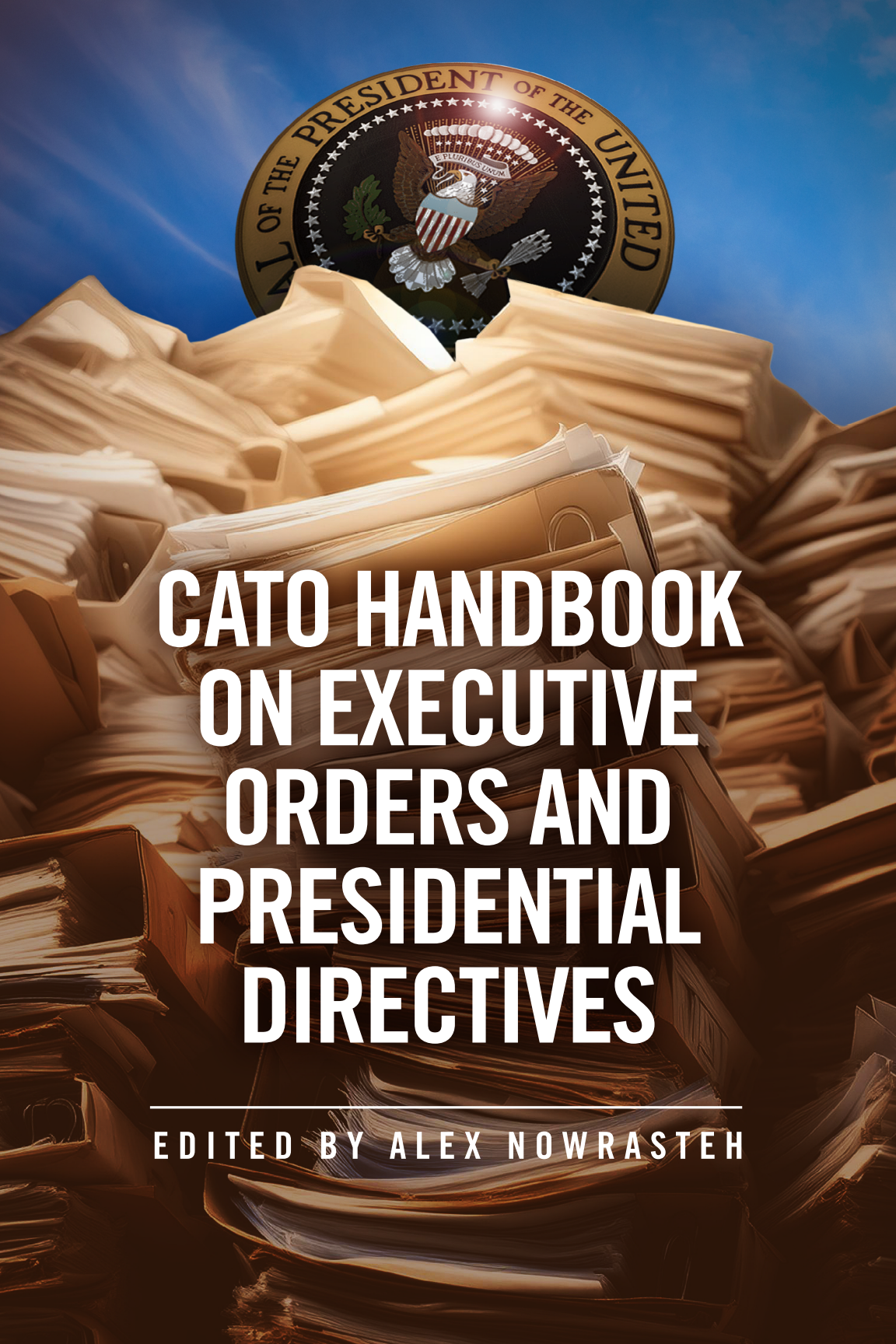

CATO HANDBOOK ON EXECUTIVE ORDERS AND PRESIDENTIAL DIRECTIVES

EDITED BY ALEX NOWRASTEH

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Introduction

The Cato Institute stands for the foundational American values of individual liberty, limited government, free markets, and peace. The Declaration of Independence and the Constitution established American independence and our form of government to guard those values by restricting government power primarily to the protection of individual rights. For almost 50 years, Cato scholars have not shied away from criticizing policies that strike against our values and the Constitution, nor do we hold back praise when we see those values upheld. In that spirit, we introduce the *Cato Handbook on Executive Orders and Presidential Directives* to guide the next administration.[1]

Article I of the Constitution vests Congress with the power to legislate within the confines of its enumerated powers.[2] Article II vests the president with "executive power," which encompasses the duty to "take Care that the Laws be faithfully executed" and the president's status as the commander in chief of the armed forces, which are much more general powers than those granted to Congress.[3] However, successive Congresses have gradually delegated much of their power to the president or stood idly by as presidents have usurped more power that is legislative in nature and effect. National crises, such as the Civil War, the Spanish-American War, the Great Depression, the World Wars, and the Global War on Terrorism, were the impetuses for many of the surges in presidential power, but the power never reverted to its former limits at the conclusion of those emergencies.[4] Such legislative or quasi-legislative action by the president usurps Congress's legislative power. The president's power is now so gargantuan that it alone is sufficient reason to focus on the president's means

1. David Boaz, ed., *Cato Handbook for Policymakers*, 9th ed. (Washington: Cato Institute, 2022), p. 1.
2. US Const. art. I.
3. US Const. art. II; John C. Duncan Jr., "A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role," *Vermont Law Review* 35, no. 2 (2010): 367–68; and Justin Keeton, "Executive Orders: What Is the Scope of Executive Authority?," *American Journal of Trial Advocacy* (blog), October 7, 2019.
4. Tara L. Branum, "President or King? The Use and Abuse of Executive Orders in Modern-Day America," *Journal of Legislation* 28, no. 1 (2002): 6; Robert Higgs, *Crisis and Leviathan: Critical Episodes in the Growth of American Government* (New York: Oxford University Press, 1987); Committee on Government Operations, "Executive Orders and Proclamations: A Study of a Use of Presidential Powers," House of Representatives, December 1957, 35–36.

of exercising power.[5] Nowhere is this increase in executive power more apparent than in the proliferation of executive orders (EOs) and other executive proclamations, memoranda, directives, executive agreements, and edicts with the force of law.

THE TAXONOMY OF EXECUTIVE ORDERS

American law does not define an executive order despite it being the president's most important means of wielding power.[6] In practice, EOs are written directives that have the force of law and are issued by the president to direct and manage how federal agencies, federal employees, or department heads operate and perform their duties and to set other policies for the executive branch to follow.[7] The major statutory requirement for EOs is that they must be published in the *Federal Register*; the same is true for executive proclamations.[8] Presidents have issued EOs that set the standards for the "preparation, presentation, filing, and publication" for EOs and executive proclamations, but these are standards imposed by presidents on themselves and so are unenforceable and ignored when inconvenient.[9] There is no specific mention of EOs or other presidential directives in the Constitution like there is for Congress's legislative process for the deliberation of bills.[10] This is a source of ambiguity but, to be clear, not as damning a criticism as it first appears. Other important features of our system, like judicial review accomplished through written opinions, are underspecified in the Constitution but no less lawful.

EOs purport to derive their authority from the president's powers in Article II of the Constitution, or from an express or implied statutory delegation of power by

5. "Executive Orders in Times of War and National Emergency: Report of the Special Committee on National Emergencies and Delegated Emergency Powers," Senate, June 1974, p. 1.
6. Abigail A. Graber, "Executive Orders: An Introduction," Congressional Research Service, March 29, 2021, p. 1; Jennie Holman Blake, "Presidential Power Grab or Pure State Might? A Modern Debate over Executive Interpretations on Federalism," *BYU Law Review* 2000, no. 1 (2000): 296; Kevin M. Stack, "The Statutory President," *Iowa Law Review* 90, no. 2 (January 2005): 546–47; and John C. Duncan Jr., "A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role," *Vermont Law Review* 35, no. 2 (2010): 333.
7. Robert B. Cash, "Presidential Power: Use and Enforcement of Executive Orders," *Notre Dame Law Review* 39, no. 1 (1963): 44; John C. Duncan Jr., "A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role," *Vermont Law Review* 35, no. 2 (2010): 333; and Committee on Government Operations, "Executive Orders and Proclamations: A Study of a Use of Presidential Powers," House of Representatives, December 1957, p. 1.
8. 44 U.S.C. § 1505.
9. "Executive Orders in Times of War and National Emergency: Report of the Special Committee on National Emergencies and Delegated Emergency Powers," Senate, June 1974, pp. 4–5.
10. US Const. art. I, sec. 7.

Congress to the president.[11] There are several theories of the scope of "executive power," and these differences directly influence the types of EOs that a president can issue.[12] Often, EOs are innocuous and can clarify laws, streamline operations between different federal agencies, and realize "the objectives of congressional legislation by various means of enforcement."[13] For instance, the first EO issued by President George Washington asked the heads of executive departments to describe their jobs and the current state of the union.[14]

Other times, EOs can interpret or expand the scope of legislation beyond its text or Congress's intent and be "formidable instruments of power" by, among other actions, ordering executive agencies to issue regulatory rules.[15] President Bill Clinton's adviser Paul Begala summed up the power of modern EOs best when he said, "Stroke of the pen. Law of the land. Kind of cool."[16] The most infamous EO in American history ordered the internment of Japanese Americans and lawful residents in camps during World War II.[17] Unlike legislation, EOs do not need to pass both houses of Congress. Nor do presidents need to navigate the legal hoops and constraints of the Administrative Procedure Act when they pick up a pen or phone.[18] Large numbers of EOs do not even reference any specific legal authority for the president's action and often rely on sweeping claims of authority or vaguely reference "statutes."[19] For instance, President Barack Obama issued 19 EOs in 2011 that generally claimed they were justified by "the authority vested in me as president by the Constitution and the laws of the United States of America."[20]

11. Abigail A. Graber, "Executive Orders: An Introduction," Congressional Research Service, March 29, 2021, p. 1; and Kevin M. Stack, "The Statutory President," *Iowa Law Review* 90, no. 2 (January 2005): 539–600.
12. Jennie Holman Blake, "Presidential Power Grab or Pure State Might? A Modern Debate over Executive Interpretations on Federalism," *BYU Law Review* 2000, no. 1 (2000): 297.
13. John C. Duncan Jr., "A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role," *Vermont Law Review* 35, no. 2 (2010): 334.
14. Abigail A. Graber, "Executive Orders: An Introduction," Congressional Research Service, March 29, 2021, p. 1; and John C. Duncan Jr., "A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role," *Vermont Law Review* 35, no. 2 (2010): 339.
15. John C. Duncan Jr., "A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role," *Vermont Law Review* 35, no. 2 (2010): 366; and Erica Newland, "Executive Orders in Court," *Yale Law Journal* 124, no. 6 (2015): 2031.
16. James Bennet, "True to Form, Clinton Shifts Energies Back to US Focus," *New York Times*, July 5, 1998.
17. Exec. Order No. 9066 (February 19, 1942).
18. Erica Newland, "Executive Orders in Court," *Yale Law Journal* 124, no. 6 (2015): 2031–32; and John C. Duncan Jr., "A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role," *Vermont Law Review* 35, no. 2 (2010): 337.
19. "Executive Orders in Times of War and National Emergency: Report of the Special Committee on National Emergencies and Delegated Emergency Powers," Senate, June 1974, p. 7.
20. Erica Newland, "Executive Orders in Court," *Yale Law Journal* 124, no. 6 (2015): 2052.

Presidents have shifted the scale and scope of EOs over time, and the courts have responded by *mostly* tolerating the extension of executive power.[21] This extension has ridden apace with the general increase in government powers that the Constitution never delegated to the federal government or Congress.[22] Plaintiffs who challenge EOs in court have the legal burden of proving that the order exceeds the authority of the president. Courts will bend over backward to approve such EOs unless they clearly conflict with a statute—even going so far as to rule that Congress's silence on an EO is post hoc congressional acquiescence of the EO.[23] To be sure, federal courts have occasionally restrained the power of presidential EOs, as in the infamous steel seizure case when President Harry Truman issued EO 10340 to direct the secretary of commerce to take possession of and operate several steel mills owned by private firms.[24] The DC Circuit Court of Appeals also invalidated EO 12954, which was issued by President Clinton and barred the government from entering into contracts with firms that hire strikebreakers.[25] In 1935, the Supreme Court *indirectly* invalidated five EOs issued by President Franklin Delano Roosevelt (FDR) when it unanimously held that the National Industrial Recovery Act was unconstitutional, but that case did not specifically consider the legality of the EOs.[26] Until 1999, the courts had struck down only 14 EOs in whole or in part.[27]

More often, the courts have affirmed or expanded presidential power and flexibility in issuing EOs with little underlying theory and chaotic results.[28] Courts review EOs on a case-by-case basis, which has produced few bright-line rules that indicate when a president steps outside their legal authority.[29] The general effect of this legal

21. Erica Newland, "Executive Orders in Court," *Yale Law Journal* 124, no. 6 (2015): 2026.
22. William J. Olson and Alan Woll, "Executive Orders and National Emergencies: How Presidents Have Come to 'Run the Country' by Usurping Legislative Power," Cato Institute Policy Analysis no. 358, October 28, 1999, p. 8.
23. John C. Duncan Jr., "A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role," *Vermont Law Review* 35, no. 2 (2010): 365, 374–76.
24. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 US 579 (1952); Exec. Order No. 10340, 17 Fed. Reg. 3139 (April 10, 1955); and Abigail A. Graber, "Executive Orders: An Introduction," Congressional Research Service, March 29, 2021, pp. 8–11.
25. John C. Duncan Jr., "A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role," *Vermont Law Review* 35, no. 2 (2010): 365, 389; and *Chamber of Commerce of the United States v. Reich*, 74 F.3d 1322 (DC Cir. 1996).
26. *Schechter Poultry Corp. v. United States*, 295 US 495 (1935).
27. Tara L. Branum, "President or King? The Use and Abuse of Executive Orders in Modern-Day America," *Journal of Legislation* 28, no. 1 (2002): 59.
28. Erica Newland, "Executive Orders in Court," *Yale Law Journal* 124, no. 6 (2015): 2035–36, 2040.
29. John C. Duncan Jr., "A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role," *Vermont Law Review* 35, no. 2 (2010): 376.

disorder is an inexorable court-approved increase in presidential power and privileges without correspondingly expanded responsibilities or review. Presidential power has thus grown at the expense of the other branches and the liberties of Americans.

