



School of Energy Resources
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The Policy Pendulum & Risks of
Establishing Energy Policy Through

Executive Order

Acknowledgments

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Introduction

President Joseph Biden's first week of office in January 2021 saw the issuance of more than three dozen executive orders, proclamations, and memoranda, spanning a wide range of policy topics including COVID-19 pandemic restrictions, immigration and asylum issues, and environmental justice. Nearly all of the President's actions in his first week were designed to reverse or roll back executive and administrative actions by the Trump Administration.¹ While President Biden issued more executive orders during his first week in office than any recent president, his swift use of a pen to retract the policies of his predecessor is part of a trend that has extended more than a decade. Within his first weeks in office in 2017, President Trump similarly issued numerous executive orders reversing actions of the Obama Administration, including among others, an especially emblematic executive order signed just hours after his inauguration which sought "prompt repeal" of the Affordable Care Act—a key hallmark of his predecessor's administration.² Likewise, President Obama used his first days in office in 2009 to roll back key policies of the Bush Administration, reversing course on regulations related auto emissions and fuel economy, among other issues.³ With a changing administration as a result of the 2024 election, this history is a strong testament to the likelihood of yet another round of political whiplash.

Though executive orders have long played a critical role in executive policymaking—and their usage has actually declined since the mid-twentieth century—their influence is not always well understood. In a political climate already prone to drastic swings of the "policy pendulum," a term which refers to the dramatic swings in public policy that occur during partisan-driven shifts in the executive branch and other bodies of governance,⁴ the power of executive orders can be striking. This owes in part to the swiftness with which they can be issued as well as rescinded, and the fact that presidents can issue them unilaterally without congressional input and without the same checks of lengthy review afforded in the administrative rulemaking process.

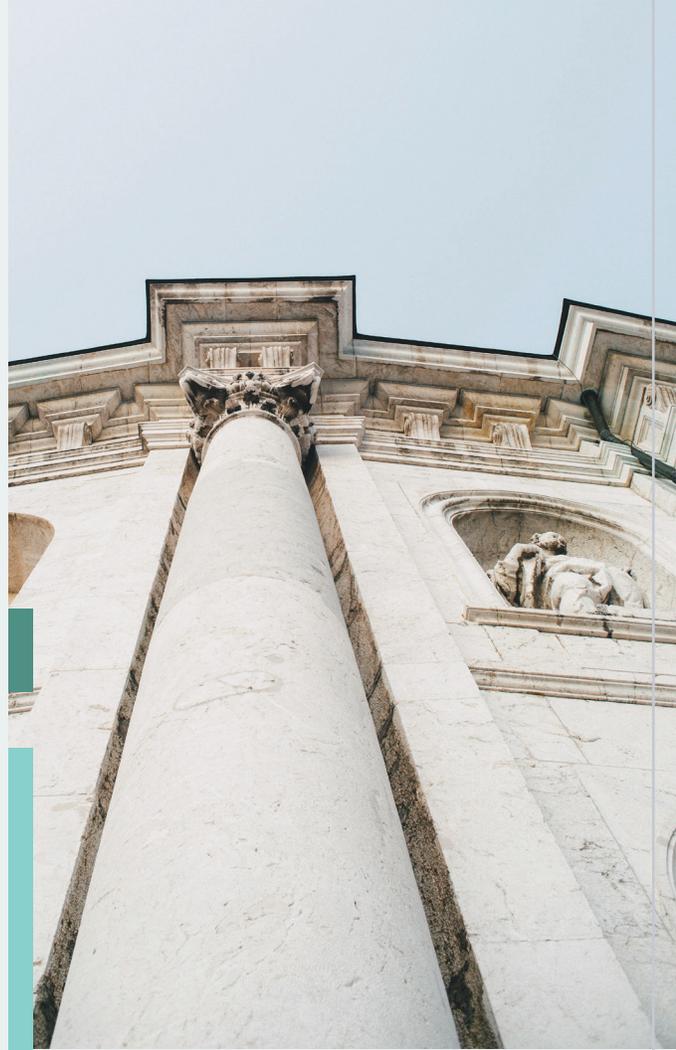
¹ Jarrett Renshaw, A 'transitory way to govern' - Biden reverses Trump's orders with the stroke of a pen, REUTERS (Jan. 27, 2021), [https://www.brookings.edu/articles/the-pendulum-is-the-pits-can-the-united-states-make-enduring-regulations/](https://www.reuters.com/article/us-usa-biden-executive-orders-analysis-idUSKBN29W2FO/#:~:text=(Reuters)%20%2D%20In%20his%20first,of%20his%20predecessor%2C%20Donald%20Trump; Philip A. Wallach, <i>The Pendulum is the Pits: Can the United States Make Enduring Regulations?</i>, BROOKINGS (Dec. 21, 2020), <a href=).

² *Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal*, Executive Order 13765, 82 FR 8351 (Jan. 20, 2017) (revoked by Executive Order 14009 on January 28, 2021).

³ See, e.g., Executive Order 13514, 74 Fed. Reg. 52117 (Oct. 8, 2009); John M. Broder, et al., *Obama sorting Bush's environment legacy*, NEW YORK TIMES (Feb. 7, 2009), <https://www.nytimes.com/2009/02/07/world/americas/07iht-enviro.4.20000768.html>.

⁴ Edward Arnett, *Conservation and the political pendulum*, FRONTIERS IN ECOLOGY AND THE ENVIRONMENT (Dec. 3, 2018), <https://esajournals.onlinelibrary.wiley.com/doi/full/10.1002/fee.1982>.

While all areas of federal policy are vulnerable to executive-order-related volatility at least to some extent, the risk generated for large energy projects can be profound. This is because energy projects of all types almost always entail significant permitting, infrastructure, and large amounts of upfront investment capital. Many projects can take years to complete and require significant regulatory planning and permitting. Once commissioned and constructed, energy projects often operate for decades, far longer than any single administration will hold office. These characteristics render energy projects vulnerable to risk of interruption, delay, unexpected costs, or cancellation because of executive action and rulemaking which either implement new rules or announce different interpretations and applications of existing rules. This potential for unforeseeable policy change generates uncertainty that plays a significant role in the willingness of energy developers to take financial risks on projects and infrastructure. Much of our legal system has been designed to guard against this uncertainty by functioning deliberatively and predictably through well-reasoned, though sometimes lengthy, regulatory or lawmaking procedures such as administrative rulemaking, judicial case review, and legislating.⁵ These deliberative processes with the safeguards of administrative and judicial review generally provide at least some level of assurance that operative bodies of law and regulation will not be subject to unanticipated or unforeseeable changes during project development. In recent years, however, nearly every presidential administration has leveraged the executive power to dramatically shift course on national energy priorities, sometimes altering the trajectory of specific projects or technologies seen as symbolic to a certain administration's energy philosophy.



This white paper examines the process of executive order issuance and historic effects on the energy industry. Part II describes the history and nature of executive order usage, outlining the constitutional origin of executive power and the evolution of their usage. Part III offers a summary of energy-related executive orders issued by recent administrations, while Part IV assesses the risks of overreliance on executive action and the effects of the policy pendulum in policymaking. Part V concludes.

⁵ Justin (Gus) Hurwitz & Geoffrey A. Manne, *Regulating into Uncertainty: Regulation as a Discovery Process* (Working Paper), THE C. BOYDEN CENTER FOR THE STUDY OF THE ADMINISTRATIVE STATE (2020).



