Dan Farber just posted an insightful, brief analysis of the executive order "Reducing Regulation and Controlling Regulatory Costs" that was issued this morning.

As Dan notes, the order is absurd and arbitrary – but more than that, it's extraordinary in its potential for doing harm to our country and its residents. It is meant to kneecap our federal regulatory agencies, without regard to those agencies' impact on our country's welfare.

This post digs a little deeper into the details. (The full text of the order is available on the Politico website.)

The order directs federal agencies to eliminate two regulations for every one new one enacted, to ensure that "total incremental cost" of all new regulations in this fiscal year is zero, and to ensure that if a new regulation is enacted, any "incremental costs" are offset by the "elimination of existing costs" from at least two prior regulations.

Regulations, at their best, correct the dynamics that motivate companies to impose harms on the public in order to increase their profits. These regulations include basic health, environmental, safety, consumer, financial, and labor protections upon which we all rely. The order is an affront to the application of agency knowledge and expertise to address these complicated and crucial issues to protect all of us. The White House, through a blanket order that arbitrarily restricts the quantity or regulations and imposes a requirement that the cost of new regulations to regulated parties be eliminated, is attempting to sabotage these protections.

For anyone interested in taking a deep dive into the reasons why the President's approach – or even a more modest variation on it – will harm our country and its residents, this Congressional testimony by Rob Verchick of Loyola University New Orleans Law School, from late in 2015, explains why in great detail. Rob makes five basic points:

> 1. In contrast to what some budgeting advocates suggest, there is no question that our regulatory system, over all, benefits Americans immensely. Federal regulations keep our air clean, our water drinkable, our workplaces safe, and our access to energy reliable. Government estimates have routinely shown (in the administrations of both parties) that the combined benefits of major regulations far outstrip the costs. An arbitrary cap on future rulemaking would deprive us of many necessary protections and of even more net benefits.
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> 2. It is a mistake to focus on the quantity of regulations rather than the quality.

> By itself, quantity (as expressed in terms of compliance costs) says nothing useful about a rule at all. As my first point shows, regulation is not a zero-sum game. More regulations can bring more benefits to the public and the economy if managed properly. This pivot from quality to quantity marks a dramatic shift in reform strategies, and I’m concerned it will lead to worse decision-making within agencies.
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> 3. A regulatory budget program could create a series of novel governance problems, including threats of government shut-down over a failure to raise the “reg ceiling,” legal questions about proper delegations of power to the executive branch, and the challenge of accompanying many new rulemaking actions with equal and opposite “unrulemaking” actions. These problems would hobble, not improve the regulatory system.
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> 4. Regulatory budgeting risks leaving people and the environment unprotected, particularly against new and emerging risks like those posed by nanotechnology, driverless cars, and many other important but untested technologies.
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> 5. For rulemaking agencies, improving regulatory outcomes is Job Number 1. Sound proposals for making the system smarter include (a) eliminating unnecessary ex ante analytical and procedural requirements, (b) empowering agencies to emphasize back-end adjustments in the implementation of completed rules, and (3) empowering agencies to emphasize more flexible, agency-driven reviews of their existing regulations and regulatory programs.

Below is the text of the operative provisions. On a quick reading, aside from the obvious arbitrariness of the requirements that two rules be eliminated for each new rule and that new rules impose no incremental costs in the aggregrate, my primary concerns – like Dan’s and Rob’s – are that this order will stifle regulation that creates great benefits, will leave people unprotected from risks, and will create governance problems.

> Sec. 2. Regulatory Cap for Fiscal Year 2017. (a) Unless prohibited by law, whenever an executive department or agency (agency) publicly proposes for notice and comment or otherwise promulgates a new regulation, it shall identify at least two existing regulations to be repealed.
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> (b) For fiscal year 2017, which is in progress, the heads of all agencies are

> directed that the total incremental cost of all new regulations, including repealed regulations, to be finalized this year shall be no greater than zero, unless otherwise required by law or consistent with advice provided in writing by the Director of the Office of Management and Budget (Director).
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> (c) In furtherance of the requirement of subsection (a) of this section, any new incremental costs associated with new regulations shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations. Any agency eliminating existing costs associated with prior regulations under this subsection shall do so in accordance with the Administrative Procedure Act and other applicable law.

Especially worrisome is this language: "total incremental cost of all new regulations … shall be no greater than zero." I suspect they mean "incremental cost" to be the gross cost to regulated parties, rather than the net cost after considering benefits of regulation. (On a quick review, I can't find any federal definition of the term "incremental cost" that would apply here.) Well-crafted regulations create enormous benefits for society, because (among other reasons) they address market failures that motivate companies to act for private gain even when they create great public harm. (Look, for example, at air pollution in Beijing today, or in Los Angeles prior to air quality regulation, for snapshots that reveal the value of just one area of regulation.) So a rule that would ordinarily be calculated to provide great benefit to society – like cleaning up smog – would be deemed to create an "incremental cost" because it costs industry to comply.

This executive order may be obscure and abstract to many, in comparison with visceral and concrete actions such as the immigration and visa order issued late last week. But it is every bit as important.