

To: President-Elect Biden DOJ Agency Review Team
From: Federal Public and Community Defenders
Date: December 4, 2020
Re: Biden Administration Day One Actions

We are grateful to the DOJ Agency Review Team for taking the time to meet with the Federal Public and Community Defenders. In advance of our meeting, we are providing you with “Day One” priorities for the Biden Administration.

President-elect Biden made racial and criminal justice reform a key part of his campaign and committed to reduce the number of incarcerated people, root out unfair disparities in the system, ensure fair sentences, and refocus our criminal justice system on rehabilitation. Although some reforms require legislation, the Administration can act without Congress by taking the steps listed below. Each would advance the cause of racial justice and begin to fulfill President-elect Biden’s campaign promises.

Avoid Mandatory Minimum Sentences. President-elect Biden promised to eliminate mandatory minimum sentences in his criminal justice platform. Federal crimes that carry mandatory minimum sentences can almost always be charged in ways that do not trigger a mandatory penalty. The Administration should immediately rescind harmful Trump-era charging policies and issue an interim policy directing all USAOs to avoid charges that carry a mandatory minimum where an alternate charge is available, and decline to seek recidivist enhancements.

Suspend the Machinery of Death. Perhaps nowhere is racial disparity more disturbing than in the implementation of the death penalty. The Trump administration has been rushing executions in its final days in office. President Biden can immediately fulfill his promise to eliminate the death penalty by withdrawing all pending execution dates, halt any capital authorizations in process; and withdraw capital authorization in cases that have already been authorized. Following the suspension, the administration should conduct a thorough review of the capital punishment process.

End Mass Immigration Prosecutions. The Administration should immediately rescind the 2017 & 2018 Attorney General memoranda prioritizing criminal immigration enforcement and suspend all § 1325 prosecutions.

Protect Incarcerated People from COVID-19. The Trump administration has shamelessly left incarcerated people exposed to the ravages of COVID-19 despite ample tools to protect them. The Biden Administration should immediately use existing CARES Act, First Step Act, Second Chance Act, medical furlough, and commutation authorities to quickly move out of prison individuals at heightened risk of serious illness or death from COVID-19.

Reverse Litigation Positions that Fuel Mass Incarceration. At this moment, the Trump administration is litigating positions that fuel mass incarceration. The Biden Administration should immediately reverse litigation positions that undermine reforms made by the First Step Act, including mandatory minimum reform, sentencing relief for crack cocaine offenses, and compassionate release reform. It should also dismiss government appeals of district court decisions granting relief pursuant to the legislation. Lastly, it should immediately review all federal charges related to the 2020 protests for consistency with law enforcement priorities of the incoming administration.

End Unnecessary Pretrial Detention. Addressing the ongoing crisis of over-detention in federal pretrial detention, where a 75% federal pretrial detention rate stands in stark contrast to a 45% detention rate for state-level violent felonies, is an important step towards fulfilling President Biden’s promise to reduce prison and jail populations. Incarceration at these levels is unnecessary and counterproductive. The new administration should commit to reducing pretrial detention rates by issuing policies directing USAOs to sharply limit their requests for pretrial detention.

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