Executive Orders in Law and Governance

Nature and Legal Basis of Executive Orders

There is no bright-line, legal definition as to what qualifies as an “executive order.” The Constitution does not explicitly authorize them. Rather, a president’s authority to issue executive orders derives generally from Section 1 of Article II of the U.S. Constitution, which provides merely that, “The Executive Power shall be vested in a President of the United States of America.”⁶ Every president since George Washington has construed this clause to permit presidential issuance of various declarations, proclamations, memoranda, and directives to announce policy decisions and provide specific direction to executive branch agencies on prioritization and how to exercise the authority vested in them by Congress.⁷ The first executive order-type document was issued by President Washington on June 8, 1789, addressed to the heads of the federal departments, instructing them to “impress [him] with a full, precise, and distinct general idea of the affairs of the United States” in their fields.⁸ Though the term “executive order” did not emerge until long after 1789, it was generally agreed at the time that Washington’s action was a proper exercise of his authority under Article II, ultimately creating a pathway for an eventually-normalized version of policymaking through executive proclamations. Every President since George Washington has issued executive orders.⁹

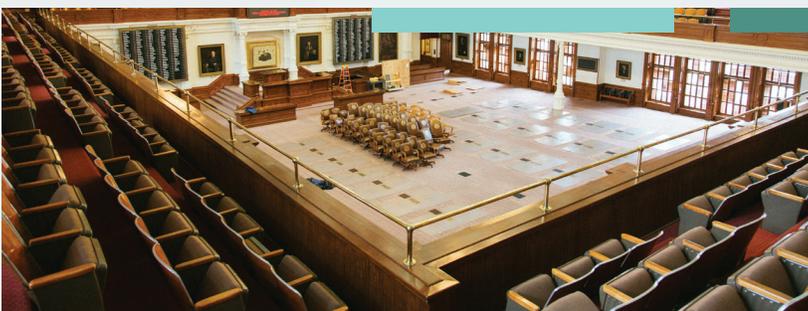


⁶ U.S. CONST. art. II, § 1, cl. 1.

⁷ TODD F. GAZIANO, *The Use and Abuse of Executive Orders and Other Presidential Directives*, 5 TEX. REV. L. & POL. 267, 274 (2001).

⁸ The numbering of executive orders happened retroactively, beginning in the 1900s. Prior to this numbering process, executive orders were only delivered and made available to the agencies which such orders pertained to. Today, all numbered executive orders are published and publicly available. See, *Executive Orders*, THE AMERICAN PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/statistics/data/executive-orders> (last visited May 16, 2024).

⁹ *Executive Orders*, ABA (Nov. 28, 2021), https://www.americanbar.org/groups/public_education/resources/teacher_portal/educational_resources/executive_orders/.



Today, executive orders are generally understood to include presidential orders, directives, proclamations, memoranda, signing statements, or executive agreements, which are treated as legally binding directives from the president to federal agencies.¹⁰ “When they are founded on the authority of the President derived from the Constitution or statute, they may have the force and effect of law.”¹¹ As noted by one scholar, “executive orders are best ascertained by their substance, not their form.”¹² This view aligns with a 1957 study by the U.S. House Committee on Government Operations, which found:



There is no law or even Executive order which attempts to define the terms “Executive order” or “proclamation.” In the narrower sense Executive orders and proclamations are written documents denominated as such

Executive orders are generally directed to, and govern actions by, Government officials and agencies. They usually affect private individuals only indirectly

Since the President has no power or authority over individual citizens and their rights except where he is granted such power and authority by a provision in the Constitution or by statute, the President’s proclamations are not legally binding and are at best hortatory unless based on such grants of authority.¹³

In general, executive orders are used to direct the executive branch and allow swift action to address issues in a far more expedited manner than other forms of law and policymaking. Executive orders are binding on the federal agencies to which they are directed.¹⁴ Executive orders often provide instruction to agencies on interpreting and enforcing federal laws and policies, sometimes reshaping their priorities, reallocating their resources and staff, or creating or disbanding task forces and committees.¹⁵ Additionally, these orders facilitate the issuance of guidelines for the interpretation of legislation.¹⁶



¹⁰ *What is an Executive Order?*, AMERICAN BAR ASSOCIATION (Jan. 25, 2021), https://www.americanbar.org/groups/public_education/publications/teaching-legal-docs/what-is-an-executive-order-/.

¹¹ H. Comm. On Gov’t Operations, 85th Cong., *Executive Orders and Proclamations: A Study of a Use of Presidential Powers 1*, n.1 (1957) (“House Committee Report”).

¹² ADAM J. WHITE, EXECUTIVE ORDERS AS LAWFUL LIMITS ON AGENCY POLICYMAKING DISCRETION, 93 NOTRE DAME L. REV. 1569, 1571 (2018).

¹³ *Id.* (citing House Committee Report, *supra* note 11).

¹⁴ *The Executive Branch*, WH.GOV, <https://www.whitehouse.gov/about-the-white-house/our-government/the-executive-branch/> (last visited May 16, 2024).

¹⁵ Abigail A. Graber, *Executive Orders: An Introduction*, CONG. RESEARCH SERVICE (2021).

¹⁶ *Id.*

Limitations on Executive Orders

While executive orders serve a clear utility by enabling the executive branch to direct agency action, the role of executive orders in creating policy frequently attracts controversy. While legislation and agency rulemaking are generally subject to extensive deliberation among lawmakers and interested parties, and sometimes tedious administrative checks and processes involving public comment and hearings, executive action is unilateral.¹⁷

Some scholars have argued that the modern use of executive orders is a potential distortion of the Framers' vision for strict limitations on the executive branch, with presidents enjoying a potentially unintended role in shaping domestic policy.¹⁸ This perceived overreach can generate tension between the executive and legislative branches, as well as among the general public, who may see executive orders as lacking in consensus and legitimacy.¹⁹

Congress cannot directly overturn an executive order. Rather, it can only pass legislation that effectively nullifies the order's impact (assuming the president signs the legislation into law).²⁰ If the president does elect to veto the legislation, Congress can override the veto with a two-thirds majority in both the House and the Senate.²¹ Judicial review can also serve as a check on executive orders that violate or lack a basis in law or the Constitution, though orders are not often challenged in the courts and courts are generally reluctant to strike down orders and tend to do so sparingly.²² While legal scholars have noted that “[t]he due process rights guaranteed by the Fifth Amendment theoretically serve as some constraint” and lend a judicial basis for challenge, no challenge to an executive order based on allegations of denial of due process has ever succeeded.²³ Moreover, as observed by the Supreme Court in the 1992 case of *Franklin v. Massachusetts*, the Administrative Procedure Act (APA) also does not apply directly to presidential actions.²⁴ Thus, as long as the orders themselves are constitutional, they are often sheltered from some of the major process-related challenges that typically arise in relation to federal agency action.

¹⁷ Terry M. Moe & William G. Howell, *Unilateral Action and Presidential Power: A Theory*, 29 PRES. STUD. Q. 850 (1999).

¹⁸ See, e.g., David M. Driesen, *President Trump's Executive Orders and the Rule of Law*, 87 UMKC L. REV. 489 (2019); TARA L. BRANUM, PRESIDENT OR KING? THE USE AND ABUSE OF EXECUTIVE ORDERS IN MODERN-DAY AMERICA, 28 J. LEGIS. 1, 6 (2002).

¹⁹ *How Presidents get Things Done*, UNM LIBRARIES, <https://open.lib.umn.edu/american-government/chapter/13-2-how-presidents-get-things-done/> (last visited May 17, 2024).

²⁰ AMERICAN BAR ASSOCIATION, *supra* note 9. Section 334 of the Energy Policy Act of 2005, for instance, explicitly revoked Executive Order 12,291, which established Naval Petroleum Reserve Numbered 2 in Kern County, California, on December 13, 1912. The revocation also lifted the withdrawal of the land.

