LAW360

Portfolio Media. Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

# Managing Litigation Side-Switching During 2nd Trump Admin

By **Kevin King and Ian Todd** (January 21, 2025, 6:19 PM EST)


Kevin King


Ian Todd

The presidential transition will soon have significant effects in court. Like its predecessors, the Trump administration will reconsider — and in many cases fundamentally change — the positions taken by the federal government in pending litigation.

In some cases, the government will switch sides entirely; in others, it will modify its position in less drastic ways, for example, by disavowing particular arguments or advocating for different remedies.

Now that President Donald Trump has been officially sworn in on Jan. 20, these changes will begin to occur. They will affect a broad range of issues, and they will arise at every level of the judiciary, including in the U.S. Supreme Court.

That process will present risks and opportunities for regulated industries, and there are tools businesses can employ to protect their interests. For example, parties aligned with the Biden administration can continue to defend its positions as intervenors.

Parties opposed to Biden-era positions, on the other hand, can partner with the Trump administration to dismiss enforcement actions, settle cases on favorable terms and secure vacatur of adverse precedents. This article summarizes the modern era of government litigation side-switching and the strategies stakeholders can employ to navigate that process.

**Litigation Side-Switching Following Recent Presidential Transitions**

Strategic litigation side-switching occurs when the government changes its position in pending litigation to reflect a new presidential administration's priorities. New administrations have switched sides in this fashion many times in the past,[1] although the frequency of these changes appears to be increasing over time.

The Obama-to-Trump presidential transition is illustrative. Early on, the Trump administration changed the government's position in a series of high-profile cases.[2] For example, in Lucia v. SEC in the Supreme Court in 2018, the Obama administration had successfully defended the constitutionality of the U.S. Securities and Exchange Commission's process for appointing administrative law judges.[3]

The Trump administration changed course, siding with parties who had challenged the SEC's action

under the appointments clause.[4] The Supreme Court took up the case, appointed amicus curiae to defend the government's prior position and ultimately adopted the position advocated by the Trump administration.[5]

The Biden administration continued that trend, and in some instances was even more aggressive in changing the government's position.[6]

These tactics had significant practical effects: The Biden administration mooted cases involving Trump administration regulations, paving the way for the regulations to be repealed or superseded; withdrew appeals filed by the Trump administration, leaving in place lower-court rulings adverse to Trump-era policies; and changed positions on the merits — including in at least 10 Supreme Court cases.[7]

These changes occurred quickly. For example, on Feb. 3, 2021 — less than a month after President Joe Biden was inaugurated — the Supreme Court granted an abeyance requested by his administration in Biden v. Sierra Club, a case challenging the Trump administration's use of emergency authority to fund construction of a southern border wall.[8] The Biden administration's subsequent decision to end funding for the wall mooted the controversy.[9]

In another case, the Biden administration took advantage of a decision by the U.S. District Court for the Northern District of Illinois in Cook County Illinois v. Wolf, which had vacated the Trump-era public charge rule.

Although the Trump administration had appealed and obtained a stay of the district court ruling, on March 9, 2021, the Biden administration dismissed the appeal — thus allowing the judgment to take effect.[10] The Biden administration then relied on the district court's judgment to repeal the public charge rule.[11]

**Forecasting Strategic Litigation Side-Switching in the Second Trump Administration**

Businesses and other stakeholders should anticipate further strategic litigation side-switching during the second Trump administration, particularly in pending challenges to Biden administration regulations.

In the lower courts, the Securities and Exchange Commission has voluntarily stayed a climate-disclosure rule that is under review in the U.S. Court of Appeals for the Eighth Circuit,[12] and the U.S. Court of Appeals for the Sixth Circuit has **vacated** the Federal Communications Commission's latest net neutrality rule in In re: MCP No. 185, potentially teeing up a petition for Supreme Court review.[13]

Also, the U.S. Department of Labor is facing challenges to several of its rules, including a rule broadening fiduciary duties under ERISA on appeal in the U.S. Court of Appeals for the Fifth Circuit,[14] a rule involving independent contractor classifications pending in the U.S. District Court for the Eastern District of Texas,[15] and a rule establishing a $15 minimum wage for federal contractors, vacated by the U.S. Court of Appeals for the Ninth Circuit on Nov. 5.[16]

The Trump administration will have an opportunity to reconsider the government's position in these cases and to drop appeals of judgments vacating the Biden-era rules.

This dynamic may affect cases pending in the Supreme Court as well. The Biden administration has defended a Bureau of Alcohol, Tobacco, Firearms and Explosives rule regulating so-called ghost guns,[17] the Nuclear Regulatory Commission's ability to license private entities to store nuclear waste

at offsite locations,[18] and the U.S. Food and Drug Administration's denial of applications to market e-cigarettes.[19]

Although these cases are far along, the government could change its position and alter the litigation even where the cases have already been briefed and argued, as discussed below.

