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An Administrative Solution to the Student Loan Debt Crisis

Justin C. Van Orsdol

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An Administrative Solution to the Student Loan Debt Crisis

Justin C. Van Orsdol*

Abstract

To say that the student loan debt crisis is out of control is a massive understatement. Although solutions such as Public Service Loan Forgiveness and the recent temporary payment/interest rate freeze have provided some relief for borrowers, more can be done. Of course, as with any large outlay of taxpayer dollars, opposition is sure to be heated. Given the current political climate, the likelihood of any legislative fixes seems unlikely.

But what if there was an administrative solution that could do more to address this crisis without the cost of the legislative process? This essay proposes such a solution. It explains how, through an executive order and changes in the Federal Acquisition Regulation, the Government can provide additional relief to the 5.3 million people who work for federal contractors. Further, this essay explains why such an approach might be more advantageous than traditional legislation and counters likely rebuttals.

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“Out of student loans and treehouse homes, we all would take the latter.”¹—Twenty One Pilots

I. INTRODUCTION

Student loan debt has hobbled college graduates for decades—graduates who were sold a promise of a fiscally secure future² but now face snowballing debt.³ Today, “[t]he student loan debt crisis affects over 43 million Americans. . . . [who] owe a total of \$1.75 trillion in federal and private student loan debt combined.”⁴ Of those 43 million, nearly 12.4% are delinquent on their loans as of March 2020.⁵

1. TWENTY ONE PILOTS, *Stressed Out*, on BLURRYFACE (Fueled by Ramen 2015).

2. See John Ringer & Meghna Chakrabarti, *The Federal Government’s Role in Causing and Fixing the Student Debt Crisis*, WBUR (May 2, 2022), <https://perma.cc/JQU3-A5KR> (explaining that President Johnson credited his college education “with helping him escape the crushing poverty of his upbringing” and the “so-called college wage premium”).

3. See Ward Williams, *Student Loan Debt by Age*, INVESTOPEDIA (Feb. 17, 2022), <https://perma.cc/D5GB-ZS2H> (noting the average student loan debt balance by various age groups).

4. Melanie Hanson, *Student Loan Debt Crisis*, EDUC. DATA INITIATIVE (Jan. 5, 2022), <https://perma.cc/2CCN-KZFS>.

5. *Id.*

Congress and multiple presidents have sought to reduce this burden with varying degrees of success. One of the first forms of student loan debt relief predates the problem itself in the form of the Servicemen's Readjustment Act of 1944, "more commonly known as the GI Bill of Rights or the GI Bill."⁶ After the enactment of the Higher Education Act of 1965, which created Sallie Mae, student loan debt began to spiral out of control in the late 1980s to early 1990s.⁷

Over time, other reforms were implemented. 1973 saw the Basic Educational Opportunity Grant,⁸ now known as the Pell Grant, which lessened the amount low income students need to borrow for college.⁹ In 1992, the Higher Education Act was amended to create the Free Application for Federal Student Aid (FAFSA) and the unsubsidized Stafford Loan Program; together, these amendments increased loan limits and opened eligibility for students to take out student loans.¹⁰ In 2001, President George W. Bush signed into law the Economic Growth and Tax Relief Reconciliation Act.¹¹ This act made "student loan payments tax-deductible for borrowers."¹²

Six years later, the College Cost and Reduction Access Act created the income-based repayment and the infamous public service loan forgiveness (PSLF) program.¹³ To assist borrowers

6. Robert F. Muth, *Scam Schools: The Cyclical Abuse of Veterans by For-Profit Institutions*, 90 UMKC L. REV. 597, 597 (2022).

7. See Phil Izzo, *Number of the Week: Class of 2013, Most Indebted Ever*, WALL ST. J. (June 19, 2013, 10:52 AM), <https://perma.cc/T8VL-VLTE> (graphing the average debt per borrower by graduating class).

8. U.S. DEPT OF EDUC., BASIC EDUCATIONAL OPPORTUNITY GRANT PROGRAM END-OF-YEAR REPORT 1 (1974), <https://perma.cc/MY5T-P2RJ> (PDF).

9. See Dori Zinn, *Pell Grants: A simple Guide to Understanding Them*, STUDENT LOAN HERO (Feb. 22, 2021), <https://perma.cc/V9PN-47L6> ("The Pell Grant is a federal grant that's awarded to students with financial need.").

10. See Mark Pitsch, *Bush Clears H.E.A. Reauthorization; Law Increases Aid, Expands Eligibility*, EDUC. WEEK (Aug. 5, 1992), <https://perma.cc/WEJ8-JP8B> ("The bill increases loan limits to \$2,625 annually for first year students . . . [and,] for the first time, students will be eligible for unsubsidized federal loans.").

11. Andrew Pentis, *The History of Student Loans (and How to Avoid Repeating It)*, STUDENT LOAN HERO (June 25, 2021), <https://perma.cc/Q3JP-WC4D>.

