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ANALYSIS ON THE FUTURE STRATEGY OF THE WHITE HOUSE DURING BIDEN ADMINISTRATION

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What to Expect on Energy and Environmental Policy from the New U.S. Administration?

In the November 3, 2020 U.S. election, the Democrat team of Joe Biden and Kamala Harris defeated incumbent Republican President Donald Trump and Vice President Mike Pence, signaling a major change in the executive branch of the U.S. government. And, as a result of a runoff election for the two Georgia Senatorial seats on January 5, 2021, the Democrats will take control of the Senate. With the Democrats haven won both of these seats, the Senate will be tied 50-50, with the Democrat Vice President (who serves as president of the Senate) breaking the tie, thereby turning Senate control over to Democrats. In the House of Representatives, Republicans gained a relatively small number of seats, so Democrats have maintained their control of that body.

There will be numerous changes — many rather significant, and some quite dramatic — in U.S. climate change policy under the Biden administration. But in a variety of ways it will be an uphill battle, just to return to the pre-Trump status at the time President Obama departed the White House, let alone to move beyond that point.

Significant Changes in Policy Priorities and Norms of Conduct

Mr. Biden and Ms. Harris will be inaugurated on January 20th, 2021, and will immediately face an unprecedented set of national challenges. As the Biden-Harris transition website indicates, the greatest challenges – and top policy priorities – are: the pandemic, the economic recession, racial justice, and climate change (listed by President-Elect Biden in that order).

The failure of Mr. Trump to be re-elected to a second term brings a dramatic change in leadership at the very top. For the first time in four years, honesty and civility will be hallmarks of behavior, as will fundamental trust in expertise, including in the realms of science, economics, and law. The dozens of political and behavioral norms that have been abandoned by President Trump and his administration will be respected once again.

Democratic norms will be restored, racism denounced, and diplomatic relationships will be reestablished with allies. There will be a turn away from xenophobia and hostility toward immigrants, and perhaps some movement toward free trade.

I focus in this essay on anticipated changes in public policies regarding climate change, both in the international and domestic domains. Four years ago, it was rather straightforward for me to predict what the newly-elected Trump administration would bring in the climate change realm, as I discussed in *the New York Times* and in my blog in November, 2016. This time, however, it is a bit less obvious, because of the moving parts.

I caution readers to beware of advocates on either side making predictions at this very early date about the new administration's future climate policy initiatives. Predictions from those who advocate particular policies are likely to be infected with some degree of wishful thinking. That may be true not only of professional environmental advocates, but also of academics, like myself, who would like to claim some degree of objectivity. The best I can offer is that I have "no skin in the game," and so I will try to offer what I hope is an objective assessment of what I honestly believe is most likely to emerge over the next two to four years.

International Dimensions of Climate Change Policy

Because climate change is a global commons problem, international cooperation is necessary in order to constrain (if not suppress) free-rider incentives. On January 20th (inauguration day) or shortly thereafter, Mr. Biden is likely to initiate the process of rejoining the Paris Agreement (from which Mr. Trump withdrew the United States on November 4th, the earliest date permitted by the Agreement). Thirty days after the necessary paperwork is filed with the United Nations, the United States will again be a Party to the Agreement. That's the easy part. The hard part is coming up with a quantitative statement of how and how much U.S. emissions of greenhouse gases (GHGs) will be reduced over time.

This "Nationally Determined Contribution" (NDC) will need to be sufficiently ambitious to satisfy (at least to some degree) both domestic green groups and some of the key countries of the international community. This essentially means that the NDC will need to be more ambitious than the Obama administration target of a 26-28 percent reduction in GHG emissions by 2025, compared with 2005. And it will need to compare favorably with the targets now being announced by other major emitters. For example, the European Union is coming close to enacting a new target to cut its emissions 55% below their 1990 level by 2030. And China recently said it will achieve carbon neutrality (zero net emissions) by 2060.

If significant ambition is one necessary condition for the new Biden NDC, the other necessary condition is that it be credible, that is, truly achievable given existing and reasonably anticipated policy actions. The only way that both of these necessary conditions can be achieved is with aggressive new domestic climate legislation.

Domestic Climate Legislation

Even with a Democratic-controlled Senate with the one-vote margin, meaningful and ambitious climate legislation will be difficult, if not impossible, because of the 60-vote total required by Senate rules to pass legislation. The "budget-reconciliation process," whereby only a simple majority is needed to pass legislation, rather than the 60 votes required to cut off Senate debate, will be available only if every Democrat supports the given legislation.

Under these circumstances, it will be challenging, to say the least, for Democrats to enact President-Elect Biden's climate plan, including its $2 trillion in spending over four years with the goal of making all U.S. electricity carbon free in 15 years. Keep in mind that the Obama administration's major climate legislation – the American Clean Energy and Security Act of 2009 (the so-called Waxman-Markey bill) – failed to receive a vote in the Senate, despite the fact that Democrats (and independents who caucused with Democrats) then held a total of 59 seats. On the other hand, climate change is now taken more seriously by the public and receives considerably greater attention in political circles than it did twelve years ago. It is fair to say that the prospects over the next two to four years for comprehensive climate legislation – such as a truly meaningful carbon-pricing system – are not very good.

