



## Insight

# Self-Inflicted Emergency? The Biden Administration and Electricity

TORI SMITH, TOM LEE | JUNE 23, 2022

### Executive Summary

- In June, the Biden Administration declared a national electricity emergency and undertook a series of extraordinary executive actions to intervene in the electricity industry.
- These questionable policies were, in part, forced by President Biden's decisions to make combatting climate change his administration's most important policy issue and implementing a risky strategy of significant reliance on wind and solar power production coupled with heavy-handed suppression of fossil fuels.
- Federal interventions in the name of clean energy proliferation often raise costs and distort markets for such products, ultimately leading to lower access to competitively priced goods.

### Introduction

On June 6 the president took extraordinary executive actions directed toward the energy sector: declaring a national electricity emergency using the Tariff Act of 1930, delaying anticipated anti-circumvention tariffs on solar modules, and issuing five memoranda directing Defense Production Act (DPA) subsidies for five clean energy sectors. Previous policy decisions made by the administration itself forced such an expansive use of executive power.

The Biden Administration has spent the better part of its first 18 months prioritizing its climate agenda. Namely, it has [sought](#) to “create a carbon pollution-free power sector by 2035 and net zero emissions economy by no later than 2050.” The administration sees these as essential components of fighting the “existential threat” of climate change. Seeking a cleaner environment is a noble goal, but the strategy adopted has produced a cascade of federal interventions in the economy.

President Biden has used expansive federal powers to force a rapid shift in domestic energy production and consumption away from conventional fuels and toward wind and solar power. The most substantial measures to force this shift in the energy market have been done through executive action to disincentivize or even block conventional fuel production, while providing new preferential treatment and subsidies for wind and solar power. These interventions have inflicted [inefficiency and higher costs](#) on consumers – which ultimately lowers utilization of clean energy – contrary to the administration's objective.

Moreover, the overreliance on solar power is in direct conflict with the administration's [objectives concerning China](#), the largest producer of solar panels. At the same time, tariffs and other policies directed toward China are counterproductive to President Biden's climate goals, producing something of a Catch 22. To add insult to injury, new subsidies could also lead to tariff retaliation by trading partners or the adoption of similar subsidies

abroad, further distorting the global market and decreasing consumers' access to competitively priced clean energy products.

The bottom line is that these policies have suppressed fossil-fuel-generated electricity even though solar capacity has still not expanded at a pace to immediately meet the country's energy needs. Faced with potential electricity blackouts this summer, the president doubled down on his interventionist strategy by declaring a national emergency and invoking the Defense Production Act to insert the federal government into the production of solar power components.

## **Biden Administration Climate Actions**

On his first day in office, President Biden revoked the permit for the construction of the Keystone XL pipeline, which would have allowed hundreds of thousands of barrels of crude oil per day to flow across the U.S. northern border. The president's [executive order](#) stated that the pipeline was not "consistent with [the Biden] Administration's economic and climate imperatives." Canceling Keystone XL was the first of many actions taken by President Biden to disincentivize or even stop the domestic production and consumption of conventional fuels. The administration is carrying out its [goal](#) to "create a carbon pollution-free power sector by 2035 and net zero emissions economy by no later than 2050" through the following actions:

- Halting new oil, coal, and natural gas lease sales and preventing companies from using existing leases.[\[1\]](#)
- Implementing methane regulations for the oil and gas industries that were imposed under the Obama Administration, but that had been reversed or paused under the Trump Administration.[\[2\]](#)
- Proposing new regulations on greenhouse gas emissions for cars and trucks with the goal of phasing out the combustion engine.[\[3\]](#)
- Advancing the Build Back Better Act which would, among other things, create new tax credits for domestically produced electric vehicles.[\[4\]](#)
- Proposing more energy efficiency tests for consumer products.[\[5\]](#)

