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CEI ACHIEVEMENT REPORT

A Summary of 2020 Accomplishments



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*Advancing Liberty from
the Economy to Ecology*

Letter from the President



As I write this note in January 2021, America faces its greatest challenge in at least a generation. The coronavirus pandemic and resulting shutdowns have devastated the economy and exposed dysfunctional government institutions. Yet, in the face of adversity, Americans have shown remarkable resilience, creativity, and entrepreneurship.

As I reflect on the past year, I am pleased to note that the Competitive Enterprise Institute played a critical role in relaxing regulatory edicts and unleashing the ingenuity and innovation that prevented the Covid tragedy from claiming even more lives and livelihoods. The freedom and flexibility this deregulation made possible is essential for speeding up economic recovery and easing the path forward for tens of thousands of local communities.

Last March, as the pandemic began to touch the lives of 330 million Americans, the public became acutely aware of the way burdensome and inflexible regulations hindered the country's ability to respond. CEI led a campaign to show that scores of those rules did little or nothing to protect the public, even in non-crisis times, and were therefore unneeded. This Never Needed Campaign leveraged attention to the social and economic harms imposed by suspended rules to repeal many of them permanently.

Our campaign led directly to a presidential executive order instructing federal agency heads to repeal suspended rules that were unneeded and eliminate other regulations that would impede economic recovery. Weeks later, the president issued a second order directing agencies to streamline federal permitting and approval processes in order to stimulate the economy through deregulation. Governors and state legislators implemented similar reforms.

It was only after federal, state, and local government bodies agreed to suspend hundreds of these regulations that medical innovators could accelerate the development of drugs and vaccines, manufacturers could bring needed personal protective equipment and disinfecting agents to market, and businesses, small and large, were freed to again provide the goods and services upon which their customers depend.

Throughout 2020, nearly a dozen other CEI programs also achieved positive resolution for deregulatory campaigns that were years, and in some cases decades, in the making. From energy efficiency mandates to the Federal Communication Commission's merger review authority and the Securities and Exchange Commission's accredited investor rule, CEI's vertically integrated approach to policy change helped ease or eliminate rules that compromised consumer safety, stifled innovation, and made countless lives poorer and less productive. These and our many other successes are described more fully in the pages that follow.

Even as deregulation liberated the power of markets to make our world safer, healthier, and wealthier, millions of businesses were shuttered, most of America's children languished in inadequate remote learning programs, and politicians increased risk and mortality for vulnerable seniors, while state health officials botched the administration of vaccines whose safe and effective development at record speed was treated as nothing short of a miracle.

We have come far, but there remains much more for us to do. So, while we celebrate the policy successes described in this report, we are prepared to battle a destructive mindset that always prioritizes central planning and control at the expense of free people adapting and innovating. Undoubtedly, we often will be at odds with a new presidential administration and a new Congress as we defend the gains we made in the past few years and work to achieve still more in the year to come.

None of our successes would be possible if not for the steadfast support of our allies, friends, and supporters. Thank you for your partnership and all you do to help us fight for free markets, individual liberty, and a constitutional rule of law.

Yours in liberty,

A handwritten signature in blue ink that reads "Kent Lassman". The signature is fluid and cursive, with a long horizontal stroke at the end.

Kent Lassman
President and CEO

THE SOCIALIST TEMPTATION

IAIN MURRAY



Reforming Surface Transportation for Long-Term Sustainability

How Restructuring Federal Highway Funding Can Prepare Us for Future Transportation Challenges

November 2020

By Virgil G. Payne, PE



ISSUE ANALYSIS 2020 NO. 10

CEI PLANET

COMPETITIVE ENTERPRISE INSTITUTE VOL. 34, NO. 4 | FALL 2020

FEATURED ARTICLES

4 BY STEVE HORWITZ Liberal Institutions and the Material and Moral Progress of Humanity

7 BY MICHELLE MINTON The Double Standard for Nicotine and Cannabis

13 BY SEAN HUGHSON Workplace Transformation Will Affect Everyone, Even Labor Unions

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- Donald Trump's Inauguration Shows a Divisive, But Modest Derangement Has Begun 8
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China Tariffs Violate WTO Rules, Aluminum Tariffs Dropped, No Trade Deal with EU

It is ultimately up to Congress to right President Trump's wrongs on trade policy. We have learned, at great cost, that tariffs will not convince Beijing to accept needed reforms on economic policy, human rights, and political repression. The data are in, and the tariff approach does not work. A better approach will use consistent, long-term multilateral diplomatic pressure.

In the short term, the China tariffs should be rescinded entirely, regardless of what the WTO says. Tearing needed goods is terrible policy during a pandemic and a recession, and a perfect example of a #NeverNeeded policy.

Second, President Trump announced in August that he would reinstate national security tariffs against Canadian aluminum—about a month after the United States-Mexico-Canada Agreement (USMCA) came into effect. Canada announced it would retaliate, so countries rarely always do when tariffs are raised against them. Then in September, Canadian officials were set to announce what the retaliatory measures would be. Hours before the press conference was to begin, the U.S. announced it would drop the tariffs.

This is more damage control than an actual positive policy change—tariffs are not going down; they are merely not going up. But backing off represents at least a tacit admission that more tariffs will not help the economy during a pandemic and a recession. Even if tariffs would help the aluminum industry itself, which is a questionable assumption, higher prices would hurt aluminum-using industries ranging from auto

While this was a big headline, it likely means life in terms of policy changes. China retaliated in kind, and roughly in proportion to Trump's increase, so the WTO will likely consider the matter settled, and thus will not endorse further action against the United States. And as my colleague Iain Murray has pointed out, Trump, ironically, is unable to support the decision because he has essentially dismantled the WTO's dispute resolution system by letting all seven of its judges' terms expire. It will take well into the next year to reconstitute the panel, and the political wrangling between countries that want some of their citizens to be a judge will be difficult.

(continued on page 3)

What's Wrong with the Green New Deal?

WEBmemo

Several medical supply manufacturers have shut down during the past year because of unannounced government orders about effective order (EO), a gas used to sterilize medical equipment and for which there is no viable alternative. EO became an issue after the U.S. Environmental Protection Agency (EPA) released a study analysis that vastly overstated the risks associated with EO. That led several states and localities to shut down several medical equipment sterilization plants.

Those plants closures led the Food and Drug Administration (FDA) to warn of likely shortages of medical supplies, which were realized when the COVID-19 outbreak greatly increased demand. Since then, a few plants have reopened to help generate supplies necessary to fight the virus, but federal regulators should ensure that those facilities remain open well into the future and that the policies and programs that created the unannounced health care are reversed.

EO is a clear gas naturally produced inside the human body. It is also naturally produced and released into the air from combustion, vegetation, nature, volcanic eruptions, waterlogged soils, and other sources. It has many valuable commercial applications, such as the manufacture of dyes, cleaners, antifreeze, and more.

Less than 1 percent of commercially produced EO is used to sterilize more than 20 billion medical products—more than half of all sterile medical products in the United States. The FDA notes that "ethylene oxide may be the only method that effectively sterilizes and does not damage the device." In other words, as FDA Commissioner of Food and Drug Administration H. Scott Gottlieb explained last October, "this method is critical to our health care system and to the continued availability of safe, effective and high-quality medical devices."

EO has been safely used for decades, and the tiny traces released from medical plant sterilization were understood to be inconsequential to human health. But the perception of the risk changed when an EPA research program known as the Integrated Risk Information System (IRIS) released a highly biased assessment of EO risks.

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OnPOINT

April 7, 2020 No. 263
How Repeal of #NeverNeeded Regulations Can Help Responses to the COVID-19 Crisis
Reforms to Enable an Efficient Response, Improve Resilience, and Reboot the Economy by CEI Staff

A number of factors are combining to terms the American economy in the spring of 2020—the global and domestic effects of the COVID-19 pandemic, an oil price war between Saudi Arabia and Russia that is already harming the American oil and gas sector, and a possible global recession in such markets that many believe is overdue. Taken together, these factors constitute the greatest threat to the U.S. economy since the 2008 financial crisis.