12. *Id.*

13. College Cost Reduction and Access Act, H.R. 2669, 110th Cong. (2007). Although not covered in this essay, another solution would be to extend

with abusive and deceptive student loan providers, among other things, President Obama established the Consumer Financial Protection Bureau when he signed the 2011 Dodd-Frank Wall Street Reform and Consumer Protection Act.¹⁴ Finally, in 2015, the Department of Education launched the Revised Pay as Your Earn (REPAYE) method, which revitalized the income-based repayment plans by capping monthly payments at ten percent of income and granting forgiveness after two decades of timely payments.¹⁵

Then in March of 2020, the COVID pandemic hit the United States.¹⁶ Out of the devastation of the pandemic, two silver linings have emerged. First, on March 27, 2020, President Trump signed the CARES Act, which “helped most federal student loan borrowers by temporarily pausing payments and involuntary collections on federally held student loans.”¹⁷ The CARES Act has been extended several times since President Biden assumed office,¹⁸ saving “nearly \$100 billion . . . in foregone interest payments.”¹⁹ Second, the pandemic increased pressure to revitalize student loan debt forgiveness and reform.

the PSLF program to federal contract employees, as PSLF contract employees “usually don’t qualify for PSLF.” Michael Lux, *Student Loan Forgiveness for Government Contractors*, STUDENT LOAN SHERPA (July 23, 2021), <https://perma.cc/3BV3-GVXF>.

14. See *Wall Street Reform: The Dodd-Frank Act*, OBAMA WHITEHOUSE ARCHIVES, <https://perma.cc/H7ZM-ZR8M> (last visited May 10, 2022) (explaining that CFPB “launched a model financial aid disclosure form . . . to help students better understand the type and amount of aid they qualify for and easily compare aid packages”).

15. See *Negotiated Rulemaking for Higher Education 2014–2015*, U.S. DEPT OF EDUC., <https://perma.cc/QH9C-376S> (last visited May 10, 2022) (“The Secretary proposes to amend the regulations governing the . . . Direct Loan Program to create a new income-contingent repayment plan in accordance with the President’s initiative to allow more Direct Loan borrowers to cap their loan payments at 10 percent of their monthly incomes.”).

16. See *COVID-19 Timeline*, CDC, <https://perma.cc/2WT2-EQWA> (last updated Jan. 5, 2022) (providing a timeline of notable events related to COVID-19 in the United States).

17. Meghan Lustig, *Coronavirus Student Loan Relief: Borrow Update*, U.S. NEWS (Apr. 8, 2022, 4:24 PM), <https://perma.cc/U9Z7-XZ5J>.

18. See Abigail Johnson Hess, *Experts, Lawmakers Call for Biden to Push Back the Return of Student Loan Payments—Again*, CNBC MAKE IT (Dec. 8, 2021, 1:07 PM), <https://perma.cc/9UBS-GR6K> (“Both Presidents Trump and Biden extended the moratorium . . .”).

19. *Id.*

With Senators Elizabeth Warren and Chuck Schumer lobbying for cancellation up to \$50,000 and Biden contemplating cancelling \$10,000, some additional relief may be in sight.²⁰

As exciting as these proposals are, support for student debt relief is mixed among both political parties. Liberal politicians critique these proposals as not going far enough,²¹ while conservatives oppose the relief altogether calling them “an insult to every American who responsibly paid debts.”²² What if, however, there was another way to solve the student loan debt crisis? A way that would potentially increase forgiveness at higher limits than those proposed but without raising taxes, or without “insulting” those who have paid their loans? There may be an administrative law solution in the form of an executive order and an additional set-aside program in federal contracts.

This essay first explains some of the popular set-aside programs and the use of executive orders in federal contracting and how a similar program or order, modeled after them, could provide much-needed relief to borrowers without the drawbacks of legislation. Next, the essay explores what an executive order and set-aside program would look like, how they would be established, and how they would function. Last, this essay explores and rebuts potential pushback and problems.

II. SET-ASIDE PROGRAMS & THE USE OF EXECUTIVE ORDERS TO IMPOSE REQUIREMENTS ON FEDERAL CONTRACTORS

According to the Government Accountability Office, “the federal government spent more than \$665 billion on contracts”

20. See Alex Thompson, Michael Stratford & Max Tani, *The Harris-Biden Student Debt Divide*, POLITICO (May 4, 2022, 6:06 PM), <https://perma.cc/YY7D-KAPQ> (noting Sen. Warren and Schumer’s proposal); see also Madeline Halpert, *Biden May Cancel At Least \$10,000 Of Student Loan Debt For Some Individuals, Report Says*, FORBES (Apr. 29, 2022, 1:05 PM), <https://perma.cc/C4L7-9C3C> (“The Biden administration may forgive at least \$10,000 of student loan debt for some individuals . . .”).

21. See Jeff Stein, *White House Official Weigh Income Limits for Student Loan Forgiveness*, WASH. POST (Apr. 30, 2022, 6:00 AM), <https://perma.cc/6QZ4-PHZP> (noting that Rep. Ocasio-Cortez “expressed concern that \$10,000 would not amount to meaningful improvement for many people”).

