CATO BRIEFING PAPER

November 22, 2022 Number 143

The Illegality of Biden's Debt Cancellation Plan

By Thomas A. Berry

On August 24, 2022, President Biden announced a plan to cancel $10,000–$20,000 in federal student loans for all borrowers below an income cutoff.[1] My colleague Neal McCluskey has explained why student loan cancellation would be bad policy.[2] This briefing paper focuses on a separate question: Is the plan legal? Because the action both ignores crucial statutory text and creates an arbitrary income cutoff that does not follow statutory guidelines, the answer is no.[3]

THE ADMINISTRATION'S ARGUMENT IN FAVOR OF LEGALITY

On the same day that the Biden administration announced its debt forgiveness plan, the Office of Legal Counsel (OLC) in the Department of Justice released a memo concluding that student loan forgiveness can be implemented via a 2003 law called the Higher Education Relief Opportunities for Students (HEROES) Act.[4]

As implied by the name and year of the HEROES Act, the law was enacted as a reaction to the Iraq War. Several of the floor statements from members of Congress when the HEROES Act was introduced reveal that a primary motivation for the act was to ensure that military members did not fall into default on their student loans while serving their country.[5]

But the HEROES Act extends eligibility for its benefits to more than just members of the military. The law refers to people potentially eligible for relief as "affected individuals," and that term is defined to encompass several categories of people beyond just service members, including anyone who "resides . . . in an area that is declared a disaster area . . . in connection with a national emergency."[6] The federal government declared the COVID-19 pandemic a national emergency and also declared the entire United States a disaster area in connection with that emergency, which means, according to the OLC memo, that every resident of the United States is an "affected individual" as defined by the act.[7]

The HEROES Act allows for several potential benefits for "affected individuals." The one on which OLC relies to justify

THOMAS BERRY is a research fellow in the Cato Institute's Robert A. Levy Center for Constitutional Studies and managing editor of the *Cato Supreme Court Review*.

nationwide debt cancellation is an authorization for the secretary of education to "waive or modify any provision" of law applicable to federal student loans "as may be necessary to ensure that . . . recipients of student financial assistance . . . who are affected individuals are not placed in a worse position financially in relation to that financial assistance because of their status as affected individuals."[8]

The OLC argues that the requirement to pay back the principal balance of a federal student loan is a "provision" of federal law that the secretary of education may "waive" for affected individuals.[9] Thus, the argument goes, the secretary may forgive any amount of federal student debt for any residents of a disaster area, so long as that forgiveness is "necessary to ensure that" the individuals "are not placed in a worse position financially in relation to that financial assistance because of their status" as residents of a disaster area.

That leaves the question of whether loan forgiveness for some or all U.S. residents would, in fact, ensure that this goal is achieved. OLC argues that this could plausibly be so (while declining to endorse any *specific* plan). First, to establish that debt forgiveness could at least *sometimes* be necessary to ensure that this statutory goal is met, OLC posits a hypothetical example involving military service: "The Secretary might reasonably find that debt cancellation would 'ensure' that a soldier permanently disabled in a military operation and unable to work was 'not placed in a worse position financially in relation to [her] financial assistance because of' her military service." In cases such as this, OLC argues, "the aggregate financial harm suffered by borrowers as a result of their status as affected individuals might make cancellation of some or all of their federal student indebtedness appropriate."[10]

OLC next suggests that the secretary of education could plausibly determine that the COVID-19 pandemic is also a case in which the cancellation of some student loan debt for U.S. residents is appropriate.[11] Although the memo does not spell out how this action might be justified, the analogy to the hypothetical disabled soldier makes the logic clear: many Americans earned less over the past two years than they would have if not for the pandemic, whether due to job loss, COVID-19-related inability to work, or simply the general economic downturn. Although the average American's lost earnings may not be as dramatic as the hypothetical disabled soldier, debt cancellation equal to those lost earnings would similarly place an individual back in an equivalent financial position.