However, the urgency of addressing the COVID-19 pandemic makes normal "stimulus" policies to jumpstart the economy potentially counterproductive. Such policies attempt to stimulate more economic transactions between people. However, if the disease is spread by people interacting with each other, increased person-to-person economic interaction is not necessarily desirable from a public health perspective. Therefore, any policy response to the economic impact of the COVID-19 crisis will need to be more carefully considered than during previous economic crises. In fact, much of the federal stimulus spending after the 2008 financial crisis was ill-targeted or even wasteful.

To date, the initial COVID-19 efforts have focused on the immediate problem of ensuring businesses and households stay afloat in the face of mandatory closures and a precipitous drop in demand. Any further legislative effort includes provisions to ensure that the actions are able to meet the demands of the crisis and then return to full capacity without unnecessary barriers.

We have already seen that many regulations have proven to hinder or delay appropriate policy responses. Other regulations are or were making things worse than they otherwise would be. In many cases, it is now clear that these regulations were never needed, or that whatever justification they once had has been superseded.

With all that in mind, some events indicate certain principles that should be incorporated into policy responses to the crisis going forward. Future bills and executive actions should:

- Remove regulatory barriers that prevent an effective response to the crisis;
- Remove regulatory barriers that reduce resilience to changed economic behavior;
- Support or repeal policies that make the crisis worse than it would otherwise be, and

Staff Writers: Gregory S. Gault, Michelle Shover, Angela Engelhardt, Sean Kenney, Annie McHugh, Matthew Adams, John Berman, Matti Casadei, Ryan Shover, Steven Shott, Shaleen Lavin, Jeffrey Cox, and Patrick Haggard contributed to this report.
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Modernizing Environmental Reviews under the National Environmental Policy Act

New NEPA Regulations from the White House Council on Environmental Quality Will Benefit the Environment and the Economy

By Mario Loyola

European Union Antitrust Policy in the Digital Era

A History of Misunderstanding and Arbitrary Enforcement

By Henrike Schneider

October 2020

ISSUE ANALYSIS 2020 NO. 8

TEN THOUSAND COMMANDMENTS

An Annual Snapshot of the Federal Regulatory State

Clyde Wayne Crews Jr.

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

COMPETITIVE ENTERPRISE INSTITUTE, ANTHONY KRELCHEK, WALTER M. KRELCHEK, JAMES LEVY, and MARC SCHEINKE, Petitioners, vs. No. 20-1547, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, JAMES C. OWENS, in his official capacity as Acting Administrator, National Highway Traffic Safety Administration, ENVIRONMENTAL PROTECTION AGENCY, ANDREW R. WHEELER, in his official capacity as Administrator of the Environmental Protection Agency, Respondents.

PEITION FOR REVIEW

Pursuant to the Energy Policy and Conservation Act, 49 U.S.C. § 32909, the Clean Air Act § 307(b)(1), 42 U.S.C. § 7607(b)(1), Section 702 of the Administrative Procedure Act, 5 U.S.C. § 702, Rule 15 of the Federal Rules of Appellate Procedure, and D.C. Circuit Rule 15, the Competitive Enterprise

The Scientific Case for Vacating the EPA's Carbon Dioxide Endangerment Finding

The Hazard of Unreliable Models Guiding Policy

By Patrick J. Michaels and Kevin D. Dayaratna

April 2020

ISSUE ANALYSIS 2020

GEORGE WASHINGTON, ENTREPRENEUR

How Our Founding Father's Private Business Pursuits Changed America and the World

JOHN BERLAU

#NEVERNEEDED

many regulations being scrapped to help fight COVID-19 were never needed in the first place

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Appeal No. 118,474

STATE OF OKLAHOMA, ex rel. MIKE HUNTER, ATTORNEY GENERAL OF OKLAHOMA, Plaintiff/Appellee/Counter-Appellant, vs. JOHNSON & JOHNSON; JANSSEN PHARMACEUTICALS, INC.; ORTHO-McNEIL JANSSEN PHARMACEUTICALS, INC.; n/k/a JANSSEN PHARMACEUTICALS, INC.; JANSSEN PHARMACEUTICA, INC.; n/k/a JANSSEN PHARMACEUTICALS, INC.; Defendants/Appellants/Counter-Appellees.

PURDUE PHARMA L.P.; PURDUE PHARMA, INC.; THE PURDUE FREDERICK COMPANY; TEVA PHARMACEUTICALS USA, INC.; CEPHALON, INC.; ALLERGAN, PLC; n/k/a ACTAVIS PLC; n/k/a ACTAVIS, INC.; n/k/a WATSON PHARMACEUTICALS, INC.; WATSON LABORATORIES, INC.; ACTAVIS LLC; and ACTAVIS PHARMA, INC.; n/k/a WATSON PHARMA, INC., Defendants.

AMICUS CURIAE BRIEF OF COMPETITIVE ENTERPRISE INSTITUTE

District Court of Cleveland County, Oklahoma
Honorable Thad Balkman, Trial Judge
District Court Case No. CJ-2017-816
Public Nuisance

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Attorneys for Competitive Enterprise Institute

Science May Be the Easy Part

Making Sure a COVID-19 Vaccine Is Used

By Joel M. Zinberg, M.D., J.D.

October 2020

ISSUE ANALYSIS 2020 NO. 8

THE ENDANGERMENT FINDING, REVISITED

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About CEI

Founded in 1984, the Competitive Enterprise Institute is widely recognized as a leading and effective advocate for freedom on a wide range of critical economic and regulatory policy issues. Each year, our research and analysis are cited thousands of times in major media outlets, relied upon by scholars and advocates, and used by members of Congress, executive branch officials, and other federal and state policymakers as the basis for reform actions and proposals. Our work provides policymakers with user-friendly data and analysis, as well as concrete, actionable reform proposals.

CEI was among the first organizations in the free market movement founded expressly to pursue a full-service approach to advancing public policy. We not only publish original and insightful analysis, we then use that intellectual ammunition to craft advocacy and education campaigns designed to change minds and transform policy.

In addition to producing scholarly studies, CEI policy analysts produce timely commentaries for major news organizations, appear on television and radio programs, promote reform ideas through digital and online forums, and engage with other experts who cover our key policy areas.

CEI experts also meet regularly with members of Congress and state legislators, legislative staff, department heads and agency leaders, and senior administration officials to engage in direct advocacy. We participate actively in the regulatory process by testifying at congressional and agency hearings and meetings, and by filing comments on proposed

rules, guidance documents, and other agency proposals. And we regularly partner with coalition allies to pursue reforms at the state and local levels of government.

Through an active law and litigation program, CEI initiates lawsuits and files amicus briefs in on-going cases that challenge the constitutionality of dubious statutes and the legality of onerous regulations. This program has won multiple precedent-setting rulings from the U.S. Supreme Court, lower federal appeals courts, and state courts. But no matter the venue, CEI's cases ensure greater economic liberty, increased government transparency and accountability, and a stronger commitment to the rule of law.

CEI is a non-partisan educational and research institute operating under Section 501(c)(3) of the Internal Revenue Code. CEI accepts no government grants or contracts and does not have an endowment. Contributions to support our efforts are tax deductible.



CEI's Policy Programs

Program on Regulatory Reform—CEI has long advocated for reform, not only of individual regulations, but of the rulemaking process. Decades of accumulating regulatory burdens weigh heavily on America's workers, consumers, businesses, and families. And the way agencies develop, promulgate, and enforce regulations suffers from a lack of transparency, democratic accountability, and fidelity to a constitutional rule of law. Our regulatory process reform efforts are directed at increasing agency transparency and accountability, and ensuring that regulatory policy conforms to the constitution and does more good than harm.

Center for Economic Freedom—CEI's Center for Economic Freedom addresses many of the industries and activities where long-established, and often paternalistic, regulatory policies tend to stymie the creation and evolution of new products, services, technologies, business practices, and work arrangements. Key issue areas include banking and securities regulation, consumer finance, labor law and employment policy, consumer product regulation, and trade policy. These issue areas require our experts to have a firm understanding of existing regulation, regulation's monetary and social costs, and an appreciation of the way technology and innovation present new challenges and prospects for reform.

Center for Energy and Environment—For nearly four decades, CEI has led the opposition to environmental alarmism, conservation policies based on junk science and fear-mongering, and efforts to restrict and ration energy. During that time, our Center for Energy and Environment has become the most effective advocate of the free-market approach to environmental policy in Washington. Our work shows that property rights, freedom of contract, and marketplace incentives provide better means of preserving the environment, internalizing pollution costs, and conserving resources than regulatory command and control policies do.

