
HEALTHCARE POLICY DURING A PANDEMIC PRESIDENCY—BIDEN’S FIRST 100 DAYS

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As a masked President Biden took his oath of office among other socially distanced government officials, COVID-19 was the uninvited and most conspicuous guest at his inauguration. Indeed, the global pandemic has shaped his health care policies most urgently. Health care access, rising costs, and health equity have been at the forefront of his focus in these first 100 days of his presidency. Moreover, Biden inherited a health care system that many have claimed was “broken” long before the pandemic and campaigned with he continues to promise to fix it. During his campaign, he promised that he would build upon the Patient Protection and Affordable Care Act (commonly known as the “Affordable Care Act” or “ACA”) to help more Americans gain health insurance coverage and create a government-run public option.¹ He further promised to address systemic inequities. This comment examines Biden’s focus in three major areas during his first 100 days in office with respect to healthcare policy: 1) his COVID-19 response; 2) his enhancement of the ACA; and 3) his focus on health equity and access.

I. HEALTH POLICY REGARDING THE COVID-19 RESPONSE

It was unsurprising that the focus of this new administration’s health policy would begin by tackling the COVID-19 pandemic. Within his first weeks in office, President Biden signed at least twelve executive orders related to healthcare and COVID-19.² Several of those executive orders pertained to masking in support of his “100 days masking challenge.” After almost a year of a patchwork

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1. Abigail Abrams, *As Joe Biden Touts ‘BidenCare,’ Donald Trump Promises a Health Care Plan That Doesn’t Exist*, TIME (Oct. 22, 2020, 11:37 PM), <https://time.com/5903204/joe-biden-health-care-debate/> [<https://perma.cc/LF6P-MET4>].

2. See, e.g., Proclamation No. 13987, 86 Fed. Reg. 7019 (Jan. 20, 2021) (Organizing and Mobilizing the United States Government to Provide a Unified and Effective Response to Combat COVID-19 and to Provide US Leadership on Global Health and Security); Proclamation No. 13994, 86 Fed. Reg. 7189 (Jan. 21, 2021)

state mask mandates and campaign promises for a national response including mask mandates, Biden began by creating two new leadership positions to incentivize and encourage widespread mask wearing.³ Federal employees, contractors, and all persons in federal buildings or lands were now required to wear masks and maintain physical distancing. The new plans encourage people to wear masks across America and are designed to develop a COVID-19 testing plan for the federal workforce.⁴ To be sure, the President has no authority over local and state public health orders and many states have continued to choose not to issue statewide orders.⁵ However, Biden has mandated masks for interstate travelers in airports, planes, trains, ferries, buses, and public transportation.⁶ It remains to be seen whether these mandates will be effective in motivating people to continue to wear masks especially as more of the population becomes vaccinated, despite existing mask mandates.

Among Biden's chief challenges with respect to the COVID-19 response was the task of a massive vaccine rollout amidst the threat of new viral variants. Even before the inauguration, Biden set a goal of administering 100 million shots in 100 days.⁷ In this age of disinformation, vaccine hesitancy given the rapid development of the vaccine, and the lack of uniformity in the public health measures taken among the States, this goal seemed formidable. Using the powers under the Defense Production Act ("DPA")⁸, Biden was able to expedite vaccine production and work with manufacturers to hasten delivery. The DPA allows the President to compel the private sector to provide essential materials needed for

(Ensuring a Data-driven Response to COVID-19 and Future High-Consequences Public Health Threats); Proclamation No. 13995, 86 Fed. Reg. 7193 (Jan. 21, 2021) (ensuring an equitable pandemic Response and Recovery); Proclamation No. 13996, 86 Fed. Reg. 7197 (Jan. 21, 2021) (Establishing the COVID-19 Pandemic Testing Board and Ensuring a Sustainable Public Health Workforce for COVID-19 and Other Biological Threats); Proclamation No. 13997, 86 Fed. Reg. 7201 (Jan. 21, 2021) (Improving and Expanding Access to Care Treatments for COVID-19); Proclamation No. 13998, 86 Fed. Reg. 7205 (Jan. 21, 2021) (Promoting COVID-19 Safety in Domestic and International Travel); Proclamation No. 13999, 86 Fed. Reg. 7211 (Jan. 21, 2021) (Protection Worker Health and Safety); Proclamation No. 14001, 86 Fed. Reg. 7212 (Jan. 21, 2021) (A Sustainable Public Health Supply Chain); Proclamation No. 14007, 86 Fed. Reg. 7615 (Jan. 27, 2021) (Establishing the President's Council of Advisors on Science and Technology); Proclamation No. 14009, 86 Fed. Reg. 7793 (Jan. 28, 2021) (Strengthening Medicaid and the Affordable Care Act).