22. Zack Friedman, *Republicans Call Student Loan Relief ‘Outrageous’ and an ‘Insult’*, FORBES (Apr. 7, 2022, 8:30 AM), <https://perma.cc/A7QW-FGZ7>.

in fiscal year 2020 alone.²³ For those unfamiliar, a healthy percentage of federal contracting dollars are reserved for small business and special interest groups.²⁴ The Small Business Administration and other federal agencies promulgate set-aside rules in the Federal Acquisition Regulation (FAR) via notice-and-comment rulemaking.²⁵ These set-aside rules establish dollar thresholds and goals to assist special interest groups and ensure that they get a share of contracting dollars.²⁶ For example, contracts between \$3,500 to \$150,000 are set aside automatically and exclusively for small business, which range in size by annual revenue and number of employees depending upon the North American Industry Classification System (NAICS) code of the items/services being procured by the agency.²⁷ Such programs include the 8(a) Program (minority owned businesses), HUBZone Program (geographically challenged businesses), Service-Disabled Veteran-Owned Small Business Procurement Program, and the Women-Owned Small Business Program.²⁸ Above the simplified acquisition threshold of \$150,000, federal contractors generally are required to have their own small business contracting plans detailing how much of the contract award they intend to subcontract and how they intend to execute their plan.²⁹

23. *A Snapshot of Government-Wide Contracting for FY 2020*, U.S. GOV. ACCOUNTABILITY OFF. (June 22, 2021), <https://perma.cc/6AEW-VZDK>.

24. *See Set-Asides and Special Interest Groups*, U.S. GEN. SERVS. ADMIN., <https://perma.cc/3GXH-EUVR> (last visited May 7, 2022) (explaining the different set-aside programs).

25. *See, e.g.*, Federal Acquisition Regulation: Small Business Program Amendments, 87 Fed. Reg. 10327 (proposed Feb. 24, 2022) (noting proposed changes to certain set asides for the DoD, GSA, and NASA).

26. *See* 48 C.F.R. *et seq.* (2022) (outlining the Federal Acquisition Regulations System).

27. *See* FAR 19.102(a)(1) (2014) (The Small Business Administration “establishes small business size standards on an industry-by-industry basis. Small business size standards and corresponding [NAICS] codes are provided in 13 C.F.R. § 121.201.”); *see also id.* § 19.203(b) (requiring that contracts between the micro-purchase threshold and the simplified acquisition threshold are reserved to these special interest groups).

28. FAR 19.203(a) (2020).

29. *See* FAR 52.219-9(c)(1) (2013) (requiring offerors to “submit and negotiate a subcontracting plan . . . that separately addresses subcontracting with small business, veteran-owned small business, service-disabled

Federal contractors are subject to additional requirements by way of executive orders. In 2021, for instance, President Biden issued Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, which required federal contractors and their subcontractors to comply with COVID safeguards.³⁰ The same year, President Biden issued an executive order that increased the minimum wage for federal contractors, which became effective in January 2022.³¹ Likewise, on March 15, 2022, President Biden issued Executive Order on Advancing Economy, Efficiency, and Effectiveness in Federal Contracting by Promoting Pay Equity and Transparency.³² This executive order directs the Federal Acquisition Regulatory Council and other executive department heads to “consider issuing proposed rules to promote, economy, efficiency, and effectiveness . . . by enhancing pay equity and transparency for job applicants and employees of Federal contractors and subcontractors.”³³

Given the billions spent annually by the federal government, these set-aside programs and executive orders effect impacting change for large numbers of the American workforce. This is especially true in the aftermath of the Trump administration, which saw the number of contractors working for the federal government rise “from about 3 million in 1996 to 4.1 million in 2017.”³⁴ President Biden’s most recent executive

veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns”).

30. See SAFER FEDERAL WORKFORCE TASK FORCE COVID-19 WORKPLACE SAFETY: GUIDANCE FOR FEDERAL CONTRACTORS AND SUBCONTRACTORS 1–2 (Sept. 24, 2021), <https://perma.cc/YN28-EZYP> (PDF) (outlining guidance for COVID-19 workplace safety compliance).

31. See *Final Rule: Increasing the Minimum Wage for Federal Contractors (Executive Order 14026)*, U.S. DEPT OF LABOR, <https://perma.cc/NU32-CM3C> (announcing the Biden administration’s executive order raising minimum wages).

32. See Press Release, The White House, Executive Order on Advancing Economy, Efficiency, and Effectiveness in Federal Contracting by Promoting Pay Equity and Transparency (Mar. 15, 2022), <https://perma.cc/P2L5-VQFA> (stating that the Biden administration’s policy is to “eliminate discriminatory pay practices”).

33. *Id.*

34. Janet Nguyen, *The U.S. Government is Becoming More Dependent on Contract Workers*, MARKETPLACE (Jan. 17, 2019), <https://perma.cc/G8P9-98N3>; see also Neil Gordon, *Contractors and the True Size of Government*, POGO

order raising the minimum wage for federal contractors to \$15 an hour is estimated to give nearly 390,000 low-wage federal contractors a \$3,100 annual raise.³⁵ And many federal contractors—especially those who provide products and services for the Department of Defense—employ college educated employees.³⁶ This provides a prime opportunity to tackle student loan debt by implementing an executive order and/or new rules to FAR requiring federal contractors to offer employee federal student loan repayment.³⁷

III. THE PROPOSAL

My proposal to mitigate the student loan debt crisis is twofold: (1) the issuance of an executive order and (2) the creation of a new set-aside program.

A. *The Executive Order*

First, the president should issue an executive order requiring all federal contractors who classify as large businesses under applicable NAICS codes to pay at least \$10,000 per year

(Oct. 5, 2017), <https://perma.cc/VW7B-6HGQ> (“Four out of every ten people who work for the U.S. Government are private contractors.”).

