

BIDEN BEGINS: WHAT TO EXPECT FROM THE NEW ADMINISTRATION

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I. Executive Summary

On December 15, 2020, we reported on the November 3 U.S. Presidential election and its aftermath up to the Dec. 14 vote of the Electoral College confirming Joe Biden's 306 – 232 electoral vote victory over Donald Trump (available at <https://kurtinlaw.com/articles-whitepapers/>). The subsequent January 6 insurrectionist attack on the U.S. Capitol seeking to overturn that result and, apparently, to kidnap and even murder leaders of the government was unprecedented in the nation's history, at least since the American Civil War, and, though put down in about six hours, profoundly shook the nation to its core, revealing a new crisis of American constitutional democracy to add to those of the Covid-19 pandemic, resulting economic collapse, and race relations resulting most immediately from the 2020 police killings of George Floyd and Breonna Taylor. On Jan. 20, exactly two weeks after the attack, Biden was inaugurated as President and Kamala Harris as Vice President in a ceremony unmarred by further violence or disruption. They assume the reins of the Executive Branch of the U.S. government with not only those 2020 crises to deal with, but those of climate change, ever-increasing economic inequality and newly revealed levels of right wing, white supremacist- and conspiracy theory-fueled violent insurrectionist populism that threaten the constitutional, legal, political and social fabric of the country. Whether one believes, as various historians have suggested, that no incoming administration has faced greater challenges since Franklin Roosevelt's in 1933, Abraham Lincoln's in 1861 or even ever in American history, the challenges facing the new administration are enormous in scope and scale. Here is a selective list of what to expect in the early weeks and months of the Biden – Harris administration.

II. Initial Executive Orders

In his first three days in office, Biden signed thirty Executive Orders, ten of which specifically reversed Trump administration initiatives. Among them are the following categorized measures:

- Covid-19 Pandemic Public Health Response
 - Invokes the Defense Production Act to requisition and facilitate production and distribution by private industry of vaccines, vaccination equipment and personal protective equipment for first responders

- Mandates mask-wearing for federal buildings, federal lands, federally-regulated transport and by federal contractors; encourages mask-wearing generally for the first 100 days of the administration
- Mandates proof of a negative Covid-19 test for arriving international travelers
- Cancels planned U.S. withdrawal from the World Health Organization; Dr. Anthony Fauci becomes the chief U.S. delegate to WHO
- Creates a “Covid-19 Response Coordinator,” reporting directly to Biden
- Establishes a new Pandemic Testing Board to increase U.S. testing capacity
- Directs FEMA (Federal Emergency Management Agency) to establish community vaccination centers
- Enhances pandemic data collection, analysis and distribution capabilities
- Establishes a pandemic pre-clinical program to boost therapeutics development
- Re-establishes the National Security Council Directorate for Global Health Security and Biodefense (the “Pandemic Bureau”) disbanded by the Trump administration
- Creates a Covid-19 Health Equity Task Force to ensure equitable pandemic responses
- Directs federal Departments of Education and of Health and Human Services to establish national school re-opening and operating guidelines
- Directs OSHA (federal Occupational Safety and Health Administration) to establish national pandemic workplace safety standards

- Covid-19 Pandemic Economic Relief
 - Directs FEMA to increase reimbursement to state and local governments for National Guard and emergency supplies
 - Extends the national moratorium on evictions and foreclosures to at least March 31
 - Extends the national moratorium on student loan payments and interest to at least September 30
- Economy
 - Restores federal employee collective bargaining and protections
 - Mandates federal contractors to pay employees a \$15/hour minimum wage
 - Lays the groundwork for a federal \$15/hour minimum wage
- Immigration/Foreign Relations
 - Strengthens DACA (Deferred Action for Childhood Arrivals), the Obama-era Executive Order to defer removal/deportation of undocumented immigrants brought to the United States as children, the so-called “Dreamers,” that the Trump administration attempted to end
 - Terminates the “Travel Ban” restricting/prohibiting U.S. entry for passport holders of seven majority Muslim countries
 - Reverses Trump administration expansion of immigration removal/deportation within the United States
 - Halts construction of southern border wall by immediate termination of the national emergency declaration that funded it
 - Blocks removal/deportation of Liberians living in the U.S.