Stakeholders should anticipate that the Trump administration will move quickly and plan accordingly. Although it will likely take weeks or months for cabinet secretaries and other senior officials to clear the Senate-confirmation process and begin implementing new policies through rulemaking and enforcement proceedings, acting officials in many cases now have authority to change the government's litigating positions.

Indeed, on his first day in office, Biden issued an executive order instructing agencies to review actions taken by the Trump administration[20] and permitting the attorney general to "request that the court stay or otherwise dispose of litigation, or seek other appropriate relief" in pending litigation related to this review.[21]

Acting officials wasted no time in carrying out that instruction. For instance, on Feb. 1, 2021, the acting U.S. Environmental Protection Agency administrator — citing the EPA's implementation of the Jan. 20, 2021, executive order — sought an abeyance in California v. Regan, a case challenging Trump-era oil-and-gas performance standards.[22] The U.S. Court of Appeals for the D.C. Circuit granted this request on Feb. 12, 2021.[23]

**Stakeholder Participation in Strategic Litigation Side-Switches**

There are a number of steps businesses and other stakeholders can take to manage the risks and pursue the opportunities presented by strategic government side-switching.

Participation as an intervenor is a particularly important tool in this regard. In general, a business may intervene in a pending third-party lawsuit if it has a concrete stake in the outcome and meets the other requirements prescribed by Federal Rule of Civil Procedure 24.

Intervenors participate in litigation on equal footing with the original parties in many ways[24]: They can appeal adverse judgments, may continue litigating after other parties have settled, and are often permitted to present oral argument.[25]

Critically, intervenors are also able to participate in settlement negotiations and can in some instances block the other parties from settling a case. These functions are particularly important for parties who support the Biden administration's litigation positions and wish to continue defending them even now that the Trump administration has taken office.

Interested parties can also participate as amicus curiae. Amici generally have fewer rights than intervenors: They must obtain consent from the parties or leave of court to file briefs,[26] cannot block the other parties from settling, cannot appeal adverse rulings, and are rarely permitted to present oral argument. That said, amicus participation can be simpler and cheaper than intervention because amici do not need to establish standing or satisfy the other requirements to intervene as a party.[27]

Whether, and in what capacity, interested parties should participate in ongoing suits will depend on their specific circumstances. As discussed below, the optimal litigation strategy will also depend on the

approaches taken by the Trump administration.

**Tactics for Strategic Litigation Side-Switching**

The new administration will have flexibility to change the litigation positions of the U.S. and federal agencies. Equitable doctrines that sometimes estop private litigants from switching positions generally are not applicable to the government,[28] and the administration's changes can occur at almost any point in a pending suit — including near its end.

In California v. Texas, for example, the Biden administration changed the government's position on the constitutionality of the Affordable Care Act's individual mandate after the parties had already briefed and argued the case in the Supreme Court.[29] The Trump administration will have the same ability to switch sides in many cases.

New presidential administrations can use a variety of strategies to change the government's litigation positions. The most straightforward approach is for the government to present its new position in its next substantive filing, such as an answer or appeal brief.

However, switching sides midstream often leaves the government without an adequate opportunity to develop arguments and evidence in support of its new stance. Additionally, the switch itself may lead the court to discount the government's arguments or subject them to additional scrutiny.[30] To avoid these disadvantages, the Trump administration could rely on other procedural tactics.

One frequently used approach is to switch sides in a way that ends a pending case. If the government changes sides in a suit where it is the only adverse party, it can seek to voluntarily dismiss the case — as the Biden administration did in three cases involving the public charge rule.[31]

That step ends the litigation and in some cases leaves a lower court judgment adverse to the prior administration in place.[32] A new administration can also end litigation through settlement. By accepting a proposed settlement, the government can often terminate pending suits on favorable terms that could not be easily obtained through a judgment on the merits or further agency rulemaking.

Where a lower court has already issued a judgment in favor of the Biden administration, the Trump administration can confess error and ask a court of appeals or the Supreme Court to vacate and remand for reconsideration.[33] This step often, but not always, allows the government to relitigate cases under its new legal positions or to seek dismissal of the action.[34]

Another tactic is for the new administration to raise procedural defenses rather than defending the substance of the prior administration's action. For example, in Competitive Enterprise Institute v. FCC — a case challenging conditions imposed on a merger during the Obama administration in the U.S. District Court for the District of Columbia — the Trump-era FCC contested the petitioners' standing but did not address the merits of the challenged conditions.[35] This approach allowed the FCC to end the litigation on procedural grounds without taking a position on the validity of the prior administration's approach.

These dynamics show why it is important for organizations aligned with the Biden administration's views to intervene promptly. Court rules often impose tight deadlines for intervention. Organizations that intervene in a timely fashion will be able to carry on litigation the Trump administration may seek to abandon, and can likewise resist dismissal or settlement.

