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Potential Higher Education Legal Implications of the New Presidential Administration

February 16, 2021

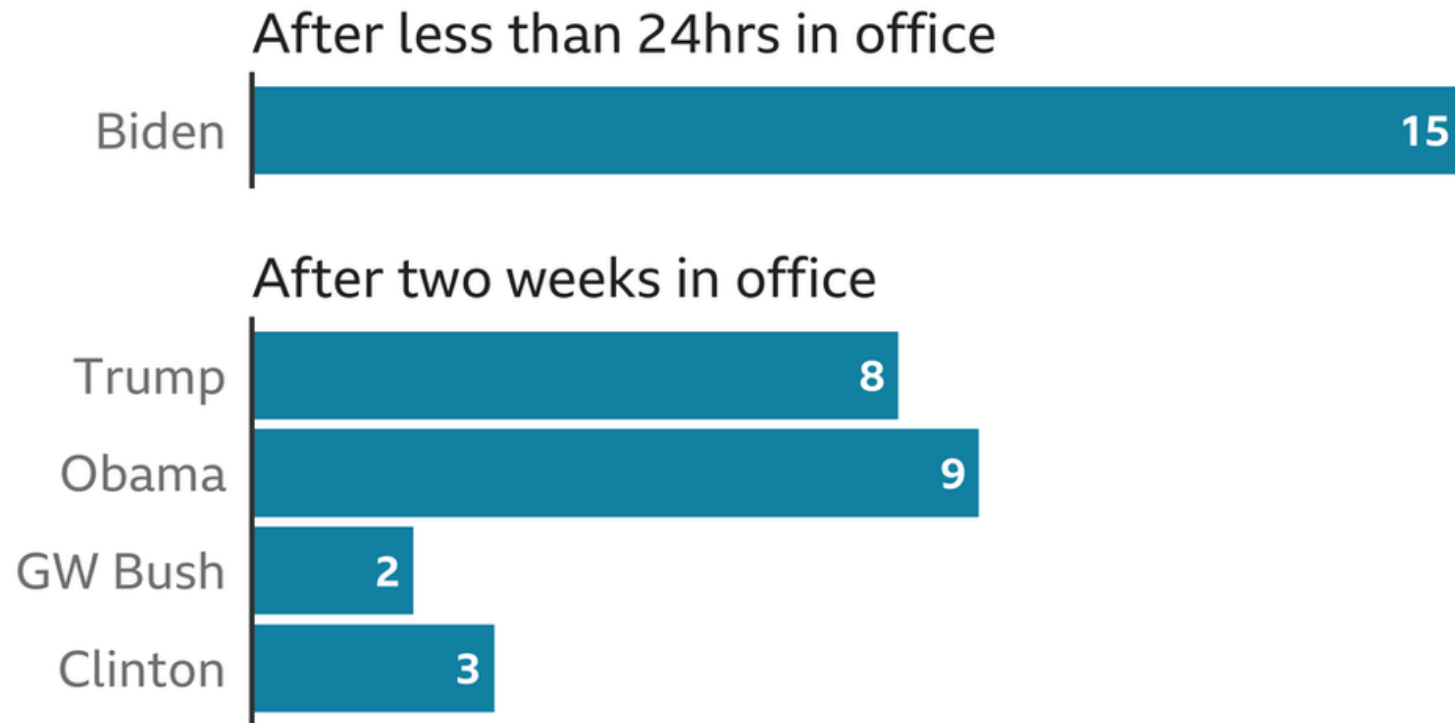
Introduction to Session and Impacted Law

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How does President Biden's use of executive power compare so far?

Number of executive orders signed by new president



Source: The American Presidency Project

BBC

Sources of federal law most impacted by presidential transition

- ▶ Federal Statute = law passed by Congress and signed by the President
- ▶ Regulations = rules enacted by an agency (Department of Education, Department of Justice, Department of Labor, etc.) that interpret a federal statute
- ▶ Executive Order = directive from the president, usually to administrative agencies, that manages operations of the federal government
- ▶ Agency Guidance = advice (including memos, bulletins, staff manuals, letters) provided by an agency regarding its current interpretations and enforcement standards

Executive Orders

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Utility and Effect of Executive Orders

- ▶ Executive Orders are directives or actions issued by the President that are generally directed to government officials and/or agencies
 - ▶ Typically do not *directly* apply to private citizens
- ▶ Executive Orders may only have the force of law if the action is based on the power vested in the President by the Constitution or delegated by Congress
 - ▶ Recent discussion of what the President can and cannot accomplish through Executive Orders

Utility and Effect of Executive Orders (Cont.)