- LGBTQ+ Rights/Racial Equity
 - Directs federal agencies to review all existing orders and regulations, policies, guidance, etc. and “fully implement” the June 2020 Supreme Court *Bostock v. Clayton County* decision (written by Trump appointee Justice Neil Gorsuch), barring LGBTQ+ discrimination in the workplace under the 1964 Civil Rights Act, arguably interpreting the *Bostock* decision as a bar against *all* LGBTQ+ discrimination under federal laws and affirming that “all persons should receive equal treatment under the law, no matter their gender identity or sexual orientation”
 - Rescinds the Trump administration establishment of the “1776 Commission,” an attempt to rehabilitate in the historical record the institution of slavery in the pre-Civil War United States
 - Rescinds the Trump administration directive to forbid all federal government agencies and contractors from including in workplace diversity training elements such as implicit bias and directing all federal agencies covered by the Trump administration directive to review and rescind all actions taken pursuant to it
 - Directs federal agencies to review all actions to ensure racial equity
- Environment/Climate Change
 - Rejoins Paris Climate Accords, a coalition of nearly 200 nations to shift away from climate change-inducing fossil fuels consumption and greenhouse gas production
 - Cancels the Keystone XL tar sands oil pipeline extension
 - Directs federal departments and agencies to review and reverse over 100 Trump administration actions on the environment, including cutting the size of national monuments (lands) and enforcing a moratorium on oil and gas drilling in the Arctic National Wildlife Refuge

- Census
 - Requires non-citizens to be included in the Census and resulting congressional reapportionment, as had previously been the case
- Government Regulation and Ethics
 - Requires Executive Branch appointees to sign an ethics pledge barring acting in personal self-interest, requiring upholding independence of the DoJ (Department of Justice), prohibits accepting gifts from lobbyists and institutes a two-year “revolving door” lobbying ban upon leaving Executive Branch service
 - Requires Office of Management and Budget Director to promulgate recommendations to modernize regulatory review and freezes and reverses Trump administration regulatory approval process

Biden is planning additional Executive Orders for this week, including rescinding the Trump administration ban on transgender persons serving in the military; strengthening the government’s “Buy American” rules in promotion of U.S. manufacturing; reinstating Obama-era policies restricting transfer of military equipment to local law enforcement; eliminating private prisons and improving prison conditions; disavowing Asian-American and Pacific Islander discrimination; and establishing a family reunification task force to try to reunite migrant families separated at the border.

III. Major Legislative Projects

With Democratic Party majorities, albeit narrow ones, in both Houses of Congress, and armed with his own 36 years of experience in the Senate and 8 years as Obama’s *de facto* legislative liaison while Vice President, Biden has suggested that he knows both that enduring achievements as President will come from passing legislation, not Executive Orders (witness the speed with which Trump’s Executive Orders are being dismantled by Biden’s); and that he is the most well positioned President in decades to “work across the aisle” to get legislation passed. Objectively, Biden is easily the most experienced Congressional insider elected President since former Senate Majority Leader Lyndon Johnson, who was a recognized master of the legislative process, arm-twister and deal-maker. One looming issue is whether the razor-thin Democratic Senate majority will preserve the 60-vote supermajority Senate filibuster for legislation, the only Senate filibuster remaining, or revoke it, and whether some of Biden’s

agenda, particularly spending, can be enacted by simple majority through the special budget “reconciliation” process, without revoking the filibuster and poisoning the well for cross-the-aisle cooperation. Looking down the road, and based on both the 2020 election campaign and statements since Election Day and the inauguration, the following are likely to be among Biden’s legislative projects. The list is obviously extensive, and some elements more likely than others based on the slim Congressional majorities. Nevertheless, the array of crises facing the country seems to have shifted Biden’s thinking from that of serving as a transitional President to serving as a transformative one.

