

Post-Election Webinar Series

Healthcare | November 20, 2020

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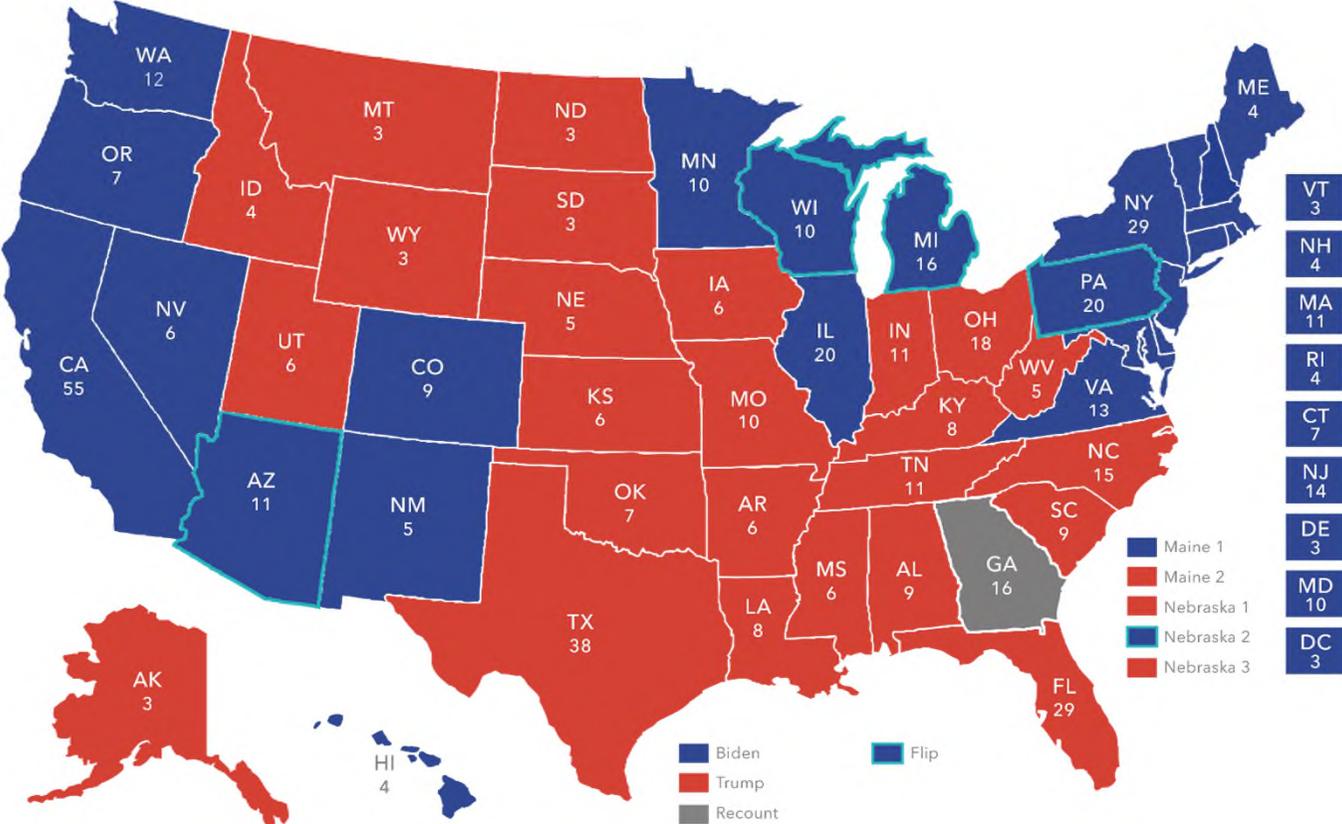