Center for Technology and Innovation—CEI's Center for Technology and Innovation strives to keep the regulatory state from encroaching upon frontier industries and ensure that 21st century technologies are not shackled by 20th century regulations. In industries characterized by rapid change and cutting-edge innovation, market discipline is a superior way of ensuring effective competition and consumer protection compared to regulatory intervention. Innovation tends to make the world safer, healthier, wealthier, and more consumer-friendly, while government regulation tends to short-circuit innovation and protect politically-favored businesses and technologies.

Center for Advancing Capitalism—CEI established the Center for Advancing Capitalism to promote a better, more robust understanding of the values and virtues of capitalism, free markets, and economic liberty. It serves a complementary role to CEI's core policy centers, based on the premise that advancing free market public policies is easier when policymakers and the public understand how capitalism not only makes people wealthier, but also advances other important values and concerns, such as fairness and justice.

Center for Law and Litigation—As a vertically-integrated policy organization, the Competitive Enterprise Institute often engages in litigation as a major part of its advocacy program. The Center for Law and Litigation initiates lawsuits on behalf of CEI or allied individuals and organizations, and it weighs in on on-going cases with amicus briefs. The program's aim is to preserve constitutional and statutory limits on agency action and promote government accountability and transparency.

Executive Summary

In 2020, CEI's scholars contributed to the reform of several major regulatory programs, ranging from environmental permitting procedures and energy efficiency rules to the Federal Communication Commission's merger review authority and the Securities and Exchange Commission's accredited investor rule. Our long-time focus on achieving reform of the rulemaking and informal policymaking processes also paid dividends, as procedural rules that CEI's experts advocated for will help rein in abuses by federal agencies by imposing substantive limits and democratic accountability.

In addition, CEI helped to reframe the media narrative and policy debates about regulatory reform during the Covid-19 outbreak. As federal and state government bodies were forced to suspend hundreds of regulations that hindered America's response to the pandemic, CEI worked with allies to convince policymakers that many of those rules served no useful purpose and should be repealed permanently. This "Never Needed Campaign" helped convince the Trump administration to issue executive orders in May and June 2020, directing federal agency heads to repeal suspended rules that were unneeded, streamline federal permitting and approval processes, and eliminate other regulations impeding economic recovery.



The first fully rescinded rule was a Food and Drug Administration policy that imposed severe premarket approval requirements for diagnostic tests. It was one of the Never Needed Campaign's priority targets, and our work was instrumental in securing its rescission. A few of CEI's most noteworthy achievements during the past year include:

- CEI's Never Needed Campaign leveraged public and policymaker awareness that unworkable regulations and bureaucratic obstruction were inhibiting the country's Covid response to generate demand for repealing many of those rules permanently.
- CEI policy recommendations were embraced wholesale in two executive orders issued by the president. The first directed federal agency heads to repeal suspended rules that were unneeded and eliminate other regulations that would

impede economic recovery. The second directed agencies to streamline federal permitting and approval processes.

- The Department of Health and Human Services and the Environmental Protection Agency issued proposed rules that forbid guidance documents from being used as the basis of an agency enforcement action, as CEI recommended.
- The Labor Department issued a rule ensuring that significant guidance is subject to notice-and-comment, like actual regulations.
- The Department of Health and Human Services proposed a rule requiring the Department to reassess all major rules every 10 years. Those not affirmatively renewed will sunset.
- The Transportation Department rescinded an

Obama-era rule requiring sharply higher fuel efficiency mandates for new automobiles and replaced it with a rule that requires the mandates to rise at a slower pace. In doing so, the Department acknowledged for the first time ever that its policy forces manufacturers to produce lighter and less crashworthy vehicles.

- In response to a CEI regulatory petition, the Energy Department finalized a new rule that will relax energy and water use restrictions for home dishwashing machines, thereby making them more effective. The Department

also finalized revisions to the efficiency standards for clothes washers and dryers, and for shower heads, and it has proposed revised standards for incandescent light bulbs.

- The Department of Health and Human Services rescinded an unofficial Food and Drug Administration policy requiring premarket approval for laboratory developed diagnostic tests, a policy that delayed testing for Covid-19 by more than two months.
- The Securities and Exchange Commission broadened an accredited investor

exemption that permits individuals to invest in non-publicly-traded corporate stocks, a right long available only for wealthy investors and denied to ordinary, middle-class investors.

- The D.C. Circuit Court of Appeals ruled, in a case brought by CEI, that the Federal Communications Commission lacks authority to require merging cable companies to implement various pricing policies favored by progressive politicians as a condition for approving the merger.



The Never Needed Campaign

Like many other policy groups, CEI's agenda during 2020 was influenced considerably by the Covid-19 pandemic and the unprecedented lockdowns on economic activity imposed to address it. As politicians around the country scrambled to suspend restrictive regulations that hindered the coronavirus response, CEI saw an opportunity to translate public attention to the human cost of regulation into meaningful, pro-market and pro-liberty reforms.

As the public became acutely aware of the way burdensome and inflexible regulations had hindered society's ability to respond to the crisis, CEI led a campaign to show that scores of those rules did little or nothing to protect the public, even in non-crisis times, and were therefore never needed in the first place. This Never Needed Campaign leveraged public, news media, and policymaker attention on the social and economic harms imposed by the suspended regulations to repeal many of them permanently.

CEI policy experts created a compendium of recommendations suggesting big-picture changes to the regulatory structure that would remove barriers to Covid-19 response and recovery. The effort also featured an aggressive multimedia campaign that used social media tools to disseminate user-friendly charts, infographics, and videos promoting these reform ideas. And our direct advocacy efforts led to briefings for federal

**CEI'S NEVER NEEDED
CAMPAIGN INSPIRES TWO
EXECUTIVE ORDERS**

**REPEAL
HARMFUL
REGULATIONS**

**STREAMLINE
FEDERAL
PERMITTING**

agency leaders, senior White House officials, members of Congress, state legislators, and allied policy organizations.

In fewer than 60 days, the effort scored two major policy victories. On May 19, President Trump issued an executive order directing federal agency heads to repeal suspended rules that were unneeded, as we recommended, and eliminate other regulations that impeded economic recovery. And on June 4, the president took another CEI recommendation and issued a second executive order directing agencies to streamline federal permitting and approval processes in order to stimulate the economy through deregulation. On Capitol Hill, Rep. Virginia Foxx in the House

and Sens. James Lankford, Ron Johnson, and Rob Portman introduced legislation to establish an independent regulatory commission to eliminate unnecessary and out-of-date regulations.

The first fully rescinded rule would not come until two months later, in the form of a Food and Drug Administration policy requiring extensive premarket review and approval of certain diagnostic tests. That policy was one CEI listed as a major priority target. Today, dozens of other federal and state rule repeals have been completed or are in the works.

Regulatory Process Reform

CEI experts do yeoman’s work to document the costs—both overt and hidden—that federal regulation imposes on American families and businesses. In May 2020, CEI released the 27th anniversary edition of *Ten Thousand Commandments*, which shines a light on the large and under-appreciated “hidden tax” of federal regulation. The latest edition concludes that federal regulations cost Americans \$1.9 trillion each year—amounting to nearly \$15,000 per household and exceeding the burden of individual and corporate income taxes combined.

The report, published annually, is widely considered to be the most authoritative accounting of federal regulatory costs, and it is frequently cited by

policymakers, scholars, and the news media alike. Hundreds of reporters, scholars and policymakers, including more than a dozen members of Congress, have cited *Ten Thousand Commandments* to make the case for regulatory policy reform. And Sen. Mike Lee (R-UT) sent a Dear Colleague letter to other senators endorsing it.