3. Proclamation No. 13987, 86 Fed. Reg. 7019 (Jan. 20, 2021) (Organizing and Mobilizing the United States Government to Provide a Unified and Effective Response to Combat COVID-19 and to Provide US Leadership on Global Health and Security).

4. Proclamation No. 13991, 86 Fed. Reg. 7045 (Jan. 21, 2021) (Protecting the Federal Workforce and Requiring Mask-Wearing).

5. For example, Alaska, Arkansas, Arizona, Iowa, Idaho, Florida, Georgia, Mississippi, Missouri, Montana, Nebraska, North Dakota, Oklahoma, South Carolina, Tennessee, and Texas. One further example of the disconnect is that the Arizona Department of Health Services announced, on April 19, that it was rescinding orders that direct K-12 schools to require masks. *See* News Release, Office of the Governor Doug Ducey, Governor Ducey Acts on COVID-19 Measures in Schools (Apr. 19, 2021), <https://azgovernor.gov/governor/news/2021/04/governor-ducey-acts-covid-19-measures-schools> [<https://perma.cc/K776-QPDB>].

6. Proclamation No. 13998, 86 Fed. Reg. 7205 (Jan. 21, 2021) (Promoting COVID-19 Safety in Domestic and International Travel).

7. *Remarks by President Biden on the 100 Million Shot Goal*, THE WHITE HOUSE (Mar. 18, 2021, 3:26 PM), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/03/18/remarks-by-president-biden-on-the-100-million-shot-goal/> [<https://perma.cc/3SZ8-D6FG>].

8. Defense Production Act of 1950, 50 U.S.C. § 4531.

national defense.⁹ However, after hitting the 100 million dose goal after just 58 days in office, Biden has been able to far surpass his original goal. Empowered with a larger supply of vaccine, Biden announced that all Americans would be eligible for the vaccination by May 1, and to get the nation “closer to normal” by July 4.¹⁰ Despite this apparent success, vaccine hesitancy, distrust, or opposition may still threaten to slow down efforts to achieve widespread vaccination.

As the demand for vaccines in the United States begins to dwindle, Biden must confront the global costs of the accrual of a stockpile of vaccines. With the increasing gap between vaccine distribution efforts in wealthy nations and developing nations, the World Health Organization warns of a “catastrophic moral failure” with those from the poorest countries paying the price for it.¹¹ The U.S. government is projected to have 300 million or more excess doses given the status of its current advanced purchase agreements for vaccines.¹² While Biden is loaning 2.5 million doses to Mexico and 1.5 million to Canada¹³, he will face more vaccine diplomacy issues as Russia and China have been the leaders in providing vaccines to developing countries.¹⁴ As Biden begins to reach his national vaccination goal, his administration will have to turn its attention to global leadership and how it will distribute available doses to the rest of the world as American demand for the vaccination diminishes.

9. The DPA has been used by the Department of Defense 300,000 times a year. In March 2020, President Trump used powers under the DPA to increase efforts in ventilator manufacturing and to acquire more surgical masks. *See also* Zolan Kanno-Youngs & Ana Swanson, *Wartime Production Law Has Been Used Routinely, but Not with Coronavirus*, N.Y. TIMES (Mar. 31, 2020), <https://www.nytimes.com/2020/03/31/us/politics/coronavirus-defense-production-act.html> [<https://perma.cc/F796-MG49>].

10. *Fact Sheet: President Biden to Announce All Americans to be Eligible for Vaccinations by May 1, Puts the Nation on a Path to Get Closer to Normal by July 4th*, THE WHITE HOUSE (Mar. 11, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/11/fact-sheet-president-biden-to-announce-all-americans-to-be-eligible-for-vaccinations-by-may-1-puts-the-nation-on-a-path-to-get-closer-to-normal-by-july-4th/> [<https://perma.cc/G8TA-RE7E>].

11. *WHO Director-General’s Opening Remarks at 148th Session of the Executive Board*, WORLD HEALTH ORG. (Jan. 18, 2021), <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-148th-session-of-the-executive-board> [<https://perma.cc/ET9M-7AE8>] (“More than 39 million doses of vaccine have now been administered in at least 49 higher-income countries. Just 25 doses have been given in one lowest-income country. Not 25 million; not 25 thousand; just 25.”).

12. These agreements provided support for rapid scale manufacturing for the following vaccines: Pfizer/BioNTech, Moderna, Johnson & Johnson, AstraZeneca, and NovaVax. *See* Mark McClellan, Krishna Udayakumar, Michael Merson & Gary Edson, *Reducing Global COVID Vaccine Shortages: New Research and Recommendations for US Leadership*, DUKE GLOBAL HEALTH INST. (Apr. 15, 2021), <https://launchandscale-faster.org/sites/default/files/documents/US%20Leadership%20for%20Global%20VaVaccin.pdf> [<https://perma.cc/5YEN-A8ZA>]; *see also* *Press Briefing by Press Secretary Jen Psaki and Secretary of Housing and Urban Development Marcia L. Fudge*, THE WHITE HOUSE (Mar. 18, 2021), <https://www.whitehouse.gov/briefing-room/press-briefings/2021/03/18/press-briefing-by-press-secretary-jen-psaki-and-secretary-of-housing-and-urban-development-marcia-l-fudge-march-18-2021/> [<https://perma.cc/6JRR-M24A>].