- ▶ Executive Orders may be issued and revoked relatively easily
 - ▶ Unless implemented in a more permanent form, such as agency regulations, grant, or contract provisions
- ▶ Executive Orders may be subject to revocation based on the priorities and goals of a new administration

The Biden Administration's Projected Approach to Executive Orders

- ▶ Stated desire to rely on bipartisan legislation to accomplish his goals, as opposed to Executive Orders
- ▶ Still, signed a large number of Executive Orders on his first day in office, and in his first few weeks as president
 - ▶ Can visit Federal Register for regularly updated list of presidential executive orders
- ▶ To the extent that President Biden has issued executive orders, many of them have been issued to revoke Executive Orders from the previous administration
 - ▶ Ex. Executive Order 13985, which revoked Executive Orders 13950 & 13958

Executive Order 13950 re: Workplace Training

- ▶ Sought to prohibit federal employers, contractors, and certain grant recipients from using any training that “inculcates in its employees any form of race or sex stereotyping or any form of race or sex scapegoating.”
 - ▶ Race or sex stereotyping was defined as “ascribing character traits, values, moral and ethical codes, privileges, status, or beliefs to a race or sex, or to an individual because of his or her race or sex.”
 - ▶ Race or sex scapegoating was defined as “assigning fault, blame, or bias to a race or sex, or to members of a race or sex because of their race or sex.”
 - ▶ Originally Published by the Trump Administration on September 22, 2020, to be effective November 2020
 - ▶ Its enforcement was enjoined in December 2020, following a lawsuit filed by NAACP challenging its enforceability, on First Amendment and other grounds.

Executive Order 13985 re: Equity Assessment

- ▶ Revoked EO 13950
- ▶ Outlines the Biden Administration's commitment to assessing whether "underserved communities and their members face systemic barriers in accessing benefits & opportunities" both within federal agencies and with respect to the programs administered by federal agencies.
- ▶ Unlike 13950, it does not include specific expectations for federal contractors or grant recipients, but does note that the equity assessment may result in the proposal of lawful measures to address any barriers identified.

Final Takeaways on these EOs

- ▶ Federal Agency scrutiny of diversity training consistent with EO 13950 has been suspended.
- ▶ Equity Assessment conducted by the Biden Administration may result in more federal guidance regarding federal contractors and grant recipients obligations to address identified barriers.
- ▶ Although EO 13950 has been revoked, private litigation may draw arguments from the Order and the agency implementation statements that accompanied the Order.

Immigration

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Senior Associate General Counsel

Protect the Young, Count the Unseen, and Welcome Muslims

1. Preserve and Fortify DACA Protections for Dreamers
2. Reverse E.O. Excluding Undocumented Immigrants from the Census & Reapportionment Count
3. Reverse the Muslim Ban

Green Card for a STEM PhD, H-1B Stability, & Work for Spouses

4. Proposal to Create Faster Path to Permanent Residency for STEM Ph.D. Graduates
5. H-1B Cap Selection Process Update – DHS Postpones Effective Date of Final Rule
6. H-4 Dependents' Work Authorization

Travel Rules, Entry Suspensions, and A Bipartisan Dream

7. DOS & CDC Require Negative COVID-19 Test for Travel to The U.S. Beginning January 26
8. Continuation of Presidential Proclamations on Novel Coronavirus
9. The Dream Act of 2021

COVID-19 Relief

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COVID Relief for Colleges & Universities

March 2020 to January 2021:

- CARES Act (March 2020)
 - Included **~\$14 billion** in Higher Education Emergency Relief Fund (HEERF) to prevent, prepare for, and respond to COVID-19
 - UNC System allocation: **~\$179 million**
 - UNC Charlotte allocation : **~\$24 million**; 50% reserved for student emergency grants
 - institutional uses included PPE, Health Center testing, wastewater testing, Digital Learning Accelerator
- FFCRA (March 2020): Emergency Paid Sick Leave and Expanded Family & Medical Leave
- CRRSA: Higher Education Emergency Relief Fund (II): During transition, Congress passed FY21 supplemental spending bill for COVID relief:
 - **~\$23 billion** to colleges/universities/students
 - UNC Charlotte allocation: \$12,155,279 (students) \$27,382,263 (institution)
 - Student loan repayment moratorium through end of January; extended by Biden executive action through end of Sept. 2021
- Total of **~\$37 billion** in relief to colleges and universities since pandemic started