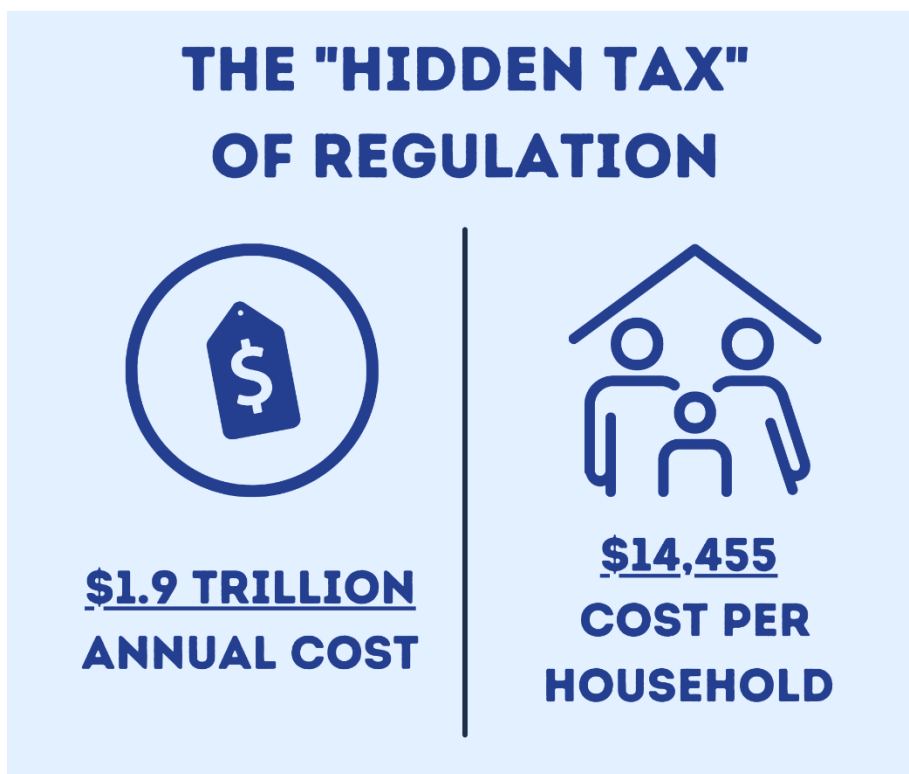
Ten Thousand Commandments, and much of CEI’s other research, also expose the poorly understood phenomenon known as “regulatory dark matter,” the thousands of executive branch and independent agency actions—including guidance documents, memoranda, bulletins, letters, and other edicts—that are not subject to the same procedural rules and

democratic accountability as official regulations, but which often have real, binding regulatory effects. This body of informal policy, known as regulatory “dark matter,” is just one of the many ways that federal agencies avoid accountability to the public and to our elected representatives.

The federal leviathan’s efforts to avoid public scrutiny and accountability, and to evade constitutional and statutory limits on its power, makes CEI’s regulatory reform work all the more important. Our experts work diligently on Capitol Hill, before regulatory agencies, at the White House, and in court to combat these abuses of authority. CEI Vice President for Policy **Wayne Crews** was among the first scholars to draw attention to regulatory dark matter—he even coined the term. And his work has been used as the building block for significant reform efforts.

In 2019, President Trump issued two executive orders to curb the use of guidance documents to implement policy without accountability to Congress or to the public. The White House drew inspiration for the move from a CEI report **Crews** authored several months earlier.

Those orders were roundly applauded by good government advocates on both sides of the political aisle, including former Obama administration regulatory czar Cass Sunstein. Without additional action, though, executive orders can be



only symbolic victories. So, **Crews** and other CEI scholars worked with allies in the Office of Management and Budget and throughout the executive branch to ensure the policies underlying the orders would be carried out.

This past summer, the Department of Health and Human Services and the Environmental Protection Agency, two of the most frequent abusers of regulatory dark matter, both issued proposed

rules to implement the executive orders. The Department of Labor also issued a rule ensuring that significant guidance is subject to notice-and-comment, just like actual regulations.

Center for Technology and Innovation

Antitrust and Competition Policy

While antitrust has long been a mainstay CEI issue, the policy area has risen in prominence in recent years. Critics of large corporations—mainly, though not exclusively, in the computer technology, Internet, and communications fields—on both the political left and right increasingly see the “bigness” of these firms as prima facie evidence of their “badness.” The policy response they propose is more aggressive use of America’s competition and antitrust laws to break up those businesses. On Capitol Hill and in state capitals, both Democrats and Republicans have targeted large technology companies in a string of hearings, proposed legislation to give antitrust enforcers sweeping new powers, and pushed the Federal Trade Commission, Department of

Justice, and state attorneys general to become more aggressive in their prosecution of unpopular firms.

CEI counters the neo-trustbusters’ efforts by raising awareness of the problems and abuses associated with federal and state-led antitrust investigations against technology companies and highly-regulated industries. CEI’s analysis, advocacy, and outreach explain why antitrust regulation actually harms consumers and, ironically, tends to concentrate power in fewer hands while enabling rent-seeking by businesses trying to use regulation to hobble competitors.

To do this, CEI experts have published a series of in-depth studies and shorter briefing papers that explain how antitrust regulation hinders innovation and competition, why large firms are not inherently bad, but often produce efficiencies that benefit consumers, and why regulators and courts should be constrained to enforcing a narrow, consumer harm-oriented standard while meeting substantial burdens of proof, rather than being given license to attack any business

arrangement that is big, new, or politically unpopular.

Our team maintains a dedicated section of CEI’s website (<https://cei.org/antitrust>) to serve as a one-stop resource for readers searching for news, analysis, and reference materials related to antitrust and today’s policy debates on the topic. In addition to housing a library of CEI’s papers, articles, and other materials on antitrust and competition policy, the site contains a helpful “Frequently Asked Questions” section and a bibliography of scholarly studies and other reference materials.

CEI also comments on high-profile antitrust investigations and prosecutions of firms in the technology, telecommunications, transportation, food, and pharmaceuticals industries.

Jessica Melugin, Director of CEI’s Center for Technology and Innovation, wrote numerous op-eds and blog posts, and was interviewed nearly half a dozen times on TV news programs in defense of market competition. Senior Fellow **Mario Loyola** penned an op-ed on the topic for *The Atlantic*. **Melugin**, **Loyola**, and other CEI scholars were frequently cited in major news outlets, including *The New York Times*, *The Washington Post*,



The image shows a screenshot of a Financial Times article snippet. At the top, it says "FINANCIAL TIMES" in a bold, serif font. Below that, there is a sub-header "Big tech" in a smaller font. The main headline reads "Google antitrust case shows the flaws in competition regulation". Underneath the headline, there is a short paragraph: "Enforcement can bring harmful unintended consequences to the consumer and challengers". Below this, the author's name "Jessica Melugin" and the date "OCTOBER 21 2020" are listed. There are also social media icons for Twitter and Facebook. At the bottom of the snippet, there is a short bio: "The writer is associate director of the Center for Technology and Innovation at the Competitive Enterprise Institute." and a short lead-in paragraph: "The US Department of Justice's filing of an antitrust lawsuit against Google on Tuesday reflects growing concern in Washington about the power wielded by big technology companies. But it also highlights some of antitrust regulation's fundamental flaws."

Politico, the *Associated Press*, *Agence France-Presse*, and others on the investigations and litigation against major technology firms.

Free Speech on the Internet

Another of the Center's major focus areas has been to defend the free speech rights of internet platforms against attacks from both the political left and right. Section 230 of the Communications Decency Act of 1996, a once-obscure legal provision, has become a flashpoint for industry critics who have accused online platforms like Twitter, Facebook, Google, and YouTube of everything from blocking access to conservative viewpoints to facilitating terrorism. CEI's work emphasizes how Section 230's protections from meritless litigation helped build the Internet and kept it free and prosperous.

Without the provision, Internet services, from online marketplaces to social media sites and customer review platforms, would have to be either unmoderated cesspools where anything goes or heavily moderated prisons where user-generated content is extremely limited. Contrary to many Section 230 critics, it is the provision's legal protections that make safe and friendly sites that host user-generated content possible. Repealing Section 230 would not promote a greater diversity of voices on social media platforms like Twitter and Facebook; it would in fact be devastating to free expression online.

CEI was very active in 2020, working to educate policymakers, columnists, and reporters on the issue, and our scholars worked to defend Sec. 230 against attacks by both the progressive left and the populist right. They spoke frequently at in-person and online meetings of conservative activists and policy scholars, penned op-eds, articles, and blog posts on the topic, and participated in coalition activities with other free market policy groups.

