



POTUS 45 and The First Hundred Days (And planning in the years to come)

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In recent decades, a president's "first 100 days" has become a proxy by which many judge the overall effectiveness of his administration. President Franklin D. Roosevelt first coined the phrase in a radio address he gave on July 24, 1933, as a reference to the significant volume of legislation enacted by the 73rd Congress during that period of time.ⁱ Shortly after his inauguration in the depths of the Great Depression, Mr. Roosevelt—enjoying a massive majority in both houses of Congress—had the political leverage to implement sweeping changes in national policy.ⁱⁱ Following the volume of legislation FDR signed into law in the early months of 1933, each new president and his team has perceived great pressure to move quickly and accomplish key elements of their campaign priorities early. The popular media have become habituated to this benchmark and drive headlines by what an administration accomplishes—or doesn't accomplish—in the first 100 days after inauguration.

Eighty-four years after FDR's inauguration, the 45th president of the United States again enjoys a majority in both houses of Congress—though with much narrower margins.ⁱⁱⁱ FDR enjoyed a landslide victory in both the Electoral College and in the popular vote,^{iv} winning decisively by all measures against the failed incumbent, Herbert Hoover. Mr. Trump does not enjoy FDR's clear election mandate. Mr. Trump won the electoral vote with 306 electors, but lost the popular vote by almost 3 million votes, emblematic of a deeply divided electorate.^v Roosevelt was very much a Democratic party insider; Trump fancies himself a political outsider and the representative of a collective repudiation of "business as usual" in Washington.

The Trump administration marked its 100th day on April 29, 2017. After articulating an aggressive list of priorities both on the campaign trail and in his published "Contract with the American Voter,"^{vi} Mr. Trump's first months have been marked by partisan bickering and GOP infighting, international conflict, and more than a little scandal. Here's a selective run-down of what Mr. Trump expected to accomplish, what actually transpired, and what the "next 100 days"—and beyond—might hold for the president, his agenda, and client planning.

Many commentators have noted that during the first 100 days, the tenor and acrimonious tone of both Mr. Trump's administration and the Democratic leadership in Congress seems much like the primary campaign season. As early as his inaugural address and as recently as his "100 days tour" to the rust belt, President Trump often repeats the campaign promises that won him widespread support, motivating his supporters and further alienating his detractors. The effectiveness of his communications strategy is uncertain. Unable or unwilling to mend fences in the early days of his administration, Mr. Trump has faced strong opposition from both



Democrats and Republicans, and he has discovered that moving his ambitious agenda forward through Congress is harder than it seemed.

The GOP majority in the Senate is narrow with only 52 seats. This means that, if the Republicans hold their voting bloc together, they can accomplish much of their agenda. But if they're committed to holding the party line, they risk alienating key Democratic senators further, hamstringing ambitious priorities like permanent tax reform. Savvy to the political risk of aligning lockstep with a president with low popular approval ratings, many Republicans have demonstrated their willingness to oppose the president early.

Mr. Trump's early losses...

As an example, on February 7, less than three weeks after his inauguration, President Trump's nominee for education secretary Betsy DeVos faced an uphill confirmation battle. Two Republicans, Susan Collins (ME) and Lisa Murkowski (AK), broke GOP ranks to vote against Ms. DeVos, deadlocking the Senate until Vice President Mike Pence cast the tie-breaking vote. As a result, Ms. DeVos's confirmation marked the first time in U.S. history that the Vice President had to cast the winning vote for a cabinet nomination. That confirmation vote was an early shot across Mr. Trump's bow that the majority is fragile and must be handled with greater care. But it wasn't the biggest battle yet lost.

President Trump signed an early series of executive orders aimed at curtailing immigration and inbound international travel from certain countries, most notably, countries with large Muslim populations. Those orders were met with widespread public protests and lawsuits, resulting in federal injunctions to prevent the enforcement of the executive orders.

Mr. Trump faced the greatest blow yet with his first attempt to repeal the Affordable Care Act (ACA)—simultaneously derided and hailed as "Obamacare." One of the most oft-repeated pledges of his campaign, the president could not build an effective coalition to confidently put the repeal measure to a vote in the House. Lacking adequate support even among Republicans, Mr. Trump's first attempt to repeal the ACA was pulled from consideration on March 24, 2017. In a Twitterfesto^{vii} reminiscent of the general election season, Mr. Trump blamed Democrats and the GOP's Freedom Caucus for Congress's inability to deliver the bill to his desk. Republicans have vowed to deliver another bill later this year but again, Mr. Trump has discovered that business in Washington moves more slowly than he is accustomed.

