agency would need to have some other basis for repealing that particular regulation that would have to be vetted in notice and comment, reducing the force of the Order as the impetus for reducing regulatory burdens.

It is also difficult to measure the "actual cost" of an existing regulation.[52] Even for major regulations with documented ex ante costs, those costs might not reflect the true costs. In fact, some of the regulations that most upset industry groups are those in which actual costs are perceived to be much higher than initially estimated—that is why a retrospective review is often advised. If agencies have to retroactively count costs for the purpose of repealing under the Order, in addition to other requirements for repealing under statute or the Administrative Procedure Act, then repealing might be further delayed.

Finally, there are regulations that even President Trump's agencies might want to issue.[53] In those cases, the Order might be counterproductive. For example, if the EPA under President Trump wants to issue a regulation making a certain air quality standard *less* stringent, would it be issuing a new regulation? OIRA's interim guidance is not entirely clear. In particular, OIRA cryptically notes that "if such deregulatory actions impose costs on individuals or entities agencies will need to offset those costs."[54] A reduction in the stringency of an air quality rule will certainly impose costs on some, most obviously those subject to increased health risks. Even if we just consider regulated entities, repealing regulations could impose costs on some companies, such as incumbent companies that had invested in compliance technology or otherwise adapted to the regulation. The Order's requirements might end up slowing down deregulatory regulations.

Overall, nothing in the Order *requires* a meaningful reduction in the total regulatory burden and, in fact, the Order might impede efforts to reduce regulatory burdens.

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50 *Id.* § 1.

51 *See* Shane, *supra* note 42 ("[I]mproving regulation should be systematic, not arbitrary, and guided by public interest goals.").

52 *See* Interim Guidance, *supra* note 14 ("Agencies are also strongly encouraged to use program evaluations and similar techniques to determine the *actual cost* and other effects of eliminating regulatory actions." (emphasis added)).

53 *See* Katzen, *supra* note 3 (providing examples of uncontroversial regulations that enable the government to function).

54 Interim Guidance, *supra* note 14.

III. TIGHTENING CONTROL OVER AGENCIES?

Almost every modern President has expressed his frustration over the difficulty of controlling the administrative state.[55] The scenario can be modeled as a principal-agent problem, in which the President uses his authority to control agency decisionmaking, subject to the cost of monitoring agencies that sometimes do not share the President's priorities.[56] Numerous scholars have viewed prior Presidents' actions in the context of gaining control over agencies.[57]

President Reagan, for example, asserted his influence over agencies in several ways, first using "his appointment power, perhaps more successfully than any other modern President, to staff the agencies with officials remarkable for their personal loyalty and ideological commitment, who would subscribe to his (obligingly clear) policy agenda even in the face of competing bureaucratic pressures."[58] The following year, Reagan also initiated the centralized review of agency rulemakings with Executive Order 12,291.[59]

Terry Moe has categorized Reagan's two control strategies as follows: on the one hand, there is "politicization," in which the appointment power is used to fill positions based on loyalty, and on the other hand, there is "centralization," in which the President imposes oversight over rulemaking.[60] These two strategies act as substitutes because if one strategy works, the other is less important.[61] Moreover, politicization, if it works, is preferable because it avoids adding a layer of oversight that is costly and may generate errors.[62] In other words, if the EPA under Scott Pruitt regulates according to President Trump's preferences, then the EPA would choose President Trump's

55 *See, e.g.*, Kagan, *supra* note 8, at 2372-73.

56 *E.g.*, *id.* at 2385; Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J. L. ECON. & ORG. 243 (1987); Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1140 (1990); Bernard Steunenberg, *Congress, Bureaucracy, and Regulatory Policy-Making*, 8 J. L. ECON. & ORG. 673 (1992).

57 *See generally*, Eric A. Posner, *Controlling Agencies with Cost-Benefit Analysis: A Positive Political Theory Perspective*, 68 U. CHI. L. REV. 1137 (2001); Kagan, *supra* note 8, at 2277; Shapiro, *supra* note 15, at 5.

58 Kagan, *supra* note 8, at 2277.

59 *Id.*

60 TERRY M. MOE, THE POLITICIZED PRESIDENCY, *in* THE NEW DIRECTION IN AMERICAN POLITICS 235, 256 (John E. Chubb & Paul E. Peterson eds., 1985).

61 *See* Livermore & Revesz, *supra* note 6, at 1347–48 (discussing the substitutability of the two strategies).

62 *See* Listokin, *supra* note 20, at 355 (arguing that when an agent shares the principal's preferences "unbounded institutional structures are preferable"); *see also* Cary Coglianese, *Presidential Control of Administrative Agencies: A Debate over Law or Politics?*, 12 U. PA. J. CONST. L. 637, 646 (2010) (noting that the president's "strongest possible control over an agency" is "placing a clone in the position of agency head"); Kagan, *supra* note 8, at 2317–18 (speculating on President George W. Bush's likely approach).

preferred regulations without the budget.[63] With the budget, however, some regulations may be mistakenly precluded due to error in setting the budget.[64]

Even with loyal appointees, there remains an important role for OIRA to collect other agency perspectives on regulatory proposals, aggregate information, and provide a generalist perspective that may elude narrowly focused agencies.[65] These functions comport well with the existing structure of OIRA review, which is oriented toward interagency coordination and review of agency cost-benefit analyses. By contrast, imposing direct, formalistic, and inflexible mandates on agencies reduces the operating room of exactly those political appointees that Presidents typically seek to empower, without any grounding in the relative strengths and weakness of agencies and OIRA in promoting the President's agenda. At the very least, at this early stage, it would be prudent to impose the Order's requirements on agencies *only* if the appointed officials were thought to be less loyal or already proved unable to control their departments.