Of course, one can only speak here of *averages*; obviously, not *every single* student loan recipient has earned less than they would have without the pandemic. As OLC points out, though, the HEROES Act explicitly notes that the secretary "is not required to exercise the waiver or modification authority . . . on a case-by-case basis."[12] OLC argues that this gives the secretary discretion to provide identical relief to a large category of people "even though categorical rules by their nature entail a degree of imprecision."[13] Thus, OLC suggests that granting an identical amount of loan forgiveness to each of a large class of people would be acceptable, even though this action will inevitably include some who are no worse off financially for having lived through the pandemic.

THE FLAW IN OLC'S ARGUMENT

Where is the flaw in this legal argument? The OLC memo takes a wrong turn when it postulates the hypothetical disabled soldier and argues that the HEROES Act could authorize debt forgiveness as compensation for "the aggregate financial harm" of lost income. The problem with this reading of the act is that it effectively ignores an important portion of the statutory text: all waivers must ensure that student loan recipients "are not placed in a worse position financially *in relation to that financial assistance*."[14]

OLC's reading would be much more plausible if Congress had instead written that a waiver must ensure that borrowers "are not placed in a worse position financially," period. If that were the law, then the education secretary could treat loan forgiveness as simply a mathematical equation; if a borrower has lost $10,000 by virtue of living in a disaster area, the secretary could forgive $10,000 in debt to make it a financial wash.

But that is not what the HEROES Act says. It is a fundamental tenet of statutory interpretation that all portions of the text should have some meaningful effect, so the qualifier "in relation to that financial assistance" must place some additional limit on the secretary's discretion.[15] The historical context in which the HEROES Act was passed clearly indicates what this statutory text was understood to mean.

As the OLC memo acknowledges, the discussion of the HEROES Act in Congress consistently focused on giving the secretary the power to forbear loans and defer payments for service members, and to ensure that service members

did not lose eligibility for any loan forgiveness programs that might otherwise require making consecutive minimum payments.[16] In essence, Congress did not want those serving in the military and temporarily unable to make payments on their loans to leave the service and find that their principal balance had gone up (by accruing interest) or that they had lost eligibility for relief programs for which they were previously eligible. In both of those scenarios, service members would have found themselves not just in a worse financial position generally but in a worse financial position specifically in relation to their loan status.

This situation suggests a narrow but plausibly well-defined reading of the HEROES Act provision at issue: that the education secretary can grant modifications or waivers only to ensure that an affected individual's loan balance does not go up or to ensure that the individual does not lose eligibility for any federal aid programs. Under this reading, the secretary can grant a loan forbearance for as long as affected individuals have lost work due to their status as affected individuals, but the secretary cannot go further to decrease the individuals' principal balances. (Indeed, the HEROES Act has already been used multiple times during the COVID-19 pandemic to grant a nationwide student loan forbearance without legal challenge, which under this reading of the statute is a much more plausible use of its authority.[17])

Two potential rebuttals to this narrower reading of the statute are possible, but both would likely be unsuccessful in court. First, suffering a loss of earnings could be understood as being put in a worse financial position in relation to one's student loans because lost earnings mean an individual has less money to put toward paying off those student loans. A loss of earnings could mean that one's principal balance is not as low as it otherwise would have been, and debt cancellation could bring that principal balance down to where it otherwise would have been. Thus, the argument goes, debt cancellation is still tied to an individual's financial status in relation to his or her student loans because the focus of relief is on the principal balance of the student loans, not of the individual's bank account.

The problem with this argument is that it proves too much, and it would lead to an interpretation of the HEROES Act that is functionally identical to a version of the law missing the "in relation to that financial assistance" language entirely. To be sure, losing $10,000 through lost work or an economic downturn would mean that, if all other expenses stay the same, a borrower would have $10,000 less to pay toward his or her principal student loan balance. Equally true, though, is that losing $10,000 puts an individual in a worse position financially in relation to any other potential expense.

If someone with such an economic loss had been hoping to buy a motorcycle and had kept all other expenses constant (including student loan payments), then the person would be $10,000 further from being able to afford the motorcycle. Thus, one could just as truthfully say that such a person is in a worse position financially in relation to the planned motorcycle purchase as that the individual is in a worse position financially in relation to his or her student loans. Because money is fungible, reading the HEROES Act expansively to include a loss of money that could be used to pay down student loans is effectively no different from reading the law to allow compensation for *any* financial harms.