On May 4 the House passed H.R. 1628, a refreshed attempt to make significant changes to the ACA. As Congress heads into recess the resolution's passage allows conservatives to score a political win in their districts among their constituents who favor repeal of Obamacare. Most analysts expect the legislation to be significantly changed in the Senate before going back to the House for final passage. Importantly, the AHCA is a budget reconciliation bill that is part of the 2017 budget, so it



So although Mr. Trump may be able to claim some traction on ACA repeal (now beyond his first 100 days), many battles lie ahead on the ACA front.

...And some early wins

Mr. Trump can chalk up some wins in his first 100 days. Easily the most significant was his ability to secure the Senate's consent to Neil Gorsuch's appointment to the Supreme Court. Justice Gorsuch was previously appointed to the Tenth Circuit Court of Appeals by President George W. Bush in 2006 and had long been on Mr. Trump's short list of candidates for the Supreme Court. The Democrats in the Senate were sure to give a strong fight.

When Justice Antonin Scalia died in February of 2016, Republicans went to great lengths to prevent President Obama from advancing the nomination of Judge Merrick Garland to the Supreme Court. Rather than allow a lame duck president to appoint a justice to the highest court, leadership in the GOP-controlled Senate refused to allow a vote on Judge Garland's confirmation, claiming that the appointment of Scalia's replacement belonged to the next president.^{viii} As the GOP stonewalled, the Supreme Court was reduced to eight justices for more than a year, giving Mr. Trump the opportunity to name Scalia's successor.

The Republicans' gamble paid off, but potentially at a significant cost. Mr. Gorsuch was confirmed by the Senate only after GOP leadership exercised the "nuclear option," changing Senate confirmation rules to end Democrats' filibuster and approve Gorsuch's nomination by simple majority. After the rule change Justice Gorsuch was confirmed largely along party lines, although three Democrats crossed the aisle with votes in his support.^{ix}

By resorting to the nuclear option, the GOP may have won a Pyrrhic victory, expending a great deal of political capital that may be in short supply as the legislative year grinds on. Even so, filling Justice Scalia's vacated seat in the first 100 days of his administration will go down as a significant political win for President Trump.^x Mr. Trump has also succeeded in getting most of his 24-member cabinet confirmed—a cabinet that represents the largest in American history.

The President's critics and supporters can surely allege other losses or wins of Mr. Trump's first days in office. But to focus on a straight "win-loss" record misses the broader issues at stake.

Moving toward tax reform

Central to Trump's campaign success was his promise to dramatically cut taxes at all levels, aligning his stated fiscal policy with key elements of the "Ryan Plan," formally proffered as, "A Better Way—GOP Tax Reform Task Force Blueprint."^{xi} On March 16, Mr. Trump issued his initial budget blueprint titled the "America First" budget, signaling his priorities to significantly increase defense spending, increase the federal budget for immigration enforcement, and increase the budget for Veterans Affairs, and to make major cuts to foreign aid, environmental protection, and healthcare research and services.



Mr. Trump's tax priorities and those of the GOP leadership in the House have much in common, suggesting that if a coalition can be formed in the Senate, significant tax reform may still be possible. Specifically, Trump and the GOP both plan to:

- Consolidate the current seven individual income tax brackets down to three, although the breakpoints are different in each plan;
- Significantly increase the standard deduction for both individual and married couples, again, with different breakpoints;
- Eliminate both individual and corporate Alternative Minimum Tax (AMT);
- Eliminate the 3.8% surtax on Net Investment Income (the "ACA/Obamacare Surtax");
- Dramatically reduce the corporate income tax rate: Mr. Trump wants a 15% maximum rate, while the GOP leadership wants 20%; and
- Eliminate the federal estate tax, although Trump's plan appears to substitute a deemed transfer rule for capital gains tax purposes.

As politically charged as Washington has been during the first 100 days of Mr. Trump's administration, sweeping tax reform is far from certain. The most conservative factions within the GOP have proven that they will not be bowed by pressure to vote lockstep with the rest of the party. Mr. Trump's lack of popularity even within the Republican mainstream—let alone outside the GOP—has emboldened both the members of the conservative Liberty Caucus and the Democratic minorities in the House and Senate. To move key parts of his tax reform agenda forward, Mr. Trump will have to rely on his negotiation skills to consolidate the Republicans in the House and add Democrats to the coalition. Barring Trump's ability to get 60 votes in the Senate, any tax reform measure will most likely be a temporary measure with a sunset provision.

