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Regulation in the Biden Administration

Richard J. Pierce, Jr.

On November 3, 2020, President-elect Joe Biden and Vice President-elect Kamala Harris won a close and bitter election over President Donald Trump and Vice President Mike Pence. Biden and Harris will take office on January 20, 2021. Harris is the daughter of a black Jamaican immigrant father and an Indian immigrant mother. She will be the first woman, the first black, and the first South Asian Vice President.

Democrats retained control of the House of Representatives, but they lost some of the seats that they had won when they took control of the House from the Republicans in 2018. Republicans now have fifty seats in the Senate, while Democrats have 48 seats. Control of the Senate is dependent on the results of two runoff elections that will be held in the State of Georgia on January 5, 2021. If the Republican candidate wins either election, the Republicans will control the Senate. If the Democrat candidates win both seats, the Senate will be evenly divided but the Democrats will control the Senate because the Vice President has the power to break any tie vote.

It is easy to predict some of the regulatory consequences of the election, but most are subject to a high degree of uncertainty. President-elect Biden has made it clear that he supports a major national effort to contain the pandemic; large increases in spending to stimulate the economy and to rebuild the nation's infrastructure; increased taxes on corporations and wealthy individuals as part of a program to counter the large and growing gap between rich and poor Americans; strengthening and expanding the scope of the Affordable Care Act, Medicare, and Medicaid to provide a guarantee of adequate healthcare for all Americans; a more welcoming immigration policy; and major increases in regulation to mitigate climate change. He may be able to accomplish the first goal—containing the pandemic—by taking a series of quick unilateral actions. He cannot further the other goals without taking a combination of legislative actions that require the cooperation of Congress and regulatory actions that require agencies to use lengthy procedures followed by review by an increasingly conservative judiciary.

Actions on Inauguration Day

While some members of the new administration are celebrating at the inaugural ball, members of the President's transition team will be hard at work putting the final touches on a large number of documents that the President and executive branch agencies will send to the Government Printing Office on or shortly after his first day in office. Those documents will include scores of Executive Orders in which the President will rescind and reverse scores of Executive Orders that President Trump issued. They will include Orders directing the U.S. to rejoin the Paris Climate Accord and the World Health Organization, rescinding President Trump's ban on travel from many predominantly Muslim countries, and rescinding President Trump's Order that directed all agencies to rescind two regulatory rules for every new rule an agency issues.

The documents that will be published on or shortly after inauguration day also will include hundreds of Guidance Documents that rescind and reverse most of the hundreds of Guidance Documents that agencies issued during the Trump Administration. Unlike legislative rules, Guidance Documents do not have the force of law. They are extremely important in the regulatory process, however. They announce agency interpretations of the statutes and rules that the agencies implement, and they

announce the policies that agencies will use in the process of implementing those statutes and rules. Unlike rules, Guidance Documents can be issued without first using any mandatory procedure. Many are not subject to judicial review at all, and courts uphold most of those that are subject to review. The Supreme Court recently held that an agency must provide an adequate explanation for any Guidance Document that changes an agency's policies in important ways, but the transition team will have worked long hours between election day and inauguration day to draft explanations that are likely to be considered adequate by courts.

The Executive Orders and Guidance Documents that the Biden Administration will issue on or shortly after inauguration day will come close to restoring the regulatory environment that existed when President Trump took office. During the Trump Administration, agencies issued hundreds of Guidance Documents that were deregulatory in nature. It attempted to make relatively few changes in major rules, however, and its efforts to defend the resulting deregulatory rules in court were extraordinarily unsuccessful.

Agencies in the Trump Administration were successful in defending their deregulatory rules in court in only 17% of cases. That record compares unfavorably with the 70% success rate that agencies enjoyed during every other Administration headed by a President of either party in recent history. The courts identified three fundamental errors in the hundreds of deregulatory actions that they rejected—the actions were based on erroneous interpretations of statutes, the actions were taken without using the notice and comment procedure that is mandatory in the process of issuing most rules, and the agency failed to provide an adequate explanation for the action it took.

The Progressive Agenda Will Be on Hold

The progressive wing of the Democratic party has an ambitious agenda that includes: Medicare for all, the Green New Deal, defund the police, and abolish ICE (the Immigration and Customs Enforcement Agency). That agenda will be on hold for at least the first two years of the Biden Administration.

President-elect Biden has made it clear that his goal is to unite America by listening attentively to the concerns expressed by the scores of millions of Americans who voted for President Trump and by negotiating compromises with the congressional leaders of the Republican Party. Pursuit of that goal will lead him in the opposite direction of the actions urged by the progressives.

The election widened the major fissures in the coalition that comprises the Democratic Party. The Democrats took control of the House in 2018 as a result of the victories of many moderates in districts that previously were controlled by Republicans. Progressives have not been successful in any contested district. Progressives have become members of Congress only by defeating moderates in party-based primaries in districts that always elect the Democratic candidate in the general election.