## *The Case of Solar Power*

In addition to disincentivizing the production and use of conventional fuels, the Biden Administration has sought a rapid shift in the energy market toward the greater use of wind and solar power. A series of federal government actions, spanning across multiple administrations, has created a web of conflicting priorities on solar power in particular. In 2018, then-President Trump imposed [tariffs](#) on solar cell and module imports from nearly all countries under such authority as delegated in Section 201 of the Trade Act of 1974.[\[6\]](#) The former president wanted to accomplish two main goals: raise the competitiveness of U.S. solar manufacturers and decrease U.S. solar consumers' reliance on products from China. The tariffs failed to accomplish these goals and instead ultimately raised costs and lowered utilization of solar products in the United States. Due to these tariffs, in 2020, the U.S. average monocrystalline [solar module](#) price was nearly twice the global average.

The Biden Administration has to date elected to keep the Section 201 tariffs in place. Moreover, the administration in March initiated an anti-circumvention tariff investigation into solar cell and module imports from Cambodia, Malaysia, Thailand, and Vietnam (CMTV). The mere threat of tariffs further increased cost pressures and resulted in the current solar panel [shortage](#), with entire solar projects being [put on hold](#). The decreased supply of solar cells and modules from CMTV countries is also incentivizing U.S. companies to once again source their solar products from China, as that is most likely their only other option.

## Electricity National Emergency

In his latest energy intervention, President Biden declared a [national emergency](#) on June 6 for “electricity generation capacity” using relevant executive authority contained in Section 318(a) of the Tariff Act of 1930.<sup>[7]</sup> Section 318(a) allows the president, in times of emergency, to direct the Treasury secretary to eliminate tariffs on “food, clothing, and medical, surgical, and other supplies for use in emergency relief work.” President Biden claimed that “a robust and reliable electric power system is therefore not only a basic human necessity, but is also critical to national security and national defense.” The president also cited as justification for this declaration Russia’s invasion of Ukraine, extreme weather conditions, the current solar panel shortage, and the Department of Defense’s determination that climate change threatens national security.

Presidents have invoked Section 318(a) only a handful of times. President Harry Truman declared a [national emergency](#) in 1946 under section 318(a) to suspend tariffs on lumber imports, citing a post-WWII housing shortage for veteran families. This order was [reversed](#) eight months later. President Truman also [invoked](#) section 318(a) in 1951 to declare a [national emergency](#) the previous year during the Korean War. The [1951 order](#) “[authorized] extensions of the statutory period in which imported merchandise may be held in a general order or bonded warehouse.” After declaring a [national emergency](#) in 2020 in response to the COVID-19 pandemic, President Trump issued an [executive order](#) allowing the secretary of the Treasury to “temporarily extend deadlines, for importers suffering significant financial hardship because of COVID–19.”

The justifications for executive action in the Korean War and COVID-19 pandemic cases are certainly more directly connected to national security than those cited by President Biden. While there are domestic and international pressures affecting the domestic energy market, the rationale for a national security-based emergency is reminiscent of the dubious arguments for applying national security tariffs on steel and aluminum imports in 2018. Moreover, U.S. government intervention in energy markets has been key driver of the price hikes and shortages consumers are experiencing. The current situation faced by the domestic solar industry is a textbook case of the market effects of intervention.

### *The Case of Solar Products ... Again*

In announcing the national emergency, the president directed the Department of Commerce to [pause](#) for up to 24 months any additional antidumping, countervailing, and anticircumvention (AD/CV) tariffs on solar cell and module imports from the CMTV.<sup>[8]</sup> Reportedly, the pause eliminates the possible retroactive application of any additional tariffs on solar cell and module imports from these countries.<sup>[9]</sup> These actions were presumably taken to alleviate the current solar panel shortage in the United States, which the administration cites as one of the main reasons for its declaration of a national electricity emergency.