²¹ *Id.*

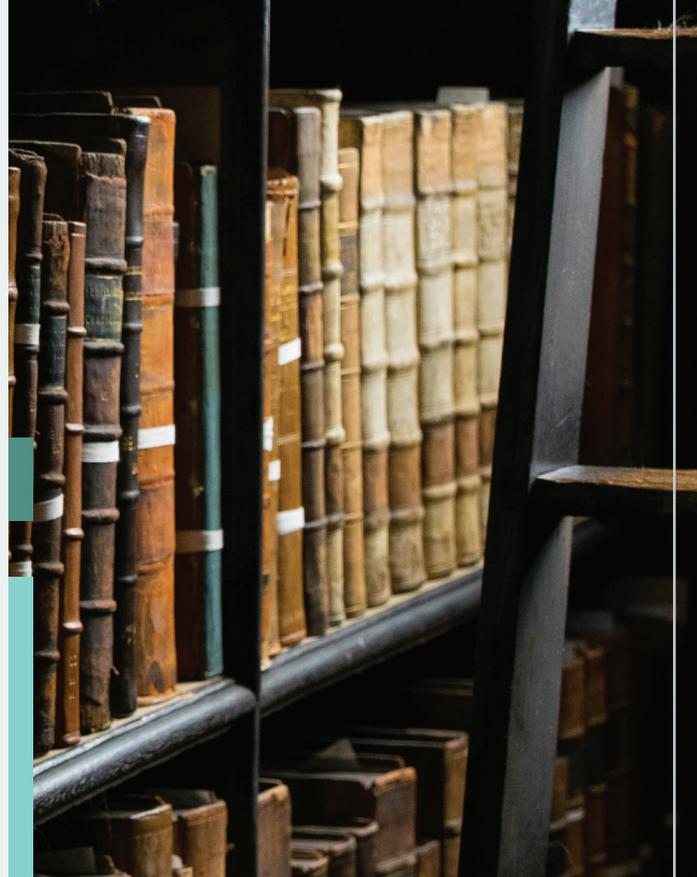
²² Lisa Manheim & Kathryn A. Watts, *Reviewing Presidential Orders*, 86 UNIV. OF CHICAGO L. REV. 1743 (2019) (providing an in-depth explanation for the relative paucity of judicial challenges to executive orders). WILLIAM G. HOWELL, *POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION* (2003).

²³ MATTHEW CHOU, *AGENCY INTERPRETATIONS OF EXECUTIVE ORDERS*, 71 Admin. L. Rev. 555, 562 (2019).

²⁴ *Id.* (citing *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992), in which the Supreme Court noted, “As the APA does not expressly allow review of the President’s actions, we must presume that his actions are not subject to its requirements”).

Historic Usage, Generally

It seems that recent trends in the publicization of executive orders, particularly during political campaigning, have contributed to a misperception that the usage of executive orders has increased over time. In reality, however, the use of executive orders actually peaked in the twentieth century under the administration of President Franklin D. Roosevelt's (FDR). From March 4, 1933, to April 12, 1945, FDR issued a total of 3,721 executive orders, averaging 307 a year.²⁵ The abundance of executive orders under FDR's administration arose largely from his need to swiftly implement wartime actions and strategies. While some such orders were certainly necessary for these purposes, they also created profound and lasting policy impacts, with one order resulting in the historically reprehensible incarceration of 120,000 Japanese Americans.²⁶ Other orders related to FDR's New Deal strategy, aiming to stabilize the economy, provided relief to the suffering population, and reformed the financial system to protect against future economic depressions.²⁷ FDR's executive orders largely reflected his fundamental views, which he expressed in his first inaugural address.²⁸ He stated he would not hesitate to "ask the Congress for the one remaining instrument to meet the crisis—broad Executive power to wage a war against the emergency, as great as the power that would be given to me if we were in fact invaded by a foreign foe."²⁹ Though FDR's actions during World War II and the Great Depression dominate his legacy, several of FDR's executive orders also set forth new energy policies with lasting impacts. Among others, Executive Order 7037 initiated a program to distribute electricity to rural areas in the country,³⁰ while Executive Order 6256 issued a code for fair competition in the petroleum industry.³¹ Additionally, Executive Order 8733 withdrew public lands to use in connection with the Canton Dam and aid in flood control in Oklahoma.³²



²⁵ THE AMERICAN PRESIDENCY PROJECT, *supra* note 7. In two 1935 decisions, the Supreme Court overturned five of these orders, finding executive overreach (Executive Orders 6199, 6204, 6256, 6284 and 6855). *Panama Refining Co. v. Ryan*, 293 US 388 (1935); *A. L. A. Schechter Poultry Corporation v. United States*, 295 U.S. 495 (1935).

²⁶ Executive Order 9066, 31 Fed. Reg. 9066 (Feb. 19, 1942).

²⁷ *Id.*

²⁸ TARA L. BRANUM, PRESIDENT OR KING? THE USE AND ABUSE OF EXECUTIVE ORDERS IN MODERN-DAY AMERICA, 28 J. LEGIS. 1, 6 (2002).

²⁹ First Inaugural Address of President Franklin Delano Roosevelt, in *Inaugural Addresses of the Presidents of the United States* 269 (Bicentennial ed. 1989).

³⁰ Executive Order No. 7037, 3 C.F.R. § 430 (1936-1943 Comp.), reprinted as amended in 50 U.S.C. § 191 (2018).

³¹ Executive Order No. 6256, 3 C.F.R. § 1 (1990), reprinted as amended in 50 U.S.C. § 1601 (2021).

³² Executive Order No. 8733, 7 Fed. Reg. 4205 (1939), reprinted as amended in 50 U.S.C. § 1601 (2021).



Research under the American Presidency Project at the University of California – Santa Barbara documents the relative decline in the use of executive orders since the mid-twentieth century.³³ Over the past five presidential administrations, executive order usage is quantified as follows:

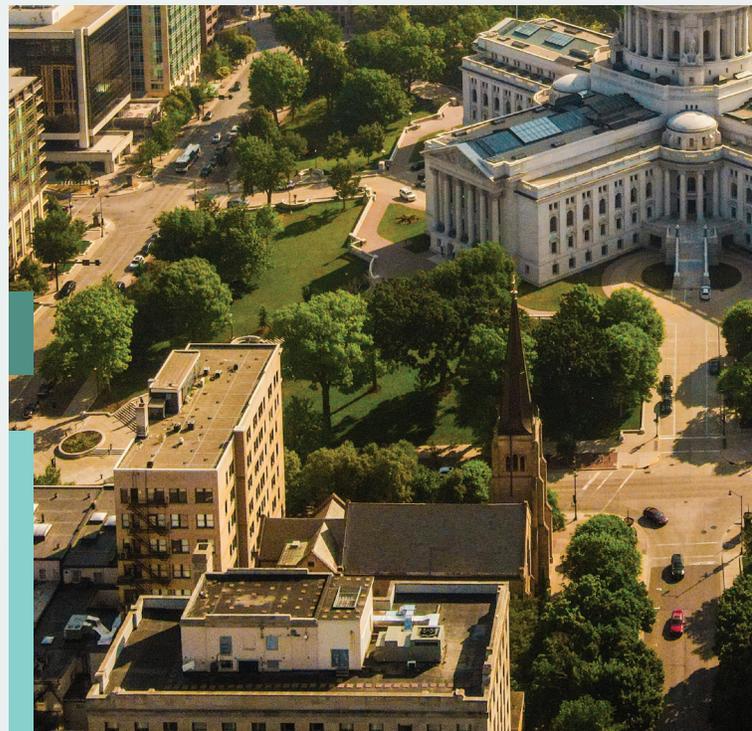


Bill Clinton: 364 over 8 years;
George W. Bush: 291 over 8 years;
Barack Obama: 276 over 8 years;
Donald Trump: 220 over 4 years; and
Joe Biden: 138 over 3.25 years (as of April 2024).³⁴

Under the Clinton and Biden Administrations, nearly one in ten of all executive orders were related to energy, climate, or the environment.³⁵ Under the Bush, Obama, and Trump Administrations, energy-related executive orders accounted for only 5% of the total orders issued by these Presidents.³⁶

The Policy Pendulum

Executive orders can create rapid shifts in policy without the benefit of deliberative legislative processes. Unlike legislation, which requires the approval from both houses of Congress, or judicial rulings, executive orders allow the executive branch to swiftly respond to emerging issues or adjust governmental policy to align with the president's agenda.



³³ THE AMERICAN PRESIDENCY PROJECT, *supra* note 7.