Telecommunications Policy

CEI scholars also worked closely with the Federal Communications Commission (FCC) to champion moving more spectrum into 'best and highest' use in private hands, clearing the regulatory underbrush that slows broadband deployment and advocating the repeal of outdated media ownership rules. Adjunct Scholar **Ryan Radia** filed comments on CEI's behalf, which helped persuade the Commissioners to consider new bands of spectrum, the 12.2-12.7 GHz, for possible auction.

Center for Technology and Innovation Director **Jessica Melugin** spoke frequently with reporters and appeared on several news programs to support telecom mergers that would position the U.S. more competitively in the international race to 5G. **Melugin** also chronicled the impressive performance of U.S. broadband networks during the pandemic. In addition to authoring a study calling on Congress to take the threat of net neutrality off the table



permanently, she also highlighted the contrast between U.S. network's return to light-touch regulation and Europe's poor network resiliency under heavy-handed, utility-style regulation in a number of shorter articles, op-eds, and blog posts.

Health Policy and the Covid Crisis

The spread of Covid-19 throughout the United States highlighted a number of significant problems in the way health care and medical technologies are regulated in the United States. From lengthy delays in the approval of diagnostic test kits and personal protective equipment for use to certificate-of-need laws and occupational licensing restrictions that prevented clinics and hospitals from adding new capacity, the over-regulation of America's health care system helped turn a disease outbreak into a nationwide medical crisis.

In the midst of this crisis, CEI leveraged its long history of work on medical products regulation and Food and Drug Administration (FDA) reform to advocate for specific changes that will not only help Americans address the pandemic, but also expand consumer access to important health services and medical technologies while improving the country's resilience to future health crises.

One of the first issues we seized on was the FDA's critical failure to allow clinical laboratories across the country to test for Covid in the early days of the outbreak. In ordinary circumstances, the FDA does not require premarket evaluation or approval for so-called laboratory developed diagnostic tests (LDTs). But the Obama administration FDA changed that policy in 2016 and began requiring premarket approval for LDTs during public health emergencies— ironically, when speed of access is most important. At the outset of the Covid pandemic in January and February 2020, when the agency forbade dozens of university- and hospital-based laboratories from producing their own Covid tests, the FDA policy put America's public health response on a back foot and allowed the virus to spread unchecked and unmonitored for months.

CEI Senior Fellows **Joel Zinberg** and **Gregory Conko** helped blow the whistle on the FDA's policy blunder and advocated for repeal of the

premarket approval policy. They highlighted the problem in a series of articles and blog posts, discussed their reform proposal in a widely-viewed webinar, and recommended repeal in a memo and briefing for senior White House staff and in conversations with other senior administration officials. The Department of Health and Human Services (HHS) permanently rescinded the FDA policy in August 2020.

Zinberg has also written broadly on the development of Covid vaccines and the federal government's Project Warp Speed, which helped facilitate more rapid clinical testing and expedited FDA reviews. The Warp Speed concept grew out of a proposal to expedite production of epidemic flu vaccines that **Zinberg** worked on in 2018 and 2019, when he served as General Counsel to the White House Council of Economic Advisors.

CEI Senior Fellow **Michelle Minton** authored a study in May 2020, noting that the Center for Disease Control and Prevention's (CDC) unpreparedness for the pandemic was not caused by underfunding, as CDC officials claimed, but instead by agency mission creep. Rather than focusing on disease control and prevention, the CDC has devoted a significant portion of its resources in recent decades in an attempt to tailor people's lifestyle choices. The CDC's purview has expanded beyond that of infectious diseases into



projects on alcohol consumption, tobacco use, traffic accidents, sports injuries, domestic violence, and gun control. **Minton's** paper argues that this lack of focus has spread thin the agency's resources leaving it unable to complete its core mission adequately.

More recently, **Zinberg** has examined the legal and constitutional basis for mandating vaccination. He has concluded that, although the Supreme Court would most likely permit state governments to mandate Covid vaccination, doing so would raise a number of personal privacy and religious issues. Instead, **Zinberg** has explained why private businesses, non-profit organizations, and civil society institutions have an incentive to promote voluntary vaccination, and why a totally or mostly voluntary approach would be superior to sweeping government mandates.

Center for Energy and Environment

Climate Policy

Climate change and energy restrictions are the defining environmental issues of our time. The recent wave of climate alarmism—embraced not only by environmental activists but also by the mainstream media—has ushered in a corresponding wave of proposals to restrict fossil fuel use and increase renewable energy subsidies. Even though Americans have overwhelmingly rejected the Green New Deal, as introduced in 2019, progressive Democrats have nevertheless committed to implementing something like it, even if doing so requires a more piecemeal approach.

In addition, a growing number of moderate Republicans in the House and Senate want to be seen as “doing something” to combat climate change. Under the direction of House Minority Leader Kevin McCarthy, many have embraced less-sweeping proposals, such as a massive tree planting campaign, tax credits for companies that capture and store carbon dioxide, subsidies for “clean energy” technology, expanded energy efficiency and recycling programs, and even a carbon tax.

While the Republican proposals are, both individually and collectively, much less harmful than the progressive alternatives, they still would cost tens of billions of taxpayer dollars, significantly raise the cost of energy use, and concede environmental activists’ claim that fossil fuel restrictions are

necessary, when in fact they would do more harm than good. Throughout 2020, CEI experts held dozens of conference calls and webinar meetings with allies on Capitol Hill to educate them on the costs and other drawbacks of energy rationing policies, published several short briefing papers and op-eds, spoke before conservative coalition meetings, and worked to educate members of Congress and their key staff.

CEI also leveraged its work as leader of the Cooler Heads Coalition to educate the constituents of moderate politicians who support conservative green proposals and thereby help generate grassroots opposition to those proposals. We worked with state level policy groups and national grassroots advocacy organizations to provide data, talking points, and messaging tips those activists could use in their own direct advocacy.

Late in 2019, CEI Senior Fellow **Patrick Michaels** co-wrote and co-edited the book *Scientocracy: The Tangled Web of Public Science and Public Policy*, which examines a number of recent abuses of science in research areas ranging from nutrition and the opioid crisis to, pollution and global warming. The book documents how the incentive structure in modern science gives rise to systematic problems that include an epidemic of withdrawn papers, bad—even fatal—dietary advice, indefensible policies on

climate change and particulate matter, and confiscation of property because of blatantly politicized science.

A further example of this process is the arbitrary determination of the “social cost of carbon.” In a peer-reviewed paper published in January 2020, **Michaels** and two co-authors showed that less-politicized calculations of the sensitivity of surface temperature to carbon dioxide, plus incorporation of the remarkable amount of planetary greening that is resulting from carbon dioxide, yields a social cost of carbon that is negative, meaning it is a net benefit. The paper, “Climate sensitivity, agricultural productivity and the social cost of carbon,” was published in the journal *Environmental Economics and Policy Studies*.

In July 2019 and February 2020, CEI published two original analyses of what various Green New Deal policies would cost American households in 11 U.S. states. Our research found that the proposals would, on average, cost a typical household more than \$70,000 in additional



energy spending in the first year of implementation alone, with recurring costs of more than \$35,000 each year thereafter. Throughout the spring and summer of 2020, CEI published several additional studies, including a scientific critique of the Obama administration's *National Climate Assessment* by **Michaels** and an extensive analysis of the environmental costs of electric vehicles.

Fuel Economy Standards

Corporate Average Fuel Economy (CAFE) standards raise the price of new vehicles, limit consumer choice, and force automakers to build smaller, less crashworthy cars. CEI has led the opposition to CAFE since the 1980s, and has even gone to court on several occasions to attempt to block proposed increases in the fleet-wide fuel efficiency mandate.

In 1992, a federal appeals court ruled in our favor, holding that the federal government had illegally concealed CAFE's lethal effects. That victory, coupled with our other advocacy work, helped keep CAFE standards stable for nearly two decades, from the mid-1990s until the Obama administration, when the Department of Transportation (DOT) and Environmental Protection Agency (EPA) jointly published rules setting new, higher CAFE standards for model-year 2017 to 2025 cars and light trucks. The EPA also granted a waiver permitting the state of California to set its own, even higher emission mandate for new vehicles.