There are other types of presidential directives, and the differences between them are typically not substantive, but some patterns emerge in a large sample.[30] Take executive proclamations, for instance. With the exception of pardons, executive proclamations have often been more ceremonial, directed at the public, hortatory, and less likely to have the force of law—like President George Washington's proclamation declaring Thanksgiving a national holiday in 1789.[31] Through executive proclamations, presidents often impose restrictions on commerce, especially international commerce, and make other important legal changes that can have tremendous effects on Americans during national emergencies and in relation to federal land management.[32] The Emancipation Proclamation, issued by President Abraham Lincoln to free all the slaves in the Confederate states on January 1, 1863, is the most consequential and praised executive proclamation in history (and rightly so).[33] The difference between executive proclamations and EOs is often "one of form rather than substance."[34]

Presidential memoranda are another type of executive action, often directed solely at executive branch officials, that can have the same effect as EOs or executive proclamations, with the legal difference being that they are published in the *Federal Register* only if the president determines that they have a "general applicability and legal effect."[35] National security directives, also known as presidential directives, are yet another type of executive action that formally notifies the head of a federal department or agency of presidential national security decisions. Often, these

30. Todd Gaziano, "The Use and Abuse of Executive Orders and Other Presidential Directives," Heritage Foundation, February 21, 2001, p. 9; Tara L. Branum, "President or King? The Use and Abuse of Executive Orders in Modern-Day America," *Journal of Legislation* 28, no. 1 (2002): 7; and Committee on Government Operations, "Executive Orders and Proclamations: A Study of a Use of Presidential Powers," House of Representatives, December 1957, p. 1.
31. John C. Duncan Jr., "A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role," *Vermont Law Review* 35, no. 2 (2010): 352, 354; and Benjamin B. Wilhelm, "Presidential Directives: An Introduction," Congressional Research Service, November 13, 2019, p. 1.
32. Robert B. Cash, "Presidential Power: Use and Enforcement of Executive Orders," *Notre Dame Law Review* 39, no. 1 (1963): 44; and Benjamin B. Wilhelm, "Presidential Directives: An Introduction," Congressional Research Service, November 13, 2019, p. 1.
33. Abraham Lincoln, "Emancipation Proclamation," January 1, 1863.
34. Robert B. Cash, "Presidential Power: Use and Enforcement of Executive Orders," *Notre Dame Law Review* 39, no. 1 (1963): 44.
35. Abigail A. Graber, "Executive Orders: An Introduction," Congressional Research Service, March 29, 2021, p. 21; and John C. Duncan Jr., "A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role," *Vermont Law Review* 35, no. 2 (2010): 356.

"implement and coordinate military policy, foreign policy, and other policy deemed to fall within the bounds of national security."[36] Presidential directives are frequently classified at presidential discretion, and presidents have often refused to notify Congress of their existence.[37] When they sign bills, presidents issue presidential signing statements, which generally offer their interpretation of the law being signed, offer insights into how the executive branch intends to implement it, indicate the law's constitutional boundaries, and direct agents on administering the new law.[38]

Executive agreements come in three types. The first are international agreements undertaken that are authorized by statute. Such agreements skirt the Constitution's requirement that two-thirds of the Senate must approve a treaty—but they are at least based on laws passed by a majority of Congress.[39] The second are sole executive agreements that the president makes without an express delegation by Congress.[40] The latter are limited, but here the courts have approved expansions of the scope of presidential power by defaulting to theories of implicit congressional delegations to the president.[41] For example, President Obama defended his decision to enter the Anti-Counterfeiting Trade Agreement without a delegation by Congress on the theory that members of Congress sent a letter calling for the executive to establish such protections with other countries and that such an agreement "fits within the fabric of existing law."[42] Presidents have also justified entering such agreements by affirming that they are nonbinding, such as when President Obama entered the Paris Agreement to participate in emissions reduction talks.[43] Stretching the limits of implied congressional

36. John C. Duncan Jr., "A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role," *Vermont Law Review* 35, no. 2 (2010): 357.
37. "Executive Orders in Times of War and National Emergency: Report of the Special Committee on National Emergencies and Delegated Emergency Powers," Senate, June 1974, pp. 5–6; and John C. Duncan Jr., "A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role," *Vermont Law Review* 35, no. 2 (2010): 357.
38. John C. Duncan Jr., "A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role," *Vermont Law Review* 35, no. 2 (2010): 359–60.
39. US Const. art. II, § 2; and John C. Duncan Jr., "A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role," *Vermont Law Review* 35, no. 2 (2010): 362.
40. John O. McGinnis and Michael B. Rappaport, "Presidential Polarization," *Ohio State Law Journal* 83, no. 1 (2022): 46.
41. John C. Duncan Jr., "A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role," *Vermont Law Review* 35, no. 2 (2010): 337.
42. John O. McGinnis and Michael B. Rappaport, "Presidential Polarization," *Ohio State Law Journal* 83, no. 1 (2022): 48; and Michael D. Ramsey, "Evading the Treaty Power?: The Constitutionality of Nonbinding Agreements," *FIU Law Review* 11, no. 2 (Spring 2016): 371–87.
43. Michael D. Ramsey, "Evading the Treaty Power?: The Constitutionality of Nonbinding Agreements," *FIU Law Review* 11, no. 2 (Spring 2016): 371–87; and John O. McGinnis and Michael B. Rappaport, "Presidential Polarization," *Ohio State Law Journal* 83, no. 1 (2022): 48–49.

consent is bad enough, but to unilaterally enter an international agreement solely on the grounds that it is nonbinding is even worse because doing so increases chaos in international relations and domestic politics. The third type of executive agreement is authorized by a prior treaty.[44]

The total number of EOs is unknown because what counts as an EO is vague, but presidents have issued over 14,000 formally recorded EOs since the beginning of the republic through September 2024.[45] The late historian Clifford L. Lord identified over 1,500 unnumbered EOs and other sorts of executive guidance issued with the force of law. Former secretary of the interior Harold L. Ickes estimated that there could have been as many as 15,000 by the time of FDR's administration, and others have said that there could be as many as 50,000, but such estimates are merely educated guesses at best and more likely shots in the dark.[46] Many early EOs were informal, sometimes consisting of nothing more than the words "I approve," "Approved," "Let it be done," or similar phrases on recommendations submitted to a president by a member of his cabinet.[47] Even a diligent and well-funded research project would be unlikely to identify the true number because the government did not start systematically numbering EOs until 1907.[48] The Federal Register Act of 1935 requires the *Federal Register* to publish EOs and executive proclamations, but the president decides which directives are EOs and which are executive proclamations.[49] Important executive actions such as President Obama's Deferred Action for Childhood Arrivals program of June 15, 2012, which stopped immigration enforcement actions against some illegal immigrants brought to the United States as children and granted many of them work permits, were created by executive memorandum and not listed in the *Federal Register*, even though that

44. John C. Duncan Jr., "A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role," *Vermont Law Review* 35, no. 2 (2010): 362.
45. "Executive Orders," *Federal Register*, National Archives.
46. Gerhard Peters and John T. Woolley, "Executive Orders," American Presidency Project, last updated June 1, 2024; and Committee on Government Operations, "Executive Orders and Proclamations: A Study of a Use of Presidential Powers," House of Representatives, December 1957, p. 37.
47. Jennie Holman Blake, "Presidential Power Grab or Pure State Might? A Modern Debate over Executive Interpretations on Federalism," *BYU Law Review* 2000, no. 1 (2000): 296; Robert B. Cash, "Presidential Power: Use and Enforcement of Executive Orders," *Notre Dame Law Review* 39, no. 1 (1963): 46; and Committee on Government Operations, "Executive Orders and Proclamations: A Study of a Use of Presidential Powers," House of Representatives, December 1957, p. 35.
48. Robert B. Cash, "Presidential Power: Use and Enforcement of Executive Orders," *Notre Dame Law Review* 39, no. 1 (1963): 46n17.
49. Federal Register Act of 1935, Pub. L. No. 74-220, 49 Stat. 500 (July 26, 1935); and "Executive Orders in Times of War and National Emergency: Report of the Special Committee on National Emergencies and Delegated Emergency Powers," Senate, June 1974, pp. 3–4.

particular program had a major legal impact on the lives of hundreds of thousands of people.[50] EOs have even described the manner in which subsequent EOs were supposed to be written, but there are few enforceable guidelines.[51] There are likely many EOs that have the force of law yet are unknown to Congress or the public.

FDR issued the most EOs, with 3,721, or an average of 307 per year.[52] The other great (ab)users of EOs were President Woodrow Wilson, who issued 1,803 during his administration; Calvin Coolidge, who issued 1,203; and Theodore Roosevelt, who issued 1,081. After World War II, President Truman issued the most at 907, followed by Dwight D. Eisenhower at 484 and Ronald Reagan at 381. EOs have also become more legislative in nature with broader legal, social, and economic consequences.[53] For example, President Wilson issued EOs that created the War Trades Board and the Grain Corporation during World War I to centrally direct large sectors of the economy during wartime under the authority of the Trading with the Enemy Act of 1917 and the Food and Fuel Control Act of 1917, respectively.[54] The raw number of EOs issued is not a perfect measure of the increase in government power because many EOs repealed older, worse EOs or had practically no effect except to change civil service rules. A simple quantitative measure ignores the impact of each individual EO, but it is roughly correlated with greater government power. Although more recent presidents have issued fewer EOs, modern EOs are, on balance, more legislative in nature, more likely to apply to the general public, and have a more significant impact on American society.[55]

Congress has also enacted at least 137 statutes that grant the president extraordinary powers during emergencies that the president declares and an additional 13 when

50. Janet Napolitano (secretary of Homeland Security) to David V. Aguilar (acting commissioner, Customs and Border Protection), Alejandro Mayorkas (director, Citizenship and Immigration Services), and John Morton (director, Immigration and Customs Enforcement), "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children," memorandum, Department of Homeland Security, June 15, 2012.
51. Jennie Holman Blake, "Presidential Power Grab or Pure State Might? A Modern Debate over Executive Interpretations on Federalism," *BYU Law Review* 2000, no. 1 (2000): 296; Exec. Order No. 7298, February 18, 1936; Exec. Order No. 10006, 15 Fed. Reg. 5927 (October 12, 1948); and Exec. Order No. 11030, 27 Fed. Reg. 5847 (June 21, 1962).
52. Gerhard Peters and John T. Woolley, "Executive Orders," American Presidency Project, last updated June 1, 2024.
53. Robert B. Cash, "Presidential Power: Use and Enforcement of Executive Orders," *Notre Dame Law Review* 39, no. 1 (1963): 45.
54. "Executive Orders in Times of War and National Emergency: Report of the Special Committee on National Emergencies and Delegated Emergency Powers," Senate, June 1974, p. 3.
55. Gene Healy, *The Cult of the Presidency: America's Dangerous Devotion to Executive Power* (Washington: Cato Institute, 2008), p. 100; Kevin M. Stack, "The Statutory President," *Iowa Law Review* 90, no. 2 (January 2005): 550; and Robert B. Cash, "Presidential Power: Use and Enforcement of Executive Orders," *Notre Dame Law Review* 39, no. 1 (1963): 55.

Congress declares a national emergency, according to the Brennan Center for Justice.[56] Congress can end emergencies with a joint resolution, and the emergencies often have a limited duration in statute, but the president can often expand the duration of the emergency with an additional declaration.[57] The president exercises those emergency powers through EOs and proclamations.[58] For instance, President Donald Trump declared an emergency along the southern border and ordered the construction of a border wall in Proclamation 9844 on February 15, 2019.[59]

THE EFFECTS OF EXECUTIVE ORDERS

The most obvious constitutional problems with expansive EOs are that they can lead to presidential abuse of power, reduce the separation of powers between the three branches by allowing the president to legislate from the White House, and erode checks and balances. The principle of the rule of law is degraded through a proliferation of EOs that have effects similar to those of legislation because, in many cases, they are unknown to Congress or the public. Democratic accountability is further eroded because the issuance of EOs is infused with an inherent moral hazard. EOs issued by one president can cause problems that the other branches of government or future presidents will have to remedy. This moral hazard affects Congress as well, but EOs are not the result of debate or compromise to the extent that legislation is, and EOs do not constrain those who do the governing like statutes often do.[60]

The effect of EOs goes well beyond the constitutional structure of our government and proper checks and balances. EOs can increase economic uncertainty and rent-seeking, such as in the cases of EO 14110, which will expand government regulatory control over the new artificial intelligence sector; EO 11615, which instituted nationwide wage and price controls; and other EOs to restrict international trade.[61]

56. "Executive Orders in Times of War and National Emergency: Report of the Special Committee on National Emergencies and Delegated Emergency Powers," Senate, June 1974, p. XII; and Brennan Center for Justice, "A Guide to Emergency Powers and Their Use," last updated June 11, 2024.
57. 50 U.S.C. § 1622.
58. For examples of EOs issued pursuant to emergencies, see "Executive Orders in Times of War and National Emergency: Report of the Special Committee on National Emergencies and Delegated Emergency Powers," Senate, June 1974, pp. 49–206.
59. Proclamation No. 9844, 84 Fed. Reg. 4949 (February 20, 2019).
60. Erica Newland, "Executive Orders in Court," *Yale Law Review* 124, no. 6 (2015): 2083.
61. Exec. Order No. 14110, 88 Fed. Reg. 75191 (November 1, 2023); Exec. Order No. 13435, 72 Fed. Reg. 34591 (June 22, 2007); Exec. Order No. 11615, 36 Fed. Reg. 15727 (August 17, 1971); and Donald J. Trump, "Presidential Memorandum on the Actions by the United States Related to the Section 301

Several EOs relating to racial equity, transgenderism, and homosexuality inserted the president into contentious cultural debates.[62] EOs revoked by a president, reinstated by another, and then revoked again by a third produce a chaotic whirl of uncertainty.[63] Presidents can change EOs at whim, wiping them away with zero public debate and imposing enormous costs on private actors (or relieving them of large burdens).