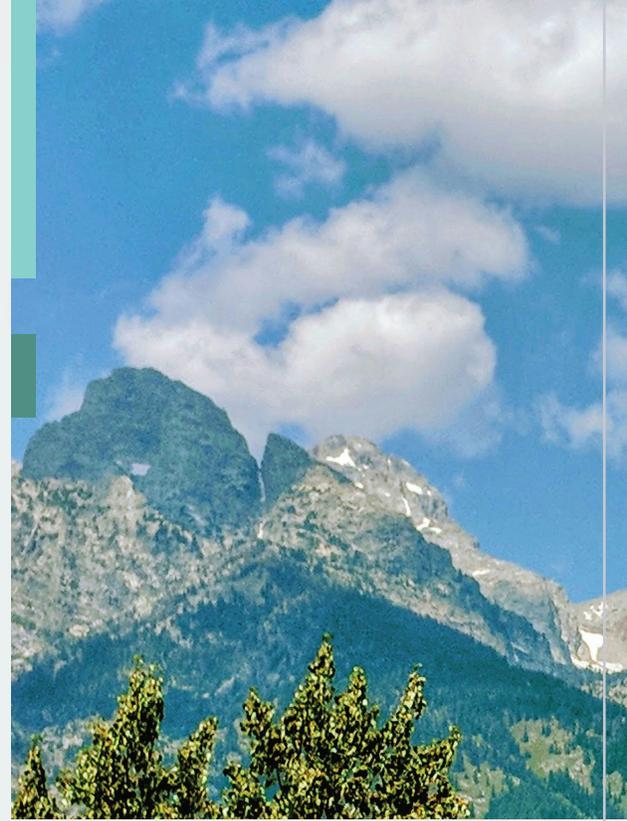
³⁴ *Id.*

³⁵ *Executive Orders*, GOVINFO, <https://www.govinfo.gov/features/executive-orders> (last visited Jun. 20, 2024); *Presidential Documents*, FEDERAL REGISTER, <https://www.federalregister.gov/presidential-documents> (last visited June 20, 2024).

³⁶ *Presidential Documents*, FEDERAL REGISTER, <https://www.federalregister.gov/presidential-documents> (last visited June 20, 2024).

During each partisan shift in administration, however, executive orders are often revoked just as swiftly as they were issued. Upon taking office, it has become standard practice for newly elected executives to rescind and revoke executive orders from prior administrations.³⁷ This rescission is as practical as it is symbolic, with executive orders used strategically to signal the shift in priorities of each new administration. During his 2016 presidential campaign, Donald Trump expressly made the rescission of many Obama-era executive orders a hallmark of his candidacy platform, claiming that if elected he would work to dismantle those orders, which he did almost immediately.³⁸ The effect of this pendulum means, in theory, that executive orders tend to be short-lived in comparison to statutory or judicial policymaking mechanisms. Still, executive orders can have profound and entrenched impacts that carry through multiple administrations. As noted by Andrew Rudalevige, a political scientist at Bowdoin College, executive orders cause agencies to “get moving in a certain direction,” with agency-wide restaffing, restructuring, and reprioritizing, ultimately resulting in “staying power” even for orders that are revoked.³⁹

Yet, other executive orders remain intact through multiple administrations even when seemingly inconsistent with new executive platforms. Executive Order 12898 is one example of the potential for executive orders to shift and take on new lives across various administrations. Issued by President Bill Clinton in 1994, Executive Order 12898 directed all federal agencies to evaluate and develop strategies to address environmental justice.⁴⁰ Its aim was to direct federal focus towards understanding the environmental and human health impacts of federal activities on minority and low-income populations, striving for environmental justice across all communities.⁴¹ President Biden has relied heavily on this executive order as precedent for his administration’s efforts to integrate environmental justice at a structural level within numerous agencies, building on frameworks those agencies originally set in motion under the auspices of Executive Order 12898. Conservative successors to the presidency post-Clinton could have rescinded Executive Order 12898 at any point during their term. Instead, it has remained in place, though with varying degrees of enforcement and implementation across administrations.



³⁷ *Executive Orders on the Revocation of Certain Presidential Actions and Technical Amendment*, WH.GOV (May 14, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/05/14/executive-order-on-the-revocation-of-certain-presidential-actions-and-technical-amendment/> (list of Trump-era executive orders rescinded by Biden in May 2021).

³⁸ Meredith Conroy, *Why Revoking Trump’s Executive Orders Isn’t Enough to Undo Their Effects*, FIVETHIRTYEIGHT (Feb. 11, 2021), <https://fivethirtyeight.com/features/why-revoking-trumps-executive-orders-isnt-enough-to-undo-their-effects/> (quoting former President Trump, stating “I’ll tell you, the one good thing about an executive order is that the new president [can] come and with just a signature, they’re all gone.”).

³⁹ Meredith Conroy, *supra* note 39 (quoting interview with Andrew Rudalevige).

⁴⁰ Executive Order No. 12898, 3 C.F.R. 859 (1994), reprinted in 42 U.S.C. § 4321 (1994).

⁴¹ *Id.*

How Executive Orders Affect Energy Policy

Like other bodies of policy, energy policy at the federal level is forged by the passage and implementation of statutes, administrative rules and regulations, executive actions, and judicial interpretation. At the federal level, executive orders have sometimes been used to shape energy development in profound ways. Recent examples include orders halting development of the Keystone XL Pipeline (Obama 2015; Biden 2021), advancing approval of the Dakota Access Pipeline and Keystone XL Pipeline (Trump, 2017), establishing and subsequently reducing the size of national monuments (Obama, 2016; Trump, 2017), and adopting a national agenda for environmental justice and equity (Biden, 2021). This “whipsawing,” according to Harvard Law Professor Jody Freeman, has resulted in inefficient and unreliable approaches to policymaking, sent mixed signals to industry and the public, and largely undermined the country’s credibility in climate collaborations on an international stage.⁴² Recently, nearly every change in presidential administration has resulted in a paradigm shift for energy development, often posing a challenge for long-term energy infrastructure planning and investment.

Clinton to Bush

Under the Clinton Administration (1993-2001), executive environmental policy decisions were designed to enhance President Clinton’s goals of promoting energy efficiency, greenhouse gas emissions reduction, and sustainable development, with numerous executive orders issued in furtherance of these aims. Executive Orders 13123, 12852, and 12898 embody some of the key energy priorities of the Clinton Administration. Executive Order 13123 sought to improve the energy efficiency in federal agency buildings, promote the use of renewable energy, and reduce greenhouse gas emissions associated with energy used in their buildings, among other energy-related requirements.⁴³ Though the order withstood the following administration, it was subsequently revoked on January 24, 2007, by President Obama’s Executive Order 13423.⁴⁴ President Clinton issued Executive Order 12852 in 1993, which established the President’s Council on Sustainable Development (PCSD).⁴⁵ This order aimed to advise the President on sustainable development and to create new strategies for achieving economic, environmental, and equity goals in a sustainable manner.

⁴² JODY FREEMAN, U.S. CLIMATE CHANGE LAW AND POLICY: TAKING STOCK, IN GLOBAL CLIMATE CHANGE AND U.S. LAW (3d ed.) (2023).