The OLC memo appears to acknowledge that the "in relation to" language does serve some limiting function. The memo concedes that "no matter how much financial harm a borrower may have suffered because of a national emergency, the Secretary can use the HEROES Act only to offset that portion of the harm that has a 'relation to' the borrower's [federal student loan] assistance."[18] But the memo never grapples with what that relation must look like, and the memo seems to endorse a reading of the act in which this additional requirement would have little chance of offering any meaningful roadblocks to debt cancellation.

Second, the narrower reading of the HEROES Act could be criticized as harmfully and unnecessarily cabining the authority of the education secretary to help borrowers who are in dire circumstances out of their control. Congress clearly intended for the HEROES Act to be a boon for military members who have federal student loan debt, and Congress chose to extend the benefits of the law not just to military members but to others affected by national emergencies. One could argue that the HEROES Act is already sufficiently cabined because, of course, any waiver can be granted only to those who have outstanding federal student loans. Rather than an all-purpose grant of authority to make the victims of natural disasters or wartime injuries whole, the law could be understood as a congressional choice to give special priority for relief to those who participated in federal student aid programs.

Based on recent trends in statutory interpretation, however, the Supreme Court would be likely to reject this argument. In a still-developing doctrine known as "major questions," the Supreme Court recently stayed or struck down three executive actions that were based on novel and expansive readings of long-standing laws.[19] And one common theme of those decisions is particularly relevant to interpreting the HEROES Act: the Court's skepticism of finding novel powers in one agency that would make more sense assigned to a different agency.

Perhaps the clearest example of that approach was when the Supreme Court stayed the nationwide "vaccine or test" mandate imposed by the Occupational Safety and Health Administration (OSHA). As the Court explained, the statute at issue consistently addressed only workplace hazards; it did not address "public health more generally, which falls outside of OSHA's sphere of expertise." Noting that a vaccine mandate is unlike the regulations OSHA typically imposes, the Court held that such a mandate "is simply not 'part of what the agency was built for.'" Supporting this view of OSHA's powers was that OSHA had "never before adopted a broad public health regulation of this kind."[20]

The Biden administration argued that COVID-19 was, literally speaking, a hazard in the workplace (among many other places), but the Court rejected that argument: "Permitting OSHA to regulate the hazards of daily life—simply because most Americans have jobs and face those same risks while on the clock—would significantly expand OSHA's regulatory authority without clear congressional authorization."[21] In the same way, permitting the Department of Education to offer compensation for all economic harms arising from national emergencies—simply because those economic harms can affect student loan payments—would expand the department's powers well beyond their previously understood bounds and well beyond the department's area of expertise.

The Supreme Court expressed a similar skepticism of novel agency powers when it stayed the nationwide eviction moratorium imposed by the Centers for Disease Control and Prevention (CDC), which relied on a statutory authorization to impose regulations preventing the interstate spread of disease. As the Court noted, the CDC had "imposed a nationwide moratorium on evictions in reliance on a decades-old statute that authorizes it to implement measures like fumigation and pest extermination." Again emphasizing the novelty of the action, the Court recounted that the law at issue had "rarely been invoked—and never before to justify an eviction moratorium."[22]

The Court also stressed the tenuousness of the connection between housing regulations and the agency's focus (public health), describing the chain of logic necessary to justify the moratorium as follows: "If evictions occur, some subset of tenants might move from one State to another, and some subset of that group might do so while infected with COVID-19." The Court rejected the administration's reliance on this "downstream connection between eviction and the interstate spread of disease,"[23] and it likely would similarly reject an argument based on the downstream connection between the economic harm of the pandemic and student loan payments.