Avoiding a shutdown

As the 100th day of Mr. Trump's administration approached, fears of a government shutdown loomed. The December 10, 2016, continuing resolution to keep the federal government funded was set to expire on April 28th of this year. On April 30th, Trump's 101st day, Congressional leaders reached a compromise to fund the government through the end of the fiscal year. The \$1.2 trillion budget extension left Mr. Trump backing down from some of his more significant campaign pledges.

Some conservatives in Congress opposed the measure because it was heavy on additional spending without additional sources of revenue. Despite the rhetoric coming from the White House and Capitol Hill, the temporary budget deal appears to be a true compromise, with both parties claiming key victories in the agreement. Mr. Trump got a \$15 billion increase for military spending and increased funding for Homeland Security, but no money for the wall along the southern border. Democrats secured continued federal funding for Planned Parenthood, Obamacare, and the EPA, all of which have been squarely in Mr. Trump's crosshairs.



The fact that Congress and the President were able to come to a compromise on the continuing budget resolution for 2017 suggests that there may be hope for a broader budget compromise going into FY2018 planning. Mr. Trump has promised sweeping cuts to many programs favored by Democrats, major funding increases for programs favored by Republicans, massive investments in infrastructure, and a total rewrite of the Internal Revenue Code. Unless the Congressional Budget Office (CBO) can project that the budget will be revenue neutral within a projected budget scoring window, the measure must either pass by a 60-vote supermajority—a tall order in the current political climate—or it must contain a sunset provision, expiring at the end of the scoring window.^{xii}

A likely whipsaw for years to come...

One indisputable conclusion from Mr. Trump's first 100 days in office—much like the presidential campaign leading into November—is that the U.S. is increasingly ideologically divided. The partisan divide between Democrats and Republicans and the lack of consensus among the GOP majority combine for unpredictable outcomes. In the months ahead, will Mr. Trump be able to engage Republican leadership and consolidate the conservative bloc? Will he reach across the aisle and court Democrat votes, at least among the Democratic senators from states that went big for Trump in November? Or will Congressional leaders from both sides engage in bipartisan negotiation, circumventing Mr. Trump in the process?

However these questions are answered, the U.S. will likely be in a volatile legislative era for at least the next several years. If Mr. Trump can push through major tax changes, the legal industry will adapt to the new planning challenges and opportunities a new tax code brings. And a political or economic swing in the other direction—or a legislative sunset—will start the process over again.

Planning Options, and the problem for clients who wait

In times of uncertainty it's tempting for people to delay planning. Many folks think they'll just wait until the smoke clears to do their planning. In truth, this is just an excuse for procrastination. I have been practicing trust and estate law for 17 years at this point, and nearly the only thing that has been constant is that there are no constants. The federal and state laws that directly affect estate planning and asset protection constantly shift. The American economy ebbs and flows with domestic and global affairs, and the state of the industry is always in flux.

If there is one thing I have learned, it is that people must plan more proactively, not less. We must plan with an eye toward the future, building backdoors and flexible options into our plans to allow clients to move ahead with compelling strategies as the laws exist today, with an eye toward adjusting those strategies as changes naturally unfold. The alternative—just waiting for clarity and hoping we get another shot at a plan before it's too late—is a fool's game.



It really doesn't matter who is in the White House today, four years from now, or 15 years from now. Laws will continue to change. The economy will continue to shift. More importantly, our clients' individual needs will change and their beneficiaries' lives will evolve in surprising ways. With this in mind, there are compelling ways to plan to provide families with the solutions they need to provide for themselves and their families, with the flexibility that can accommodate the inevitable changes yet to come.