National Priority

Biden administration has made the COVID-19 pandemic one of its highest priorities

- National Strategy for the COVID-19 Response and Pandemic Preparedness:
Includes support for equitable reopening and operation in higher education
 - Request for additional \$35 billion in emergency stabilization funds for higher education
 - Support regular COVID-19 testing for under-resourced colleges and universities
 - Provide clear guidance on safe college operations
 - Work with colleges and universities to conduct outreach to students and staff on vaccination
 - Executive Order Supporting the Reopening and Continuing Operation of Schools and Early Childhood Education Providers (1/21/21)
- Administration will rename “Operation Warp Speed” (initiative to speed development, manufacture, distribution of vaccines)
 - Dr. David Kessler, former head of the FDA, named Chief Scientific Officer of COVID-19 response

Executive Order on Supporting the Reopening and Continuing Operation of Schools and Early Childhood Education Providers

Directs federal agencies to support the safe reopening of schools and colleges, and equal access to online education:

- **Guidance for reopening based on location, resources, and population:** Directs the Departments of Education and HHS to work together on evidence-based guidance that takes those circumstances into account, indicating that the administration wants to avoid a one-size-fits-all approach.
- **Equitable distribution of testing supplies and widespread contact tracing:** The Education Department should support contact tracing “to the maximum extent possible.”
- **Establishing a “Safer Schools and Campuses Best Practices Clearinghouse”:** A repository where institutions can share what they’ve learned from operating in the pandemic.
- **Supporting online learning:** Directs Secretary of Education to give schools and colleges the technical help they need to offer high-quality remote learning. Encourages the FCC to offer more options for internet/broadband access to students.
- **Information-gathering efforts focusing on socioeconomic disparities:** Directs federal agencies to collect data on the pandemic’s effects on education, particularly socioeconomic disparities.
- **Broad input:** Federal agencies have been directed to consult with state and local officials, educators, and unions in developing strategies to deal with the pandemic’s effects on educational outcomes.

(Source: Chronicle of Higher Education, 1/22/2021)

COVID Relief for Colleges & Universities

Where we are now:

- Biden administration has proposed “American Rescue Plan,” \$1.9 trillion in aid to offset financial damage of the pandemic, including **\$35 billion in emergency stabilization funds for higher education**
 - Republicans proposed \$618 million, **with no funding for higher ed**
- House budget bill ([Section 2002](#)): **~\$40 billion** for higher education emergency relief fund, apportioned same as HEERF
 - Funds available through 9/30/23
 - Not less than 50% directly to students in emergency financial aid
 - Portion of funds must be to monitor and suppress COVID
 - Requires states to maintain higher ed funding in FY22 and 23
- Final passage of relief legislation likely in mid-March, before enhanced unemployment benefits expire

Higher Ed Advocacy Groups

- The Association of Public and Land-Grant Universities
 - Requests that Congress set aside \$97 billion for colleges as part of next COVID-19 stimulus package
 - Indicates the ~\$37 billion Congress has directed to institutions of higher education so far has fallen “far short” of what they need
 - Notes that many public universities are poised to take a big hit in state appropriations in the coming year
- American Council on Education (ACE) agenda
 - Estimates lost revenue and increased costs in higher ed are \$120 billion (per Terry Hartle)
 - Pushing for more supplemental spending to address lost revenue and increased costs
 - Urging Congress and the federal government to agree on a comprehensive response
 - See [statement](#) from ACE President, Ted Mitchell, and [letter to House Committee on Education and Labor](#) on behalf of 22 higher ed organizations

Title IX

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Associate General Counsel

The Last Ten Years

- ▶ 2011-2016: Obama guidance documents and enforcement
- ▶ 2017: Trump administration rescinded guidance documents
- ▶ 2018-present:
 - ▶ Proposed regs released in November 2018
 - ▶ More than 100,000 comments submitted
 - ▶ Final rule issued on May 6, 2020 (accompanied by 2000 pages of preamble)
 - ▶ Implementation deadline of August 14, 2020



What's Next?

- ▶ Biden's campaign website: "The Biden Administration will restore the Title IX guidance for colleges, including the 2011 Dear Colleague Letter, which outlined for schools how to fairly conduct Title IX proceedings."
- ▶ Suzanne Goldberg appointed acting Assistant Secretary
- ▶ Some options:
 - ▶ Rescind/replace regulations (lengthy!)
 - ▶ Soften regulations through guidance (limited change)
 - ▶ Nonenforcement?
- ▶ No option results in immediate and significant changes to UNC Charlotte policy ([University Policy 504](#))



Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation

- ▶ Issued January 20, 2021
- ▶ “It is the policy of my Administration to prevent and combat discrimination on the basis of gender identity or sexual orientation, and to fully enforce Title VII and other laws that prohibit discrimination on the basis of gender identity or sexual orientation.”