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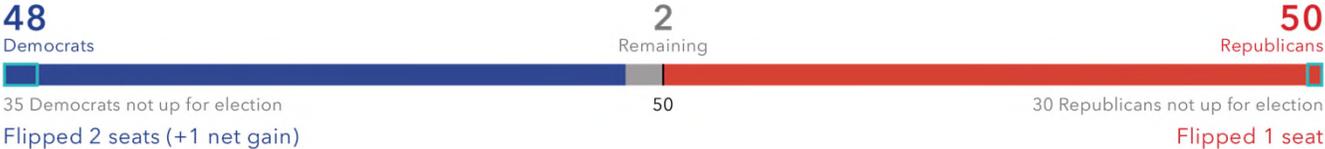
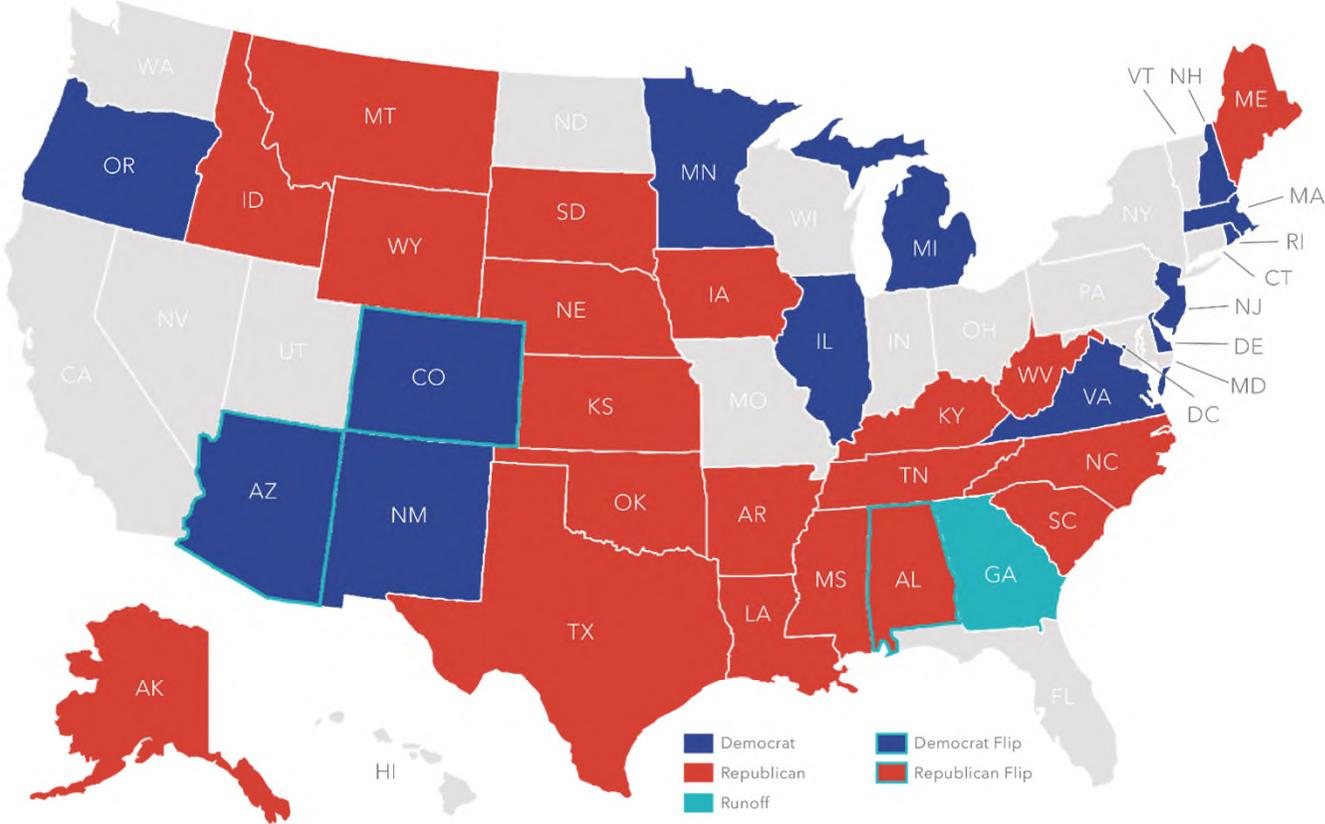
The 2020 Election – President-Elect Biden at 290