Many moderates blame progressives for the party's loss of House seats in the 2020 election. They argue that a moderate could retain their seat in 2020 only by successfully disavowing any support for the progressive agenda. Moderates who were not successful in those efforts lost their seats. To illustrate the unpopularity of the progressive agenda in contested districts, moderates point to the results of a House race in a contested district in Nebraska. The progressive who was nominated by the Democrats lost to the Republican by almost 5% in a district that President-elect Biden won by almost 7%.

The progressive agenda is far from dead for many reasons. Democrats cannot win national elections without the support of progressives; Vice President-elect Harris supports some elements of the progressive agenda; and public support for the progressive agenda has been increasing gradually for years. The progressive agenda will return to the mainstream of political debate if, and to the extent that, public support for the agenda expands. At least at the beginning of the Biden Administration, however, it will be on hold.

Staffing Agencies Will Present Problems

President Trump's war on regulation inflicted tremendous damage on the cultures and reputations of regulatory agencies. President-elect Biden's most important initial task is to appoint people to positions of leadership in agencies who can rebuild their cultures and reputations. That will present challenges.

The U.S. system of checks and balances is not well-matched to the extreme political polarity that is now the dominant feature of the U.S. political environment. The most important positions of responsibility in all agencies are held by appointees who are classified by the Constitution as principal "officers" of the United States. There are thousands of such positions. A principal officer can only be appointed through a process of nomination by the President followed by confirmation by the Senate.

Historically, the Senate was deferential to presidents in the confirmation process. Most nominees were confirmed relatively quickly by large bi-partisan majorities. As the country has become more polarized, however, the confirmation process has become increasingly partisan. Nominees are often the subject of confirmation votes that are entirely or predominantly partisan. That has created a situation in which it takes many months for a newly-elected president to appoint heads of the regulatory agencies; many principal officer positions remain vacant a year after the president is elected; and some agencies that are headed by multi-member boards are powerless to take any action for months or years because they lack the quorum required to take any action.

We will not know whether the Senate is controlled by Democrats or Republicans until after we see the results of the two runoff elections in January. Even if the Democrats can obtain control as a result of two Democrat wins and the power of the Vice President to cast the tying vote, the Senate will be divided evenly between Democrats and Republicans. President-elect Biden will face a major test of his ability to create a truce between Democrats and Republicans at the beginning of his Term when he attempts to persuade the leader of the Republican members of the Senate to confirm his nominees to thousands of offices. Success would come in the form of an informal agreement to give Republicans a voice in the nomination process in return for their willingness to confirm his nominees. Failure would come in the form of a complete inability to staff the positions of responsibility in all agencies of government.

Legislative Action Will Be Rare or Non-existent

The U.S. system of checks and balances creates formidable obstacles to enactment of legislation. Legislative action requires the President, the Senate and the House to agree to enact a Bill, except in the rare situation in which the House and Senate have the two-thirds majority required to overcome a presidential veto of a Bill. The process is particularly challenging in the common situation in which the Presidency and control of the House and Senate are divided between Republicans and Democrats. In the past, the President and the leaders of the House and Senate met with some frequency in often successful

attempts to negotiate compromises that could be enacted by all three bodies. The large and increasing political polarity in the U.S has created conditions in which compromise negotiations are rarely successful except in extreme emergencies in which the alternative is a complete shutdown of the government.

The experiences of Presidents Obama and Trump illustrate the effects of political polarization. Each entered office with his party in control of both the House and the Senate. In each case, however, the President's party lost control of the Senate two years later. Each was able to enact one major statute during the two-year period in which his party controlled the House and the Senate. In the Obama Administration, the one success was enactment of the Affordable Care Act. In the Trump Administration, it was enactment of a statute that dramatically reduced the taxes owed by corporations and wealthy individuals. In each case, the statute was enacted by a party-line vote over the strenuous objection of the opposing party. In each case the opposing party vowed to repeal the statute as soon as it regained power. Thus, for instance, Republicans have challenged the validity of the Affordable Care Act in the Supreme Court seven times, and they have attempted to repeal the Act over seventy times. In both Administrations, the President was unsuccessful in persuading Congress to enact any other major statutes once the president's party lost control of the House or the Senate.

Depending on the outcome of the two runoff elections in January, President-elect Biden may not even have control of the Senate during his first two years. If he has control of the Senate, it will be only as a result of the power of the Vice President to break ties by voting with the Democrats. This will provide an extraordinary test of President-elect Biden's ability to negotiate the compromises with the House and Senate that are essential to enactment of legislation.

Two other features of the U.S. political system combine with extreme political polarity to make the President-elect's task even more daunting. Most candidates for seats in the House and Senate are chosen through use of party-based primary elections. Primaries are low turnout elections in which political activists with extreme views are overrepresented. As a result, primaries artificially advantage politicians with extreme views.

