



TRUMP EXECUTIVE ORDER TO UNDO SAFEGUARDS IS UNCONSTITUTIONAL

On Feb. 8, 2017, Public Citizen, NRDC and the Communication Workers of America (CWA) filed a suit in federal district court, arguing that President Trump's Jan. 30 Executive Order on rulemaking is unconstitutional.

The Executive Order requires that any federal agency issuing a new regulation must rescind at least two existing regulations to offset the costs of complying with the new regulation. In fiscal 2017, the total additional costs of complying with all new federal regulations must be zero; the Office of Management and Budget (OMB) is to set a total cost level for future years.

What's wrong with the Executive Order?

The Executive Order is dangerous. The Executive Order makes it harder to protect the public by erecting barriers to the issuance of new regulations and by creating incentives to repeal existing regulations, even if they are continuing to safeguard the public. It will be harder to limit pollution, protect consumers, safeguard our food supply, guard against financial abuses or to take any other action to limit corporate actions that impose costs on the public.

The Executive Order is illogical. There is no reason why the creation of a new regulation means that an existing regulation is no longer needed. New regulations are issued to deal with new problems – new pollutants, new products, new fraudulent schemes – or new scientific understandings. When we learned that asbestos was dangerous, that did not make lead or mercury less dangerous. Existing problems don't magically vanish each time a new problem emerges.

The Executive Order is one-sided. Perhaps the fundamental flaw with the Executive Order is that it considers only costs, but not benefits. Yet benefits are the whole reason that regulations are issued to begin with. If an individual followed the logic of the Order, he or she would never buy anything because the products cost money – no car, no house, no college education. The benefits of purchasing such things would be irrelevant. Similarly, the Order examines the costs of cleaning up pollution, but not the health and other benefits that are the reason for doing so and that save much more money than the regulation costs. The Executive Order considers industry's complaints about the cost of a regulation, but not the cost to the public of not acting.

The Executive Order is unnecessary. Agencies or Congress can rescind rules, through proper processes, any time they choose. President Obama put in place a requirement for agencies to review past rules to ensure they are still needed and tailored to the problem they were designed

to solve. The Trump Administration can make sure rules are needed and up-to-date using existing authority.

But why is the Executive Order unconstitutional?

Presidents cannot change laws by fiat. But this Executive Order effectively directs federal agencies to violate the laws that govern rulemaking – laws that neither require nor allow the kind of cost-only analysis and cost-based trading the Executive Order mandates. Rather, the laws require agencies to address harms to the public. With this Executive Order, the President is attempting to single-handedly amend or overturn numerous statutes that are designed to protect the public, ensure an open rulemaking process and provide certainty and predictability to industry.

But doesn't the Executive Order reference abiding by law?

The Executive Order does say that agencies should implement it “consistent with applicable law.” This appears to mean only that agencies need to go through the normal rulemaking process when carrying out the repeal of rules. Any broader meaning would simply contradict the entire Executive Order since the entire Order is inconsistent with existing law. In short, the Executive Order appears to mean that agencies should go through the normal rulemaking *process* to repeal rules, while violating existing statute’s substantive *standards*.

But what's so wrong about considering the costs of rules?

The issue isn't about whether agencies should consider the costs of rules. Under many laws, agencies can or even must consider the costs of rules they are promulgating and a decades-old Executive Order requires agencies to calculate the projected costs of most rules. But those laws and directives require agencies to consider costs *and benefits*. The standard is to look to see whether a rule is worth the cost, not to ignore the benefits that are the entire purpose of the rule.

Also, some laws forbid agencies from considering costs for certain purposes. For example, the new chemical safety law (TSCA) that Congress passed overwhelmingly last year says that when the Environmental Protection Agency is deciding whether a chemical is safe, it can look only at the chemical's health effects. Cost doesn't change what a chemical does to the human body. Once the agency determines the risks for a chemical, then it can look at costs in deciding *how* to limit exposure.

So how does the Executive Order make rulemaking harder?

The Executive Order says that for an agency to issue a new rule it has to identify at least two to repeal to offset the cost. First, the agency has to calculate the current cost of existing rules, a new, time-consuming and costly undertaking. Then, it can only move forward with the new rule,

no matter how needed, if it can find enough rules to get rid of to offset the cost, even if its existing rules are serving their purpose. How this will all operate is still somewhat unclear, but it clearly erects new barriers to the issuance of needed safeguards. The agency must undertake at least three rulemakings each time it acts, where only one would otherwise be required.

So what does the suit ask the court to do?

The suit asks the court to hold the Executive Order unconstitutional and unlawful and to enjoin its implementation.