Insight

Biden's Executive Actions to Address Racial Equity

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Executive Summary

- President Biden signed four executive actions intended to address racial inequities.
- A memorandum on federal housing policy restores more stringent requirements intended to protect individuals from housing discrimination; specifically, it looks to eliminate practices that hinder equitable housing access and ease the burden on individuals seeking redress for discriminatory practices.
- An executive order directs the Department of Justice to not renew any prison contracts with facilities that are privately operated, affecting only the 1.5 percent of prisoners held in privately operated federal prisons.
- Two additional memoranda aim to strengthen relationships with tribal communities and to fight discrimination and intolerance towards Asian Americans and Pacific Islanders.

Introduction

On January 25, 2021, President Biden signed four executive actions aimed at promoting racial equity—something he promised to make a priority of his presidency. These executive actions cover a broad range of issues, including federal housing policy, the use of private prisons, tribal sovereignty, and racism towards Asian Americans and Pacific Islanders. Below is a brief overview of each.

Fighting Housing Discrimination

The "Memorandum on Redressing Our Nation's and the Federal Government's History of Discriminatory Housing Practices and Policies" affects the greatest number of people of the

four executive actions. The memo notes the many damaging effects that discriminatory housing policies—such as redlining and lending discrimination—have on non-white communities, such as lower rates of home ownership, lower rates of wealth accumulation, and a greater likelihood of living in highly polluted neighborhoods far from centers of commerce, grocery stores, and other resources. Broadly, the memo asserts that the Biden Administration is committed to eliminating housing discrimination and racial bias and to promoting diverse and inclusive communities. Specifically, the memo asks the Department of Housing and Urban Development (HUD) to examine a rule finalized by the Trump Administration in August 2020 (which repealed a July 2015 rule finalized by the Obama Administration) to assess its effect on the department's mandate "to affirmatively further fair housing."

The memo instructs HUD to assess the impact of the September 2020 rule implementing a new Disparate Impact Standard under the Fair Housing Act (which repealed the Obama Administration's 2013 rule on the same issue). It further instructs the HUD secretary to "take all steps necessary" should the department find that either of these rules interferes with its duty to affirmatively further fair housing.

In short, this action aims to undo the Trump Administration's undoing of two Obama Administration policies.

As background, the July 2015 rule issued by President Obama replaced the "Analysis of Impediments" standard with more stringent requirements for all HUD program participants to show how they would affirmatively further fair housing.[1] Under this rule, program participants were newly required to get approval for their plans from HUD (whereas before, plans did not have to be submitted for review). Approval was largely dependent on participants taking meaningful action to combat discrimination by prioritizing factors found to have the greatest impact. In August 2020, responding to complaints from some program participants that the 2015 rules were overly prescriptive, costly, and burdensome, HUD issued the "Preserving Community and Neighborhood Choice" rule, repealing most of the requirements of the 2015 rule.[2]

Disparate impact, also known as unintentional discrimination, refers to policies that have an adverse outcome on a "protected class" (for example, a race or religion) even if those policies are written neutrally (that is, not discriminatory when taken at face value). In 2013, the Obama Administration adopted a rule codifying a long-standing liability standard that required a plaintiff to show that a specific practice caused a discriminatory effect. Though the burden of proof for establishing discrimination was considered low relative to other standards, however.[3] In 2015, the Supreme Court ruled that plaintiffs must instead show a "robust causality" between the challenged practice and the resulting disparate impact

before the burden of proof that the practice in question is necessary would shift to the defendant.[4] The rule finalized by the Trump Administration in September 2020 largely adopted this new framework established by the Supreme Court, but took the requirements even further, making it more difficult for someone to establish a disparate impact liability.[5]

Reducing the Use of Private Prisons

President Biden's executive order "Reforming Our Incarceration System to Eliminate the Use of Privately Operated Criminal Detention Facilities" is a small move to reform the criminal justice system. Specifically, the EO directs the Justice Department to not renew any contracts with privately operated criminal detention facilities. This is another action reinstating an Obama-era policy that was reversed by the Trump Administration. The order references a report from the Justice Department's Office of the Inspector General that found private prisons had more safety and security incidents on a per-capita basis than Bureau of Prison institutions, which put both prisoners and security guards at greater risk or harm.[6] The EO states that there may be perverse incentives created by allowing for-profit companies to operate prisons, as they typically make more money the more people are imprisoned, and private prison companies have reportedly lobbied for longer sentences and for criminalizing more activities.

While there may be merit in banning the use of private prisons, doing so is likely to have limited impact. As of 2017, private prisons housed only 8.2 percent of all prisoners. Moreover, while federal prisoners are held in privately operated facilities at a higher rate than most state prisons, the federal prison population accounts for just 11.5 percent of all prisoners; thus, only 1.5 percent of all prisoners are held in privately operated federal prisons.[7] It should also be noted that this order does not apply to Immigration and Customs Enforcement detention facilities, many of which are privately operated.[8]

Strengthening Tribal Relationships

President Biden's "Memorandum on Tribal Consultations and Strengthening Nation-to-Nation Relationships" is aimed at fostering a more respectful relationship with tribal nations in the United States that "honor[s] Tribal sovereignty" and the federal government's "treaty responsibilities." Agencies throughout the government are directed to engage in "regular, meaningful, and robust consultation with Tribal officials" whenever a federal policy will impact tribal nations. Each agency will be required to develop action plans and conduct regular progress reports on the status of implementing those plans, and the director of the Office of Management and Budget is required to submit an annual report to the president summarizing the work of each of the agencies.

Fighting Racism, Xenophobia, and Intolerance Against Asian Americans and Pacific Islanders

Finally, the president issued a "Memorandum Condemning and Combating Racism, Xenophobia, and Intolerance Against Asian Americans and Pacific Islanders in the United States." This memo aims to address racial discrimination and intolerance and condemns acts of racism, xenophobia, and intolerance against the Asian American and Pacific Islander (AAPI) community. More specifically, the memo directs the Secretary of Health and Human Services to consider issuing guidance on best practices for advancing cultural competency, language access, and sensitivity towards AAPI in the government's COVID-19 response. It directs federal departments and agencies to ensure official actions and documents do not contribute to racism or intolerance, and the United States Attorney General is ordered to work with state and local governments and AAPI communities to prevent "discrimination, bullying, harassment, and hate crimes against AAPI," and to expand data collection and public reporting of such incidents.

[1] https://fas.org/sgp/crs/misc/R44557.pdf

[2] https://fas.org/sgp/crs/misc/R44557.pdf, https://www.ajjcs.net/paper/main/2020/08/15/new-hud-rule-eliminates-fair-housing-act-requirement-to-affirmatively-further-fair-housing/

[3] https://www.jdsupra.com/legalnews/will-hud-s-new-disparate-impact-rule-73003/

[4] https://www.jdsupra.com/legalnews/will-hud-s-new-disparate-impact-rule-73003/

[5] https://www.jdsupra.com/legalnews/will-hud-s-new-disparate-impact-rule-73003/

[6] https://oig.justice.gov/news/doj-oig-releases-report-federal-bureau-prisons-monitoring-contract-prisons

[7] https://www.bjs.gov/content/pub/pdf/p17.pdf

[8] https://www.usatoday.com/in-depth/news/nation/2019/12/19/ice-detention-private-prisons-expands-under-trump-administration/4393366002/