Government fidelity to the principles of individual liberty, limited government, free markets, and peace is difficult in normal times and impossible to maintain with a strong president wielding legislative and quasi-legislative power. The president isn't entirely to blame: Congress has cooperated with presidents over the centuries to strengthen the latter and weaken the former, but the extent and scale of EOs are a major symptom of an executive branch that is too powerful. The Constitution's system of checks and balances is supposed to make ambition counteract ambition, to paraphrase James Madison.[64] Congress appears to be lacking ambition in all areas save one: delegating its power to a presidency eager to hoard it.[65]

The suggested revocations and amendments in this handbook would affect the operation of the federal government and cover various policy issues that affect the general public, including health care, immigration, foreign policy, trade, defense, and others. Cato scholars have identified and outlined specific reforms to EOs and other presidential directives that conflict with the principles of individual liberty, free markets, limited government, and peace and that often violate the Constitution. This handbook is not a comprehensive list of such executive directives but merely the lowest hanging fruit and best places to begin the long journey back toward constitutionally limited government.

Investigation," White House, March 22, 2018.

62. Exec. Order No. 14075, 87 Fed. Reg. 37189 (June 21, 2022); Exec. Order No. 13985, 86 Fed. Reg. 7009 (January 25, 2021); and John O. McGinnis and Michael B. Rappaport, "Presidential Polarization," *Ohio State Law Journal* 83, no. 1 (2022): 5.

63. John O. McGinnis and Michael B. Rappaport, "Presidential Polarization," *Ohio State Law Journal* 83, no. 1 (2022): 21; and Christopher J. Deering and Forrest Maltzman, "The Politics of Executive Orders: Legislative Constraints on Presidential Power," *Political Research Quarterly* 52, no. 4 (December 1999): 770.

64. James Madison, *Federalist* no. 51, in *The Federalist Papers*, ed. Clinton Rossiter (New York: New American Library, 1961), pp. 320–25.

65. Erica Newland, "Executive Orders in Court," *Yale Law Journal* 124, no. 6 (2015): 2056.

Administrative State

Reinstate and Amend "Democratic Accountability in Agency Rulemaking" Executive Order

Reinstate and Amend Executive Order 13979, Which Was Revoked by Executive Order 14018

President Donald Trump issued Executive Order (EO) 13979 in 2021 to ensure democratic accountability in agency rulemaking.[1] President Biden issued EO 14018 later in 2021 to repeal EO 13979, among other EOs.[2] In recent decades, agencies have frequently subdelegated the authority to issue final rules to subordinate officials who are neither nominated by the president nor confirmed by the Senate.[3] This practice puts final decisionmaking power in the hands of bureaucrats who have only a tenuous link to any democratically elected officeholders. Such diffusion of power weakens the chain of accountability for consequential government actions. It also raises serious constitutional concerns.[4]

EO 13979 took a step in the right direction by limiting the authority to issue rules to only "senior appointees" who were either appointed by the president or temporarily serving in offices requiring presidential appointment. Even better would be to issue a proposed revised version of EO 13979 that further restricts rulemaking power to only those who have been both appointed by the president and confirmed by the Senate.

—Thomas A. Berry

1. Exec. Order No. 13979, 86 Fed. Reg. 6813 (January 22, 2021).
2. Exec. Order No. 14018, 86 Fed. Reg. 11855 (March 1, 2021).
3. See Angela C. Erickson and Thomas Berry, "But Who Rules the Rulemakers? A Study of Illegally Issued Regulations at HHS," Pacific Legal Foundation, April 29, 2019.
4. See Thomas A. Berry, "The Supreme Court's Patent Case May Rein in Rulemakers," *Cato at Liberty* (blog), Cato Institute, June 25, 2021.

Revoke "Protecting the Federal Workforce" Executive Order

Revoke Executive Order 14003 and Reinstate Executive Orders 13839, 13837, and 13836

President Donald Trump signed three executive orders (EOs) in May 2018 to improve efficiency in the federal workforce.[1] First, EO 13839 streamlined the process of firing poorly performing workers and those engaged in misconduct.[2] The firing rate for poor performers in the government is only about one-sixth the rate in the private sector because of excessive bureaucratic protections.[3] Second, EO 13837 limits the share of work hours that federal union representatives can use for union activities to 25 percent, and it disallows using such time to lobby Congress.[4] About one-third of the federal workforce is unionized, but ideally none of it should be. Third, EO 13836 aimed to renegotiate federal collective bargaining agreements to reduce taxpayer costs and to improve transparency by posting them on a public database.[5] In a backward move, President Biden repealed the three Trump EOs with EO 14003 in January 2021.[6] The next president should repeal EO 14003 and reinstate the Trump civil service reforms. There is no reason why federal workers should be an elite island of highly paid workers immune from the performance requirements typically expected of workers in the private sector.[7]

—Chris Edwards

1. Erich Wagner, "White House Cracks Down on Unions with Executive Orders," *Government Executive*, May 25, 2018.
2. Exec. Order No. 13839, 83 Fed. Reg. 25343 (June 1, 2018).
3. Chris Edwards, "Why the Federal Government Fails," Cato Institute Policy Analysis no. 777, July 27, 2015, p. 24; and Stewart Liff, "The Low Rate of Firing Government Employees Is Not a 'Positive Sign,'" *Government Executive*, February 6, 2018.
4. Exec. Order No. 13837, 83 Fed. Reg. 25335 (June 1, 2018).
5. Exec. Order No. 13836, 83 Fed. Reg. 25329 (June 1, 2018).
6. Exec. Order No. 14003, 86 Fed. Reg. 7231 (January 27, 2021).
7. Chris Edwards, "Reforming Federal Worker Pay and Benefits," Downsizing the Federal Government, August 2, 2019.

Amend "Equal Opportunity Employment" and "Equal Employment Opportunity in the Federal Government" to Ban Federal Affirmative Action Executive Orders

Amend Executive Orders 11246 and 11478

President Lyndon Johnson issued Executive Order (EO) 11246 in September 1965 to prohibit discrimination in federal contracting and mandate affirmative action.[1] President Richard Nixon issued EO 11478 in August 1969 to also prohibit discrimination and mandate affirmative action in federal hiring.[2] Affirmative action is an expensive, largely ineffective, and discriminatory policy that seeks to benefit some federal applicants and contractors because of their race, color, religion, sex, national origin, handicap, or age at the expense of others. These EOs have forced the federal government to discriminate based on those characteristics and to incentivize many firms to do so as well if they are government contractors or hope to sign government contracts in the future.

The EOs should be further amended to define discrimination as intentional discrimination against individuals based on their race, color, religion, sex, national origin, handicap, or age and to ban all statistical measures of discrimination and other disparate impact analysis. The president should amend EO 11246 to strike any reference to or requirement for affirmative action, amend EO 11478 to specifically prohibit affirmative action in federal hiring, and amend both EO 11246 and EO 11478 to define discrimination as intentional discrimination against an individual for their race, color, religion, sex, national origin, handicap, or age and to ban all statistical measures of discrimination or other disparate impact analyses.

—Alex Nowrasteh

1. Exec. Order No. 11246, 30 Fed. Reg. 12319 (September 24, 1965).
2. Exec. Order No. 11478, 34 Fed. Reg. 12985 (August 8, 1969).

Revoke Culture War Executive Orders

Revoke Executive Orders 13985, 13988, 14020, 14021, 14031, 14035, 14075, and 14091

President Biden issued Executive Order (EO) 13985 in January 2021 to comprehensively advance equity by systematically recognizing and redressing inequities according to extremely dubious theories of structural racism.[1] President Biden followed that by issuing EO 14035 in June 2021 to support diversity, equity, inclusion, and accessibility in the federal workforce, EO 14091 in February 2023 to advance the equity mission further, and a series of EOs expanding the "equity, justice, and opportunity" treatment to specific ethnic and racial groups through other means.[2] President Biden also waded into the cultural debate over gender more broadly and lesbian, gay, bisexual, transgender, queer, and intersex individuals specifically by issuing EOs 13988, 14020, 14021, and 14075.[3] By the stroke of a pen, the president inserted himself into contentious and toxic culture war debates that are best left to private individuals, families, private organizations, school boards, parents, and state and local governments.[4] In addition to there being no constitutional justification for the president to be involved in these cultural disagreements, the government should separate itself from these divisive cultural issues as much as possible. A good starting point would be to revoke the EOs mentioned above.

—Alex Nowrasteh

1. Exec. Order No. 13985, 86 Fed. Reg. 7009 (January 25, 2021).
2. Exec. Order No. 14035, 86 Fed. Reg. 34593 (June 30, 2021); Exec. Order No. 14091, 88 Fed. Reg. 10825 (February 22, 2023); and Exec. Order No. 14031, 86 Fed. Reg. 29675 (June 3, 2021).
3. Exec. Order No. 13988, 86 Fed. Reg. 7023 (January 25, 2021); Exec. Order No. 14020, 86 Fed. Reg. 13797 (March 11, 2021); Exec. Order No. 14021, 86 Fed. Reg. 13803 (March 11, 2021); and Exec. Order No. 14075, 87 Fed. Reg. 37189 (June 21, 2022).
4. Gene Healy, "Culture Warrior in Chief," *Reason*, May 2024, pp. 43–48.

Education and Family

Revoke White House Initiatives on "Advancing Educational Equity, Excellence, and Economic Opportunity for Hispanics" and "Educational Equity, Excellence, and Economic Opportunity for Black Americans" Executive Orders

Revoke Executive Orders 14045 and 14050, Continued by Executive Order 14109

President Biden issued Executive Orders (EOs) 14045 and 14050 in 2021 on the grounds that Hispanic Americans and Black Americans faced "entrenched disparities" in education and related outcomes and that these were the result of "systemic inequities."[1] These EOs were continued in EO 14109.[2] In both cases, the EOs point to the COVID-19 pandemic as shining spotlights on these inequities. To combat them, the EOs create initiatives to focus on eradicating disparities in disciplinary actions and eliminating discriminatory enrollment, housing, transportation, and other policies.

There are already myriad federal programs focused on disparities in education resources and outcomes; these EOs are superfluous at best.[3] At worst, federal help targeted at specific racial and ethnic groups exacerbates social divisions and violates the basic principle of equality under the law. Also, the assumption that might justify these actions—disparities indicate discrimination—is far from certain in areas such as student discipline.[4] A presidential bludgeon to wield against schools, even if in the form of loaded reports and "guidance," is unnecessary and dangerous.

—Neal McCluskey

1. Exec. Order No. 14045, 86 Fed. Reg. 51581 (September 16, 2021); and Exec. Order No. 14050, 86 Fed. Reg. 58551 (October 22, 2021).
2. Exec. Order No. 14109, 88 Fed. Reg. 68447 (October 4, 2023).
3. "Table 401.30: Federal On-Budget Funds for Education, by Level/Educational Purpose, Agency, and Program: Selected Fiscal Years, 1970 through 2021," Digest of Education Statistics, National Center for Education Statistics, 2022.
4. John Paul Wright et al., "Prior Problem Behavior Accounts for the Racial Gap in School Suspensions," *Journal of Criminal Justice*, 42, no. 3 (May–June 2014): 257–66; and Kaitlin P. Anderson and Gary W. Ritter, "Disparate Use of Exclusionary Discipline: Evidence on Inequities in School Discipline from a US State," *Education Policy Analysis Archives* 25, no. 49 (May 2017).

Revoke "Quality Care and Supporting Caregivers" Executive Order

Revoke Executive Order 14095

President Biden issued Executive Order (EO) 14095 to bolster childcare supply and improve conditions for caregivers by increasing their compensation through existing federal programs, encouraging states to spend more money on cash assistance and increase welfare use, requiring federal grantees to provide childcare, and expanding educational opportunities for caregivers, among other actions.[1] However, the EO's provisions will neither reduce the price of care nor meaningfully increase childcare supply. Rather than subsidizing care, encouraging workers to pursue a less remunerative career, or pressuring companies to provide childcare, policymakers should address the underlying causes of limited care options.

Much of the restriction on the supply of childcare workers is a consequence of local regulations such as zoning rules that prohibit home-based daycares, staff-child ratios that limit the number of children a childcare staffer can care for, and restrictive licensing and educational requirements for caregivers. These regulations drive up prices in local markets and make it difficult for parents of young children to access the care they need.[2]

Various immigration policies at the federal level contribute to the limited supply of childcare workers. To increase the supply, federal policymakers should relax the cap on EB-3 immigrant visas, allow year-round work for H-2B visa holders in the childcare sector, and relax expensive limitations and compliance rules for the J-1 au pair program. For instance, the administration should revoke its proposed rule amending the au pair program, as it would reduce the number of au pairs.[3] The president should revoke EO 14095 because it does not address the problems caused by government restrictions on the supply of carers in the childcare industry.

—Vanessa Brown Calder

1. Exec. Order No. 14095, 88 Fed. Reg. 24669 (April 18, 2023).
2. Devon Gorry and Diana W. Thomas, "Regulation and the Cost of Childcare," *Applied Economics* 49, no. 41 (January 12, 2017): 4138–47; and V. Joseph Hotz and Mo Xiao, "The Impact of Regulations on the Supply and Quality of Care in Child Care Markets," *American Economic Review* 101, no. 5 (August 2011): 1775–1805.
3. Alex Nowrasteh, "Public Comments Re: Exchange Visitor Program—Au Pairs," Cato Institute, November 14, 2023; and Alex Nowrasteh and Vanessa Brown Calder, "The Minimum Wage Undermined the Au Pair Program in Massachusetts," Cato Institute Working Paper no. 73, March 17, 2023.

Energy and Environment

Revoke "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis" Executive Order

Revoke Executive Order 13990

In January 2021, President Biden issued Executive Order (EO) 13990 to establish a suite of climate-related policies, including rejoining the Paris Agreement on climate change, revoking the permit for the Keystone XL pipeline, placing a moratorium on activities in the Arctic National Wildlife Refuge, and requiring federal agencies to use global (rather than national or subnational) estimates of the social cost of greenhouse gases such as carbon dioxide (CO_2).[1] Together, these policies reduce the supply of oil and natural gas, which artificially increase prices for consumers and introduce other economic inefficiencies. Readopting the Paris Agreement climate goals and a global social cost of CO_2 are major policy changes that Congress should address.[2] However, EO 13990 also suspended EO 13920, which limited the ability of firms in the domestic electric power sector with high-voltage equipment to import equipment to protect national security.[3] EO 13920 should remain suspended. If reinstated, it would raise costs and create regulatory uncertainty in the US electricity industry without a demonstrable national security benefit.