- President-Elect Joe Biden is the projected winner with 290 votes. President Trump has 232 votes but has yet to concede.
- Georgia is going to a recount. Pennsylvania is being litigated, and President Trump wants to prohibit PA from certifying the election.



The 2020 Election – The U.S. Senate: Undecided

- Control of the United States Senate has not been determined yet.
- Republicans were able to flip Alabama and hold Montana and Iowa.
- Democrats flipped Arizona and Colorado.
- There will be two runoffs in Georgia that will determine the majority in the U.S. Senate.



The 2020 Election – The Next 60 Days

The Election Fight, Continuing Resolution, and COVID-19 Stimulus Bill

- How long could it take to finalize the results of the presidential election?
- Georgia January runoff elections
- The government runs out of funding on December 11
- Will Democrats and Republicans work to finish a COVID-19 bill and combine with a CR or wait until 2021?
- Will Trump sign any bill coming to him?



The 117th Congress

House of Representatives



Rep. Nancy Pelosi (D-CA)

House Committee Chairs



Unknown
House Appropriations



Rep. Richard Neal (D-MA)
House Ways and Means



Rep. Frank Pallone (D-NJ)
House Energy and Commerce



Rep. Maxine Waters (D-CA)
House Financial Services

U.S. Senate



Sen. Mitch McConnell (R-KY)

Senate Committee Chairs



Sen. Richard Shelby (R-AL)
Senate Appropriations



Sen. Mike Crapo (R-ID)
Senate Finance



Sen. Roger Wicker (R-MS)
Senate Commerce, Science, and Transportation



Sen. Patrick Toomey (R-PA)
Senate Banking

The First 100 Days

Potential priorities for the first 100 days of a Biden administration could include:

- COVID-19 response/stimulus, possibly coupled with infrastructure
 - A COVID-19 package could happen regardless of which party controls the Senate, but scope will be different, depending on whether Republicans or Democrats are in the majority
 - There could be a tax component
- Immigration
 - Look for Biden to undo Trump policies and push for comprehensive immigration reform (as Biden reiterated in the last debate)
 - There is bipartisan support for something in the Senate regardless of which party controls it
- Climate/Environment
 - Biden wants to re-enter the Paris Agreement
 - Probable rollback of Trump environmental deregulation and a legislative push if Democrats control the Senate
- Voting rights advancement/John R. Lewis Voting Rights Act

Authorizing Bills

There are several issue areas that could undergo major policy overhauls, including:

- Higher Education Act (HEA) reauthorization (expired 2014)
- Debt limit suspension (expiring July 2021)
- Surface transportation programs/Highway Trust Fund (HTF) (expiring September 2021)
- National Flood Insurance Program (NFIP) (expiring September 2021)
- And, of course, healthcare

Government Spending

- Where could increased spending impact healthcare?
 - Stimulus and/or COVID-19
 - Grant programs
 - New programs/spending
 - Appropriations
- Democrats generally favor public institutions rather than private (education, healthcare, etc.)
- Fiscal Year 2022 (FY22) will be the first in a decade where Congress isn't hamstrung by discretionary spending caps on defense and non-defense spending
 - Budget Control Act in 2011 imposed these caps
- Renewed chatter about returning to some form of congressionally directed spending ("earmarks")
 - House Select Committee on the Modernization of Congress recommended this in September

Regulations

- Generally speaking, more regulations under a Democratic administration
- Anticipate Biden will get to work on “day one” undoing Trump regulatory changes (particularly ones that unwound Affordable Care Act regulations)
- Open question whether congressional Democrats will attempt to use the Congressional Review Act (CRA) to repeal some deregulatory actions of the Trump administration

COVID-19 Policies

Trump Administration

- Push for vaccines and therapeutics
- State-led testing and tracking
- Push to safely reopen schools and the economy
- Telehealth (especially Medicare)
- More money from Congress

Biden Administration

- Federal government lead
- Massive testing
- Deferential to states and localities on school and economy reopening
- Telehealth (especially Medicare)
- More money from Congress

Healthcare – Key House Players

House Ways and Means Committee

- Chairman Richard Neal (D-MA)
- Ranking Member Kevin Brady (R-TX)

Energy and Commerce Committee

- Chairman Frank Pallone (D-NJ)
- Rep. Anna Eshoo (D-CA) – *Health Subcommittee Chairwoman*
- Next top Republican:
 - Rep. Michael Burgess (R-TX);
 - Rep. Bob Latta (R-OH); or
 - Rep. Cathy McMorris Rodgers (R-WA).

Healthcare – Key Senate Players

Senate Finance Committee

- Sen. Mike Crapo (R-ID) – *likely to become top Republican*
- Sen. Ron Wyden (D-OR) – *to remain top Democrat*

Senate HELP Committee

- Sen. Richard Burr (R-NC) – *next in line to become top Republican*
 - Seniority will follow:
 - Sen. Rand Paul (R-KY)
 - Sen. Susan Collins (R-ME)
 - Sen. Bill Cassidy (R-LA)
- Sen. Patty Murray (D-WA) – *to remain top Democrat*

Biden Administration Health Agenda

Republican Senate

- Administration lead
- Drug pricing reform via imports, price controls, and CMS negotiation on what Medicare pays drug companies
- One-offs – surprise billing, PDUFA, cosmetics legislation

Democratic Senate

- Expand and strengthen the ACA via legislation and administrative steps
- Expand access to healthcare through a public option
- Drug pricing reform via imports, price controls, and CMS negotiation on what Medicare pays drug companies
- One-offs – surprise billing, PDUFA, cosmetics legislation

Nonprofit Public Option Health Plan

- Approximately 96 Democratic members who voted for the Affordable Care Act (ACA) in 2010 are still in the U.S. House
- Depending on Supreme Court decision in the first quarter of 2021, president would move legislation very quickly through U.S. House
- Even without U.S. Supreme Court decision, President-Elect Biden has stated that he will improve the ACA and move toward a public option
- Public option is viewed as a glide path to Medicare for All