Finally, and most recently, the Court again returned to the themes of novelty and lack of agency expertise when it struck down the EPA's claim of authority to impose a regulation that would have limited the amount of electricity produced by coal plants nationwide. The Court noted that predicting nationwide "trends in areas such as electricity transmission, distribution, and storage" requires "technical and policy expertise *not* traditionally needed in EPA regulatory development." The Court remarked that when an agency lacks "comparative expertise in making certain policy judgments . . . Congress presumably would not task it with doing so." Once again rejecting a Biden administration textual argument that rested on an extended chain of cause and effect, the Court pointed out by analogy that it "would not expect the Department of Homeland Security to make trade or foreign policy even though doing so could decrease illegal immigration."[24]

Similarly here, the education secretary's expertise much more plausibly lies in understanding the rules, nuances, and finances of various federal educational aid programs. Deciding when some eligibility rules for these programs should be loosened or waived, for example, is certainly within the secretary's wheelhouse. But the education secretary is much less plausibly equipped to calculate the monetary harm of wartime injuries, long-term disease, or economic downturns and to provide full compensation based on those calculations. Even though such compensation is necessarily limited to the full amount of an individual's federal student loans, that limitation does not fix the core problem: that calculating and compensating

such harms at all is an unusual and unlikely power to have been placed in the Department of Education.

In a nutshell, it is much more plausible that Congress would assign the task of providing compensation to injured soldiers to the Department of Veterans Affairs (VA) than to the Department of Education. The text and history of the HEROES Act reveal no evidence that Congress thought it was authorizing the Department of Education to assume that power as an alternative to the VA. Nor do those sources provide evidence that the act was authorizing the Department of Education to become a natural disaster compensation service. Applying the major questions doctrine, courts would likely rule that the HEROES Act does not clearly grant the education secretary the authority to compensate individuals by means of loan cancellation for any and all economic harms arising from national emergencies.

THE FURTHER LEGAL PROBLEMS RAISED BY THE INCOME CUTOFFS

For the reasons just given, the HEROES Act does not authorize waivers of principal loan balances as compensation for financial harms, whether on an individual level or for a class of people. But even assuming, for the sake of argument, that the act allows such waivers in some circumstances, how the Biden administration intends to implement its nationwide debt waiver presents an additional problem. As explained in the White House announcement, the $10,000 in loan forgiveness (or $20,000 for those who have previously received need-based Pell Grants) will go only to those who fall below an income cutoff, either $125,000 for individuals or $250,000 for married couples.[25]

OLC is correct that the HEROES Act allows relief to be granted on a classwide rather than a case-by-case basis. Even so, the choice to exclude some people from the definition of that class must have some relation to the justification for the relief. In other words, the choice to exclude some people from the class must be made because the secretary believes doing so will better tailor the relief to the statutorily prescribed goal of ensuring individuals "are not placed in a worse position financially in relation to [their] financial assistance." Otherwise, the choice to affirmatively exclude some people from the class would not be consistent with this statutory requirement.[26]

In this case, because the administration's justification for the classwide relief is based on a worsened financial position after two years of the COVID-19 pandemic, any limitation on that class must be an attempt to exclude individuals who did not suffer the same level of financial harm from having lived through COVID-19 as did those included in the class. But a flat income cutoff is not plausible as a means of drawing a line intended to narrow the class of relief to those who have suffered a greater financial harm from the pandemic, nor is the additional cutoff restricting the larger $20,000 cancellation to those who have received Pell Grants. Both class definitions instead seem clearly intended as choices based on the administration's preferred policy—and, perhaps, also based on perceived political popularity.

But even if income cutoffs may be more popular politically than granting nationwide debt relief regardless of income, the cutoffs will raise an additional legal problem for the Biden administration. Courts will likely ask the administration to show that both the $10,000 and $20,000 amounts and the class definitions were chosen on the basis of an attempt to roughly compensate for economic losses from COVID-19 as well as possible.[27] If the administration cannot make such a showing, and if the evidence instead indicates that both the amounts and class definitions were chosen on the basis of policy or political concerns, then courts will be more likely to find that the action did not follow the standards set by the HEROES Act, even if classwide debt cancellation might be permissible in some circumstances.