CEI filed extensive comments with the federal government about the safety effects of stringent CAFE standards. That work paid off when the DOT and EPA proposed the Safer Affordable Fuel-Efficient (SAFE) Vehicles rule, which formally acknowledged CAFE's safety tradeoff for the first time ever. As initially proposed, the rule would have frozen CAFE standards at the model year 2020 levels and rescinded California's authority to regulate fuel efficiency on its own. But, after substantial pushback by Congress, "blue state" governments, and some auto manufacturers, the agencies backpedaled and, in March 2020, partially rolled back the planned increases instead of freezing them.

By relaxing the Obama Administration standards, the SAFE rule will help limit the cost increases that price millions of middle-income households out of the market for new vehicles. But by increasing mandatory fuel efficiency, albeit at a slower pace than the previous policy, the final rule will still result in compromised vehicle safety, as acknowledged in the initial proposal.

Naturally, environmental activists and the state of California filed lawsuits challenging both the withdrawal of the California waiver and the reduced fuel efficiency requirements. CEI anticipated that action, however, and we beat those litigants to the courthouse in filing a legal challenge of our own. Our lawsuit challenges the revised

rule on the grounds that, by mandating tighter fuel efficiency standards, the SAFE rule still gives insufficient weight to vehicle safety concerns. This move will ensure that the legal battle over CAFE addresses the harmful effects of auto fuel standards, not just environmentalists' fear-mongering.

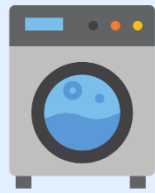
Appliance Efficiency Standards

Although they are generally viewed more as annoyances than major economic drags, government efficiency standards for home appliances are some of the most costly and problematic regulations imposed by Washington. These energy and water efficiency mandates drive up prices and reduce consumer choice. And because "energy efficient" appliances work less well than the products they replace, consumers often compensate in ways that result in greater energy use overall. For that reason, CEI has actively advocated against appliance efficiency standards for more than 30 years. Our advocacy led the Department of Energy (DOE) to roll back or even eliminate several appliance energy efficiency mandates.

For example, the Department granted a CEI petition to partially deregulate its efficiency standards for dishwashers, which had greatly reduced their cleaning ability while more than doubling the time they needed to do their job. Decades ago, dishwashers needed only an hour to clean and dry a load of dishes. Today, a new dishwasher needs nearly 2 and 1/2 hours, and the dishes themselves often

APPLIANCE EFFICIENCY MANDATES ROLLED BACK:

DISHWASHERS WASHER/DRYERS SHOWERHEADS INCANDESCENT LIGHT BULBS



remain dirty. CEI recommended that the DOE create a new class of “fast dishwashers” that could use more water in order to complete a full cycle in sixty minutes or less. And in October 2020, the Department issued its final deregulatory rule doing exactly that.

In August 2020, the Department also published final revised efficiency standards for clothes washers and dryers and for showerheads, both of which directly cited CEI comments. It has also rolled back efficiency standards for incandescent light bulbs, directly citing a CEI coalition comment in the final rule. And, importantly, the DOE has put in place a new procedural rule that forbids the agency from tightening standards in the future unless they yield net energy savings.

Permitting and NEPA Reform

The federal permitting process poses one of the most significant regulatory impediments to economic growth and job creation. Every year, billions of dollars’ worth of private natural resource projects and state, municipal, and private-sector building, engineering, and infrastructure projects are delayed and made costlier by a need to secure federal permits from a range of government bodies.

Even the permits themselves often require permits: The National Environmental Policy Act (NEPA) requires federal agencies that supervise such projects to conduct an environmental assessment to measure every conceivable impact on the natural and built

environments before a federal permit can be granted.

The Trump administration made permitting reform for infrastructure projects one of its earliest and biggest priorities, and in late 2018, the White House Council on Environmental Quality (CEQ) proposed a major re-write of its National Environmental Policy Act permitting regulations. Throughout 2019 and 2020, CEI experts wrote extensively on the problems posed by the broken NEPA process, most notably its effect on several high-profile energy-related projects (such as natural gas pipelines), and its negative consequences for both consumers and businesses. CEI experts also submitted comments on the proposed new regulations and met with CEQ staff and other White House domestic policy advisors to promote our reform proposals.

The Council published its final rule in January 2020. Among other things, it incorporates CEI’s recommendation to clarify key terms in a way that reduces the number and range of projects covered by NEPA. It sets time limits on the conduct of environmental assessments and Environmental Impact Statements, so they do not lead to unnecessary delays. And, where multiple agencies are involved in permitting for a single project, the new rule requires them to agree on a permitting schedule at the outset, so companies and workers have more certainty about the timing of key decisions.

Wetlands Regulation

In 2015, the EPA published a rule expanding the reach of federal wetlands regulation. Known as the Waters of the United States (WOTUS) rule, it expanded the definition of wetlands governed under the federal Clean Water Act to include essentially any land occupied by water at any time, including seasonal pools and drainage channels. The WOTUS rule was an unprecedented power grab that gave the EPA authority to control huge swaths of private property.

A series of Freedom of Information Act (FOIA) requests filed by CEI revealed that the EPA had gamed public comments on the rule by holding secret meetings to “brief stakeholders,” which did not include the rule’s opponents. We also found that the EPA was secretly communicating with environmental groups, such as the Sierra Club, Natural Resources Defense Council, and Earthjustice, through a private email account, essentially doing

the lobbying work for its own regulation.

As CEI and our free market allies advised the administration on ways to structure a replacement for the WOTUS rule, this information helped bolster the legal justification for rescinding it in the first place. Our efforts paid off when the Environmental Protection Agency published its replacement, the Navigable Waters Protection rule, in January 2020.

EPA Science and the IRIS Program

In 2016, the EPA’s Integrated Risk Information System (IRIS), a program that is supposed to estimate the risk of various substances, released a highly flawed assessment of the chemical ethylene oxide (EtO), a gas critical to medical equipment sterilization. That risk assessment proposed a limit on EtO use that was 5 million times more stringent than the scientific judgements underlying all other regulatory limits on EtO. As a result, several states and localities shut down medical supply sterilization plants within

their jurisdictions out of unjustified fear. The shutdown of these plants contributed significantly to the shortage of medical supplies during the Covid pandemic.

CEI led the charge for reform as one of the few non-industry voices on this topic, helping to define the issue for allies and others not familiar with the scientific research on EtO. Senior Fellow **Angela Logomasini** published three papers and several op-ed articles and blog posts, receiving positive feedback from EPA officials, industry allies, and scientists looking to reverse the IRIS assessment. She also spent a considerable amount of time informing members of Congress and congressional staff on the facts when legislative action was proposed.

Importantly, CEI not only helped forestall additional ethylene oxide restrictions, we also helped build the case for IRIS reform. Despite the change in administration, we will continue to advance that issue in 2021.

Center for Economic Freedom

Banking and Finance

A well-functioning financial system helps match investors with enterprises to supply needed capital to new and growing firms. It also helps consumers address problems related to the timing of cash flow by making credit available to finance needed purchases. When the system works well, investors

enjoy opportunities to share in the wealth creation their investments make possible, and the health of well-capitalized businesses redounds to the benefit of their employees and customers.

Too often, though, paternalistic regulation of America’s capital markets prevents innovative investment methods from taking

hold and forbids many investors and borrowers from participating in financial transactions that regulators deem too risky. Ironically, regulation and government subsidies often simultaneously incentivize imprudent risk-taking by investors by promising—explicitly or implicitly—that taxpayers will bail out their losses.

CEI seeks to liberalize financial regulation by enabling greater innovation in investment mechanisms, reducing paternalistic limits on who can invest, and removing the overt and implicit subsidies that incentivize bad investments. For example, we have long supported broadening a Securities and Exchange Commission (SEC) exemption that permits individuals to invest in non-publicly-traded corporate stocks, which are free of the regulatory burdens imposed by laws like the Sarbanes-Oxley and Dodd-Frank Acts, which public companies face. For decades, this exemption has been available only for wealthy investors, limiting opportunities for the middle class to build wealth.