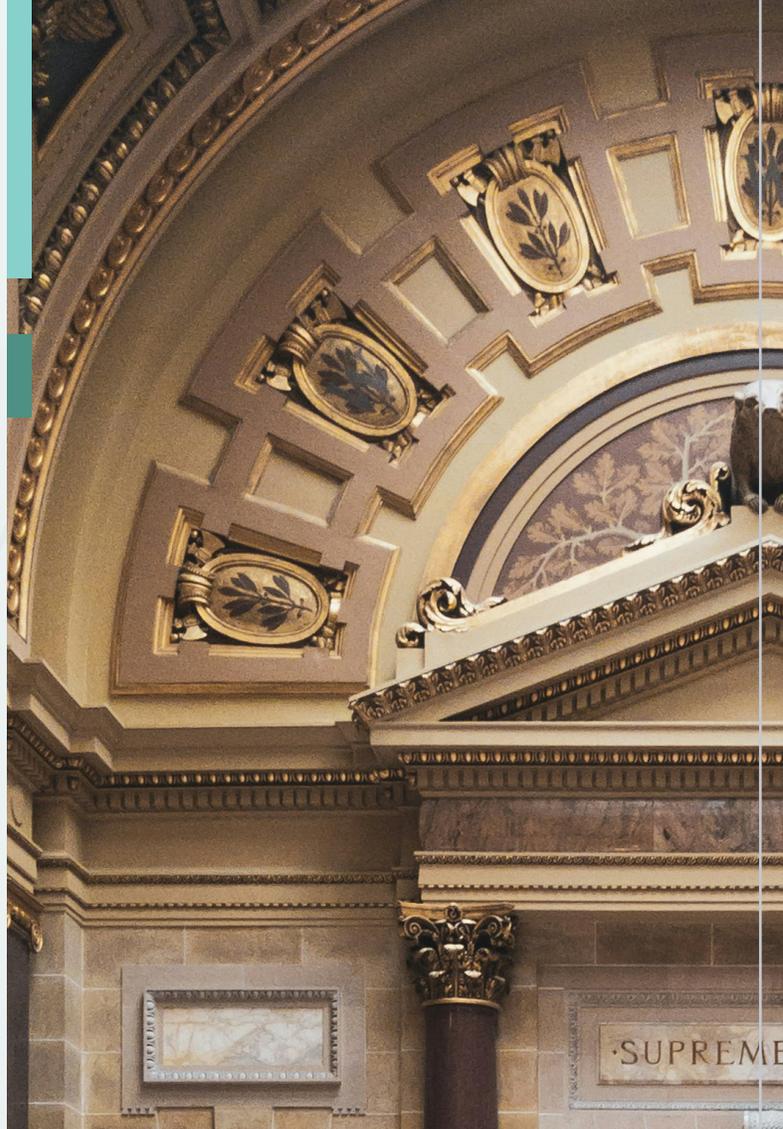
⁴³ Executive Order No. 13123, 64 Fed. Reg. 30851 (June 3, 1999).

⁴⁴ Executive Order No. 13423, 72 Fed. Reg. 3919 (Jan. 24, 2007).

⁴⁵ Executive Order No. 12852, 58 Fed. Reg. 35841 (June 29, 1993).

Other key orders of the Clinton Administration also signaled a federal response to a growing environmental justice movement that sought to ensure that disadvantaged communities enjoyed the same degree of protection from environmental and health hazards as other populations. Executive Order 12898, issued on February 11, 1994 (*infra*), is regarded as one of the first attempts of the federal government to draw attention to the environmental and human health effects of federal action on minority and low-income populations.⁴⁶ The order instructed each federal agency to “make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations.”⁴⁷

Other orders under the Clinton Administration directed federal agency procurement and decarbonization strategies. Executive Order 12902, which set goals for improving energy efficiency and water conservation in federal buildings, aimed to reduce the environmental impact of federal facilities and promote sustainable practices within the government.⁴⁸ This order indirectly impacted the broader energy landscape by encouraging more sustainable energy practices.⁴⁹ Issued later in the Clinton Administration, Executive Order 13101 continued the focus on environmental sustainability by promoting waste prevention, recycling, and the acquisition of environmentally preferable products by federal agencies.⁵⁰ Executive orders such as 12852 and 13101 were largely aimed at greening the federal government through waste prevention, recycling, and federal acquisition.⁵¹



⁴⁶ Executive Order No. 12898, 59 Fed. Reg. 7629 (Feb. 16, 1994); Albert Huang, *The 20th Anniversary of President Clinton’s Executive Order 12898 on Environmental Justice*, NRDC (Feb. 10, 2014), <https://www.nrdc.org/bio/albert-huang/20th-anniversary-president-clintons-executive-order-12898-environmental-justice>.

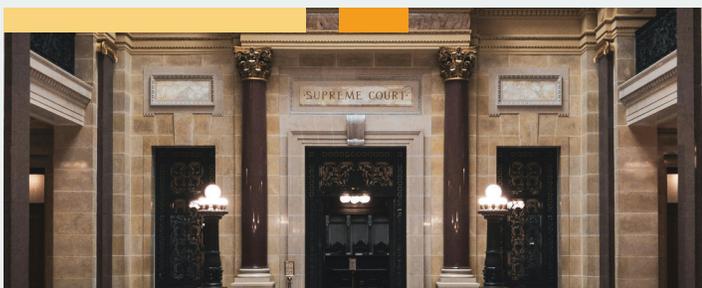
⁴⁷ *Id.*

⁴⁸ Executive Order No. 12902, 59 Fed. Reg. 11463 (Mar. 10, 1994).

⁴⁹ *The Green Rider*, U.S. Env’tl Prot. Agency (May 4, 1999), <https://archive.epa.gov/region07/p2-archive/web/pdf/greenrider.pdf>.

⁵⁰ Executive Order No. 13101, 63 Fed. Reg. 49643 (Sept. 16, 1998).

⁵¹ *Energy for America’s Future*, THE WHITE HOUSE PRESIDENT GEORGE W. BUSH, <https://georgewbush-whitehouse.archives.gov/infocus/energy/#:~:text=In%202007%2C%20President%20Bush%20signed,and%20improve%20vehicle%20fuel%20economy> (last visited May 17, 2024).





In 2001, President George W. Bush succeeded President Clinton with an entirely new energy agenda, refocusing federal policy on goals such as energy independence and security through fossil fuel production as the national priority. Though he allowed many of President Clinton's executive orders to remain intact, President Bush promptly moved to reassess many of the environmental regulations implemented by the Clinton Administration during the last months in office, including new rules against arsenic contamination in drinking water, motorized access in national parks, and energy efficiency standards.⁵² For example, within two weeks of taking office, President Bush ordered the creation of the National Energy Policy Development Group (NEPDG), "a national energy policy designed to help the private sector, and government at all levels, promote dependable, affordable, and environmentally sound production and distribution of energy for the future."⁵³ Under this mandate, the NEPDG ultimately produced a 170-page report released on May 16, 2001, instructing a U.S. energy strategy that emphasized increased domestic oil production and the strengthening of strategic international relationships with allies to develop technologies, market-based incentives, and other innovative approaches to address the issue of global climate change. Two days later, Bush issued two energy-related executive orders. The goal of Executive Order 13211 was to ensure federal regulators consider the impact on the energy sector and explore reasonable alternatives to mitigate adverse energy effects.⁵⁴ The order required federal agencies to prepare a "Statement of Energy Effects" to consist of a detailed statement by the agency responsible for the energy action relating to: (1) any adverse effects on energy supply, distribution, or use (including a shortfall in supply, price increases, and increased use of foreign supplies) should the proposal be implemented; and (2) reasonable alternatives to the action with adverse energy effects and the expected effects of such alternatives on energy supply, distribution, and use.⁵⁵ Executive Order 13212 sought to expedite the review of energy-related projects, reduce the regulatory burdens on energy production, and increase energy production transmission.⁵⁶ The executive order streamlined the permitting process for energy projects, including those involving fossil fuels, and established an Interagency Task Force to monitor and assist agencies in their efforts to expedite review of permits or similar actions. An amendment to this executive order was issued on May 15, 2003, strengthening pipeline safety in energy-related projects.⁵⁷ Executive Order 13302 revised the structure and functions of the Interagency Task Force established by the original order, emphasizing the monitoring and assistance of agencies in expediting reviews of permits or similar actions to accelerate energy-related projects.

⁵² Amanda Little, Keeping tabs on the Bush administration's environmental record, *Grist* (Sep. 4, 2003), <https://grist.org/technology/rollback/>.

⁵³ U.S. Gov't Accountability Office, GAO-03-894, Report to Congressional Requesters: Federal Agencies Have Taken Steps to Improve Contact with Benefit Recipients (2003), <https://www.gao.gov/assets/gao-03-894.pdf>.