—Travis Fisher

1. Exec. Order No. 13990, 86 Fed. Reg. 7037 (January 25, 2021).
2. See Travis Fisher, "The Political Economy of EPA's Updated Social Cost of Carbon," *Cato at Liberty* (blog), Cato Institute, February 28, 2024.
3. Exec. Order No. 13920, 85 Fed. Reg. 26595 (May 4, 2020).

Revoke "Tackling the Climate Crisis at Home and Abroad" Executive Order

Revoke Executive Order 14008

In January 2021, President Biden issued Executive Order 14008 to establish the executive branch's goal to "put the United States on a path to achieve net-zero emissions, economy-wide, by no later than 2050."[1] The appropriate process for establishing nationwide climate policy is through the US Congress and regular order. For example, the Paris Agreement is the source of President Biden's executive-branch goals to "create a carbon pollution-free power sector by 2035 and net zero emissions economy by no later than 2050."[2] If the executive branch wants to give the Paris Agreement the weight of national policy, the US Senate should ratify the agreement, as with any other binding treaty. In addition, "net zero" goals do not have a sound basis in the economics of externalities and impose far greater costs than benefits.[3]

—Travis Fisher

1. Exec. Order No. 14008, 86 Fed. Reg. 7619 (February 1, 2021).
2. "Fact Sheet: President Biden Sets 2030 Greenhouse Gas Pollution Reduction Target Aimed at Creating Good-Paying Union Jobs and Securing US Leadership on Clean Energy Technologies," White House, April 22, 2021.
3. See Travis Fisher and Alex Nowrasteh, "A Different Perspective on 'Climate Change and Globalization,'" *Cato at Liberty* (blog), Cato Institute, April 24, 2024.

Revoke "Modernizing Regulatory Review" Executive Order and Reinstate "Regulatory Planning and Review" Executive Order

Revoke EO 14094 and Reinstate EO 12866

In April 2023, President Biden issued Executive Order (EO) 14094, which amended several provisions in other EOs, particularly EO 12866.[1] EO 14094 increased the threshold for "significant regulatory action" from $100 million to $200 million in annual economic impacts. It also implemented the presidential memorandum of January 20, 2021 (Modernizing Regulatory Review).[2] Among the changes triggered by the memo and EO 14094 is the reduction of the social discount rate used in the Office of Management and Budget's Circular A-4, a guidance document for structuring regulatory cost–benefit analysis. By reducing the discount rate applied in cost–benefit analyses, the amended Circular A-4 results in a significantly higher social cost of greenhouse gases, which in turn empowers a more aggressive regulatory agenda that would not be justified using previous discount rates.[3] Finally, EO 14094 states that regulatory analysis should "facilitate agency efforts to develop regulations that . . . advance statutory objectives."

Regulatory analysis is too important a policymaking tool to be enlisted in agencies' efforts to expand their own authority. In contrast, the purpose of EO 12866 was clear in its opening paragraph:

> The American people deserve a regulatory system that works for them, not against them: a regulatory system that protects and improves their health, safety, environment, and well-being and improves the performance of the economy without imposing unacceptable or unreasonable costs on society; regulatory policies that recognize that the private sector and private markets are the best engine for economic growth; regulatory approaches that respect the

1. Exec. Order No. 14094, 88 Fed. Reg. 21879 (April 11, 2023); and Exec. Order No. 12866, 58 Fed. Reg. 51735 (October 4, 1993).
2. Joseph R. Biden, "Modernizing Regulatory Review," presidential memorandum, January 20, 2021.
3. See Travis Fisher, "The Political Economy of EPA's Updated Social Cost of Carbon," *Cato at Liberty* (blog), Cato Institute, February 28, 2024.

role of State, local, and tribal governments; and regulations that are effective, consistent, sensible, and understandable. We do not have such a regulatory system today.[4]

EO 14094 should be revoked and EO 12866 should be reinstated in its place.

—Travis Fisher

4. Exec. Order No. 12866, 58 Fed. Reg. 51735 (October 4, 1993).

Revoke Federal Procurement Mandates for "Climate-Related Financial Risk" and "Clean Energy Industries and Jobs through Federal Sustainability" Executive Orders

Revoke Executive Orders 14030 and 14057

President Biden issued Executive Order (EO) 14030 in May 2021 to, among other things, "lead by example by appropriately prioritizing Federal investments and conducting prudent fiscal management" in the face of climate change.[1] Of particular note is Section 5(b), which instructs the Federal Acquisition Regulation (FAR) Council to "require major Federal suppliers to publicly disclose greenhouse gas emissions and climate-related financial risk and to set science-based reduction targets." On October 15, 2021, the FAR Council published a proposed rule that would require major federal suppliers to submit plans detailing how their operations are consistent with the goals of the Paris Agreement.[2] A final rule has not been issued. The proposal violated EO 12866 by failing to quantify its costs and benefits and, if finalized, would add unnecessary costs to US defense contractors.[3] President Biden also issued EO 14057 in December 2021 to leverage the federal government's procurement practices to transform how Americans "build, buy, and manage electricity, vehicles, buildings, and other operations to be clean and sustainable."[4] Pursuant to EO 14057, the Office of the Federal Chief Sustainability Officer developed a plan that would require the following across the federal government:

- net-zero emissions operations by 2050;
- 100 percent carbon dioxide–free electricity by 2035;
- net-zero emissions buildings by 2045;
- climate-resilient infrastructure and operations;
- net-zero emissions procurement by 2050; and

1. Exec. Order No. 14030, 86 Fed. Reg. 27967 (May 25, 2021).
2. "Federal Acquisition Regulation: Minimizing the Risk of Climate Change in Federal Acquisitions," 86 Fed. Reg. 57404 (October 15, 2021).
3. Exec. Order No. 12866, 58 Fed. Reg. 12866 (September 30, 1993); and Travis Fisher and Maiya Clark, "Biden Proposal Puts Climate Agenda above America's Defense," *Daily Signal*, February 17, 2023.
4. Exec. Order No. 14057, 86 Fed. Reg. 70935 (December 13, 2021).

- all zero-emission-vehicle acquisitions by 2035.[5]

The White House Council on Environmental Quality issued a detailed implementation instruction report in August 2022 without estimates of the cost of implementing EO 14057 within the federal government.[6] As required by EO 12866, implementation costs should be carefully estimated and compared to the expected benefits of EO 14057. Mandating net-zero goals for all federal procurement imposes high costs on taxpayers and goes beyond even standard economic approaches to reducing the negative externalities of climate change.[7] EOs 14030 and 14057 should be revoked.

—Travis Fisher

5. Office of the Federal Chief Sustainability Officer, "Federal Sustainability Plan—EO 14057" (overview for the Office of Acquisition Policy Federal Advisory Council Acquisition Workforce Subcommittee).
6. "Implementing Instructions for Executive Order 14057 Catalyzing Clean Energy Industries and Jobs through Federal Sustainability," White House Council on Environmental Quality, August 2022.
7. Travis Fisher and Alex Nowrasteh, "A Different Perspective on 'Climate Change and Globalization,'" *Cato at Liberty* (blog), Cato Institute, April 24, 2021.

Foreign Policy, National Defense, and Intelligence

Revoke "Authority to Order the Ready Reserve of the Armed Forces to Active Duty to Address International Drug Trafficking" Executive Order

Revoke Executive Order 14097

President Biden signed Executive Order (EO) 14097 in April 2023, which grants the president the emergency authority to order the ready reserve of the armed forces to address international drug trafficking.[1] This EO establishes a dangerous precedent for the use of military force abroad under the vague umbrella of countering the international drug trade. This is particularly worrisome given the recent push by elected officials to authorize the use of military force to combat drug cartels in Mexico, despite the objections of the Mexican government.[2] United States–led drug wars have not been particularly successful.[3] EO 14097 grants the president carte blanche to use military force devoid of context and specific US interests at stake. Revoking EO 14097 is necessary to safeguard the authority granted to Congress under the Constitution that it has the exclusive power to declare war.

—Jon Hoffman

1. Exec. Order No. 14097, 88 Fed. Reg. 26471 (May 1, 2023).
2. Justin Logan and Daniel Raisbeck, "The US Military Can't Solve the Fentanyl Crisis," *Foreign Policy*, September 8, 2023.
3. Christy Thornton, "The US Has Led the War on Drugs Abroad for Decades, and It's Been a Staggering Failure," *New York Times*, September 7, 2022.

Revoke "Reimposing Certain Sanctions with Respect to Iran" Executive Order

Revoke Executive Order 13846

President Donald Trump signed Executive Order 13846 in August 2018, which ceased US participation in the Joint Comprehensive Plan of Action (JCPOA)—an agreement that would lead Iran to dismantle much of its nuclear program and permit closer inspection of its facilities—and reimposed on Iran all sanctions lifted or waived in connection with the JCPOA.[1]

Trump's decision to withdraw from the JCPOA and the collapse of negotiations to reenter the agreement under President Biden have reaped counterproductive results for Middle East stability and US interests. Washington's strategy of trying to isolate Iran while applying "maximum pressure" on Tehran has backfired considerably.[2] Abandoning diplomacy with Tehran has left only coercion and backdoor negotiations—often through third-party actors—aimed at de-escalation. Reimposed sanctions on Iran have not stymied its nuclear program. In fact, Iran is now closer to producing a nuclear bomb than before.[3] The United States and its partners should renegotiate a return to the JCPOA, especially given that Iran poses virtually no threat to the United States, absent our needless military bases in the Middle East.[4] Rejoining the JCPOA is a necessary first step to de-escalating unneeded tension between the United States and Iran.

—Jon Hoffman

1. Exec. Order No. 13846, 83 Fed. Reg. 38939 (August 7, 2018).
2. Daniel DePetris, "'Maximum Pressure' Harms Diplomacy and Increases Risks of War with Iran," Defense Priorities, November 19, 2021.
3. Joby Warrick, "Nuclear Deal in Tatters, Iran Edges Closer to Weapons Capability," *Washington Post*, April 10, 2024.
4. Justin Logan, "The Case for Withdrawing from the Middle East," Defense Priorities, September 30, 2020.

Close the Guantanamo Bay Detention Facilities

Revoke Executive Order 13823 and Reinstate Executive Order 13492

President Donald Trump signed Executive Order (EO) 13823 in January 2018, which repealed EO 13492 and stopped the closure of US detention facilities at Guantanamo Bay in Cuba holding enemy combatants captured during the Global War on Terror.[1]

Nearly 800 detainees have gone through the US detention center at Guantanamo Bay since it opened in 2002, and as of May 2024, there were 30 detainees remaining in the facility.[2] In many instances, detainees were held for years without being charged or standing trial, including some of the 30 current detainees. Human rights organizations and former detainees have also shared accounts of torture and abuse at Guantanamo Bay, especially in the first few years of the facility's existence.[3] Guantanamo Bay represents a dark chapter in US foreign policy that Washington should be eager to close.

The Obama administration failed to completely follow through on EO 13492 and close Guantanamo Bay entirely, but it reduced the number of detainees from close to 250 to about 60 by 2016 primarily by transferring detainees to other countries.[4] At least 55 countries have accepted Guantanamo transferees, and their experiences have considerably varied based on where they were sent. Some transferees stood trial in Western democracies, others went through rehabilitation programs, and others are not imprisoned but are monitored and cannot leave the country or even city where they have been sent.[5] The Biden administration has increased the pace of transfers

1. Exec. Order No. 13823, 83 Fed. Reg. 4831 (February 2, 2018); and Exec. Order No. 13492, 74 Fed. Reg. 4897 (January 27, 2009).
2. "The Guantánamo Docket," *New York Times*, updated May 24, 2024.
3. "Guantanamo Bay: 'Ugly Chapter of Unrelenting Human Rights Violations'—UN Experts," United Nations Office of the High Commissioner for Human Rights, January 10, 2022; "Faces of Guantánamo: Torture," Center for Constitutional Rights; Ed Pilkington, "US Subjects Guantánamo Bay Detainees to 'Cruel' Treatment, UN Says after Visit," *The Guardian*, June 27, 2023; and Letta Tayler and Elisa Epstein, "Legacy of the 'Dark Side': The Costs of Unlawful US Detentions and Interrogations Post-9/11," Costs of War, Watson Institute of International and Public Affairs, Brown University, January 9, 2022.
4. "Life after Guantanamo," *Washington Post*; and Barbara Starr, Elise Labott, and Ryan Browne, "Largest Transfer of Gitmo Detainees under Obama Announced," CNN, August 16, 2016.
5. "Guantanamo Detainee Transfers," Issue Brief, Human Rights First, December 2018; Joel Gunter, "Life after Guantanamo: 'We Are Still in Jail,'" BBC, June 12, 2022; and Jeremy Pelofsky, "US Sends Two from Guantanamo to Italy for Trial," Reuters, November 30, 2009.

but reports from March 2024 suggest that the facility might be used to house Haitian migrants due to domestic instability in that country.[6]

It is well past time for Guantanamo Bay to close. The next administration should repeal EO 13823 and adopt a policy similar to the one set out in EO 13492 for closing Guantanamo Bay. Additionally, the next administration should prioritize either giving detainees trials in the United States or transferring them to countries with good human rights records where they can either stand trial or live their lives with minimal government intrusion.

—Eric Gomez

6. Priscilla Alvarez, "Biden Administration Discussing Using Guantanamo Bay to Process Possible Influx of Haitian Migrants," CNN, March 13, 2024; and Sacha Pfeiffer, "Biden Administration Releases Guantánamo Inmate, Its Fourth Transfer in a Month," NPR, March 9, 2023.