College Affordability

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FAFSA Simplified

- ▶ December Omnibus Spending Bill
- ▶ 108 questions to 36 questions
- ▶ Effective October 2022 (for 2023-24 academic year)
- ▶ Pell Grant Updates



Pell Grant Updates

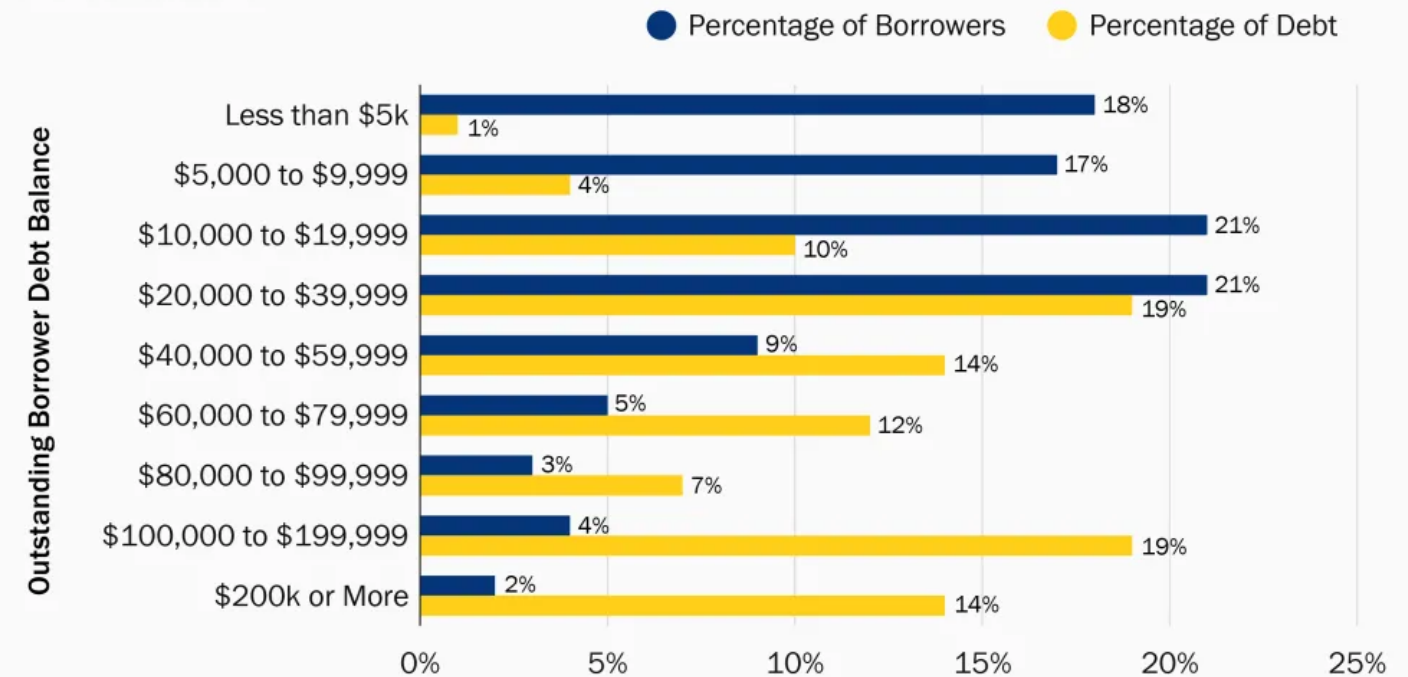
- ▶ Automatic Qualifications
- ▶ Increase to the income limits for receiving the grant
- ▶ Eligibility extended to incarcerated individuals
- ▶ Update to student aid index (as low as -\$1,500)
- ▶ Future: Double maximum award



Student Loans

- ▶ Continued COVID Relief for ED Loans (September 30, 2021)
- ▶ Student Loan Forgiveness
- ▶ Student Loan Reform
- ▶ Tuition Free College

Figure 1. Share of Borrowers and Share of Debt by Outstanding Borrower Debt Balance



Source: The College Board and U.S. Department of Education, via Sandy Baum.

Questions?

Feel free to contact any of the attorneys in the Office of Legal Affairs.
See the attorney directory at <https://legal.uncc.edu/directory-list/attorneys>