35. See Heidi Shierholz & Ben Zipperer, *EPI Comments on Proposal to Increase the Minimum Wage for Federal Contractors*, ECON. POL’Y INST. (Aug. 27, 2021), <https://perma.cc/J53A-ANJK> (“We estimate that as many as 390,000 low-wage federal contractors will see a raise under this policy, with the average annual pay increase for affected year-round workers being up to \$3,100.”).

36. See CONG. RESEARCH SERV., DEFENSE PRIMER: DEPARTMENT OF DEFENSE CONTRACTORS 1 (Dec. 17, 2021), <https://perma.cc/4KRB-A852> (PDF) (listing the top five defense contractors); see also *Careers*, LOCKHEED MARTIN, <https://perma.cc/A56Y-6KQM> (explaining Lockheed’s various student programs open to engineering and other majors); *Students and Entry Level*, NORTHROP GRUMMAN, <https://perma.cc/R53S-RA2Z> (last visited May 7, 2022) (listing many of the positions as requiring a bachelor’s or master’s degree).

37. Although outside the scope of this essay, states could also do the same through state contracts. See, e.g., Exec. Order No. 151, State of New Jersey, <https://perma.cc/9LUC-LLCC> (establishing an executive order to direct the use of funds from the American Recovery and Reinvestment Act of 2009 among small and minority owned businesses); Exec. Order No. 162, State of New York, <https://perma.cc/SL6R-W3KF> (PDF) (ensuring pay equity among state contractors).

of each employees student loan debt.³⁸ The executive order, which would be modeled after the order that established a \$15 hour minimum wage³⁹ would read as follows:

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Property and Administrative Services Act, 40 U.S.C. 101 *et seq.*, and to promote economy and efficiency in procurement by contracting with sources who adequately compensate their workers, it is hereby ordered as follows:

Section 1. Policy.

This order seeks to increase efficiency and cost savings in the work performed by parties who contract with the Federal Government by paying off qualifying student loan debt of employees at the rate of \$10,000 per year.⁴⁰ Paying the student loan debt of workers increases their morale and the productivity and quality of their work, lowers turnover and its accompanying costs, and reduces supervisory costs. These savings and quality improvements will lead to improved economy and efficiency in Government procurement.

Section 2. Student loan debt payment program for Federal contractors and subcontractors.

(a) Executive departments and agencies shall, to the extent permitted by law, ensure that new contracts, contract-like instruments, and solicitations (collectively, contracts), as described in section 6 of this order, include a clause, which the contractor and any subcontractors shall incorporate into

38. Note that the amount per year could be changed to whatever the President felt was appropriate. I use \$10,000 per year because President Biden's current proposal is a one-time \$10,000 forgiveness.

39. See generally *Increasing the Minimum Wage for Federal Contractors*, 86 Fed. Reg. 67126 (Nov. 24, 2021) (to be codified at 29 C.F.R. pts. 10, 23).

40. Further notice-and-comment rulemaking would need to establish the definition of "qualifying employee." I propose that "qualifying employee" includes any employee with at least a bachelor's degree and student loan debt exceeding \$10,000 who has worked for a covered employer for at least one year and agrees to work one year for each \$10,000 payment. Employers should also be free to require repayment of any student loan debt on a *pro rata* basis if the employee leaves before each year period, similar to claw-back provisions provided by law firms for repayment of signing or clerkship bonuses.

lower-tier subcontracts, specifying as a condition of payment that their employees' student loan debt will be paid, including workers whose wages are calculated pursuant to special certificates issued under 29 U.S.C. § 214(c), in the performance of the contract or any subcontract thereunder, shall be at least:

(i) \$10,000 per year beginning January 1, 2023; and

(ii) beginning January 1, 2024, and annually thereafter, an amount determined by the Secretary of Labor (Secretary). The amount shall be published by the Secretary at least 90 days before such new student loan debt repayment is to take effect and shall be:

(A) not less than the amount in effect on the date of such determination;

(B) increased from such amount by the annual percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers (United States city average, all items, not seasonally adjusted), or its successor publication, as determined by the Bureau of Labor Statistics; and

(C) rounded to the nearest multiple of \$0.05.

(b) In calculating the annual percentage increase in the Consumer Price Index for purposes of subsection (a)(ii)(B) of this section, the Secretary shall compare such Consumer Price Index for the most recent month, quarter, or year available (as selected by the Secretary prior to the first year for which a minimum wage is in effect pursuant to subsection (a)(ii)(B)) with the Consumer Price Index for the same month in the preceding year, the same quarter in the preceding year, or the preceding year, respectively.

(c) Nothing in this order shall excuse noncompliance with any applicable Federal or State prevailing wage law, or any applicable law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this order.

Section 3. *Regulations and Implementation.*

(a) The Secretary shall issue regulations by January 1, 2023, to the extent permitted by law and consistent with the requirements of the Federal Property and Administrative Services Act, to implement the requirements of this order, including providing exclusions from the requirements set forth in this order where appropriate. To the extent permitted by law, within 60 days of the Secretary issuing such regulations, the

Federal Acquisition Regulatory Council shall issue regulations in the Federal Acquisition Regulation to provide for inclusion of the contract clause in Federal procurement solicitations and contracts subject to this order.