13. *Press Briefing by Jen Psaki and Marcia L. Fudge*, *supra* note 12; Nick Miroff, Karen DeYoung & Kevin Sieff, *Biden Will Send Mexico Surplus Vaccine, as U.S. Seeks Help on Immigration Enforcement*, WASH. POST (Mar. 18, 2021, 11:08 AM), https://www.washingtonpost.com/national-security/biden-mexico-immigration-coronavirus-vaccine/2021/03/18/a63a3426-8791-11eb-8a67-f314e5fcf88d_story.html [<https://perma.cc/6HL6-VVFB>].

14. Kerry Cullinan & Esther Nakkazi, *Russian And Chinese Bilateral Vaccine Deals & Donations Outmaneuver Europe & United States*, HEALTH POL’Y WATCH (Apr. 4, 2021), <https://healthpolicy-watch.news/russia-and-chinas-bilateral-vaccine/> [<https://perma.cc/PZK7-P7U9>].

II. SAVING THE ACA

The pandemic has magnified many of the fissures in the current U.S. Health care system. As more Americans continue to contract and live with COVID-19, more people will need access to health care and may find themselves without insurance. Long before the pandemic, America has been enduring what many commentators call a “health care crisis”—increasing costs coupled with access issues for many Americans to quality health care.¹⁵ For over a decade, the ACA has been front and center of the debate on how best to tackle the crisis. The ACA provides for the creation of marketplace exchanges that would allow more Americans to be insured, to purchase insurance regardless pre-existing conditions, to encourage health care integration, to reward health care quality, and to amplify wellness programs.¹⁶ The legislative scheme has come under its share of judicial scrutiny.¹⁷ Most recently, the Supreme Court heard oral arguments and will likely decide the ACA’s fate this spring.¹⁸ As we await the Supreme Court’s decision, Biden has begun to invest more in the ACA.¹⁹ While it is unlikely that the Supreme Court will overturn the ACA, such a decision would leave potentially tens of millions of people uninsured during a global pandemic. Even if the Supreme Court does not overturn the ACA, many Americans remain uninsured and in need of ongoing healthcare. In fact, in 2019, before the onset of the pandemic, 14.5% of adults aged 18-64 were uninsured (an increase from 2018 where 13.3% lacked coverage).²⁰ There are several factors contributing to this increase and among them are that many Americans believed they could not afford the cost of coverage, followed by not being eligible.²¹ Furthermore, some states, under the Trump Administration, required low-income residents to work in order to gain Medicaid coverage.²²

In order to address this problem, Biden not only revoked President Trump’s executive order calling for the repeal of the ACA, but he also revoked two of President Trump’s executive orders that shortened the period for enrollment for coverage under the ACA.²³ Biden also called for federal agencies to review policies that “undermine protections for people with pre-existing conditions, including complications related to COVID-19” and policies reducing “affordability of

15. Zachary R. Paterick, Nachiket Patel, & Timothy E. Paterick, *Commentary: America’s Healthcare Crisis*, 34 J. MED. PRAC. MGMT. 10 (2018).

16. Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in 42 U.S.C. § 18001).

17. *NFIB v. Sebelius*, 567 U.S. 519 (2012); *King v. Burwell*, 135 S. Ct. 2480 (2015); *see also* Abbe R. Gluck, Mark Regan & Erica Turret, *The Affordable Care Act’s Litigation Decade*, 108 GEO. L.J. 1471 (2020).

18. *California v. Texas*, 140 S. Ct. 1262 (2020).

19. *See* Abrams, *supra* note 1.

20. Amy E. Cha & Robin A. Cohen, *Reasons for Being Uninsured Among Adults Aged 18-64 in the United States, 2019*, NCHA (Sept. 2020), <https://www.cdc.gov/nchs/data/databriefs/db382-H.pdf> [<https://perma.cc/2CFJ-HT95>].

21. *Id.*

22. *See* Phil Galewitz, *5 Things to Know About Medicaid Work Requirements*, KHN, (June 14, 2018), <https://khn.org/news/5-things-to-know-about-medicaid-work-requirements/> [<https://perma.cc/3EL5-VM36>].

