

# Disorder in the Courts — More Than Usual Transition Upheaval

**I**f past is prologue, as it often is in politics, the Obama-Trump transition can serve as a guide for what the new Biden administration can expect in its first few weeks and months. In other words, there is sure to be an avalanche of activity in courts around the country. The Trump administration left behind many significant rules with ongoing litigation. It also engaged in aggressive midnight rulemaking, spurring more litigation. And the Biden administration will likely move fast to finalize its own rules and put off Trump-era rules.

Let's take stock and look at the court dramas that will be playing out.

The Trump administration's environmental docket was packed with rollbacks. Berkeley Law's Center for Law, Energy & the Environment compiled a list of nearly

two hundred environmental rollbacks during the four-year term. But many of the administration's biggest rules were only finalized last year. Litigation over those rules was still pending at the time of the inauguration.

Briefing was complete in the challenge to EPA's rollback of its methane emissions rule only in February. Petitioners' briefs in the challenge to the administration's rollback of vehicle emissions standards were filed only in January, just before the change in the White House. And summary judgment motions are still pending in cases around the country challenging the Navigable Waters Protection Rule.

Because the Trump administration ran out of time to defend these rules in court, the new administration can see how litigation plays out. If it plans to roll a rule back quickly, it has the option of seeking abeyances. The Trump administration itself took advantage of this flexibility. It sought abeyances in multiple cases and generally received

them. Meanwhile, it allowed litigation over the Fiduciary Rule to continue in the Fifth Circuit. That court eventually vacated the rule, making pending rewrites unnecessary.

In addition to ongoing cases, midnight rules will spur more litigation. The State Energy and Environmental Impact Center at NYU Law School, which I direct, compiled a list of 24 midnight rules in areas of climate change, clean air, and clean energy. Propublica's Midnight Regulations tracker listed 16 environment rules finalized after election day.

One of those rules, the Department of the Interior's new interpretation of the Migratory Bird Treaty Act, already faces a new challenge brought by a coalition of states, which is similar to the challenge that the agency already faced for its

similar guidance. In that previous case, a court found that interpreting the act to allow unintentional kills was contrary to the purpose of the statute. The Trump replacement rule again adopts this interpretation. The new administration has the option of launching a quick rewrite of that interpretation while also waiting to see what happens with the pending litigation.

The outgoing administration's attempts to open up the Arctic National Wildlife Refuge for drilling also demonstrate how legal maneuvers and agency-level requirements can collide with a transition. After the administration finalized steps to begin leasing last summer, separate coalitions of tribal, NGO, and state plaintiffs filed federal lawsuits in Alaska. And those lawsuits have legs.

Among other claims, the plaintiffs allege that the agency failed to adequately address the impacts of the drilling program under the National Environmental Policy Act, a claim that



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is bolstered by recent appellate court decisions, as Berkeley Law's Daniel Farber has explained recently at the school's Legal Planet web site. In addition, the agency thumbed its nose at notice-and-comment procedures when it announced the lease sales before the time to comment had expired.

The court did deny an injunction in early January on the grounds that many steps remained before drilling could begin. But the court explained that plaintiffs would have another chance to seek an injunction "should BLM approve ground-disturbing activities." As a result, the new administration could slow or stop the process before any such activity, and plaintiffs have the option of continuing with the lawsuit.

Ultimately, this will be a busy time as agencies refocus on President Biden and his cabinet's priorities. In court, lessons from the Trump administration will prove helpful. As I have chronicled in a paper forthcoming in the *Administrative Law Review*, entitled "Tired of Winning," the record of decisions analyzing Trump agency actions shows that the outgoing administration suffered significant losses in court because of its aggressive approach toward procedural and statutory requirements. As long as Biden administration agencies endeavor to stay within the bounds of their governing statutes and follow procedural rules, it is likely that they will not meet the same fates the Trump administration met in court.

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