In June 2019, when the SEC proposed to liberalize this exemption by expanding who may qualify as an “accredited investor,” CEI leapt at the opportunity to support the proposal. Senior Fellow **John Berlau** coordinated activities with SEC Commissioners Hester Peirce and Elad Roisman to support the effort among free market advocates. He wrote several op-eds and blog posts touting the democratization of wealth creation that the revision would allow, and he offered advice and information to allied organizations that lack specialized expertise in the area.

Given the Commission’s general support for liberalization, we were caught off-guard when, in January 2020, SEC Chairman



Jay Clayton proposed a new rule to restrict investment in several widely available exchange-traded funds because the Commission deemed their risk management practices too risky for ordinary investors. The proposal ran counter to the SEC’s proposed “accredited investor” liberalization. In response, CEI worked to prevent the new rule from being finalized. **Berlau** penned well-received op-eds in *The Wall Street Journal*, *Forbes*, *RealClearMarkets.com*, and elsewhere. CEI submitted comments to the administrative docket, and **Berlau** helped generate opposition to the proposal among free market allies.

Ultimately, we were pleased when the SEC finalized its liberalized “accredited investor” regulation in August 2020. We were also generally satisfied when a sharply divided Commission finalized the proposed exchange-traded funds rule with the most paternalistic provisions omitted.

Labor and Employment Policy

Widespread Covid-19 lockdowns created drastic shifts in labor and employment practices across the country as many businesses struggled to shift to remote work or downsize to match a drastic decrease in demand. Unfortunately, attempts by American businesses and employees to adapt were greatly hindered by complex regulations. That provided a target-rich environment for CEI’s employment policy research and advocacy, led by Research Fellow **Sean Higgins**.

Among CEI’s most significant targets in recent years have been union-backed efforts to stymie the growing “gig economy” by making it more difficult for businesses to hire independent contractors instead of employees. This was a featured element of the Democrat-supported Protect the Right to Organize Act, which CEI helped defeat in the House of Representatives in 2019. But unions and their allies have had



more success implementing such policies at the state level.

Front and center in the national debate this past year was California’s Assembly Bill 5 (AB5). The legislation undermines the gig economy business models of companies like Uber, Lyft, TaskRabbit, and GrubHub. But in legislatively reclassifying nearly all independent contractors as employees, it hit thousands of workers in other occupations, including news reporters and other freelance writers, website and graphic designers, and even workers in the Hollywood movie and television industries.

The law jeopardized millions of jobs, and many workers lost flexible-hour arrangements they valued more than the benefits of full-time employment. AB5 also complicated the Covid-19 response by outlawing the flexibility of piecemeal and work-from-home jobs, and by

exacerbating production and delivery shortages at a time the government of California was encouraging or ordering residents to stay at home.

Higgins helped expose the many problems created by AB5 and other state and proposed federal laws like it. He penned nearly a dozen op-eds featured in major media outlets; wrote a prolific array of blog posts; and frequently commented on television and radio news programs. In the November 2020 election, California voters approved a ballot initiative to repeal several of the most egregious AB5 provisions by a landslide.

Consumer Freedom

Many consumer product regulations imposed in the name of safety are really paternalistic efforts to control consumer purchasing habits, which needlessly limit individual freedoms. During the Covid-19 pandemic, many of these regulations—such as restrictions on the production, shipping, and sale of alcoholic beverages, which often date to the post-Prohibition era—that normally would only inconvenience Americans became serious problems. Rules restricting home delivery of small quantities of alcohol, requiring some types of alcoholic beverages to be sold only in bars

and restaurants, and restrictions and tax policies that prevented beverage distilleries from making and selling alcohol for use in disinfectants and hand sanitizers, gave rise to product shortages and prevented small businesses from adapting to social distancing and stay-at-home orders.

Many states and the federal government temporarily suspended some of these laws to help restaurants and bars through state-mandated lockdowns. However, CEI made the case that these laws should not only be suspended but repealed entirely. CEI Senior Fellow **Michelle Minton** authored dozens of articles and blog posts, and worked with state-level allies to support their direct advocacy efforts by supply intellectual ammunition and data. Several states that adopted emergency liberalization measures later took steps to make their alcohol law liberalization more permanent. For example, Georgia passed a bill allowing home delivery of beer, wine, and spirits, while Mississippi became the 47th state to allow direct-to-consumer wine shipping. In addition, the legislatures in New Jersey and Illinois passed bills to make to-go alcohol permanently legal.

Center for Advancing Capitalism

Capitalism has been the most dynamic force for economic progress in history, raising billions of people out of poverty,

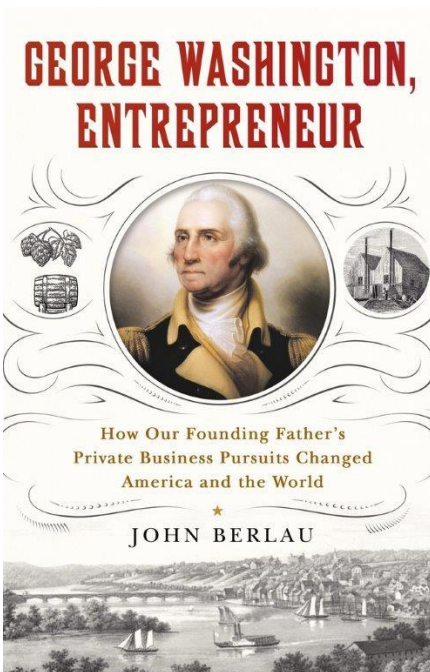
and delivering unprecedented human flourishing. But around the globe, capitalism is under attack. Especially in a world

where people suffer due to a global pandemic and the economic downturn caused by unprecedented business

lockdowns, people are increasingly drawn to socialism and other anti-capitalist ideologies. Instead of defending their own value, however, many business leaders often bow to anticapitalistic pressures.

During the past year, the Center for Advancing Capitalism took both of these trends head on. CEI debunks the growing mythology that capitalism is exploitative, that it is imbued with systemic bias, and that it is leaving a less healthy, less fair, and less productive world to future generations.

In 2020, CEI scholars released two highly acclaimed books, *The Socialist Temptation* and *George Washington, Entrepreneur*. In the former, CEI Vice President for Strategy **Iain Murray** develops an argument that these attacks on capitalism are occurring because of a global political realignment that sees identity as more



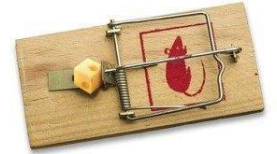
important than economics. In the latter, Senior Fellow **John Berlau** demonstrates many of capitalism's virtues by detailing the first president's entrepreneurialism and illustrating how capitalism was key to the birth and early growth of the country. The books were positively mentioned and reviewed in *The Wall Street Journal*, *National Review*, and *Forbes*, among other media outlets.

The Socialist Temptation and *George Washington, Entrepreneur* are useful and important contributions to the two different angles of the Center for Advancing Capitalism's work: a) rebutting the arguments for greater government control of economic decisions and b) making the positive case for the virtuous and inspiring results of hard work and innovation.

The Center's other major focus area during the past year has been to publish a significant amount of material on corporate governance and politicized investing. In particular, CEI scholars have examined and critiqued the movement for "environmental, social, and governance" (ESG) requirements in finance, practices that pose a direct threat to the property rights of investors and to the market economy itself. CEI Research Fellow **Richard Morrison** published op-eds and articles on the topic in *National Review*, the *Washington Examiner*, and *Inside Sources*. He also has had reviews of recent economics books

THE SOCIALIST TEMPTATION

IAIN MURRAY



published in *Reason* and the *Cato Journal*, and by the Foundation for Economic Education.

The Center also produced analyses of two ESG- and corporate governance-related proposed rules by the Department of Labor: "Financial Factors in Selecting Plan Investments" and "Fiduciary Duties Regarding Proxy Voting and Shareholder Rights." The Center's public interest comments supported the Department's effort to rein in politically-motivated pension fund activism that threaten the investment security of millions of American workers and retirees. **Morrison** explained that the rules merely clarify the fiduciary duty already mandated under existing law. Pension fund fiduciaries must invest for the sole benefit of their beneficiaries, not to advance their own (or some other third-party's) political preferences.