23. Proclamation No. 14009, 86 Fed. Reg. 7793 (Jan. 28, 2021) (Strengthening Medicaid and the Affordable Care Act).

coverage or financial assistance, including dependents.”²⁴ Furthermore, the Secretary of Health and Human Services (“HHS”) has been directed to establish a special enrollment period for uninsured and underinsured Americans to seek coverage through a Federal marketplace exchanges. The Federal marketplace handles enrollment in 36 states and several state-operated exchanges will also allow for a special enrollment period. In addition to these Executive Orders, Biden signed the American Rescue Plan Act of 2021 into law; his first legislative victory.²⁵ The legislation covers a broad array of programs. Specifically, it provides for premium subsidies for individuals purchasing health insurance through the exchanges and that individuals will pay not more than 8.5% of their income for health insurance purchased on the exchange. As of April 7, more than 500,000 Americans have taken advantage of this program.²⁶ This number may be larger given that several state-sponsored exchanges also provided special enrollment periods. These efforts to bolster the reach of the ACA seem to be helping individuals obtain health insurance. In fact, the data suggests an increase in the diversity of American consumers purchasing insurance through the exchange.²⁷

III. HEALTH EQUITY

In addition to Biden’s aggressive agenda to expand ACA and Medicaid coverage, Biden also created a Health Equity Task force,²⁸ to identify and eliminate health and social disparities that result in disproportionately higher rates of exposure, illness, hospitalization, and death due to COVID-19.²⁹ The goal of the Task Force as to provide recommendations with respect to: 1) allocating resources to the extent permitted by the law, 2) disbursing COVID-19 relief funding in a manner that advances equity, and 3) cultural aligned communication to communities of color.³⁰ The Administration has also issued a memorandum on protecting women’s health at home and abroad.³¹ The memorandum directs the Secretary of State, the Secretary of Defense, and the Secretary of HHS to consider revising, rescinding, or suspending Trump era regulations pursuant to the Title X family planning program.³² The legality of this directive is certain to be

24. *Id.*

25. H.R. 1319, 117th Cong. (2021) (became Pub. Law No. 117-2 on Mar 10, 2021).

26. *2021 Marketplace Special Enrollment Period Report*, CMS NEWSROOM (Apr. 7, 2021), <https://www.cms.gov/newsroom/fact-sheets/2021-marketplace-special-enrollment-period-report-0> [https://perma.cc/SH8B-FP8Z].

27. *Id.*

28. The Task Force consists of a designee of the Secretary of HHS and “the heads of such other executive departments, agencies, or offices (agencies) as the Chair may invite; and up to 20 members from sectors outside of the Federal Government appointed by the President.” *See* Proclamation No. 13995, 86 Fed. Reg. 7193 (Jan. 21, 2021) (ensuring an equitable pandemic Response and Recovery).

29. Proclamation No. 13995, 86 Fed. Reg. 7193 (Jan. 21, 2021) (ensuring an equitable pandemic Response and Recovery).

30. *Id.*

31. *Memorandum on Protecting Women’s Health at Home and Abroad*, THE WHITE HOUSE (Jan. 28, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/28/memorandum-on-protecting-womens-health-at-home-and-abroad/> [https://perma.cc/QGY3-K2AF].

32. *Id.*

a subject of debate given that the Title X family planning program has faced many challenges.³³ In fact, in February, the Supreme Court agreed to hear three consolidated cases addressing this program.³⁴ While health equity is one of Biden's priorities, the road ahead for his initiatives will not be without challenge.

IV. CONCLUSION

As we approach President Biden's 100th day in office, he will be remembered for his approach to the COVID-19 response. His implementation of a rocky but successful vaccination rollout while trying to secure more equity and access to health care for uninsured and underinsured Americans is laudable. However, it remains to be seen what will happen beyond this 100-day milestone. Almost all of President Biden's policy changes have been realized through executive order. Real sustainable change to health policy will require more than just action through executive orders in the short term. Such changes will only happen through consensus among lawmakers to address issues of equitable access to health care. For the past three administrations, such consensus has been illusive and it will likely remain that way. Without legislative consensus and will, the most vulnerable for whom health care access and cost affects most acutely will be left paying the true price. Health care access and cost issues will continue to predominate the Biden Administration's focus since the pandemic shows no sign of ending anytime soon. As the pandemic continues to reveal the cracks the health care system, President Biden may be presented with new opportunities to address these problems through legislative or regulatory means. How he seizes on those opportunities remains to be seen.

33. *California v. Azar*, 927 F.3d 1068 (9th Cir. 2019); *Mayor of Baltimore v. Azar*, 973 F.3d 258 (4th Cir. 2020).

34. *See Am. Medical Assn. et al. v. Cochran*, No. 20-429, 2021 WL 666372 (U.S. Feb. 22, 2021); *Cochran v. Mayor & City Council of Baltimore*, No. 20-454, 2021 WL 666373 (U.S. Feb. 22, 2021); *Oregon v. Cochran*, No. 20-539, 2021 WL 666375 (U.S. Feb. 22, 2021).