- New \$1.9 Trillion Covid-19 Relief and Economic Stimulus Package
 - An additional \$1,400 in Covid-19 relief direct payments to persons, to add to the \$600 per person approved in December
 - Child tax credits
 - Aid to state and local governments
 - A \$15/hour federal minimum wage (considered likely to be stripped from Covid-19 relief and to become a separate legislative project)
- Energy, Environment and Climate Change
 - Invest in research and development of clean technologies, bolstering environmental regulations, target net-zero carbon emissions by 2050, and link clean energy investment to investment in economic growth
- Comprehensive Immigration Reform
 - Set an 8 year “path to citizenship” for illegal/undocumented immigrants and the Dreamers
 - Establish new refugee/asylum and removal/deportation regimes
 - Establish new visa categories, quotas and standards of review

- Healthcare
 - Bolster the Affordable Care Act, aka “Obamacare” and add a Medicare as a “public option” under Obamacare
 - Lower the age of Medicare eligibility from 65 to 60 years old
 - Increase Obamacare tax credits to limit healthcare spending to 8.5% of household income
- Infrastructure
 - Combine economic stimulus with a major public works/infrastructure project, especially to address the U.S.’s crumbling highways, rail lines, ports, bridges, tunnels, airports, train stations and other infrastructure
 - Stabilize the Highway Trust Fund
 - Fast-track critical infrastructure projects
- Trade
 - Extension of Trump administration “Buy American” policies
 - Continued pressuring of China with tariffs, including section 232 and section 301 tariffs
 - World Trade Organization Reform
 - Continued bolstering of foreign investment regulatory tools, including the already existing CFIUS (Committee on Foreign Investment in the United States) and FIRREA (Foreign Investment Risk Review Modernization Act)

- Education
 - Triple federal K – 12 funding
 - Means-tested free public university and college and community college tuition for students with household incomes under \$125,000, including for workers trying to retrain for new careers
- Tax
 - Reverse the Trump-era tax cuts made by the 2017 Tax Cut and Jobs Act
 - Raise the corporate tax rate to 28% from its current 21%; part of the 2017 Act's purpose was to make C-corporations a more attractive business form compared to LLCs (limited liability companies) and LPs (limited partnerships) which feature "pass-through" taxation; raising the corporate tax rate may reinvigorate LLC and LP popularity compared to corporations
 - Ensure that Americans making less than \$400,000/year pay no new taxes
 - Continue to discourage off-shore supply-chain sourcing by U.S. companies
- Banking and Financial Services
 - Bolstering the 2012 Dodd-Frank Act and the Consumer Financial Protection Bureau created under it
 - Potential creation of a federal banking program, FedAccounts, to be run by the Federal Reserve and U.S. Postal Service on the model of simple consumer banking run out of post offices in other countries

- Housing
 - Make the federal Section 8 housing voucher program an entitlement, like Medicaid
 - Tie federal transportation funding to state and local government reduction of regulatory barriers to low income housing construction

- Voting Rights, Campaign Finance and Election Systems
 - Restoration of the 1965 Voting Rights Act
 - Hardening of election infrastructure
 - Barring 501(c)(4) not-for-profits election spending, eliminating a significant “dark money” pathway
 - Requiring SuperPacs to be independent of political parties
 - Mandating donor disclosure by all groups running political ads or campaigning

- Law Enforcement and Criminal Justice Reform
 - Increase support for state and local police selection and training
 - Reinforce DoJ guidance on law enforcement “rules of engagement” and civil rights of persons suspected of committing crimes
 - Improve FBI support of local law enforcement
 - Review of DoJ policies on non-violent crime law enforcement and prosecution
 - Review DoJ policies towards domestic terrorism and extremist groups

- Communications and Media Policy
 - Repeal of section 230 of the Communications Decency Act, which exempts Internet Service Providers like Facebook, Twitter and Instagram from ordinary publisher liability for defamation and other exceptions from First Amendment freedom of speech and of the press.

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