CONCLUSION

The HEROES Act of 2003 is an implausible vehicle for a nationwide debt cancellation plan, and a careful examination of the act's text reveals no clear congressional intent to authorize such a sweeping plan. If challenged by a plaintiff with standing, the act is likely to fall, just as several other dubious claims of statutory authority have fallen over the past two years.

NOTES

1. "FACT SHEET: President Biden Announces Student Loan Relief for Borrowers Who Need It Most," White House, August 24, 2022.

2. Neal McCluskey, "Biden Student Debt Cancellation Proposal: Even Worse than Expected," *Cato at Liberty* (blog), Cato Institute, August 24, 2022.

3. On October 18, 2022, the Cato Institute filed a lawsuit in Kansas federal court challenging the administration's student loan forgiveness plan. "Cato Institute Sues Department of Education on Student Loan Program," news release, Cato Institute, October 18, 2022.

4. Christopher H. Schroeder, "Use of the HEROES Act of 2003 to Cancel the Principal Amounts of Student Loans," Office of Legal Counsel, August 23, 2022.

5. 149 Cong. Rec. 7920–7925, April 1, 2003.

6. 20 U.S.C. § 1098ee(2)(C).

7. Schroeder, "Use of the HEROES Act of 2003," p. 20.

8. 20 U.S.C. § 1098bb(a)(2)(A).

9. Schroeder, "Use of the HEROES Act of 2003," pp. 8–11.

10. Schroeder, "Use of the HEROES Act of 2003," p. 13.

11. Schroeder, "Use of the HEROES Act of 2003," pp. 20–24.

12. 20 U.S.C. § 1098bb(b)(3).

13. Schroeder, "Use of the HEROES Act of 2003," p. 23.

14. 20 U.S.C. § 1098bb(a)(2)(A) (emphasis added).

15. Antonin Scalia and Bryan A. Garner, *Reading Law* (St. Paul, MN: Thomson/West, 2012), p. 174.

16. Schroeder, "Use of the HEROES Act of 2003," p. 17.

17. Congressional Research Service, "The Biden Administration Extends the Pause on Federal Student Loan Payments: Legal Considerations for Congress," January 27, 2021.

18. Schroeder, "Use of the HEROES Act of 2003," p. 21.

19. *West Virginia v. Environmental Protection Agency* (*West Virginia v. EPA*), 142 S. Ct. 2587 (2022); *National Federation of Independent Business et al. v. Department of Labor, Occupational Safety and Health Administration* (*NFIB v. OSHA*), 142 S. Ct. 661 (2022); and *Alabama Association of Realtors v. Department of Health and Human Services* (*AAR v. HHS*), 141 S. Ct. 2485 (2021) (per curiam). See also Jonathan H. Adler, "*West Virginia v. EPA*: Some Answers about Major Questions," in *Cato Supreme Court Review: 2021–2022* (Washington: Cato Institute, 2022), p. 37; and Ilya Somin, "A Major Question of Power: The Vaccine Mandate Cases and the Limits of Executive Authority," in *Cato Supreme Court Review: 2021–2022*, p. 69.

20. *NFIB v. OSHA*, 142 S. Ct. at 665–6.

21. *NFIB v. OSHA*, 142 S. Ct. at 665.

22. *AAR v. HHS*, 141 S. Ct. at 2486–7.

23. *AAR v. HHS*, 141 S. Ct. at 2488.

24. *West Virginia v. EPA*, 142 S. Ct. at 2612–3 (internal quotation marks omitted).

25. "President Biden Announces Student Loan Relief," White House.

26. A legal memo from the Department of Education appears to concede this point, advising that "the Secretary's determinations regarding the amount of relief, and the categories of borrowers for whom relief is necessary, should be informed by evidence regarding the financial harms that borrowers have experienced, or will likely experience, because of the COVID-19 pandemic." Office of the General Counsel, "The Secretary's Legal Authority for Debt Cancellation," Department of Education, August 23, 2022, pp. 2–3.

27. Any such calculation of net financial harm would also have to take into account that during the pandemic, borrowers have benefited from zero student loan interest and from zero-dollar minimum payments counting toward public service loan forgiveness.