IV. COPYING COMMONWEALTH COUNTRIES?

At this point, you might ask: can the Executive Order really be that senseless if one of its requirements has been debated for decades and the other is employed in some form in at least three other Commonwealth countries—Canada, the United Kingdom, and Australia?

Regarding the regulatory budget, we believe that there are good reasons that President Reagan, after considering both a budget and cost-benefit analysis requirement, decided to go with cost-benefit analysis. Cost-benefit analysis, while not perfect, is consistent with rational decisionmaking, weighing both costs and benefits of regulation. President Reagan, we believe, made the right choice.

Regarding the one-in-two-out requirement, it goes without saying that just because other countries have implemented some form of this requirement does not mean it's a sensible thing to do, or that the United States should do it. In addition, we don't know how many benefits have been foregone in these countries—especially in light of the small cost savings attributed to these measures.

Canada's 2015-2016 Annual Report, for example, musters only "a $30 million decrease in net administrative burden" since the 2012-2013 fiscal year, the year that its version of the one-in-one-out requirement was

63 Listokin, *supra* note 20, at 355 (describing a similar example in which Congress is the principal instead of the president).

64 *Id.* (concluding that, in the case of a loyal agency, the "regulatory budget is harmful").

65 *See generally* Livermore & Revesz, *supra* note 6.

implemented.[66] And while the Australian government estimated that between September 2013 and December 2015, the cost of complying with regulations decreased by $4.8 billion per year, some of these reductions appear to have come from proposed legislative repeals and not from the implementation of its offset requirement.[67] The United Kingdom, which has been ratcheting up its requirement from a one-in-one-out version to the current one-in-three-out version, posted somewhat more impressive results: the requirements, over a two-year period, "remov[ed] around £963 million more in business burdens than they introduced."[68] The governments, however, do not track how much health and safety was sacrificed in pursuit of these cost savings. And in any event, all three countries promote flexibility and avoid perverse outcomes by "allow[ing] the banking and trading of offsets," among other features.[69] The United Kingdom's requirement is also part of a larger regulatory reform package that includes improvements to the enforcement of government regulations that remain.[70]

CONCLUSION: WHAT TO MAKE OF IT ALL?

President Reagan's Executive Order 12,291 was unveiled suddenly, without outside consultation, and was met with skepticism and pushback by agency officials, scholars, and commentators.[71] Notwithstanding these initial misgivings, the Order's core requirements have endured and are now generally accepted, including by us,[72] as essential steps in rational agency decisionmaking.

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66 GOV'T CAN., ANN. REP.: REDUCING REGULATORY ADMINISTRATIVE BURDEN AND IMPROVING SERVICE AND PREDICTABILITY (2015-16), https://www.canada.ca/en/treasury-board-secretariat/services/federal-regulatory-management/2015-2016-annual-report.html [https://perma.cc/KY2B-U7QY].

67 *See* AUSTRALIAN GOV'T, ANNUAL RED TAPE REDUCTION REPORT 10 (2015), https://cuttingredtape.gov.au/sites/default/files/files/2015_annual_red_tape_reduction_report.pdf [https://perma.cc/RZC2-99M9] (noting that in 2015 the government "introduced legislation to repeal an additional 1,796 Acts of Parliament" and then "including these legislative proposals" in its estimates).

68 *See* U.K. DEP'T FOR BUS., INNOVATION & SKILLS, 2010–2015 GOVERNMENT POLICY: BUSINESS REGULATION (2015), https://www.gov.uk/government/publications/2010-to-2015-government-policy-business-regulation/2010-to-2015-government-policy-business-regulation [https://perma.cc/BVN2-GQ72].

69 Marcus Peacock, *Implementing a Two-for-One Regulatory Requirement in the U.S.* 7 (George Washington Univ. Regulatory Studies Ctr. Working Paper).

70 *See generally* 2010–2015 GOVERNMENT POLICY, *supra* note 68.

71 *See* Blumstein, *supra* note 8, at 859–60 (describing C. Boyden Gray's account of the agitation and confusion surrounding the unveiling of Executive Order 12,291).

72 *See, e.g.*, RICHARD L. REVESZ & MICHAEL A. LIVERMORE, RETAKING RATIONALITY: HOW COST BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH (2008); Caroline Cecot & W. Kip Viscusi, *Judicial Review of Agency Benefit-Cost Analysis*, 22 GEO. MASON L. REV. 575, 584 (2015) ("BCA can be a useful tool in agency decision making").

If President Trump wants to have a similarly lasting impact on the regulatory process, his Order, like Executive Order 12,291, must also be rooted in principles of rational decisionmaking. His Order is not. In fact, it is difficult to see the Order succeeding at any of the three goals we analyzed: increasing net benefits, reducing regulatory burdens in a sensible way, and rationally increasing presidential oversight of the regulatory process. President Trump should grapple with the significant defects we describe—or just scrap the Order. In the Order's place, he should ensure that agencies engage in reasonable retrospective review of existing regulations and that OIRA has sufficient staff to oversee agency decisionmaking, among other sensible reforms.[73]

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73 *See*, JASON A. SCHWARTZ & CAROLINE CECOT, STRENGTHENING REGULATORY REVIEW: RECOMMENDATIONS FOR THE TRUMP ADMINISTRATION FROM FORMER OIRA LEADERS (2016) (containing consensus recommendations from a roundtable of former OIRA administrators (six from Republican administrations, two from Democratic administrations)).