⁵⁴ *Summary of Executive Order 13211 – Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use*, EPA, <https://www.epa.gov/laws-regulations/summary-executive-order-13211-actions-concerning-regulations-significantly-affect> (last visited May 16, 2024).

⁵⁵ *Summary of Executive Order 13211 - Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*, U.S. ENV'TL PROT. AGENCY, <https://www.epa.gov/laws-regulations/summary-executive-order-13211-actions-concerning-regulations-significantly-affect> (Last updated June 18, 2024).

⁵⁶ Executive Order No. 13212, 66 Fed. Reg. 28357 (May 22, 2001).

⁵⁷ *Executive Order 13302-Amending Executive Order 13212, Actions to Expedite Energy-Related Projects*, THE AMERICAN PRESIDENCY PROJECT (May 15, 2003), <https://www.presidency.ucsb.edu/documents/executive-order-13302-amending-executive-order-13212-actions-expedite-energy-related>.

Bush to Obama

When President Obama took office in 2008, his administration promptly shifted course with immediate efforts toward combating climate change, promoting renewable energy, and also issued policies affecting the fossil fuel sector. In the first days of his administration, Obama announced, through presidential memoranda, the enforcement of heightened fuel economy standards for auto manufacturers.⁵⁸ On October 5, 2009, President Obama subsequently issued Executive Order 13514, aiming to improve environmental, energy, and economic performance of federal agencies, setting sustainability goals for federal agencies that included reducing greenhouse gas emissions, increasing energy efficiency, and decreasing petroleum use.⁵⁹ Executive Order 13693 was signed on March 19, 2015, building upon Executive Order 13514 and setting more aggressive targets for reducing greenhouse gas emissions, increasing renewable energy use, and improving energy efficiency in federal buildings and operations.

Though the Obama Administration championed numerous greenhouse gas reduction policies, the administration considered itself as adhering to and “All-of-the-Above Energy Strategy,” and purported to promote American energy production in fossil fuels, nuclear, and renewables.⁶⁰ The strategy aimed to enhance energy independence by supporting a broad array of energy sources. Through at least one executive order, issued on April 13, 2012, President Obama announced support for the increased development of domestic natural gas supplies, though with an emphasis on safe and responsible development.⁶¹ Later in his second term, in June 2013, President Obama subsequently unveiled a Presidential Climate Action Plan to outline a comprehensive national climate change strategy which proposed actions to cut emissions, accelerate low-carbon energy sources and transportation, and establish U.S. leadership in climate action.⁶² Though the Climate Action Plan did not have the binding effect of an executive order, it laid the groundwork for later executive action taken in 2013 via Executive Order 13653 (“Preparing the United States for the Impacts of Climate Change”) and in 2014 via Executive Order 13677 (“Climate-Resilient International Development”).⁶³



⁵⁸ Memorandum for the Secretary of Transportation and the Administrator of the National Highway Traffic Safety Administration, *The Energy Independence and Security Act of 2007*, OBAMA WHITE HOUSE ARCHIVES (Jan. 26, 2009), <https://obamawhitehouse.archives.gov/the-press-office/energy-independence-and-security-act-2007>. The standards themselves resulted from Energy Independence and Security Act of 2007 (relevant portions codified at 49 U.S.C. § 32902), but the Bush Administration had not provided instruction on their implementation. Kevin Bullis, *Obama Orders Fuel Efficiency*, MIT TECH. REV. (Jan. 26, 2009), <https://www.technologyreview.com/2009/01/26/95548/obama-orders-fuel-efficiency/>.

⁵⁹ Executive Order No. 13514, 74 Fed. Reg. 52117 (Oct. 8, 2009); *Executive Order 13514 Federal Leadership in Environmental, Energy, and Economic Performance*, U.S. DEP'T OF ENERGY (Jan. 2014), https://www.energy.gov/sites/prod/files/2017/01/f34/eo13514_fleethandbook.pdf.

⁶⁰ Jason Furman & Jim Stock, *New Report: The All-of-the-Above Energy Strategy as a Path to Sustainable Economic Growth*, THE WHITE HOUSE - PRESIDENT BARACK OBAMA (May 29, 2014).

⁶¹ Executive Order 13605, 77 FR 23107 (Apr. 17, 2012).

⁶² *The President's Climate Action Plan*, The White House — Obama (June 2013), <https://perma.cc/SB7B-PEKG>.

⁶³ Executive Order 13653, 78 FR 66819 (Nov. 6, 2013); Executive Order 13677 (Sep. 23, 2014).

Obama to Trump

Donald Trump's 2016 election to the presidency resulted in a shift away from Obama-era policies, with a new emphasis on the domestic production of fossil fuels and the deregulation of the energy industry. By Executive Order 13783, signed on March 28, 2017, President Trump announced cancellation of Obama's Climate Action Plan and announced an express national intent to "avoi[d] regulatory burdens that unnecessarily encumber energy production," instructing all agencies to "immediately review existing regulations that potentially burden the development or use of domestically produced energy resources and appropriately suspend, revise, or rescind those that unduly burden the development of domestic energy resources beyond the degree necessary to protect the public interest or otherwise comply with the law. promoted domestic fossil-based energy production."⁶⁴ Similar to how other presidents have wielded executive orders, President Trump appears to have leveraged Executive Order 13783 partly for symbolic purposes, announcing a vision for energy growth without instructing specific action. For instance, the executive order stated, "It is in the national interest to promote clean and safe development of our Nation's vast energy resources, while at the same time avoiding regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation. Moreover, the prudent development of these natural resources is essential to ensuring the nation's geopolitical security."⁶⁵

Other notable orders issued by President Trump include Executive Order 13766, which aimed to expedite environmental reviews and approvals for high priority infrastructure projects⁶⁶ including pipelines and other fossil fuel-related projects (discussed in further depth *infra*). The purpose was to "streamline and expedite, in a manner consistent with law, environmental reviews and approvals for all infrastructure projects, especially projects that are a high priority for the Nation, such as improving the U.S. electric grid and telecommunications systems and repairing and upgrading critical port facilities, airports, pipelines, bridges, and highways."⁶⁷



⁶⁴ Executive Order No. 13783, 82 Fed. Reg. 16093 (Mar. 31, 2017).