The Biden Administration did not end the anti-circumvention case announced in March. The case will continue with a preliminary decision expected in August, which could still result in the imposition of tariffs. The administration simply paused the future collection of these tariffs for up to 24 months. Since the threat of solar tariffs has been eliminated for the next 24 months on the CMTV countries, in this relatively short time U.S. solar firms may be able to source solar cells and modules again and continue with current projects and installations. It is unclear, however, the extent to which the pause on tariffs will benefit future projects, since the threat of tariffs and resulting market uncertainties still exist after 24 months.

The administration’s action on solar products is reflective of its broader goals to increase U.S. clean energy consumption – namely from solar and wind – and decrease U.S. reliance on oil and gas.<sup>[10]</sup> In 2021, roughly 12

percent of domestic energy was powered by clean energy, with the remainder of consumption reliant on conventional fuels.<sup>[11]</sup> The anti-circumvention investigation, as well as the broader tariff policy toward energy resources, run counter to the administration's goal because they make these products less affordable, and therefore less viable substitutes for conventional fuels. The president's action, while perhaps helpful in the short term, similarly falls short of increasing competitiveness in the energy industry.

## Defense Production Act Memoranda

In addition to the emergency declaration, President Biden issued five memoranda<sup>[12]</sup> to authorize federal investment and purchases “to rapidly expand American manufacturing of five critical clean energy technologies.” These sectors are insulation; electric heat pumps; transformers; electric power grid components; solar modules and components; and electrolyzers, fuel cells, and platinum group metals. The president is making these investments by invoking Section 303 of the DPA of 1950,<sup>[13]</sup> a law originally meant to help bolster the U.S. defense industrial base during the early years of the Cold War. President Biden determined that each of the five sectors were “industrial resources, materials, or critical technology items essential to the national defense.” A White House [fact sheet](#) describes these actions as “[putting] the full power of federal procurement to work spurring additional domestic solar manufacturing capacity by directing the development of master supply agreements, including ‘super preference’ status.”

At first glance, the relationship between defense needs and domestic electricity consumption may seem light-years apart. In 1980, however, Congress added [synthetic fuels](#) to the list of goods subject to DPA intervention. Furthermore, Congress has since expanded DPA's purview to include emergency preparedness, natural disasters, and energy security.<sup>[14]</sup> President Biden's DPA actions are not the first of their kind, but they are clearly more expansive than those of his predecessors. In 2012, President Obama used DPA to allocate \$230.5 million toward [biofuel production](#). More than \$3.5 million from DPA was also put toward [bio-synthetic paraffinic kerosene](#) production in 2013. Additionally, President Trump considered using DPA to support [domestic coalmines](#) in 2018 but did not act on it.

Defense experts at The Heritage Foundation have criticized these past uses of DPA for energy-related issues, [characterizing](#) them as “exploiting the DPA for non-defense reasons.” Todd Tucker at the Roosevelt Institute [calls](#) climate change a “slower-moving” crisis than those for which the DPA was used in the past, and questions the “legal and political precedent” for the way President Biden is using it. Tucker ultimately suggests, however, that President Biden's actions on DPA “can increase consumer demand for clean products and make businesses change how they are thinking about their upcoming capital expenditures.”

There is precedent for using DPA to support energy production, yet the legitimacy of the Biden Administration's unprecedentedly deep intervention in the electricity supply chain is questionable. The memoranda invoking DPA do not provide justification or evidence of deficient production in insulation, electric heat pumps, transformers, electric power grid components, solar modules and components, or electrolyzers, fuel cells, and platinum group metals. There is a shortage of solar modules, but it is largely due to tariff policy that has made importing solar products more expensive. Presumably, the administration is taking these actions in response to what [it has called](#) an “urgent crisis of changing climate.”