(b) Within 60 days of the Secretary issuing regulations pursuant to subsection (a) of this section, agencies shall take steps, to the extent permitted by law, to exercise any applicable authority to ensure that contracts as described in section 6(a)–(b) of this order, entered into after January 1, 2023, consistent with the effective date of such agency action, comply with the requirements set forth in section 2 of this order.

(c) Any regulations issued pursuant to this section should, to the extent practicable and consistent with section 6 of this order, incorporate existing definitions, procedures, remedies, and enforcement processes under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*; the Service Contract Act, 41 U.S.C. § 6701 *et seq.*; and the Davis-Bacon Act, 40 U.S.C. § 3141 *et seq.*

Section 4. *Enforcement.*

(a) The Secretary shall have the authority for investigating potential violations of and obtaining compliance with this order.

(b) This order creates no rights under the Contract Disputes Act, and disputes regarding whether a contractor has paid the wages prescribed by this order, to the extent permitted by law, shall be disposed of only as provided by the Secretary in regulations issued pursuant to this order.

Section 5. *Severability.*

If any provision of this order, or applying such provision to any person or circumstance, is held to be invalid, the remainder of this order and the application of the provisions of such to any person or circumstance shall not be affected thereby.

Section 6. *Applicability.*

(a) This order shall apply only to a new contract or contract-like instrument, as defined by the Secretary in the regulations issued pursuant to section 3(a) of this order, if:

(i) (A) it is a procurement contract for services or construction;

(B) it is a contract or contract-like instrument for services covered by the Service Contract Act;

(C) it is a contract or contract-like instrument for concessions, including any concessions contract excluded by Department of Labor regulations at 29 C.F.R. § 4.133(b); or

(D) it is a contract or contract-like instrument entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public; and

(ii) the wages of workers under such contract or contract-like instrument are governed by the Fair Labor Standards Act, the Service Contract Act, or the Davis-Bacon Act.

(b) For contracts or contract-like instruments covered by the Service Contract Act or the Davis-Bacon Act, this order shall apply only to contracts or contract-like instruments at the thresholds specified in those statutes. For procurement contracts where workers' wages are governed by the Fair Labor Standards Act, this order shall apply only to contracts or contract-like instruments that exceed the micro-purchase threshold, as defined in 41 U.S.C. § 1902(a), unless expressly made subject to this order pursuant to regulations or actions taken under section 4 of this order.

(c) This order shall not apply to grants; contracts and agreements with and grants to Indian Tribes under the Indian Self-Determination and Education Assistance Act (Public Law 93-638), as amended; or any contracts or contract-like instruments expressly excluded by the regulations issued pursuant to section 4(a) of this order.

(d) Independent agencies are strongly encouraged to comply with the requirements of this order.

Section 7. General Provisions.

(a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an agency or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or

in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Section 8. *Effective Date.*

(a) This order is effective immediately and shall apply to covered contracts where the solicitation for such contract has been issued on or after:

(i) January 1, 2023, consistent with the effective date for the action taken by the Federal Acquisition Regulatory Council pursuant to section 4(a) of this order; or

(ii) for contracts where an agency action is taken pursuant to section 4(b) of this order, January 1, 2023, consistent with the effective date for such action.

(b) This order shall not apply to contracts or contract-like instruments entered into pursuant to solicitations issued on or before the effective date for the relevant action taken pursuant to section 4 of this order.

(c) For all new contracts and contract-like instruments negotiated between the date of this order and the effective dates set forth in this section, agencies are strongly encouraged to take all steps that are reasonable and legally permissible to ensure that individuals working pursuant to those contracts and contract-like instruments receive student loan debt repayment in the amount of \$10,000 annually (as set forth under section 2 of this order) as of the effective dates set forth in this section.

B. The SBIR/STTR Student Loan Repayment Set-Aside Program

Second, the President should direct agency heads to develop a new set-aside program for use in the award of Small Business Innovation Research (SBIR) and Small Business Technology Transfer (STTR) contracts.⁴¹ SBIR and STTR contracts, in particular, utilize employees with advanced degrees to “engage in Federal Research/Research and Development (R/R&D) with potential for commercialization.”⁴² As SBIR/STTR contracts are

41. See 15 U.S.C. § 638 (stating that the duty of the administration to “survey and monitor the operation of SBIR and STTR”).

42. *The SBIR and STTR Programs*, SMALL BUS. ADMIN. (last visited May 8, 2020), <https://perma.cc/QNU5-3M35>.

geared for small business, the repayment amount would be less than what would be required of large contractors under the executive order proposal. SBIR/STTR programs are also successive, i.e., they are dual-phased awards.⁴³ Thus, the repayment requirement could become a condition in the second phase—as opposed to the first phase—to shift the repayment burden to when a larger share of funding is provided.⁴⁴

IV. BENEFITS & DRAWBACKS

The use of an executive order and set-aside program offers several advantages compared to a legislative solution—of course, Congress could still pursue loan forgiveness if it chose to. First, executive orders are quicker than legislation and would provide faster remediation of student loan debt.⁴⁵ Fast action here is crucial because it is unclear when student loan interest will resume.⁴⁶ And an initial payment would result in compounded savings over the future.⁴⁷ Second, an executive

43. See *Frequently Asked Questions (FAQs) for SBIR-STTR*, NAT'L SCI. FOUND. <https://perma.cc/9NWF-G74M> (explaining the phases with SBIR-STTR programs).