Nonprofit Public Option Health Plan

- The public option is a government-sponsored, nonprofit healthcare plan
- Similar to Medicare, it will not be funded by government subsidies, but instead will be funded solely by the premiums it collects (just like private plans)
- It will be required to follow the same regulations as those placed on private insurance companies, including staying financially solvent
- Absolutely no one will be forced into the public option; it is just that – an option
- It will exist only as long as Americans want to buy into it

Nonprofit Public Option Health Plan

- Eliminate the health insurance industry's anti-trust exemption
- Create interim high-risk pools for individuals who are uninsured because of preexisting condition
- Allow young people to remain on their parents' insurance policy
- Create individual mandate to have insurance coverage
- Fully close prescription drug donut hole
- Base reimbursement on quality of care rather than quantity of procedures
- Provide coverage for all individuals, including undocumented individuals

Nonprofit Public Option Health Plan

- Require Secretary of HHS to negotiate lower drug prices for federal government
- Prohibit employers from reducing employee pay to cover costs of healthcare
- Limit yearly out-of-pocket expenses
- Eliminate lifetime cap on benefits

Nonprofit Public Option Health Plan

- Employer mandate to provide health insurance for employees and their families
- Public Option recognizes how employers can meet mandate by providing 1. group health insurance; 2. private health insurance; 3. nonprofit public option; 4. non-federal government plan; or 5. federal government-provided healthcare.
- Federal tax credits for small businesses up to [35% up to 50%*] of employer premium contributions
- Public option structured similar to Medicare for consumers to choose their own health insurance provider
- Surcharge on high-income individuals
- Excise tax on medical devices

Nonprofit Public Option Health Plan

*Figures that are bracketed are based on HR 3962 Public Option passed by Democratic House in 2009

- Public Option is an Employer Mandate
- Employer contribution to Employee [72.5%*] and family coverage [65%*] of lowest-cost private plan offer AND not to exceed [12%*] of Employer modified adjusted gross income
- If not providing insurance, Employer must pay [8%*] of average of wages to nonprofit public option plan
- Small business exemption is fewer than 100 employees or sliding scale based on annual payroll less than \$750,000.00
- Employer waiver for “undue hardship”
- Employee can opt out of Employer health insurance plan

Budget Reconciliation

- Budget tool that allows for expedited consideration in the Senate – debate limited to 20 hours; simple majority (51) votes for passage
 - A way for Democrats to enact some policies without eliminating the filibuster
- Reconciliation bills can only alter revenue, spending or the debt limit – no extraneous policy matters
- Reconciliation has been used 21 times since 1980
 - Republican tax bill in December 2017
 - Portions of the Affordable Care Act in March 2010

What's Possible with Budget Reconciliation?

- Must be fiscal in nature (revenue, spending, or debt limit)
- Republicans attempted to use reconciliation to repeal portions of the ACA in 2017 but faced limitations
 - Couldn't repeal the individual mandate but could eliminate the tax penalty for noncompliance
 - Couldn't eliminate policies, such as coverage for preexisting conditions
- Funding for federal healthcare programs, perhaps even the creation of a slimmed-down public option, could be done through reconciliation

California v. Texas

- Argument held November 10, 2020
- **Background.** In 2013, SCOTUS held that the ACA’s “individual mandate” was constitutional as a “tax” and was intimately entwined with other provisions of the ACA. In 2017, Congress reduced the “tax” to \$0.
- **The Standing Issue.** In order to bring a lawsuit, the individual must generally have experienced some harm that the court can remedy. Has there been any such harm here?
- **The Constitutional Issue.** Is the individual mandate, which has no enforcement mechanism, a command or merely “precatory” language? If a command, is it justified by the taxing power even though it does not raise revenue?
- **The Severability Issue.** Is the mandate intimately entwined with the rest of the ACA based on the 2010 congressional findings, or is the mandate severable based on Congress’s action in 2017?

Rutledge v. Pharmaceutical Care Management Ass'n

Argued October 6, 2020

- **Background.** An Arkansas statute seeks to regulate the reimbursement rates paid to pharmacies by pharmacy benefit managers (PBMs). In particular, the law prevents PBMs from paying pharmacies less than their out-of-pocket costs.
- **The Preemption Issue.** ERISA preempts state laws that attempt to regulate the administration of employee benefit plans.
 - Arkansas argues that its law regulates rates, not plan administration, and is not preempted by ERISA. (There are many similar state laws.)
 - The PBMs argue that the state law regulates plan administration and interferes with uniform national administration.

Questions?



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