Moreover, most members of the House and Senate live in constant fear of being "primaried." The vast majority of House and Senate seats are "safe" in the sense that the candidate of either the Democratic Party or the Republican Party is virtually certain to win in the general election. Thus, the only risk to the job security of most members of the House and Senate is the risk of losing in a party-based primary. For Democrats, the risk comes from the left. For Republicans, the risk comes from the right. Thus, the safest course of action for most Democrats is to take positions on the far left and never to move toward the center to compromise, while the safest course of action for most Republicans is to take positions on the far right and never to move toward the center to compromise.

The second feature of the U.S. political system that renders compromise nearly impossible is the method of deciding whether any Bill can be considered by the full House or Senate. The majority leader of the Senate and the Speaker of the House are the gatekeepers who make those decisions. Both are elected by majority vote of the members of their party. This creates a situation in which Bills that could easily be enacted by a majority of the members of the Senate often cannot be considered by the full Senate, and Bills that could easily be enacted by a majority of members of the House often cannot be considered by the full House. A rational Speaker of the House will not allow a floor vote on a Bill that would be enacted by a vote of 325 to 110 if the 110 members who oppose the Bill are members of her party, and a rational majority leader of the Senate will not allow a floor vote on a Bill that would be

enacted by a vote of 74 to 26 if the 26 members who oppose the Bill are members of his party. In either of those situations, a decision to allow a floor vote on the Bill would expose the gatekeeper to a high risk of losing their job by angering the majority of members of her party who are in a position to vote her out of office.

President-elect Biden is an experienced and highly skilled negotiator, but even he may not be successful in enacting major legislation in the political environment in the U.S. today.

Issuance of New Rules Will Be a Long and Risky Process

The remarkably poor track record of agencies' attempts to defend decisions to rescind or modify rules during the Trump Administration was caused by the agencies' failure to comply with the most fundamental legal prerequisites for a lawful rulemaking. To issue, amend, or rescind a rule, an agency must use a process of notice and comment and then must provide an adequate explanation for the action the agency has taken. Agencies in the Trump Administration attempted unsuccessfully to circumvent that process. Agencies in the Biden Administration are unlikely to repeat that mistake.

It follows, however, that it will take agencies in the Biden Administration a long time to issue the many major rules that President-elect Biden would like them to issue. It usually takes years to issue a major new rule through use of the notice and comment process.

The new rules issued by agencies during the Biden Administration will have to clear a high hurdle to judicial affirmance. An agency can only issue a rule if Congress has enacted a statute in which it delegated to the agency the power to issue the rule. Congress has not been able to enact or amend most of the statutes that delegate power to agencies for many decades. As a result, agencies must rely on statutes that are thirty to eighty years old to support the issuance of rules that are intended to address problems that were unknown when the statutes were enacted. Thus, for instance, agencies must rely primarily on a 1934 statute to support decisions about whether and how to regulate the internet, and agencies must rely primarily on a statute that was last amended in 1990 to support decisions to mitigate climate change.

The many conservative judges and Justices that President Trump appointed are likely to react with skepticism to any claim by an agency that it can rely on an old statute that says nothing that is directly relevant to today's problems as the sole basis for a bold new rule that addresses those problems. The Supreme Court's reaction to the Clean Power Plan (CPP) that the Environmental Protection Agency (EPA) issued during the Obama Administration illustrates the likely reaction of conservative judges and Justices to attempts of this type. The CPP was the Obama Administration's most important step in its efforts to comply with the duties that the Paris Accord imposed on the U.S. It required electric utilities to switch from high carbon fuels to low carbon fuels at a cost of many billions of dollars.

The Supreme Court took the unprecedented step of staying the CPP before it could even be the subject of review by a lower court. The Supreme Court did not issue an opinion in which it explained the basis for its action, but the basis for its decision is easy to infer from the agency's explanation of its rule, the briefs in support of the stay, and the division among the Justices. The EPA relied entirely on a novel and aggressive interpretation of a provision of a 1990 statute as the basis for the CPP. That provision was not intended to be a source of power to address climate change and it had never been interpreted to authorize EPA to require utilities to switch fuels. So far, Congress has refused to take any action to address

climate change or to authorize any agency to take actions to address climate change. The five conservative Justices who voted to stay the CPP were not willing to uphold the agency's attempt to reinterpret a statute that did not address climate change at all as the basis for a new rule that addressed climate change by imposing billions of dollars of costs on electric utilities and their customers.

The reaction of the five conservative Justices to the CPP is typical of the likely reactions of conservative judges and Justices to attempts to support major new rules by relying on old statutes that were not enacted to address the problem the rule addresses. They will not uphold a rule unless they are persuaded that Congress conferred on the issuing agency the power to issue the rule. Because of the success of the Trump Administration in appointing conservative judges and Justices, there are now six conservative Justices and over one hundred newly appointed conservative judges. They will react with skepticism to the attempts by agencies in the Biden Administration to issue major rules to address important new problems that Congress has never addressed.

Conclusion

The Biden Administration will enjoy many important successes in its early days. After that, it will experience extreme difficulty taking the kinds of bold regulatory actions that President Biden envisions. President Biden will have to combine superior political acumen with patience and perseverance to be successful in his attempt to reunite a nation that is experiencing extreme political polarity.