End the Iraq Stabilization National Emergency

Revoke Executive Order 13303

In May 2003, President George W. Bush issued Executive Order (EO) 13303, which established a national emergency related to the reconstruction of Iraq after the United States overthrew the regime of Saddam Hussein by military force.[1] EO 13303 was later amended by multiple other EOs, but it remains in effect. In May 2024, the Biden administration notified Congress that it would extend the national emergency declared by EO 13303 for at least another year.[2]

Additionally, there are several other EOs that sanction individuals and organizations from the long-overthrown Hussein regime that should be revoked given the significant changes to Iraq's government and reduced US interests. EO 13290 of March 20, 2003, for example, confiscated funds associated with the government of Iraq, the Central Bank of Iraq, and a handful of other banks and state-owned enterprises.[3] EO 13350 of July 29, 2004, revoked a host of EOs from the 1990s that the George H. W. Bush administration implemented to respond to Hussein's invasion of Kuwait.[4] EO 13350 also amended several other EOs sanctioning Iraq, including 13290 and 13303, but these changes amounted to adjusting language about which national emergency those EOs were based on and issuing a new list of individuals and entities to sanction.

The next administration should revoke EO 13303 and end the national emergency of Iraq stabilization. It should also remove all remaining US military forces from Iraq, which frequently come under attack without there being a compelling strategic rationale for their continued presence.[5] Moreover, the Iraqi government is eager for US troops to leave the country, and in January 2024, Baghdad and Washington began formal talks to reduce the US military presence in Iraq.[6] Repealing EO 13303 should be

1. Exec. Order No. 13303, 68 Fed. Reg. 31931 (May 28, 2003).
2. Joseph R. Biden, "Message to the Congress on the Continuation of the National Emergency with Respect to the Stabilization of Iraq," White House, May 20, 2024.
3. Exec. Order No. 13290, 68 Fed. Reg. 14307 (March 24, 2003).
4. Exec. Order No. 13350, 31 C.F.R. 575 (September 13, 2010).
5. Reuters, "US Troops in the Middle East: What Are They Doing and Where?," *Voice of America*, February 3, 2024; and Justin Logan, "The Middle East Is a Costly Distraction," *American Conservative*, February 6, 2024.
6. Anne Flaherty and Luis Martinez, "US, Iraq to Begin Talks That Could Lead to Withdrawal of Remaining American Troops," *ABC News*, January 25, 2024.

part of a broader effort to finally end the US intervention in Iraq more than 20 years after the US overthrow of Hussein.

—Eric Gomez

Restore Reporting of US Military Strikes in Areas outside Active Hostilities

Revoke Executive Order 13862, Restore Section 3 of Executive Order 13732

On March 6, 2019, President Donald Trump signed EO 13862, which amended the 2016 EO 13732, originally intended to increase transparency around civilian casualties caused by US military operations. EO 13862 removed Section 3 of EO 13732, which pertained to civilian casualties resulting from US strikes on terrorist targets "outside areas of active hostilities."[1] This amendment reduces the public's knowledge about US military operations and increases risks to civilians around the world. EO 13862 should be amended to restore Section 3 and add language to make reports more regular.

EO 13862 was part of larger trends of increased counterterrorism airstrikes and decreased US transparency. According to reporting in *Time* magazine, "In the first seven months of 2020, the Trump administration conducted more air strikes in Somalia than were carried out during the administrations of George W. Bush and Barack Obama combined."[2] A 2016 report by the director of national intelligence issued as part of EO 13732's reporting requirements named Afghanistan, Iraq, and Syria as "areas of active hostilities."[3] If such reporting requirements had continued to be in place throughout the Trump administration, then information regarding US counterterrorism strikes in Africa, Yemen, and elsewhere would have been revealed.

The lack of transparency created by EO 13862 makes it harder to know the full scope of US military activities and the harm they cause to civilians. That these EOs exist in the first place is a failure of US policy to rein in the president's ability to wage war. Revoking EO 13862 and restoring the civilian casualty reporting from Section 3 of EO 13732 would not fix the deeper problems of presidential war powers or the failures and excesses of the Global War on Terror.[4] However, it would still be a step in the right direction.

—Eric Gomez

1. Exec. Order No. 13862, 84 Fed. Reg. 8789 (March 11, 2019); and Exec. Order No. 13732, 81 Fed. Reg. 44485 (July 7, 2016).
2. Nick Turse, "The Trump Administration's Air Strikes in Somalia Are on the Rise Again—and Civilians Are Paying the Price," *Time*, August 14, 2020.
3. "Summary of Information Regarding US Counterterrorism Strikes outside Areas of Active Hostilities," Director of National Intelligence, July 1, 2016.
4. Gene Healy, "Bringing an End to the Forever War," *War on the Rocks*, August 29, 2016.

Revoke "Classified National Security Information" Executive Order and Make the Classification and Declassification System Mandatory

Revoke Executive Order 13526

President Barack Obama issued Executive Order (EO) 13526 in December 2009 to establish a system of classification and declassification for national security information.[1] EO 13526 was the culmination of several earlier EOs, beginning with EO 10290, issued by President Harry Truman in September 1951.[2] Article II of the Constitution provides no explicit authority for the president to classify and withhold from public release information related to national defense. Despite this fact, and the fact that Article I, Section 5 explicitly authorizes Congress to make secret its own proceedings, the national legislature has never asserted its constitutional prerogatives or authority in this area more broadly. As a result, successive presidents have claimed the authority to decide what would or would not be kept secret. Yet as so many former government officials have revealed over the past half century or more, America's existing classification system is used, more often than not, to conceal waste, fraud, abuse, mismanagement, or even criminal conduct by federal officials, despite EO 13526's explicit ban on doing so (specifically via Section 1.7).

The president should revoke EO 13526. Congress should reassert its primacy in this area by passing legislation that would 1) codify the classification and declassification system, 2) mandate the automatic release of previously classified information that is 25 years old or more, and 3) include severe legal penalties—including mandatory minimum sentences and fines—for those convicted of misusing the classification system to conceal government incompetence or abuse of any kind.[3]

—Patrick G. Eddington

1. Exec. Order No. 13526, 75 Fed. Reg. 707 (December 29, 2009).
2. Exec. Order No. 10290, 16 Fed. Reg. 9795 (September 27, 1951); Exec. Order No. 12958, 60 Fed. Reg. 19825 (April 20, 1995); Exec. Order No. 13292, 68 Fed. Reg. 15315 (March 25, 2003); and Exec. Order No. 13526, 75 Fed. Reg. 707 (December 29, 2009).
3. For further information, see Patrick G. Eddington, senior fellow in homeland security civil liberties, Cato Institute, Testimony before the Senate Committee on Homeland Security and Governmental Affairs, 118th Cong., 1st sess., March 23, 2023.

Amend "United States Intelligence Activities" Executive Order

Amend Executive Order 12333

In 2014, a whistleblower in the Obama administration's State Department published an op-ed in the *Washington Post* warning Americans that "some intelligence practices remain so secret, even from members of Congress, that there is no opportunity for our democracy to change them."[1] He singled out Executive Order (EO) 12333, which strengthened the powers of American intelligence agencies during the Cold War.[2] In the 1970s, the Central Intelligence Agency was subjected to congressional investigation and budget cuts after the *New York Times* revealed the agency had compiled intelligence files on about 10,000 American citizens.[3] In December 1981, President Ronald Reagan issued EO 12333, titled "United States Intelligence Activities."[4] In the words of his attorney general, William French Smith, the EO was intended to bolster "an intelligence community that had been demoralized and debilitated by six years of public disclosures, denunciations, and . . . budgetary limitations."[5]

Among other things, EO 12333 (and its amendments) blessed many forms of intelligence gathering and counterintelligence, within the United States and without, and provided exemptions from the Freedom of Information Act to intelligence agencies. It supercharged the secrecy surrounding America's intelligence agencies and initiated an expansion of intrusive surveillance and bulk collection of Americans' records to the present day.[6] The administration should amend the EO to prevent bulk collection of Americans' communications, including collection occurring outside

1. John Napier Tye, "Meet Executive Order 12333: The Reagan Rule That Lets the NSA Spy on Americans," *Washington Post*, July 18, 2014.
2. Exec. Order No. 12333, 46 Fed. Reg. 59941 (December 8, 1981).
3. Seymour M. Hersh, "Huge CIA Operation Reported in US against Antiwar Forces, Other Dissidents in Nixon Years," *New York Times*, December 22, 1974.
4. Exec. Order No. 12333, 46 Fed. Reg. 59941 (December 8, 1981).
5. "Excerpts from the Address by Smith on Countering Russians' Espionage," *New York Times*, December 19, 1981.
6. See John Napier Tye, "The Reagan Rule That Lets the NSA Spy on Americans," *Washington Post*, July 18, 2014. Further, the executive order has not achieved its intended effect. Even a recent domestic terrorism case with substantial amounts of evidence remains unresolved. See, for example, Kerry Picket, "Jan. 6 Pipe Bombs at RNC, DNC Were Inoperable, Says Ex-Agent Who Contradicts FBI's Official Story," *Washington Times*, May 12, 2023. According to a former FBI agent, the FBI has "linked the [January 5, 2021] bomber to a D.C. MetroRail SmarTrip card" and has "surveillance video that showed the [suspect] entering a car with a visible license plate after exiting a Metro stop in Northern Virginia."

US territorial boundaries, and to automatically declassify classified records that are 25 years old or older.[7]

—Brent Skorup

7. See 50 U.S.C. § 3161(a).

Health Care

Amend "Protecting and Improving Medicare for Our Nation's Seniors" Executive Order

Amend Executive Order 13890

In October 2019, President Donald Trump issued Executive Order (EO) 13890.[1] The order effectively directs the secretary of health and human services to find numerous ways to channel greater taxpayer subsidies to, while demanding less accountability from, the health care industry. Continuous expansions of Medicare subsidies are why Medicare is the primary driver of the federal government's unsustainable fiscal trajectory.[2] At the same time, Medicare's centralized economic planning subsidizes low-quality care at the expense of high-quality care.[3] Due to private insurers gaming Medicare's payment systems, Medicare pays private Medicare Advantage (MA) insurers an average of 22 percent more per MA enrollee than it would spend if the enrollee remained in traditional Medicare.[4]

In the name of innovation, EO 13890 directs the secretary to, among other things, loosen MA rules in ways that would allow more such gaming; to loosen accountability requirements for Medicare-participating clinicians; to find ways to increase the prices Medicare pays for various services; and to find ways for Medicare to subsidize more goods and services. The administration should amend EO 13890 by removing all substantive sections except Section 9 and amending Section 9 to direct the secretary to test a payment model in which Medicare subsidizes enrollees with income- and risk-adjusted cash payments.

—Michael F. Cannon

1. Exec. Order No. 13890, 84 Fed. Reg. 53573 (October 8, 2019).
2. Phillip L. Swagel, "The Federal Budget and Healthcare Policy," (PowerPoint presentation, conference organized by the Economic Policy Innovation Center and the Paragon Health Institute, April 25, 2024).
3. Michael F. Cannon and Jacqueline Pohida, "Would 'Medicare for All' Mean Quality for All? How Public-Option Principles Could Reverse Medicare's Negative Impact on Quality," *Quinnipiac Health Law Journal* 25, no. 2 (2022).
4. Medicare Payment Advisory Commission, *Report to the Congress: Medicare Payment Policy* (Washington: Medicare Payment Advisory Commission, March 2024).

Expand "Lowering Drug Prices by Putting America First" Executive Order

Expand Executive Order 13948

In September 2020, President Donald Trump issued Executive Order 13948.[1] The order directed the secretary of health and human services to test payment models under which Medicare would pay no more for Part B and Part D drugs than the lowest price a manufacturer charges in comparable advanced nations (where prices are generally significantly lower than what Medicare currently pays). An interim final rule to implement such models drew court challenges, in part for failing to follow notice-and-comment rulemaking procedures.[2] President Biden subsequently rescinded the interim final rule.[3] The administration should reinvigorate Executive Order 13948 and launch most-favored-nation drug-pricing models through the notice-and-comment rulemaking process. Reinvigorating Executive Order 13948 would complement the Inflation Reduction Act's Medicare drug-price negotiations.[4]

—Michael F. Cannon

1. Executive Order No. 13948, 85 Fed. Reg. 59649 (September 23, 2020).
2. "Most Favored Nation Model," Centers for Medicare and Medicaid Services; and *California Life Sciences Association et al. v. Center for Medicare and Medicaid Services et al.*, 20-cv-08603-VC (N.D. Cal. 2020).
3. Most Favored Nation (MFN) Model, 42 C.F.R. 513 (December 29, 2021).
4. See "Medicare Drug Price Negotiation under the Inflation Reduction Act: Industry Responses and Potential Effects," Congressional Research Service, December 8, 2023; Michael F. Cannon, "The Case for Letting Medicare Bureaucrats Haggle with Drug Makers," ***Reason***, September 22, 2023; and "At What Price: Determining Pharmaceutical Prices in Medicare," Cato Institute policy forum, May 22, 2024.

Expand "Increasing Drug Importation to Lower Prices for American Patients" Executive Order

Expand Executive Order 13938

Individuals have a fundamental human right to trade with other willing buyers and sellers, including across political borders.[1] Drug prices in other advanced nations are generally half what they are in the United States.[2] With narrow exceptions, Congress prevents US residents from purchasing lower-price medicines from other countries, a policy that mostly benefits pharmaceutical manufacturers.[3] Congress authorizes the secretary of health and human services to "grant to individuals, by regulation or on a case-by-case basis, a waiver of the prohibition of importation of a prescription drug or device or class of prescription drugs or devices."[4] In July 2020, President Donald Trump issued Executive Order 13938.[5] It directed the secretary to grant "waivers of the prohibition of importation of prescription drugs," to "authoriz[e] the re-importation of insulin products" from countries with lower prices, and to finalize regulations expanding reimportation generally.[6] In October 2020, the secretary issued a final rule that facilitates reimportation from only one country.[7] By January 2024, the secretary had approved only one such "importation program."[8] The administration should expand Executive Order 13938 by directing the secretary to finalize a regulation that waives the prohibition on reimportation for all classes of drugs and devices from all Organisation for Economic Co-operation and Development member nations.