44. See *Program Basics*, SBIR (last visited May 8, 2020), <https://perma.cc/BH6G-J7FY> (explaining that SBIR/STTR contracts are three phase contracts, wherein the last phase does not include government funding).

45. See Sahar F. Aziz, *A Muslim Registry: The Precursor to Internment?*, 2017 B.Y.U. L. REV. 779, 800 n.100 (2017) (“Notably, an executive order is faster because it is not subject to the notice and comment period applicable to executive agency regulations.”); see also Steven Davidoff Solomon & David Zaring, *Transactional Administration*, 106 GEO. L.J. 1097, 1104 n.33 (2018) (noting that some scholars have suggested that “executive power in emergencies can allow for quick, decisive action as opposed to legislative action”); Marianne Spencer, Note, *Prescribing a Cure for Right-to-Try Legislation*, 86 GEO. WASH. L. REV. ARGUENDO 30, 58 (2018) (arguing that the use of an executive order “would skip the arduous legislative process”).

46. See Danielle Douglas-Gabriel & Jeff Stein, *White House Expected to Extend Student Loan Payment Pause*, WASH. POST (Apr. 5, 2022, 4:27 PM), <https://perma.cc/R2F7-5JAW> (reporting that “if the administration does land on an August extension, it would be far shorter than what congressional democrats want”); see also Hannah Bareham, *Will the Federal Student Loan Payment Pause be Extended Past August?*, BANKRATE (Apr. 20, 2022), <https://perma.cc/CF3Y-HNSP> (“As the economy recovers, the Education Department is less likely to continue extending the forbearance period.”).

47. Cf. *In re Martin*, 584 B.R. 886, 888 (Bankr. N.D. Iowa 2018) (noting that a debtor’s student loan debt was “mostly from compounding interest”); *In re Shenk*, 603 B.R. 671, 679 (Bankr. N.D.N.Y. 2019) (explaining that the

order and/or set-aside program is more likely to result in actual action. Given the current state of Congress, any bill aimed at student loan debt forgiveness is unlikely to pass the Senate.⁴⁸ Third, repayment may have the downstream effect of reducing the number of adversary proceedings filed in bankruptcy courts as steady repayments may not require borrowers to attempt to have their student loans cancelled.⁴⁹

Finally, use of the set-aside program for SBIR/STTR contracts could incentivize new students to pursue STEM based degrees. This is beneficial for two reasons. First, the use of a set-aside program could incentivize students to consider

amount owned on a student loan of nearly \$45,000 had increased to over \$90,000 due to “\$8.51 interest accruing daily”); Julie Rogier, *Principal-Only Student Loan Payment: What to Know*, U.S. NEWS (Dec. 30, 2020, 9:00 AM), <https://perma.cc/CV3Z-VV2C> (“Making extra payments to the principal on student loans is a way you can free up funds sooner to apply to other financial goals . . .”).

48. See Aris Folley & Emily Brooks, *GOP Steps Up and Attacks on Canceling Student Debt*, THE HILL (May 3, 2022, 5:18 AM), <https://perma.cc/DV44-VR5C> (“Republicans are attacking Democrats and President Biden on the issue of student loan debt cancellation . . .”); see also Sahil Kapur, Julie Tsirkin & Haley Talbot, *Biden Considers Forgiving Some Student Debt as GOP Pushes New Bill to Stop Him*, NBC NEWS (Apr. 27, 2022, 1:37 PM), <https://perma.cc/W4JD-NA6J> (“Republicans strongly oppose the idea of debt forgiveness. A group of Republicans . . . is introducing a bill to prevent Biden from canceling student loan debt . . .”).

49. Pamela Foohey, Aaron S. Ament & Daniel A. Zibel, *Changing the Student Loan Dischargeability Framework: How the Department of Education Can Ease the Path for Borrowers in Bankruptcy*, 106 MINN. L. REV. HEADNOTES 1, 2–3 (2021) (“To discharge student loans, borrowers must bring a separate lawsuit within their bankruptcy proceeding—termed an adversary proceeding—in which they must show that they and their dependents will suffer an ‘undue hardship’ because of their student loan debt.”). Although the total number of adversary proceedings are currently small due to the somewhat inflexible nature of the *Brunner* test, courts and scholars have begun to rethink this test. See Cooper Murphy, *Side Stepping the Brunner Test: An Easier Path to Student Loan Discharge*, 30 S. CAL. REV. L. & SOC. JUST. 453, 471 (2021) (noting that “only 0.1 percent of the approximately 240,000 student borrowers filing for bankruptcy filed an adversary proceeding to discharge their student loans”); see also Leslie Pappas, *Del. Bankruptcy Ruling Sparks Rethink of Student Loan Debt*, LAW360 (Jan. 26, 2022, 7:50 PM), <https://perma.cc/JBG5-W9LT>

Joining a growing wave of courts taking a fresh look at the Brunner test, U.S. Bankruptcy Judge Laurie Selber Silverstein of the District of Delaware rejected ‘onerous’ and ‘overly strict’ standards that have evolved for discharging student debt as ‘unmoored from the original test and the plain language of ‘undue burden.

pursuing a STEM based degree and would have the added benefit of easing recruitment and retention of highly qualified employees.⁵⁰ This also helps reduce the STEM shortage in private industry.⁵¹ Second, STEM majors generally are able to pay off their student loan debt faster, due in part to higher salaries.⁵² Thus, if more students opt for a STEM degree, fewer graduates will be straddled with student loan debt in the future. In turn, more workers can invest money for retirement or spend it in the economy.