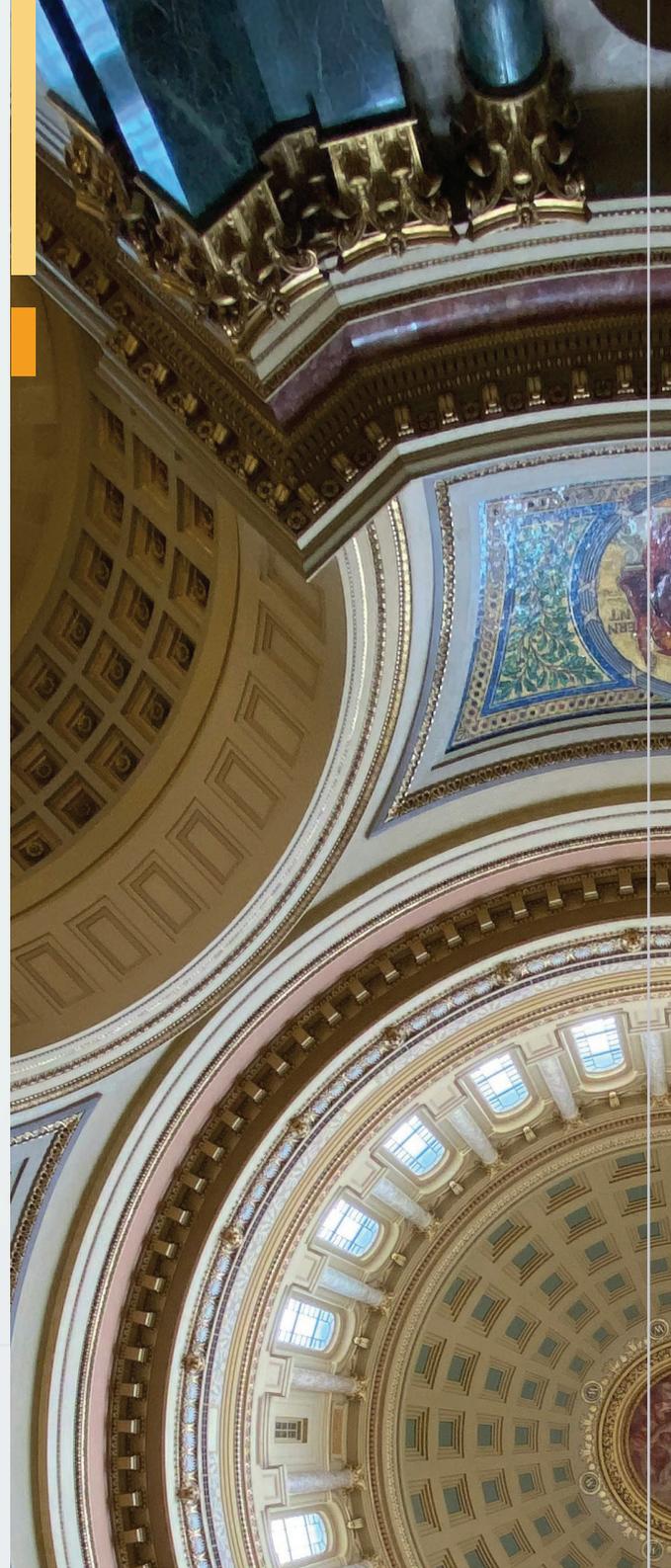
⁶⁵ *Id.*

⁶⁶ Executive Order No. 13766, 82 Fed. Reg. 8657 (Jan. 24, 2017).

⁶⁷ *Id.*

Trump to Biden

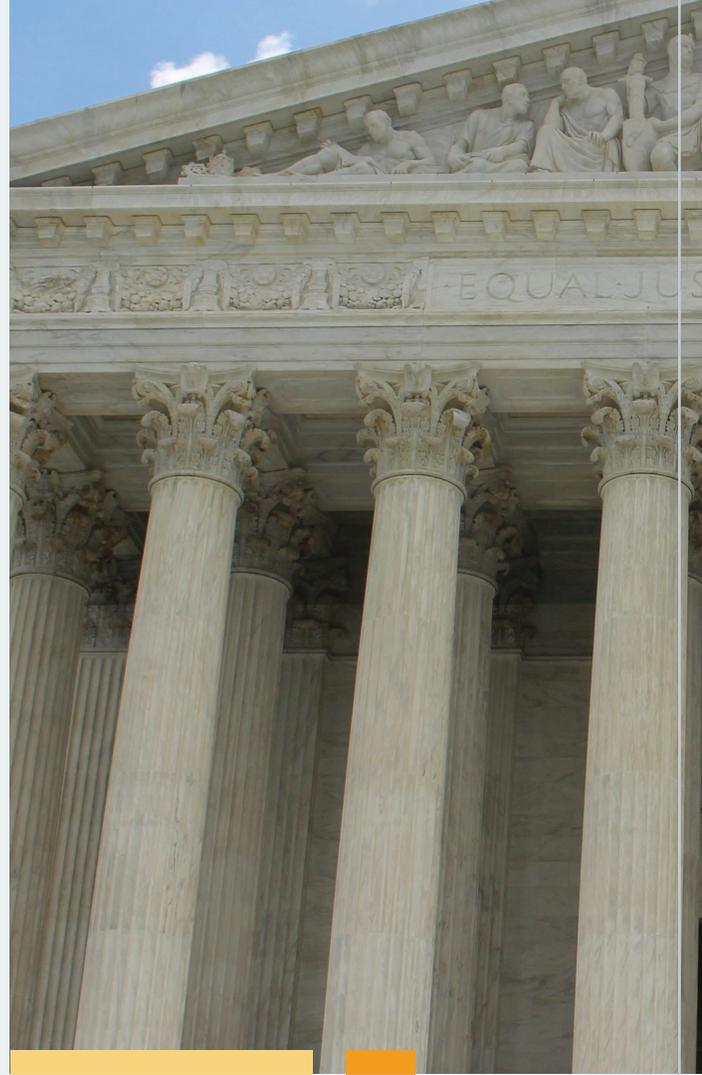
Since taking office in 2021, President Biden has used numerous executive orders to reverse energy and environmental policies of the Trump Administration. Various energy-related executive orders have focused on addressing climate change and the expansion of low-carbon energy technologies. Executive Order 14008, “Tackling the Climate Crisis at Home and Abroad”, issued in January 2021, was an early cornerstone of these efforts. It halted new oil and gas leasing on federal onshore lands and offshore waters and announced the national intent to rejoin the Paris Agreement. Further, it instructed agencies to take specific actions designed to “elevate the issue of climate change,” and created the Justice40 Initiative under which “40 percent of the overall benefits [of certain federal investments must] flow to disadvantaged communities.”⁶⁸ Beyond announcing specific mandates such as Justice40, Executive Order 14008 illustrates well the potential for executive orders to be used as vehicles to signal the priorities of an administration. To this end, the order forecasts goals of the new administration at-large, with broad, ambiguous statements such as, “We must strengthen our clean air and water protections. We must hold polluters accountable for their actions. We must deliver environmental justice in communities all across America,” which seems intended to speak more to the values, priorities, and credo of the new administration than to specifically instruct agencies. Executive Order 14008 set the stage for a now-robust suite of progeny orders on energy and environmental justice in particular, including but not limited to, Executive Order 14096, “Executive Order on Revitalizing Our Nation’s Commitment to Environmental Justice for All”, which largely restated the Biden Administration’s commitment to environmental justice in energy development, while announcing new specific metrics for implementing the longstanding Clinton-era Executive Order 12898. Other orders issued by the Biden Administration have supported growth of the low-carbon energy economy, including directives for federal agencies to procure carbon-free energy and electric vehicles, and to spur the commercialization of clean energy technologies.⁶⁹



⁶⁸ Jim Watson, *Biden Makes Sweeping Changes to Oil and Gas Policy*, CSIS (Jan. 28, 2021).

⁶⁹ Jeff St. John, *Biden Executive Orders Set Broad Federal Role in Clean Energy and Climate Change Mitigation*, GREEN TECH MEDIA, Jan. 27, 2021.

Finally, though President Biden did not explicitly overturn Executive Orders 13766 and 13783, Executive Order 13990, issued on January 20, 2021, broadly directed agencies to review and take action to address the environmental and public health impacts of federal actions.⁷⁰ It instructed agencies to immediately revoke, revise, or replace any orders, rules, or policies that did not align with the Biden Administration's goals for the environment, public health, and climate objectives, listed in the order as including adherence to science in informing public health and climate decisions, polluter accountability, environmental justice, restoration of national monuments, and emissions reductions, inter alia. Through these broad agency instructions and otherwise, the Biden Administration has repeatedly leveraged the executive power to integrate environmental stewardship into all facets of government operations, seeking to prioritize actions that bolster energy efficiency, renewable energy adoption, and broader environmental protections while discouraging or disallowing certain fossil fuel development.⁷¹



⁷⁰ Executive Order No. 13990, 86 Fed. Reg. 7037 (Jan. 25, 2021).

⁷¹ Thomas J. Pyle, *175 Ways the Biden Administration and Democrats Have Made it Harder to Produce Oil & Gas*, INSTITUTE FOR ENERGY RESEARCH (Sept. 19, 2023), <https://www.instituteforenergyresearch.org/fossil-fuels/gas-and-oil/175-ways-the-biden-administration-and-democrats-have-made-it-harder-to-produce-oil-gas/>.