—Michael F. Cannon

1. "Insulin and Disobedience," Cato Institute, November 16, 2020.
2. See generally Andrew W. Mulcahy et al., "International Prescription Drug Price Comparisons: Current Empirical Estimates and Comparisons with Previous Studies," RAND Corporation, 2021; and "Comparison of US and International Prices for Top Medicare Part B Drugs by Total Expenditures," Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, October 25, 2018.
3. "Personal Importation," Food and Drug Administration, last updated December 7, 2023.
4. 21 U.S.C. 384(j)(2).
5. Executive Order No. 13938, 85 Fed. Reg. 45757 (July 29, 2020).
6. 21 U.S.C. § 384.
7. Importation of Prescription Drugs, 21 C.F.R. 251 (October 1, 2020).
8. John Paul Tasker, "Federal Health Minister Says He Won't Allow Florida to 'Pillage' the Drug Supply," *CBC News*, January 10, 2024.

Revoke "Improving Rural Health and Telehealth Access" Executive Order

Revoke Executive Order 13941

Medicare's failure to encourage telehealth as a low-cost option for delivering medical services is one example of how Medicare does not innovate so much as subsidize and protect high-cost, low-quality providers.[1] The introduction and subsequent expansion of subsidies for telehealth services in the Medicare program has followed the typical process that has put Medicare on an unsustainable fiscal path.[2] In August 2020, President Donald Trump issued Executive Order (EO) 13941.[3] The president directed the secretary of health and human services to find ways to add telehealth services to the list of services Medicare subsidizes during the COVID-19 public health emergency and ways to extend such subsidies beyond the public health emergency. The move invigorated the telehealth lobby. Congress subsequently enacted both temporary and permanent expansions of Medicare to subsidize telehealth services it previously did not.[4] The administration should revoke EO 13941 to reject the creeping of expansions of the Medicare program and to refocus policymakers' attention on fundamental Medicare reform.

—Michael F. Cannon

1. See generally Michael F. Cannon and Jacqueline Pohida, "Would 'Medicare for All' Mean Quality for All? How Public-Option Principles Could Reverse Medicare's Negative Impact on Quality," *Quinnipiac Health Law Journal* 25, no. 2 (2022).
2. Phillip L. Swagel, "The Federal Budget and Healthcare Policy," (PowerPoint presentation, conference organized by the Economic Policy Innovation Center and the Paragon Health Institute, April 25, 2024).
3. Exec. Order No. 13941, 85 Fed. Reg. 47881 (August 6, 2020).
4. "Telehealth Policy Changes after the COVID-19 Public Health Emergency," Telehealth.HHS.gov, Health Resources and Services Administration, Department of Health and Human Services, last updated December 19, 2023.

Revoke "Protecting the Federal Workforce and Requiring Mask-Wearing" Executive Order

Revoke Executive Order 13991

On his first day in office, January 20, 2021, President Biden issued Executive Order (EO) 13991 to promote "wearing masks when around others, physical distancing, and other related precautions recommended by the Centers for Disease Control and Prevention (CDC)." The president directed agencies "to require compliance with CDC guidelines with respect to wearing masks, maintaining physical distance, and other public health measures by: on-duty or on-site Federal employees; on-site Federal contractors; and all persons in Federal buildings or on Federal lands." He further directed agencies to "engage . . . with State, local, Tribal, and territorial officials, as well as business, union, academic, and other community leaders, regarding mask-wearing and other public health measures, with the goal of maximizing public compliance."[1] Scientific literature reviews have since found "wearing masks in the community probably makes little or no difference to the outcome of influenza-like illness/COVID-19-like illness compared to not wearing masks" and "low to moderate strength evidence that mask use (any or unspecified type) may be associated with a small reduction in risk for SARS-CoV-2 infection versus no masks."[2] The administration should revoke EO 13991.

—Michael F. Cannon

1. Exec. Order No. 13991, 86 Fed. Reg. 7045 (January 25, 2021).
2. Tom Jefferson et al., "Physical Interventions to Interrupt or Reduce the Spread of Respiratory Viruses," *Cochrane Database of Systematic Reviews* 1 (2023); and Roger Chou and Tracy Dana, "Major Update: Masks for Prevention of SARS-CoV-2 in Health Care and Community Settings—Final Update of a Living, Rapid Review," *Annals of Internal Medicine* 176, no. 6 (2023): 827–35.

Revoke "Strengthening Medicaid and the Affordable Care Act" Executive Order and Reinstate "Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal" and "Promoting Healthcare Choice and Competition across the United States" Executive Orders

Revoke Executive Order 14009 and Reinstate Executive Orders 13765 and 13813

In 2017, President Donald Trump issued Executive Order (EO) 13765 directing agencies "to waive, defer, grant exemptions from, or delay the implementation of any provision or requirement of the [Patient Protection and Affordable Care] Act that would impose a fiscal burden on any State or a cost, fee, tax, penalty, or regulatory burden on individuals."[1] Trump further issued EO 13813, finding "the average [Obamacare] premium in the 39 States that are using www.healthcare.gov in 2017 is more than double the average overall individual market premium recorded in 2013" and directing agencies to increase consumer choice and protections in health insurance.[2] The latter led to regulations that increased consumer choice and protections via association health plans, short-term, limited-duration insurance (STLDI), and health reimbursement arrangements. STLDI made comprehensive coverage available to most consumers at premiums 60 percent lower than the lowest Obamacare premiums.[3]

In 2021, President Biden issued EO 14009, which revoked and directed agencies to roll back regulations stemming from EOs 13765 and 13813.[4] Agencies responded by expanding federal subsidies beyond the clear limits in federal law and by issuing regulations that stripped consumer protections and coverage from sick patients—all

1. Exec. Order No. 13765, 82 Fed. Reg. 8351 (January 24, 2017).
2. Exec. Order No. 13813, 82 Fed. Reg. 48385 (October 17, 2017).
3. Michael F. Cannon, "ObamaCare Is Now Optional," *Washington Examiner*, August 1, 2018.
4. Exec. Order No. 14009, 86 Fed. Reg. 7793 (February 2, 2021).

to hide the cost of Obamacare.[5] The administration should revoke EO 14009 and the regulations it generated. The administration should reinstate EOs 13765 and 13813 and the regulations each generated.

—Michael F. Cannon

5. Internal Revenue Service, "Affordability of Employer Coverage for Family Members of Employees," 26 C.F.R. 1 (October 13, 2022); and Michael F. Cannon, "Biden Short-Term Health Plans Rule Creates Gaps in Coverage," Cato Institute Policy Analysis no. 970, March 14, 2024.

Revoke "Continuing to Strengthen Americans' Access to Affordable, Quality Health Coverage" Executive Order

Revoke Executive Order 14070

Federal health spending is the main driver of rising federal deficits and debt, pushing both to unsustainable levels.[1] Medicare, Medicaid, and Obamacare reduce health care and health insurance quality, for healthy and sick alike.[2] On April 5, 2022, President Biden issued Executive Order (EO) 14070, directing federal agencies to find ways to increase enrollment in and otherwise increase these programs' subsidies for high-cost, low-quality care.[3] A 2024 study found evidence that massive enrollment fraud followed: For instance, the number of Floridians enrolling in Obamacare's heaviest-subsidized health plans is four times higher than the number of Florida residents who meet the legal requirements.[4] The administration should revoke EO 14070 and pursue fundamental reform of these programs.[5]

—Michael F. Cannon

1. Phillip L. Swagel, "The Federal Budget and Healthcare Policy," (PowerPoint presentation, conference organized by the Economic Policy Innovation Center and the Paragon Health Institute, April 25, 2024).
2. Michael F. Cannon and Jacqueline Pohida, "Would 'Medicare for All' Mean Quality for All? How Public-Option Principles Could Reverse Medicare's Negative Impact on Quality," *Quinnipiac Health Law Journal* 25, no. 2 (2022); Stephen A. Moses, "Aging America's Achilles Heel: Medicaid Long-Term Care," Cato Institute Policy Analysis no. 549, September 1, 2005; and Michael F. Cannon, "Is Obamacare Harming Quality? (Part 1)," *Health Affairs*, January 4, 2018.
3. Exec. Order No. 14070, 87 Fed. Reg. 20689 (April 8, 2022).
4. Brian Blase and Drew Gonshorowski, "The Great Obamacare Enrollment Fraud," Paragon Health Institute, June 2024.
5. Michael F. Cannon, *Recovery: A Guide to Reforming the US Health Sector* (Washington: Cato Institute, 2023).

Taxation

Revoke "Office of Information and Regulatory Affairs Review of Treasury Regulations" Memorandum of Agreement

Revoke Memorandum of Agreement Dated June 9, 2023, and Reinstate Memorandum of Agreement Dated April 11, 2018

President Biden published an updated Memorandum of Agreement (MOA) between the Department of the Treasury and the Office of Management and Budget on June 9, 2023, regarding the review of Treasury regulations under Executive Order 12866.[1] The MOA includes a number of provisions, among them excluding tax regulations issued by the Internal Revenue Service (IRS) from standard Office of Information and Regulatory Affairs (OIRA) review and superseding an April 11, 2018, agreement that first established an OIRA review process for tax regulations.[2] Tax regulations are often the most consequential actions taken by the government, interpreting laws that directly deprive individuals and businesses of their incomes. In a 2016 review, the Government Accountability Office noted that IRS regulatory actions increasingly look like other regulations as they implement social and economic objectives through special tax credits, deductions, and exemptions.[3] These significant economic regulations should not be exempt from standard regulatory review. The president should revoke the June 9, 2023, MOA and reestablish the MOA from April 11, 2018.

—Adam N. Michel

1. Joseph R. Biden, "Memorandum of Agreement: The Department of the Treasury and the Office of Management and Budget, Review of Treasury Regulations under Executive Order 12866," June 9, 2023; and Exec. Order No. 12866, 58 Fed. Reg. 51735 (October 4, 1993).
2. Donald J. Trump, "Memorandum of Agreement: The Department of the Treasury and the Office of Management and Budget, Review of Treasury Regulations under Executive Order 12866," April 11, 2018.
3. Michelle A. Sager et al., "Regulatory Guidance Processes: Treasury and OMB Need to Reevaluate Long-Standing Exemptions of Tax Regulations and Guidance," Government Accountability Office, September 2016.

Technology

Amend the "Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence" Executive Order

Amend Executive Order 14110

President Biden issued Executive Order (EO) 14110 in 2023 to address the potential risks and benefits of artificial intelligence (AI).[1] The EO takes a more regulation-heavy approach to AI than the United States previously has taken with respect to other emerging digital technologies. The EO would place significant burdens on this broad category of technology, undermining its potential to deliver extraordinary benefits.

Notably, the EO invokes the Defense Production Act (DPA) to place reporting and "red teaming" (i.e., vulnerability testing) requirements on certain types of AI models deemed high risk. These requirements would exceed the DPA's typical uses and intended scope, allowing significant government intervention in the AI industry in a variety of ways unrelated to defense.[2]

In addition, the EO encourages independent agencies, including those with jurisdiction over financial services, to consider using their authorities "as they deem appropriate" to address risks related to fraud, discrimination, and financial stability.[3] Some of these encouragements would have certain agencies consider imposing specific requirements related to uncovering bias in financial models; others are more general.[4] While ostensibly left to the agencies' interpretation of their own authorities, such encouragements could easily be construed as a regulatory push that all but demands new regulatory interventions, or at least tips the scale in favor of them.[5] In addition, these provisions prioritize the identification of risk and exercise of authorities without

1. Exec. Order No. 14110, 88 Fed. Reg. 75191 (November 1, 2023).
2. Jennifer Huddleston, "Statement RE: White House Overreach on AI," Testimony before the Subcommittee on Cybersecurity, Information, Technology, and Government Innovation, House of Representatives, 118th Cong., 2nd sess., March 21, 2024.
3. Exec. Order No. 14110 § 7.3(b) and § 8(a), 88 Fed. Reg. 75191 (November 1, 2023).
4. Exec. Order No. 14110 § 7.3(b) (the directors of the Federal Housing Finance Agency and Consumer Financial Protection Bureau are encouraged to use their authorities, as they deem appropriate, to require entities they regulate to evaluate underwriting models and valuation processes for bias) and § 8(a), 68 Fed. Reg. 75191 (November 1, 2023) (independent regulatory agencies generally are encouraged to use their "full range of authorities," as they deem appropriate, to protect American consumers from certain risks, many of which have a clear financial nexus).
5. See Jack Solowey, "First Impressions of the AI Order's Impact on Fintech," *Cato at Liberty* (blog), Cato Institute, November 3, 2023.

due consideration for the lost benefits from both existing and future regulatory interventions.[6]

Given the EO's overreach, imbalanced weighting of AI risks over benefits, and redundancy with certain existing laws and rules, the EO should be revoked with the exception of Section 5.1, which calls for a slightly more liberal approach to the granting of visas that are likely to be used by foreign-born workers in the AI sector. A light-touch and innovation-focused approach, such as that adopted in EO 13859 on "Maintaining American Leadership in Artificial Intelligence," would be preferable to EO 14110.[7] In addition, a future administration should consider embracing AI's potential even more thoroughly by following the precedent of the United States' pro-innovation approach to the internet, as in the Framework for Global Electronic Commerce.[8]

—Jack Solowey and Jennifer Huddleston

6. See Jack Solowey, "Regulators Must Avert Overreach When Targeting AI," *Law360*, September 13, 2023.
7. Exec. Order No. 13859, 84 Fed. Reg. 3967 (February 14, 2019).
8. "The Framework for Global Electronic Commerce," White House, July 1997.

Trade and Immigration

Revoke "Findings of the Investigation into China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation under Section 301" Presidential Memoranda

Revoke Presidential Memoranda Dated March 22, 2018, and May 14, 2024

Pursuant to Section 301 of the Trade Act of 1974, the Office of the United States Trade Representative (USTR) issued a report about China's international trade and investment laws, policies, practices, and actions in March 2018.[1] In conjunction with the release of the report, President Donald Trump issued a presidential memorandum dated March 22, 2018, directing the USTR to develop a list of products upon which to place tariffs.[2] Over successive rounds, the USTR imposed tariffs on nearly two-thirds of all imports from China, and Beijing predictably retaliated against American products. Today, the average tariff on those two-thirds of imports from China is about 20 percent.[3] Academic studies have found that Americans, not the Chinese, are paying the tariffs.[4] The New York Federal Reserve estimates that the tariffs cost the average American family about $830 per year in direct costs and efficiency losses.[5] Not only did the tariffs hurt the American economy, but they failed in their stated objective: forcing Beijing to make holistic changes to its intellectual property, technology, and other international trade and investment practices.