To be sure, there are drawbacks and disadvantages to this plan. For starters, it is narrow. Unlike legislation that could be aimed at everyone with student loan debt, the executive order and set-aside program would affect only employees with student loan debt working for federal contractors. As discussed above, however, the number of employees working for federal contractors has grown considerably over the past few years to 5.3 million,⁵³ meaning that the impact would still be considerable.

Next there are the inherent issues with the use of an executive order. “[B]ecause an executive order is only in force as long as the President fails to unilaterally repeal it,”⁵⁴ it is possible that a future administration could simply repeal the executive order outright. Alternatively, such an executive order

50. See Brian O’Connell, *The Business Case for Employee Student Loan Repayment Programs*, SHRM (Jan. 25, 2020), <https://perma.cc/M6KR-U89X> (explaining that student loan repayment could help “attract young talent,” “instill loyalty,” and produce “happier, more productive employees”).

51. Yi Xue & Richard C. Larson, *STEM Crisis or STEM Surplus? Yes and Yes*, BLS MONTHLY LABOR REV. (May 2015), <https://perma.cc/5JQ7-F6BQ> (“Economic projections point to a need for approximately 1 million more STEM professionals than the U.S. will produce at the current rate over the next decade . . .”).

52. See William Broman, *STEM Provides Answers for Student Loan Debt*, U.S. NEWS (Jan. 11, 2012, 10:11 AM), <https://perma.cc/HMG2-X2VK> (noting, for example, that the starting salary for a “petroleum engineering major is more than \$85,000” as opposed to a \$35,000 starting salary for a psychology major).

53. See Kristin Tate, *The Sheer Size of Our Government Workforce is An Alarming Problem*, THE HILL (Apr. 14, 2019, 6:00 PM), <https://perma.cc/JC4K-LXM3> (noting that as of 2019 there were “4.1 million contract employees [and] 1.2 million grant employees”).

54. Spencer, *supra* note 45.

and set-aside program could be undone through the courts⁵⁵ or by congressional action under the Congressional Review Act.⁵⁶ None of these concerns, however, are substantial enough to warrant forgoing the enactment of an executive order or set-aside.

Regarding repeal from a future administration or via congressional action, such action would come with considerable political cost. Why? According to a recent poll conducted by Morning Consult, “[s]ome 62% of voters support student loan forgiveness.”⁵⁷ Although not a guarantee, this rare bipartisan support for student loan repayment or forgiveness provides somewhat of a backstop for repeal from a future administration.⁵⁸

As to judicial action, it is unclear whether a lawsuit would survive. Even so, similar executive orders aimed at curing longstanding societal problems such as wage and price standards or affirmative action through government contract regulations have survived judicial review in the past.⁵⁹

55. See, e.g., Courtney Bubl , *Part of Biden’s \$15 Contractor Minimum Wage Order Was Temporarily Halted*, GOV. EXEC. (Feb. 17, 2022), <https://perma.cc/VMP2-YSYG> (reporting that “seven states sued the Biden administration over its new requirement that contractors pay their employees a \$15 per hour minimum wage”).

56. See Roberto Borgert, *Negative Legislation*, 22 FEDERALIST SOC’Y REV. 86, 95 (2021) (“Congress already has the power to negate the actions of the executive branch by virtue of the Congressional Review Act (CRA).”).

57. Carmen Reinicke, *More Than 60% of Voters Support Some Student Loan Debt Forgiveness*, CNBC (Dec. 22, 2021, 1:14 PM), <https://perma.cc/5PV7-N5VA>.

58. See Adam Minsky, *New Poll Shows Substantial, Bipartisan Support for Student Loan Forgiveness and Other Relief for Borrowers*, FORBES (Sept. 25, 2020, 11:52 AM), <https://perma.cc/ZT43-EA7B> (noting that “67% of respondents, including 58% of Republicans, support some form of widespread student loan forgiveness”).

59. See, e.g., *Am. Fed’n of Lab. & Cong. Of Indus. Orgs. v. Kahn*, 618 F.3d 784, 796 (D.C. Cir. 1979) (upholding an executive order that denied government contracts to companies that failed or refused to comply with certain voluntary wage and price standards); *Beverly Enters., Inc. v. Herman*, 130 F. Supp. 2d 1, 14 (D.D.C. 2000) (noting that an executive order requiring federal contractors to maintain affirmative action programs was “widely held to authorize administrative searches to confirm compliance with its mandates”); Mary E. Pivec, *Representing Employers Challenged by Harsh and Conflicting Regulatory Imperatives*, ASPATORE, 2009 WL 4025310 (Nov. 2009), (noting that “in the 1970s, the courts rejected several challenges to President

Moreover, some major federal contractors, like Raytheon and Lockheed Martin, are already implementing student loan repayment programs on their own or offer similar educational benefits,⁶⁰ thus decreasing the likelihood that lawsuits will be filed in the first place.

