

# It Is Time to Talk About the Biden Administration's Record in Court

**T**HE Biden administration has, like the Trump administration that preceded it, faced push-back in court for its environmental policies. Both lost some high-profile cases. But just over a year in, the Biden litigation record shows some marked differences from the Trump scorecard. In one major difference, the Biden administration is actually winning federal cases.

Four years ago at this writing, by late March 2018, the Trump administration had lost 16 cases in the environmental or energy arena. It had not won any. In one blockbuster case, its delay of regulations for new oil and gas facilities was vacated summarily by the D.C. Circuit. In nine cases, lawsuits forced agencies to change course.

For example, in June 2017, after rolling back a mercury rule for dental offices, EPA was sued for failing to follow notice-and-comment procedures, and it soon put the rule back into place. I gathered this data on the Trump administration's success rate in court in a tracker hosted on the Institute for Policy Integrity's website and wrote about it in a recent article published in the *Administrative Law Review*.

It is too soon and there are not enough cases to predict trends and overall win rates for the Biden administration. But even with the small number of decided cases so far, the differences stand out.

At current count, the win rate is better. At press time, there were 10 Biden-era decisions in the energy/environmental space. (There are many more pending cases.) Out of those 10 that have reached a decision, there are only four cases that the Biden administration lost. All of those were in lower courts and one of them has been stayed pending review by the

Fifth Circuit. In that case, a court in the Western District of Louisiana had enjoined the Biden administration's use of the social cost of carbon—a metric that agencies use to calculate the damages for an additional ton of greenhouse gas emissions that might be caused by a proposed project or rule. In a prior column, I explained that agencies are required by case law to make a reasonable estimate of the costs of greenhouse gas emissions, and that the social cost of carbon estimates enjoined in this case are based on solid science. The Fifth Circuit stayed the lower court's injunction after finding that plaintiffs' alleged injuries were speculative and based on claims only that an “unknown regulation . . . may place increased burdens on them and may result from consideration” of the social cost of carbon.

Another difference is the win rate in front of judges appointed by a president of the opposing party. One proxy scholars use to examine a judge's partisan leanings is the party of the president who appointed him or her. At this time in the Trump administration, in environmental cases, the administration had a zero percent win rate in front of Democratic-appointed judges and no cases had yet been decided by a Republican-appointed judge. After four years of cases, the win rate with Republican-appointed judges was below 50 percent. Thus far, the Biden administration has a 50 percent win rate with Republican-appointed judges and has even won a case in front of a Trump-appointed judge. In that case, the court denied a motion seeking to keep EPA's newly reconstituted Clean Air Scientific Advisory Committee from meeting.

Prior to the Trump administration, many studies had found that

**Unlike his predecessor, the new president is actually winning some cases**



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agencies won in court around 70 percent of the time. Overall, across all types of cases, the Trump administration's win rate was 23 percent. In contrast, so far, the results do not seem too far off from the typical win rate for the Biden administration.

And at least one of the losses could be characterized as a policy win. In that case, the Biden administration had conducted a large oil and gas lease sale, which the court vacated after finding that the environmental review was insufficient. But the Biden administration had only entered into that sale after a broad pause it had placed on leasing was enjoined in another case. The Biden administration did not appeal. Louisiana did, however, and the appeal remains pending.

In another loss, the Biden administration delayed a regulation meant to require shrimper vessels to install a device to protect turtles, citing implementation delays caused by the Covid-19 pandemic. The Biden administration argued that the delay was unreviewable, and in a *déjà vu* moment, the court disagreed—citing for support the case that the Trump administration lost after delaying its regulations for new oil and gas facilities.

All of these Biden-era cases are listed on the website of the State Energy & Environmental Impact Center, which I direct. It will be interesting to see how the administration does going forward.