## Implications of the National Emergency and DPA Usage

The appropriateness of the Biden Administration's expansive use of the Tariff Act and the DPA is worth questioning, but it is just as important to discuss the potential international ramifications of invoking national

security and defense in this way. The United States maintains commitments to trade rules under several trade agreements, but the institution of greatest consequence is the World Trade Organization (WTO). Invoking DPA can be construed as an intention to provide subsidies to domestic industries, which could violate our WTO commitments under the Agreement on Subsidies and Countervailing Measures.<sup>[15]</sup> Presumably, the administration would claim that the invocation of national security as the justification for these subsidies falls under the national security exception in Article XXI of the General Agreement on Tariffs and Trade,<sup>[16]</sup> but the claim that these sectors are vital for national security is weak. Much like how trading partners challenged the U.S. use of national security to impose [Section 232 tariffs](#), the United States could face challenges to these DPA subsidies. At the same time, U.S. national security subsidies for clean energy products could also open the door for other countries to provide similar subsidies to their favored industries. Finally, providing subsidies could make American exports of these clean energy products subject to countervailing duties abroad. All of these scenarios would further distort the global energy market, affecting consumers' access to competitively priced clean energy products.

[1] <https://www.heritage.org/government-regulation/report/37-biden-administration-regulations-the-pipeline-americans-should-know>

[2] <https://www.epa.gov/controlling-air-pollution-oil-and-natural-gas-industry/epa-proposes-new-source-performance>

[3] <https://www.epa.gov/regulations-emissions-vehicles-and-engines/proposed-rule-revise-existing-national-ghg-emissions>; and <https://www.epa.gov/regulations-emissions-vehicles-and-engines/proposed-rule-and-related-materials-control-air-1>

[4] <https://www.forbes.com/wheels/news/ev-incentive-plan-headed-to-senate/>; <https://www.americanactionforum.org/insight/energy-tax-credits-in-the-build-back-better-act-run-afoul-of-the-world-trade-organization/>; and <https://www.americanactionforum.org/daily-dish/is-the-bbbf-a-climate-bill/>

[5] <https://www.heritage.org/government-regulation/report/37-biden-administration-regulations-the-pipeline-americans-should-know>

[6] This provision of the Trade Act of 1974 is often referred to as the “safeguard” provision. It allows the president, after conducting an investigation, to impose tariffs on imports that impair or threaten to impair an infant domestic industry. <https://www.heritage.org/trade/report/us-solar-energy-sector-threatened-government-proposal-jack-prices>

[7] 19 U.S. Code § 1318

[8] Currently imposed AD/CV tariffs are still in effect and due to apply to this 24-month pause.

[9] <https://www.lexology.com/library/detail.aspx?g=dae63e58-2889-4bc2-ab3f-cc0203eff231>

[10] The administration has notably emphasized solar and wind energy, but has stayed away from emphasizing nuclear energy.

[11] <https://www.eia.gov/tools/faqs/faq.php?id=92&t=4>

[12] <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/06/06/memorandum-on-presidential-determination-pursuant-to-section-303-of-the-defense-production-act-of-1950-as-amended-on-insulation/>; <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/06/06/memorandum-on-presidential-determination-pursuant-to-section-303-of-the-defense-production-act-of-1950-as-amended-on-electric-heat-pumps/>; <https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/06/memorandum-on-presidential-determination-pursuant-to-section-303-of-the-defense-production-act-of-1950-as-amended-on-transformers-and-electric-power-grid-components/>; <https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/06/memorandum-on-presidential-determination-pursuant-to-section-303-of-the-defense-production-act-of-1950-as-amended-on-solar-photovoltaic-modules-and-module-components/>; and <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/06/06/memorandum-on-presidential-determination-pursuant-to-section-303-of-the-defense-production-act-of-1950-as-amended-on-electrolyzers-fuel-cells-and-platinum-group-metals/>

[13] 50 U.S. Code § 4533

[14] U.S. Code § 4552

[15] [https://www.wto.org/english/tratop\\_e/scm\\_e/subs\\_e.htm](https://www.wto.org/english/tratop_e/scm_e/subs_e.htm)

[16] [https://www.wto.org/english/res\\_e/booksp\\_e/gatt\\_ai\\_e/art21\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art21_e.pdf)