Center for Law and Litigation

Abuse of the FCC's Merger Review Authority

In one of CEI's most interesting recent cases, we helped vindicate the rule of law and struck a blow against abuses of regulatory power by the Federal Communications Commission (FCC). Five years ago, the FCC approved the merger of Time Warner and two other cable companies, but only conditioned on the merged firm's compliance with several FCC requirements, such as offering low-income broadband service and agreeing to never institute usage-based pricing.

The firms themselves felt unable to object, but CEI saw this move as an effort by the agency to extend its authority far beyond the power Congress gave it. So, we filed suit on behalf of several customers whose service had suffered as a result. And in August 2020, the U.S. Court of Appeals for the D.C. Circuit ruled in CEI's favor. The decision was not only a victory

for regulated businesses and their customers, but an important victory for the rule of law. The Court of Appeals agreed with us that the FCC's abuse of its authority was troubling, and that imposing conditions that are not germane to a merger amounts to extortion.

Consumer Financial Protection Bureau and Separation of Powers

CEI also helped vindicate the rule of law in another case this past year, though less directly. In 2012, we initiated a constitutional challenge to the Consumer Financial Protection Bureau (CFPB), arguing that the Bureau's structure as an independent agency insulated from congressional and executive branch oversight violates the Constitution's separation of powers and presidential appointment provisions, and therefore that the agency should be dissolved.

Following a series of proceedings at the federal district court and

court of appeals, the U.S. Supreme Court accepted a companion case, *Seila Law v. CFPB*, instead of CEI's legal challenge (likely, we believe, because Justice Kavanaugh heard CEI's case at the D.C. Circuit and would therefore have had to recuse himself if the high court took our appeal).

Still, CEI submitted a well-received amicus brief in the *Seila Law* case, and our legal team helped persuade the Department of Justice to soften its opposition and concede that one aspect of the CFPB's structure was unconstitutional. In June 2020, the Supreme Court agreed that an agency headed by a single director, rather than a multi-person board with bi-partisan representation, cannot have a director insulated from oversight by the president. The court cited precedent from an earlier CEI Supreme Court case, *Free Enterprise Fund v. PCAOB*, to reach that determination.

Wealth Taxes and the Constitution

In what may turn out to be one of CEI's most significant legal cases to date, we are now challenging the constitutionality of the Mandatory Repatriation Tax, part of the comprehensive tax reform legislation of 2017. The law taxes American citizens who own stock in certain foreign corporations on the estimated value of those companies' accumulated earnings, even if the earnings are never distributed as dividends to shareholders and even if they do not sell their stock.

6 FEDERAL CASES ADVANCED WITH CEI AS LITIGANT OR AMICI

1 LANDMARK VICTORY



Taxing shareholders for a business' undistributed earnings (in essence, a tax on the increased value of the company) amounts to a direct tax on property or wealth. The U.S. Constitution generally forbids direct taxes—though the 16th Amendment provides a single exception for direct taxes on income. The Repatriation Tax attempts to expand that exception significantly through the legal fiction of “deeming” a company's increased value to be income. Defeating the tax would not only enforce an important constitutional limitation on Congress' taxing power, it would reinforce constitutional arguments against the kind of national wealth taxes or property taxes favored by many progressives.

CEI filed the case, *Moore v. United States*, in September 2019 in the U.S. District Court in Seattle. In November 2020, the judge granted the IRS's motion for summary judgement on the grounds that that the Supreme Court's distinction between taxes on property and on income—laid out in a seminal 1920 decision and reaffirmed as recently as 2012—has been eroded by several federal appeals courts. In the court's view, it is therefore

permissible for Congress and the IRS to treat retained earnings of foreign corporations as taxable income. When CEI initiated the case, we anticipated the need to litigate it all the way to the U.S. Supreme Court, and we appealed the district court's decision in January 2021.

New York and the Trusted Traveler Program

Following perceived abuses of federal immigration enforcement, the state of New York decided to stop assisting with the enforcement immigration laws. New York cut off the Department of Homeland Security's (DHS) access to the New York DMV records unless the DHS agreed not to use the records for immigration enforcement. In response, the agency barred all New Yorkers from enrolling in Trusted Traveler programs like Global Entry. The DHS claimed that, without access to New York's DMV records, it would no longer be able to safely vet New York applicants for programs that allow prescreened individuals to quickly pass through domestic TSA checkpoints and customs.

CEI has had a long history of supporting federalism and decentralized decision making.

While we do not take a position on whether New York (or any state), as a matter of policy, should or should not assist the federal government in enforcing federal immigration laws, we believe states should retain the power to make that choice free of unjustified retaliation and coercion.

In July 2020, CEI filed an amicus brief opposing the DHS motion. We argued that Congress required DHS to establish Trusted Traveler programs using “security threat assessments” and that citizens have the right to ensure that DHS is doing what Congress instructed it to do. The federal government remains free to enforce federal immigration laws, but it cannot coerce New York into assisting it in doing so by threatening New York citizens' access to these programs.

Less than a week after CEI filed our brief, the DHS agreed to allow New Yorkers back into the Trusted Traveler program. DHS also admitted that several of the assertions by DHS on the inability to safely vet applicants were inaccurate.

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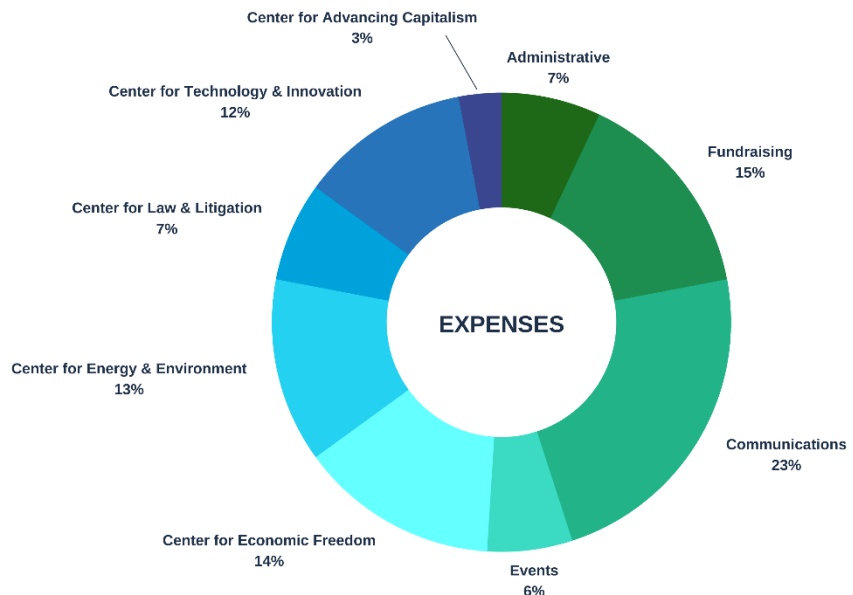
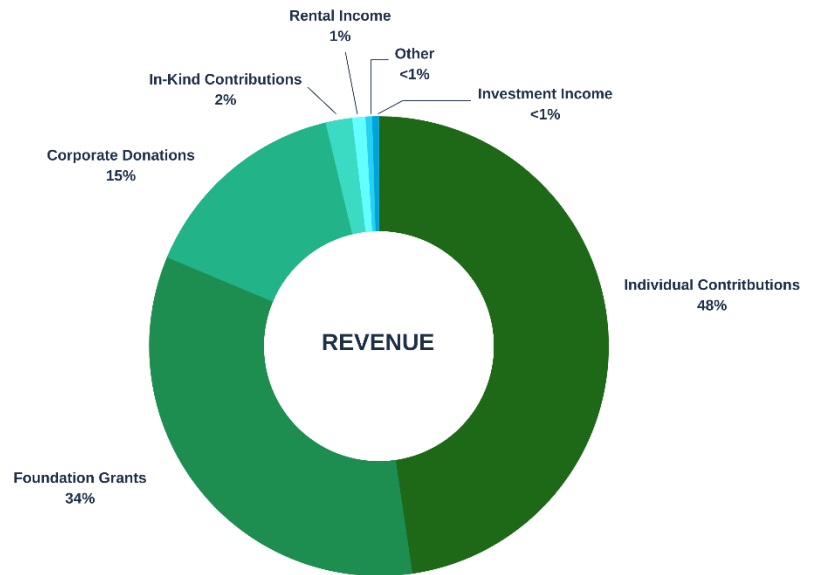
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