The Policy Pendulum at Work: Saga of the Keystone Pipeline

In addition to indirectly impacting energy development and affecting investment decisions, executive orders have also been used on occasion to cancel or greenlight specific projects. This includes several high-profile projects, which have been viewed as tied symbolically to the policy direction of the nation in general. The controversial TransCanada Keystone XL pipeline is one example.⁷² This pipeline faced extensive delays due to environmental concerns, legal battles, and shifts in executive policy, ultimately leading to drawn-out stakeholder disputes and billions of dollars in lost energy investments. Initially, during the Obama Administration, the Keystone XL pipeline faced significant scrutiny due to environmental concerns, particularly about its potential impact on climate change and local ecosystems.⁷³ Pipelines on international borders require presidential authorization (a “Presidential Permit”), which requires determination by the State Department that the pipeline would serve the “national interest.”⁷⁴ TransCanada submitted its application for this permit in May 2012, and in November of the same year, Secretary of State John Kerry announced the Department’s determination in the negative. According to the record of decision, approval of the pipeline would have yielded minimal economic benefits, while undermining U.S. climate leadership with adverse effect to the national interest.⁷⁵ As noted by President Obama in a statement concurring with Secretary Kerry’s determination, “for years, the Keystone Pipeline has occupied . . . an overinflated role in our political discourse. It became a symbol too often used as a campaign cudgel by both parties rather than a serious policy matter. And all of this obscured the fact that this pipeline would neither be a silver bullet for the economy, as was promised by some, nor the express lane to climate disaster proclaimed by others.”⁷⁶



⁷² Sam Kalen, *Thirst for Oil and the Keystone XL Pipeline*, 46 CREIGHTON L. REV. 1, 2 (2012).

⁷³ *Id.* at 11.

⁷⁴ *Id.*; Paul W. Parfomak et al., Cong. Research Serv., R41668, *Keystone XL Pipeline Project: Key Issues* 6 n.22 (2012), available at <http://www.fas.org/sgp/crs/misc/R41668.pdf>.

⁷⁵ *Dep’t of State Record of Decision and National Interest Determination, TransCanada Keystone Pipeline, L.P., Application for Presidential Permit, Keystone Pipeline*, <https://2012-keystonepipeline-xl.state.gov/nid/249254.htm> (Nov. 2015).

⁷⁶ *Statement by the President on the Keystone XL Pipeline*, The White House – Obama (Nov. 6, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/11/06/statement-president-Keystone-XL-pipeline>.

Indeed, the symbolic power of the Keystone XL Pipeline extended to subsequent administrations. In President Trump's first week of office, he issued Executive Order 13766, inviting TransCanada (now TC Energy) to reapply for the required Presidential Permit under an administrative expedited review process.⁷⁷ Within months of the executive order, in March 2017, the State Department issued a revised national interest determination, finding the project would serve the national interest by creating jobs and building energy independence.⁷⁸ Following a period of judicial challenge during which a federal judge paused development of the pipeline to allow for additional environmental impact study, construction began in 2020 with the support of additional billions of dollars in funding, but over the protests of many indigenous and environmental groups.⁷⁹

On January 20, 2021, his first day in office, President Biden issued an executive order that once again revoked the permit for the Keystone XL pipeline.⁸⁰ The executive order cited the pipeline's potential environmental risks and the need to uphold America's commitment to combating climate change as reasons for revoking the permit.⁸¹ TC Energy eventually announced termination of the project in 2021, ultimately translating to TC Energy's loss of billions of investment dollars⁸² and years of protracted uncertainty for those who opposed the project on environmental or cultural grounds. According to a regulatory tracker maintained by Harvard Law School's Environmental & Energy Law Program, all domestic litigation related to the pipeline has been dismissed, but TC Energy and the province of Alberta have submitted claims against the U.S. under the North American Free Trade Agreement (NAFTA) for damages resulting from the permit revocation.⁸³

Though the saga of the Keystone XL Pipeline is arguably the most high-profile example of the role of executive action in driving energy policy and in drawing out uncertainty for a specific project, the pipeline is far from the only energy development project to have been directly affected or canceled by executive action. For instance, in 2021, Executive Order 14008 instructed a pause on all new federal oil and gas leasing—a move which would have resulted in hundreds of millions of dollars in lost tax revenue for the State of Wyoming had the moratorium not been blocked by a federal court.⁸⁴



⁷⁷ Executive Order 13766, 82 FR 8657 (Jan. 30, 2017).

¹⁸ *Dep't of State Record of Decision and National Interest Determination, TransCanada Keystone Pipeline, L.P., Application for Presidential Permit, Keystone Pipeline* (Mar. 23, 2017).

⁷⁹ *A look at the history of the Keystone XL pipeline expansion*, CBC NEWS (Jan. 17, 2021), <https://www.cbc.ca/news/canada/timeline-keystone-xl-pipeline-1.5877117>.

⁸⁰ Eddie C. Lewis & Bob Greenslade, *How the Biden Administration Will Impact Environmental Law*, HOUS. LAW. (2021).

⁸¹ Executive Order No. 13990, 86 Fed. Reg. 7037 (Jan. 25, 2021).

⁸² Nia Williams & Shariq Khan, *TC Energy posts C\$1 bln quarterly loss on Keystone XL suspension*, REUTERS (May 27, 2021), <https://www.reuters.com/world/americas/tc-energy-posts-c1-billion-quarterly-loss-keystone-xl-suspension-2021-05-07/>.

⁸³ *Keystone XL Pipeline Regulatory Tracker*, HARVARD LAW ENVIRONMENTAL & ENERGY LAW PROGRAM, <https://eelp.law.harvard.edu/2018/02/keystone-xl-pipeline/> (last visited Jun. 26, 2024).

⁸⁴ *Cost of the Biden Ban on Public Lands*, WESTERN ENERGY ALLIANCE (2021), https://www.westernenergyalliance.org/biden_ban_public_land.html (citing a study by University of Wyoming Professor Tim Considine).

Conclusion

Legal scholars have observed the current prevalence of executive orders in driving energy and other policy decisions is likely far beyond what the Framers could have originally intended. As Professor Driesen has argued, the Framers sought to establish stability in the rule of law but had not foreseen the potential for the strongly bipartisan political environment that controls the policy pendulum today.⁸⁵ Indeed, political parties did not emerge until President Washington left office.⁸⁶

Beyond these scholarly and historical problems with the nature of executive power, however, directing energy policy through executive order results in a practical problem: it can feed into political whiplash for projects with inherent dependence on having clear and certain parameters in place for the long-term. Given the protracted deliberative processes required of energy projects, including rulemaking, NEPA (the National Environmental Policy Act) review, permitting, and potential litigation, most energy projects are already subject to a high level of uncertainty with risk for delay, increased costs, and possible cancellation—risks that are only amplified with the potential for unilateral executive action to derail an entire project. Large-scale energy projects often involve substantial upfront financial investments and have long payback periods. Securing investors requires project proponents to demonstrate that project risk is at an acceptable level, including regulatory risk. Indeed, policy factors significantly influence the types of technologies and specific projects selected for support through investment. According to 2022 research by the Fraser Institute within the mining sector, “policy factors”, including regulatory and policy uncertainty, accounted for approximately 40 percent of investment decisions among mining companies, indicating a significant influence from often-unpredictable policy environments.⁸⁷ Derrick Morgan, a senior vice president for federal and regulatory affairs at American Fuel and Petrochemical Manufacturers has further stated, “Our industry measures commitment in decades, with very large capital investments to be utilized over many decades, so a whipsaw approach is not conducive to that.”⁸⁸

Ultimately, though the policy pendulum is not necessarily unique to executive orders, they can easily set the pendulum’s swing in motion with more speed and politically motivated influence than other types of policymaking. Given the size, extended timelines, and often symbolic meaning of large-scale energy projects, they are particularly vulnerable to disruption from the swinging pendulum. Developing and innovating energy on a meaningful and sustained scale in the U.S. requires significant planning and investment, both of which are more difficult to sustain in an environment of regulatory uncertainty abetted by reliance on executive orders.

⁸⁵ See Driesen, *supra* note 19, at 493.

⁸⁶ *Id.*

⁸⁷ Julio Majía & Elmira Aliakbari, *Survey of Mining Companies 2022*, FRASER INST. ANN. (2023).

⁸⁸ *Id.*



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