- Clayton election marital deduction planning works well for most couples. Default the decedent's share to a bypass trust to protect assets for the surviving spouse and preserve the inheritance for the settlor's kids. If you need the marital deduction, elect property into the QTIP—that's far better than any other type of marital deduction trust. Clayton works far better than the disclaimer and provides more flexibility than the fractional marital. (Fractional marital is usually my second choice.)
- Design trusts that continue for descendants' lives. Trusts should be viewed as vehicles that help children grow into their inheritances responsibly. Designed and managed properly, a trust can give a child great access and flexibility, but still provide tremendous protection for the inheritance their parents left behind.
- If the kid isn't his own trustee—or if he needs to resign for some reason—make the successor trustee an independent trustee with a purely discretionary, nonascertainable distribution standard. In most states this provides more asset protection than the child could ever provide for himself.
- Incorporate decanting provisions in trusts. Most states now have statutes that allow an independent trustee to create a new trust and then distribute assets from an older trust into the new trust. Decanting is one of the most powerful methods for cleaning up messes without going through the unpredictable and time-consuming judicial process, or having everyone "lawyer up" in a nonjudicial settlement.
- Incorporate trust protector provisions in trusts and carefully tailor them to the circumstances of the trust. Don't throw in every power and option just because you can, and be realistic about what powers are fiduciary and which aren't. Know what the law says in your jurisdiction (or in your trust's situs and governing jurisdiction) and draft accordingly.
- Understand the estate inclusion rules and basis adjustment rules so you can create "estate defects" in bypass trusts or other estate excluded trusts to strategically trigger basis step-up and wash out untaxed appreciation.
- Whenever possible, use institutional power holders. Trustees, trust protectors, and other parties involved in the administration of the trust must be available long-term. If the trust is going to last for generations, make sure the trust doesn't become hard to manage just because all the trustees and protectors named in the instrument are dead.
- Don't just know your own state law; know which trust jurisdictions are attractive and why, and be prepared to help trusts trigger flight clauses to resitus in more tax-advantaged or asset protected jurisdictions. If your state law has weaknesses for asset



protection (I'm thinking of you Florida, California, Massachusetts, and several others), address those weaknesses and be prepared to move the trust during administration to take advantage of more favorable laws.

- Get back in front of your clients frequently. Keep their medical documents current and review trust funding. This includes beneficiary designation forms and life insurance performance audits. You aren't a scribe, you're a counselor. Take an active role.

Legendary UCLA coach John Wooden is often credited as saying, "Failing to prepare is preparing to fail." In the context of estate planning, we know this is true because we've seen it often through the years. As the collective experts in this field, we owe it to the individuals and families in our communities to wake them from procrastination and tailor compelling strategies that will give them peace of mind today, with flexibility and oversight to help their plans endure. And that is true regardless of who is in the White House.

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ⁱ Jonathan Alter, *The Defining Moment, FDR's Hundred Days and the Triumph of Hope* (Simon & Schuster, 2006) ISBN-13: 978-0-7432-4600-2

ⁱⁱ At Mr. Roosevelt's inauguration his party held a 196-vote margin in the House of Representatives and a 23-vote margin in the Senate.

ⁱⁱⁱ Republicans control the House of Representatives 237-194. They control the Senate 52-46-2. Source: www.clerk.house.gov

^{iv} FDR won the 472 votes in the Electoral College, though only 270 are required to win. He also won more than 57% of the popular vote, beating Herbert Hoover by more than 7 million votes.

^v <http://uselectionatlas.org/RESULTS/national.php>

^{vi} https://assets.donaldjtrump.com/_landings/contract/O-TRU-102316-Contractv02.pdf

^{vii} Given the President's affinity for using Twitter for key policy announcements and to articulate strongly-worded positions, the author takes the liberty of marrying "Twitter" and "manifesto." If it catches on, you read it here first!

^{viii} This was a risky move by Senate Republicans. During the early days of the Republican primary there were at least a dozen active candidates vying for the GOP nomination. Mr. Trump was not even considered to be a serious candidate until late summer 2016. Only former Secretary of State and First Lady Hillary Clinton and Independent Senator Bernie Sanders were in the hunt for the Democratic nomination.

^{ix} Democratic Senators Joe Donnelly (IN), Heidi Heitkamp (ND), and Joe Manchin (WV) joined a unanimous GOP coalition in voting to confirm Mr. Gorsuch's appointment.

^x 21% of voters during the general election said that filling Scalia's vacancy in the Supreme Court was "the most important factor" in casting their ballots in November. Mr. Trump won by a whopping 15



points among those voters. Read more at <http://www.nationalreview.com/article/442227/donald-trump-gop-congress-2016-election-mandates>

^{xi} The GOP's Tax Reform Task Force Blueprint is available at http://abetterway.speaker.gov/_assets/pdf/ABetterWay-Tax-PolicyPaper.pdf

^{xii} Under Senate rules currently in place, any tax reform measure that incurs deficit increases as scored by the CBO must either pass by supermajority or it must be a temporary measure, causing the law to sunset, or expire at the end of a 10-year scoring window. However, the GOP leadership in the Senate may change the rules and increase the scoring window for CBO, potentially allowing a "temporary" tax reform measure to extend well beyond the traditional 10-year scoring window.