But other legislation that would help reduce GHG emissions in the long term appears more feasible. That includes a post-COVID economic stimulus bill, which might have a green tinge, if not a fully green hue. The Obama administration's stimulus package enacted twelve years ago in response to the Great Recession included some $90 billion in clean energy investments and tax incentives. Another candidate will be a future infrastructure bill, something both parties seem to recognize is important to upgrade aging U.S. infrastructure. This could include funding for improvements in the national electricity grid, which will be necessary to facilitate greater reliance on renewable sources of electricity generation.

Finally, there are possibilities for less ambitious, but bipartisan climate legislation, with stringency and scope much less than what Biden's climate plan calls for. The key approaches here might involve tax incentives, that is, nearly every politician's favorite instrument – subsidies. This may fit well with President-Elect Biden's moderate approach to governing and his stated desire to work with both parties in Congress. Specific bipartisan options could include policies targeting wind and solar power, carbon capture and storage/utilization, nuclear power, and technology initiatives.

But such modest, bipartisan initiatives are unlikely to satisfy either the demands of domestic climate policy advocates or international calls for action. Because of this, the new administration – like the Obama administration – may have to opt for regulatory as opposed to statutory approaches.

Regulatory Approaches

The new President, under existing authority, could "quickly" take actions through executive orders (Oval Office directives) in a number of areas to reverse many of Trump's regulatory rollbacks. For example, new oil and gas leasing on federal lands could again be prohibited, and the White House could attempt to block the Keystone XL pipeline from being completed. More promising, the President could direct that the Social Cost of Carbon (SCC) be revised, presumably returning it the Obama administration's use of global (not just domestic) damages and a 3% (rather than 7%) discount rate in the calculations, thereby increasing the SCC from about $1 to about $50 per ton, and directing federal agencies to use the revised SCC in their own decision making.

Presumably the new administration will move to reinstate and move beyond the Obama administration's ambitious Corporate Average Fuel Economy (CAFE) standards. Also, there is the possibility of using the authority of the Securities and Exchange Commission (SEC) to use financial regulation of publicly-traded companies to raise the cost of capital for fossil energy development, or to set standards for disclosure of climate-related corporate information. Likewise, the Commodity Futures Trading Commission (CFTC) has itself begun to explore options via its Market Risk Advisory Committee.

Regulatory approaches under existing statutory authority through rulemaking often appear to be an attractive option, but using new regulations under existing legislation rather than enacting new laws raises another problem – the courts. Rulemaking entails lengthy notice and comment periods, extensive records, and inter-agency consultation, and the rules are subject to potential litigation. The Obama administration promulgated its Clean Power Plan after the Senate failed to deliver on the administration's comprehensive climate legislation. But the Clean Power Plan was subjected to a stay by the U.S. Supreme Court even before Trump entered office. Then Trump arrived, and killed the regulation outright.

The real challenge to the regulatory approach is that new regulations are much more likely to be successfully challenged in federal courts in 2021 than they were during the Obama years. This is partly because there are now 228 Trump-appointed federal lower-court judges. But more importantly, the Supreme Court now has a 6-3 conservative majority, which is very likely to favor literal reading of statutes, giving executive departments and agencies much less flexibility to go beyond the letter of the law or to interpret it in "innovative ways." In particular, it is possible that the Supreme Court will move to modify or even overrule the critical Chevron Doctrine (1984), under which federal courts defer to administrative agencies when Congress was less than explicit in a statute on some issue (such as whether carbon dioxide can be regulated under sections of the Clean Air Act of 1970 intended for localized air pollutants).

There is also talk of a "whole of government" approach to climate change, in which the White House pushes virtually all departments and agencies to put in place changes that are supportive of decarbonizing the economy. This would be beyond or instead of the focused statutory and regulatory policies described above. Of course, the critical question is what such an approach could actually produce in terms of short-term emissions reductions and/or long-term decarbonizing of the economy.

Sub-National Climate Policy

Even if relatively little can be accomplished with climate policies at the Federal level over the next two to four years, the new administration will not be hostile to states and municipalities taking more aggressive action. Indeed, as I have written about previously in my blog and elsewhere, climate policies at the state level (California) and regional level (the Regional Greenhouse Gas Initiative in the northeast) have become increasingly important, particularly during the four years of the Trump administration. Bottom-up evolution of national climate policy may continue to evolve from the Democrat-leaning states in the recent election – the Northeast, Middle Atlantic, Upper Midwest, Southwest, and West Coast (and Georgia!) – which together represent more than half of the U.S. population and an even larger share of economic activity and GHG emissions.

The Path Ahead

The new administration may find creative ways to break the logjam that has prevented ambitious national climate change policies from being enacted (or, if enacted, from being sustainable). My greatest source of optimism is that the Biden-Harris team, in sharp contrast with the Trump-Pence administration, will embrace scientific and other expertise across the board – whether that means the best epidemiologists and infectious disease experts designing an effective strategy for COVID-19, or the best scientists, lawyers, and economists designing sound climate policies that are also politically feasible.

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