As part of a statutorily mandated review of the Trump administration's Section 301 tariffs, the USTR recommended that President Biden maintain the

1. "Findings of the Investigation into China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation under Section 301 of the Trade Act of 1974," Office of the US Trade Representative, March 22, 2018.
2. Donald J. Trump, "Presidential Memorandum on the Actions by the United States Related to the Section 301 Investigation," White House, March 22, 2018.
3. Chad P. Bown, "US-China Trade War Tariffs: An Up-to-Date Chart," Peterson Institute for International Economics, April 6, 2023.
4. Jeanna Smialek and Ana Swanson, "American Consumers, Not China, Are Paying for Trump's Tariffs," *New York Times*, updated December 31, 2020.
5. Mary Amiti, Stephen J. Redding, and David E. Weinstein, "The Impact of the 2018 Tariffs on Prices and Welfare," *Journal of Economic Perspectives* 33, no. 4 (Fall 2019): 187–210.

Section 301 tariff. In a presidential memorandum issued May 14, 2024, President Biden decided to maintain the tariffs and to raise the rates of duty on certain imports, including electric vehicles and batteries, solar cells, semiconductors, and steel and aluminum products.[6] On May 28, 2024, the USTR published a request for comments that included a prospective list of products that would be subject to the higher rates of duty specified in the May 14, 2024, presidential memorandum as well as a list of products that would be excluded from this action. It is highly unlikely these new tariffs will change Beijing's international trade and investment practices.

Accordingly, the administration should revoke the March 22, 2018, presidential memorandum and all subsequent regulations and the May 14, 2024, presidential memorandum and the May 28, 2024, notice from the USTR.[7]

—Clark Packard

6. Joseph R. Biden, "Memorandum on Actions by the United States Related to the Statutory 4-Year Review of the Section 301 Investigation of China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation," White House, May 14, 2024.
7. Donald J. Trump, "Presidential Memorandum on the Actions by the United States Related to the Section 301 Investigation," White House, March 22, 2018; Office of the USTR, "Notice of Action Pursuant to Section 301," 83 Fed. Reg. 40823 (August 16, 2018); Office of the USTR, "Notice of Modification of Section 301 Action," 83 Fed. Reg. 47974 (September 21, 2018); Office of the USTR, "Notice of Modification of Section 301 Action," 84 Fed. Reg. 20459 (May 9, 2019); Office of the USTR, "Notice of Modification of Section 301 Action," 84 Fed. Reg. 45821 (August 30, 2019); Joseph R. Biden, "Memorandum on Actions by the United States Related to the Statutory 4-Year Review of the Section 301 Investigation of China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation," White House, May 14, 2024; and Office of the USTR, "Request for Comments on Proposed Modifications and Machinery Exclusion Process in Four-Year Review of Actions Taken in the Section 301 Investigation," 89 Fed. Reg. 46252 (May 28, 2024).

Revoke "Adjusting Imports of Aluminum into the United States" and "Adjusting Imports of Steel into the United States" Proclamations

Revoke Proclamations 9704, 9705, 10782, and 10783

After his Commerce Department delivered dubious reports pursuant to Section 232 of the Trade Expansion Act of 1962 finding that aluminum and steel imports were entering the country in such quantities so as to jeopardize the national security of the United States, President Donald Trump issued Proclamations 9704 and 9705, which imposed ad valorem tariffs of 10 and 25 percent, respectively, on imported aluminum and steel products from every country other than Canada and Mexico.[1] In July 2024, the Biden administration expanded the tariffs to include aluminum and steel shipments through Mexico in order to combat transshipment of Chinese steel and aluminum products.[2] These tariffs inflicted enormous costs on the US economy, triggered predictable retaliation from trading partners, and did nothing to enhance the national security of the United States. The president should revoke Proclamations 9704, 9705, 10782, and 10783 to remove the aluminum and steel tariffs.

—Clark Packard

1. Bureau of Industry and Security, "The Effect of Imports of Aluminum on the National Security: An Investigation Conducted under Section 232 of the Trade Expansion Act of 1962, as Amended," US Department of Commerce," January 17, 2018; Bureau of Industry and Security, "The Effect of Imports of Steel on the National Security: An Investigation Conducted under Section 232 of the Trade Expansion Act of 1962, as Amended," US Department of Commerce, January 11, 2018; Proclamation No. 9704, 83 Fed. Reg. 11619 (March 15, 2018); and Proclamation No. 9705, 83 Fed. Reg. 11625 (March 8, 2018).
2. Proclamation No. 10782, 89 Fed. Reg. 57339 (July 10, 2024); and Proclamation No. 10783, 89 Fed. Reg. 57347 (July 15, 2024).

Revoke "To Facilitate Positive Adjustment to Competition from Imports of Certain Crystalline Silicon Photovoltaic Cells" Proclamations

Revoke Proclamations 9693, 10339, and 10779

In 2017, two domestic solar firms filed a complaint with the International Trade Commission (ITC) arguing that the United States experiencing a surge of imported solar products was a "substantial cause of serious injury, or the threat thereof" to the domestic industry under Section 201 of the Trade Act of 1974.[1] After the ITC determined that the United States was experiencing such a surge of imports, the Trump administration issued Proclamation 9693, which levied heavy tariffs and tariff-rate quotas on imported solar products that were scheduled to be phased out over time.[2] In 2022, the Biden administration slightly modified the tariffs but extended them largely intact.[3] In 2024, the Biden administration further modified the existing tariffs by revoking an exclusion applied to bifacial solar modules, which are two-sided solar panels typically used in utility-scale projects.[4]

These import restrictions have raised the cost—and thereby stunted the deployment—of solar products around the country, undermining the Biden administration's stated climate goals. Likewise, the Solar Energy Industry Association estimates that the tariffs and tariff-rate quotas have cost approximately 6,000 American jobs.[5] The administration should revoke Proclamations 9693, 10339, and 10779.

—Clark Packard

1. Peg Brickley, "Solar Cell Maker Suniva Seeks Trade Aid to Survive," *Wall Street Journal*, April 18, 2017.
2. Crystalline Silicon Photovoltaic Cells, Whether or Not Partially or Fully Assembled into Other Products: Investigation No. TA-201-75, International Trade Commission, November 2017; and Proclamation No. 9693, 83 Fed. Reg. 3541 (January 25, 2018).
3. Proclamation No. 10339, 87 Fed. Reg. 7357 (February 9, 2022).
4. Proclamation No. 10779, 89 Fed. Reg. 53333 (June 26, 2024).
5. "SEIA Urges Biden Administration to Phase Out Section 201 Tariffs," press release, Solar Energy Industry Association, November 1, 2021.

Revoke "Strengthening Buy and Hire American Requirements" Executive Orders

Revoke Executive Orders 13788, 13858, 13881, 13975, and 14005

President Donald Trump issued Executive Orders (EOs) 13788, 13858, 13881, and 13975 to strengthen the Buy American Act of 1933 and related laws that require the federal government to purchase domestic materials and products.[1] President Biden issued EO 14005 with similar goals, including the establishment of a Made in America Office, whose duties include evaluating requests for waivers of the Buy American Act, Buy America Act of 1982, and related laws.[2] Such laws and their related executive orders raise the cost of government procurement by functioning as a barrier to the efficient sourcing of goods and materials for various government purposes, including infrastructure projects.[3] Beyond their monetary cost, such laws also serve as an irritant in relations with US trading partners and extend project timelines due to the need to find suppliers compliant with these protectionist measures.[4]

—Colin Grabow

1. Exec. Order No. 13788, 82 Fed. Reg. 18837 (April 21, 2017); Exec. Order No. 13858, 84 Fed. Reg. 2039 (February 5, 2019); Exec. Order No. 13881, 84 Fed. Reg. 34257 (July 18, 2019); Exec. Order No. 13975, 86 Fed. Reg. 6547 (January 21, 2021); and Buy American Act of 1933, Pub. L. No. 72-428, 47 Stat. 1520 (1933).
2. Exec. Order No. 14005, 86 Fed. Reg. 7475 (January 28, 2021); Buy American Act of 1933, Pub. L. No. 72-428, 47 Stat. 1520 (1933); and Buy America Act of 1982, Pub. L. No. 97-424, title XI, sec. 165, 96 Stat. 2136 (1983), codified at 49 U.S.C. § 5323(j).
3. Michaela D. Platzer and William J. Mallett, "Effects of Buy America on Transportation Infrastructure and US Manufacturing," Congressional Research Service, updated July 2, 2019.
4. Scott Lincicome, "Bye, America," *The Dispatch*, February 15, 2023.

Revoke "Investing in America and Investing in American Workers" Executive Order

Revoke Executive Order 14126

In September 2024, President Biden issued Executive Order (EO) 14126, which instructs federal agencies charged with implementing the Investing in America agenda to prioritize federal grants, loans, and rebates to projects that include collective bargaining agreements, union-pattern wage scales, and certain worker benefits such as paid leave and childcare.[1] The Investing in America agenda includes the American Rescue Plan Act of 2021, the Infrastructure Investment and Jobs Act, the CHIPS Act of 2022, and the Inflation Reduction Act of 2022.[2]

Federal policy should not favor particular labor arrangements, especially when they would raise costs. Instead, efficiency, cost savings, and the ability to fulfill contracts should determine the allocation of government funds—assuming they should be spent in the first place. As such, EO 14126 should be revoked.

—Colin Grabow

1. Exec. Order No. 14126, 89 Fed. Reg. 176 (September 11, 2024).
2. American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4 (March 11, 2021); Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (November 15, 2021); CHIPS Act of 2022, Pub. L. No. 117-167, 136 Stat. 1366 (August 9, 2022); and Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat. 1818 (August 16, 2022).

Revoke Executive Order That Increases Visa Wait Times

Revoke Executive Order 13802 and Reinstate Executive Order 13597

President Barack Obama signed Executive Order (EO) 13597 in January 2012 to, among other things, mandate that the State Department schedule 80 percent of nonimmigrant visa interviews within three weeks of applications being received.[1] Nonimmigrant visas authorize travelers to come to the United States temporarily as workers, students, tourists, and business travelers. Throughout 2011, visa applicants were facing serious delays at consulates, and EO 13597 helped reduce wait times and restore foreign travel after a decline following the 9/11 attacks.[2]

In June 2017, President Donald Trump signed EO 13802, which revoked the three-week scheduling requirement of EO 13597.[3] The order was connected to President Trump's EOs that slowed visa processing for supposed security concerns.[4] But President Obama's EO 13597 did not limit vetting of applicants; it merely mandated that 80 percent of them be scheduled within three weeks and required the agencies to develop a plan to meet the goal. Visa delays reemerged during the Trump administration and exploded after the State Department closed consulates in 2020 and 2021 during the pandemic. As a result, in March 2024, the average consulate was scheduling nonimmigrant visa interviews 165 days out, and many with a much longer delay.[5]

Beyond harming the applicants, this is a crisis for US tourism, US international relations, and US businesses that need to bring in workers or personnel to oversee projects in the United States. The president should immediately revoke EO 13802 and restore the expedited nonimmigrant visa interview scheduling requirement.

—David J. Bier

1. Exec. Order No. 13597, 77 Fed. Reg. 3373 (January 24, 2012).
2. "Nonimmigrant Visas: State Has Reduced Applicant Interview Wait Times, but Sustainability of Gains Is Uncertain," Government Accountability Office, September 2015; and David J. Bier, "The 9/11 Legacy for Immigration," *Independent Review* 26, no. 2 (Fall 2021).
3. Exec. Order No. 13802, 82 Fed. Reg. 28747 (June 26, 2017).
4. Victoria Macchi, "New Trump Executive Order May Increase US Visa Wait Times," *Voice of America*, June 22, 2017.
5. "Global Visa Wait Times," US Department of State.

Revoke "Securing the Border" Proclamation

Revoke Proclamation 10773

President Biden signed Proclamation 10773 on June 3, 2024, suspending the entry of any noncitizen who has not received prior authorization into the United States across the southern border.[1] The direct effect of Proclamation 10773 is to prevent any noncitizen from requesting asylum at official crossing points without an appointment. The secondary effect was to justify new regulations from the Department of Homeland Security that ban asylum for anyone who crosses the border illegally.[2]

Proclamation 10773 and its companion regulations violate section 208(a) of the Immigration and Nationality Act (INA), which authorizes anyone in the United States or "arriving in the United States" to apply for asylum.[3] Moreover, they obstruct a lawful way for immigrants to enter the country, incentivizing illegal entry and subsequent evasion of Border Patrol.

Asylum is one of the only legal ways to enter and reside in the United States for people without very close family connections. The president should revoke Proclamation 10773 and replace it with an order requiring the processing of asylum requests at ports of entry and opening requests for refugee status under section 207(a) of the INA and humanitarian parole under section 212(d)(5)(A) of the INA at consulates abroad.[4] These alternative legal pathways would reduce illegal immigration and help "secure the border."

—David J. Bier

1. Proclamation No. 10773, 89 Fed. Reg. 48487 (June 7, 2024).
2. Securing the Border, 89 Fed. Reg. 48710 (June 7, 2024).
3. 8 U.S.C. 1158(a).
4. Immigration and Nationality Act § 212(d)(5)(A); and 8 U.S.C. § 1182(d)(5)(A).