Last, there is the issue of increased costs. The amount of taxpayer money spent on government contracts is already too high.⁶¹ I admit that with this executive order and set-aside program there is a strong possibility of increased prices in government contracts. After all, federal contractors are in the business of making money.⁶² And ultimately it is taxpayers who pay the bill for these federal contractors. But my proposal has an inherent backstop to curb excessive increases in prices, namely competitive solicitations.⁶³ In fact, the Competition in Contracting Act requires competitive solicitations with limited exceptions.⁶⁴ Competitive solicitations, when performed correctly, can and do limit price and cost increases.⁶⁵

Carter's executive order requiring federal contractors to adopt affirmative action plans to promote the hiring and promotion of women and minorities").

60. See O'Connell, *supra* note 50 (explaining Raytheon's "recently rolled out new program to help employees save for retirement while repaying their student loans"); see also *Employee Compensation*, LOCKHEED MARTIN (last visited May 8, 2022), <https://perma.cc/5GPJ-GCEN> (explaining Lockheed's "student loan refinancing" and "tuition reimbursement program"); *BGOV200's Top 10 Government Contractors Lists*, BLOOMBERG GOV'T (last visited May 8, 2022), <https://perma.cc/G6J3-QEC8> (listing Lockheed and Raytheon as the top two federal contractors).

61. Note that this statement comes from someone who spent nearly eight years as a federal contracting officer.

62. See Robert Jones, *Increased Profit Margins on Government Contracts*, LEFT BRAIN PROFESSIONALS (Nov. 30, 2015), <https://perma.cc/G98P-4Q2A> (explaining the profit increases attained by federal contractors).

63. See *Competition in Contracting*, DATA LAB (last visited May 8, 2022), <https://perma.cc/TPD2-ATY2> (noting in 2017 nearly "60 percent of federal contracts were competitively awarded").

64. See 41 U.S.C. § 3301(a)

Except as provided in sections 3303, 3304(a), and 3305 . . . and except in the case of procurement procedures otherwise expressly authorized by statute, an executive agency in conducting a procurement for property or services shall—(1) obtain full and open competition . . . ; and (2) use competitive procedures or combination of competitive procedures

65. See Michael J. Benjamin, *Multiple Award Task and Delivery Order Contracts: Expanding Protest Grounds and Other Heresies*, 31 PUB. CONT. L.J. 429, 443 n.70 (2002) (explaining, for example, that multiple award contracts "provide a choice of many vendors, creating continuous competition on price

CONCLUSION

As Captain Picard once said, “things are only impossible until they are not.”⁶⁶ The same is true with student loan debt reduction, but with creative solutions there is much that can be done to stem the bleeding. Inaction, however, is not a viable option. Stagnation and refusal to provide any relief only exacerbates the problem, as student loan payments and interest will inevitably resume. What was a brief respite for borrowers will soon return to a daily nightmare if some action—be it executive or legislative—is not taken soon.

My proposal is optimistic, but it is not impossible. Nor is it the only means by which to tackle this issue. Indeed, my proposal should be part of a much larger reform strategy, including legislative student loan forgiveness, changes to student loan interest rates,⁶⁷ and increased promotion of alternatives to college, like trade schools and apprenticeships.⁶⁸

Additionally, my strategy offers a response to those who lament that student loan forgiveness is unfair because it requires taxpayers to foot the bill of others.⁶⁹ And it does so with

and approach; offer fast, streamlined ordering, reduce contracting overhead, . . . [and] bulk[] up smaller agencies’ buying power”); *see also* Pete Sepp & Andrew Lautz, *A Run for Our Money—The Latest on Why Competition in Defense Acquisitions Can Save Tax Dollars*, NAT’L TAXPAYERS UNION (Apr. 12, 2022), <https://perma.cc/CS96-DHHC> (explaining and arguing that competitive contracting procedures, such as the “fly before you buy” programs can reduce prices, save taxpayer funds, and produce higher quality goods and services).

66. *Star Trek the Next Generation: When the Bough Breaks* (NBC television broadcast Feb. 13, 1988).

67. *See Lowering Student Loan Debt*, KRISTEN GILLIBRAND (last visited May 8, 2020), <https://perma.cc/UBJ4-HJ5F> (explaining Sen. Gillibrand’s proposal to “enable individuals who have student loan interest rates over 4 percent to refinance at a fixed rate of 4 percent”).

68. *See How Apprenticeships Help Combat the Student Loan Crisis*, ICATT (last visited May 9, 2022), <https://perma.cc/2PRY-P4PQ> (explaining how apprenticeship programs can help people avoid college debt and still result in a well-paying career).

69. *See* Christina Wyman, *The Selfish and Extreme Reactions in Response to Biden’s Student Debt Relief*, NBC NEWS (Apr. 11, 2022, 5:18 PM), <https://perma.cc/NAT6-HBQ4> (noting that some have complained that loan forgiveness is “a slap in the face to all who sacrificed and worked extra jobs to pay off their student loans”). As Wyman points out, this is “a lazy interpretation of—and solution for—a crisis decades in the making, as the cost

benefits to everyone. Placing the burden on some of the country's richest and most powerful corporations—who already receive lucrative contracts from the federal government—reduces the strain on borrowers and balances this “unfairness” argument. Certainly, this comes at cost to these contractors, but it also provides rewards in the form of easier recruitment, increased retention, and better employee morale. That, in turn, results in higher-quality goods and services rendered to government. In short, my proposal is a down payment on efficiency and improvement to deliverables from government contracts.

of college has risen exponentially at the same time that a college degree has increasingly become a prerequisite for earning a self-supporting salary.” *Id.*