Revoke "Mandated Use of E-Verify" and "Heightened Workplace Immigration Enforcement in Federal Contracting" Executive Orders

Revoke Executive Orders 12989 and 13465

President Bill Clinton issued Executive Order (EO) 12989 in February 1996 to enhance the enforcement of anti-illegal immigrant employment prohibitions against federal contractors.[1] President George W. Bush issued EO 13465 in June 2008 to mandate the use of E-Verify by all federal contractors.[2] E-Verify is an expensive and ineffective electronic employment verification system that is intended to prevent the hiring of illegal immigrants. In practice, E-Verify raises the administrative compliance costs for employers, increases the cost of government contracting more generally, encourages identity theft, and erroneously prevents the lawful hiring of some work-eligible Americans and lawful residents without reducing the economy-wide employment of illegal immigrants.[3] The administration should revoke EOs 12989 and 13465 and also revoke all subsequent EOs or amend by striking sections of subsequent EOs that amend EOs 12989 and 13465.[4]

—Alex Nowrasteh

1. Exec. Order No. 12989, 61 Fed. Reg. 6091 (February 15, 1996).
2. Exec. Order No. 13465, 73 Fed. Reg. 33285 (June 11, 2008).
3. Alex Nowrasteh and Jim Harper, "Checking E-Verify: The Costs and Consequences of a National Worker Screening Mandate," Cato Institute Policy Analysis no. 775, July 7, 2015; Alex Nowrasteh, "E-Verify Has Low Compliance Costs Where It Is Mandated," *Cato at Liberty* (blog), Cato Institute, October 4, 2017; Alex Nowrasteh, "Why E-Verify Is Failing," *Politico*, October 19, 2019; "Findings of the E-Verify® Program Evaluation," Westat, December 2009; "Evaluation of the Accuracy of E-Verify Findings," Westat, July 2012; Alex Nowrasteh, "Mandatory E-Verify Will Increase Identity Theft," *Cato at Liberty* (blog), Cato Institute, May 22, 2018; Alex Nowrasteh, "Mandatory E-Verify Would Subsidize Identity Theft and Increase Corruption," *Cato at Liberty* (blog), Cato Institute, February 26, 2021; and Shalise Ayromloo, Benjamin Feigenberg, and Darren Lubotsky, "States Taking the Reins? Employment Verification Requirements and Local Labor Market Outcomes," NBER Working Paper no. 26676, January 2020.
4. See Exec. Order No. 13286 § 19, 68 Fed. Reg. 10619 (March 5, 2003).

Conclusion

Executive orders (EOs) have grown in importance as Congress has ceded more and more power to the president, regardless of the party in office. This handbook is a response to that lamentable trend.

Congress does not seriously constrain the president's ability to issue EOs and has legislatively overturned only four of the more than 3,500 EOs issued between 1945 and 1998—and none in the 21st century.[1] From 1789 to 1999, Congress legislatively modified only an additional 235 EOs of the more than 14,000 that are known to have been issued.[2] Congress is not a dead institution and still has considerable power, but its power is waning and shifting to the president—often at Congress's instigation. This trend will continue and perhaps even accelerate as increasing political polarization reduces the likelihood of legislation passing Congress, placing more political pressure on presidents to act unilaterally.[3] In turn, each significant presidential EO increases political polarization that raises the stakes of every presidential election and incentivizes each political side to go to policy extremes reflected by the median position within their parties rather than of the electorate overall.[4]

As if the things previously mentioned weren't worrisome enough, less polarization or unified government would probably not completely deter the rise of EOs. Presidents issue them for many reasons: to reinforce legislative victories when there is a lower likelihood that Congress will overturn or modify EOs by legislation; when presidents have high approval ratings; or when they face less political opposition through other channels.[5] Each additional presidential directive, impotent response by Congress,

1. Kevin M. Stack, "The Statutory President," *Iowa Law Review* 90, no. 2 (January 2005): 542, ft. 7.
2. Tara L. Branum, "President or King? The Use and Abuse of Executive Orders in Modern-Day America," *Journal of Legislation* 28, no. 1 (2002): 59.
3. Christopher J. Deering and Forrest Maltzman, "The Politics of Executive Orders: Legislative Constraints on Presidential Power," *Political Research Quarterly* 52, no. 4 (December 1999): 767–83; and Tara L. Branum, "President or King? The Use and Abuse of Executive Orders in Modern-Day America," *Journal of Legislation* 28, no. 1 (2002): 54–56.
4. John O. McGinnis and Michael B. Rappaport, "Presidential Polarization," *Ohio State Law Journal* 83, no. 1 (2022): 10, 20.
5. Christopher J. Deering and Forrest Maltzman, "The Politics of Executive Orders: Legislative Constraints on Presidential Power," *Political Research Quarterly* 52, no. 4 (December 1999): 768–69; Dino P. Christenson and Douglas L. Kriner, "Does Public Opinion Constrain Presidential Unilateralism?," *American Political Science Review* 113, no. 4 (November 2019): 1071–77; and Fang-Yi Chiou and Lawrence S. Rothenberg, *The Enigma of Presidential Power: Parties, Policies, and Strategic Uses of Unilateral Action*

and judicial rubber stamp provides precedent for future presidents to issue even more expansive and radical EOs.[6]

An astute critic of this handbook may note that several of the suggestions herein, if adopted by the next president, would, at least in the short term, increase uncertainty and polarization—two problems inherent to governance by EO and expansive presidential power described in this handbook. Like other actors in the debate over public policy, we are affected by the incentives produced by this spiraling anti-Madisonian system, and we cannot sit out debates over consequential policy issues. Unlike other actors, we would gladly accept a compromise that confines the president to properly tailored constitutional guardrails. Until such time, which we hope is nigh, scholars at the Cato Institute must be involved in identifying the most harmful EOs and recommending how to change them.

The constitutional, legal, political, and judicial defects that have shifted some lawmaking power from Congress to the president must be discovered, remedied, and reversed lest the separation of powers be fatally undermined. James Madison warned of the tyrannical danger when legislative, executive, and judicial powers accumulate in the same hands, but that tendency toward centralized and unseparated power is most pronounced for the president, and EOs are his chief means of exercising undivided power.[7] Restoring the presidency to its constitutionally limited role is an important component of reining in the administrative state and consistent with efforts like the Regulations from the Executive in Need of Scrutiny (REINS) Act (S. 15), originally introduced in 2009 but yet to be passed, that would restore much congressional oversight to regulatory policymaking. Over the years, representatives have introduced many versions of the Separation of Powers Act—none of which have become law—that are substantially different from each other.[8] Still, most versions or combinations of different provisions from various versions would likely restrict the scope and power of EOs and subject them and agency actions pursuant to them to greater scrutiny. Renewed interest in courts revisiting the nondelegation doctrine

(New York: Cambridge University Press, 2017).

6. John O. McGinnis and Michael B. Rappaport, "Presidential Polarization," *Ohio State Law Journal* 83, no. 1 (2022): 7.

7. James Madison, *Federalist* no. 47, in *The Federalist Papers*, ed. Clinton Rossiter (New York: New American Library, 1961), pp. 298–304.

8. Separation of Powers Restoration Act of 1999, H.R. 2655, 106th Cong., 1st sess. (July 30, 1999); Separation of Powers Restoration Act of 2016, H.R. 4768, 114th Cong., 2nd sess. (March 16, 2016); Separation of Powers Restoration Act of 2021, H.R. 4317, 117th Cong., 1st sess. (July 1, 2021); and Separation of Powers Restoration Act of 2023, H.R. 288, 118th Cong., 1st sess. (January 11, 2023).

is another welcome trend.[9] Another option discussed by Vanderbilt University law professor Kevin Stack is for Congress to subject all EOs to the general procedural requirements of the Administrative Procedure Act.[10] Furthermore, all presidential directives should be published in the *Federal Register*, which would require Congress to amend the Federal Register Act to remove all exceptions that aren't related to classified directives.[11] Relatedly, Congress should fund a project to collect, organize, and number all presidential directives that are currently in effect and that have ever been issued for inclusion in the *Federal Register*.[12] EOs and other directives must be known to Congress and the public to be consistent with the principle of the rule of law. Congress should repeal statutes that grant the president extraordinary powers during a national emergency or, at a minimum, set a firm time duration for all emergency declarations that the president cannot extend without a prior joint resolution from Congress.

Until such reforms and others become law, current or future administrations that are interested in stopping this constitutional hemorrhaging can start by revoking or amending the EOs identified in this handbook along the lines suggested by Cato scholars. The recommendations would improve public policy, reduce government power over the lives of Americans, and increase protection of individual liberties and private property. Those reasons justify their enactment, but much more needs to be done to reduce the impact of executive orders.

Every person elected or appointed to office in the federal government takes an oath to support and defend the Constitution. Too often, presidents and other officials violate that oath by aggregating power and authority in themselves and the executive branch with the cooperation of Congress and the judiciary. Following the recommendations in this handbook would allow presidents and the other members of the executive branch to begin to honor their oaths.

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9. John O. McGinnis and Michael B. Rappaport, "Presidential Polarization," *Ohio State Law Journal* 83, no. 1 (2022): 30; *Gundy v. United States*, 139 S. Ct. 2116 (2019); Jonathan H. Adler and Christopher J. Walker, "Nondelegation for the Delegators," *Regulation* 43, no. 1 (Spring 2020): 14–19; Thomas A. Berry and Alexander Khoury, "Congress Can't Delegate Away Its Power to Define Crimes," *Cato at Liberty* (blog), Cato Institute, April 29, 2024; and Thomas A. Berry and Nathaniel Lawson, "OSHA Is Unconstitutional," *Cato at Liberty* (blog), Cato Institute, March 1, 2024.
10. Kevin M. Stack, "The Statutory President," *Iowa Law Review* 90, no. 2 (January 2005): 553; and *Franklin v. Massachusetts*, 505 US 788 (1992).
11. 44 U.S.C. § 1505.
12. *Executive Orders in Times of War and National Emergency: Report of the Special Committee on National Emergencies and Delegated Emergency Powers* (Washington: Government Printing Office, June 1974), p. 9; and *National Emergencies and Delegated Emergency Powers: Final Report of the Special Committee on National Emergencies and Delegated Emergency Powers* (Washington: Government Printing Office, May 28, 1976), p. 18.

About the Cato Institute

Founded in 1977, the Cato Institute is a public policy research foundation dedicated to broadening the parameters of policy debate to allow consideration of more options that are consistent with the principles of limited government, individual liberty, and peace. To that end, the Institute strives to achieve greater involvement of the intelligent, concerned lay public in questions of policy and the proper role of government.

The Institute is named for ***Cato's Letters***, libertarian pamphlets that were widely read in the American Colonies in the early 18th century and played a major role in laying the philosophical foundation for the American Revolution.

Despite the achievement of the nation's Founders, today virtually no aspect of life is free from government encroachment. A pervasive intolerance for individual rights is shown by government's arbitrary intrusions into private economic transactions and its disregard for civil liberties. And while freedom around the globe has notably increased in the past several decades, many countries have moved in the opposite direction, and most governments still do not respect or safeguard the wide range of civil and economic liberties.

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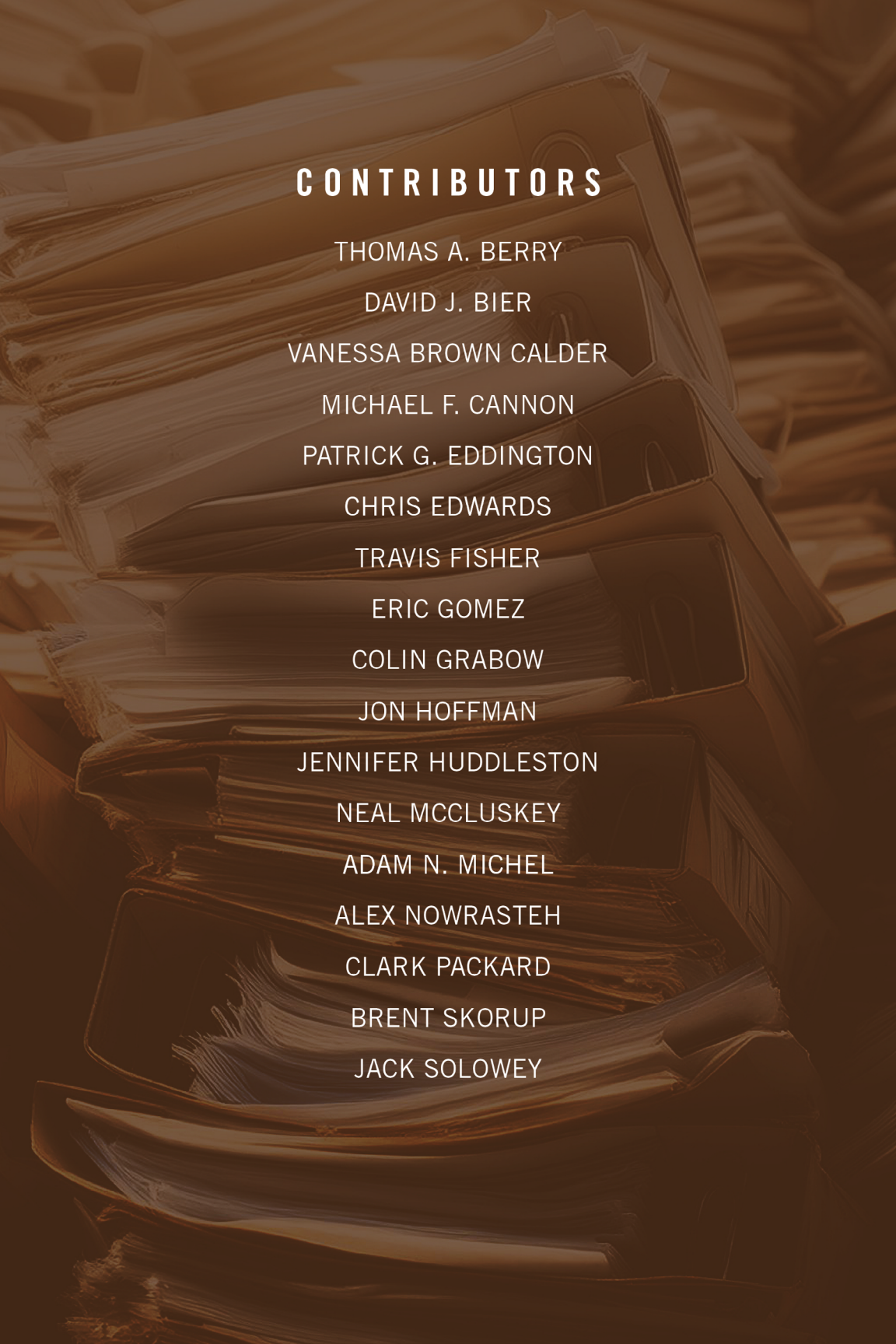

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