Organizations opposed to the Biden administration's litigating positions, meanwhile, can benefit from these considerations in other ways. For example, these organizations can intervene, or participate as amici, and present additional arguments and evidence in support of the Trump administration's new positions.

Support from intervenors and amici will likely play a particularly important role in statutory interpretation cases following the Supreme Court's decision in Loper Bright Enterprises v. Raimondo last year.[36]

Under Loper Bright, it is no longer sufficient for an agency's construction to be reasonable; instead, courts must adopt the single best interpretation of the statute.[37] Resolving that issue is often a complex exercise in which agencies sometimes omit winning arguments. e.g., for political or strategic reasons, or do not have enough space to fully present viable alternatives. Intervenors and amici can — and often do — fill in those gaps.[38

**Reconsideration of Prior Agency Actions and Strategic Litigation Side-Switching**

As the second Trump administration begins to reconsider Biden-era positions, it can use that process to strategically delay or dismiss pending suits. For instance, if a court has not yet decided a challenge on the merits, the new administration can seek a voluntary remand to the agency to revisit a challenged rule or order.[39] The courts have broad discretion to grant such requests.[40]

The Trump administration can also use its reconsideration of Biden-era agency actions to delay pending litigation. The Biden administration took this approach when it reviewed the first Trump administration's Migrant Protection Protocols program.

In Mayorkas v. Innovation Law Lab in 2020, the government moved to hold litigation challenging the program in abeyance while the U.S. Department of Homeland Security devised a new policy, and likewise moved to remove the case from the Supreme Court's argument calendar pending the outcome of that administrative process.[41]

Where the Trump administration modifies or rescinds Biden-era policies, it can invoke the Munsingwear doctrine to dismiss pending cases involving those policies and vacate prior court rulings that upheld them.

The Munsingwear doctrine allows courts to vacate a prior ruling where (1) the ruling remains eligible for appellate review but (2) the underlying case becomes moot before the appeal can be resolved.[42] The Biden administration relied on this doctrine after it terminated the Remain in Mexico program, a step that mooted pending lawsuits that had challenged the program and eliminated the Supreme Court's jurisdiction over the case.

Rather than allowing a lower court decision regarding the validity of the program to stand, the Biden administration moved for Munsingwear vacatur of the decision and dismissal of the litigation, which the Supreme Court granted.[43]

**Conclusion**

There are ample forthcoming opportunities for strategic litigation side-switching, and the second Trump

administration is likely to make use of many of them. Whether aligned with the new administration or not, parties affected by those changes can take steps to protect their interests.

---

*Kevin King is a partner and Ian Todd is an associate at Covington & Burling LLP.*

***Disclosure: King was part of the legal team that filed a respondent-intervenor brief on behalf of the American Petroleum Institute in Sinclair Wyoming Refining v. EPA and argued the case in support of EPA's final rule.***



[1] For example, the Obama Administration switched the government's position in Kiobel v. Royal Dutch Petroleum, 569 U.S. 108 (2012), urging the Supreme Court not to adopt the "categorical rule against extraterritoriality" that had been advocated by the Bush Administration. See Suppl. Br. for the United States as Amicus Curiae in Partial Supp. of Aff. at 21 n.11 (No. 10-1491).

[2] Michael R. Dreeben, Stare Decisis in the Office of the Solicitor General, 130 Yale L. J. 541, 552–53 (2021) (discussing Trump Administration side-switching in Epic Sys. Corp. v. Lewis, Husted v. A. Phillip Randolph Inst., Janus v. Am. Federation of State, County, and Municipal Employees, and Lucia v. SEC).

[3] See Br. for Respondent at 9–10, Lucia v. SEC, 585 U.S. 237 (2017) (No. 17-130).

[4] Id.

[5] See Lucia v. SEC, 585 U.S. 237, 244 (2018).

[6] Bethany A. Davis Noll & Richard L. Revesz, Presidential Transitions: The New Rules, 39 Yale J. on Reg. 1100, 1103 (2022).

[7] See, e.g., Brnovich v. Democratic National Committee, 594 U.S. 647 (2021); Americans for Prosperity Found. v. Bonta, 594 U.S. 595 (2021); HollyFrontier Cheyenne Ref., LLC v. Renewable Fuels Ass'n, 594 U.S. 382 (2021); Cedar Point Nursery v. Hassid, 594 U.S. 139 (2021); Mayorkas v. Innovation L. Lab, 141 S. Ct. 2842 (2021); California v. Texas, 593 U.S. 659 (2021); Terry v. United States, 593 U.S. 486 (2021); Becerra v. Gresham, 141 S. Ct. 2461 (2021); Biden v. Sierra Club, 141 S. Ct. 1289 (2021); Dep't of Homeland Sec. v. New York, 141S. Ct. 1292 (2021).

[8] Biden v. Sierra Club, 141 S.Ct. 1289 (2021).

[9] Biden v. Sierra Club, 142 S. Ct. 56 (2021).

[10] Inadmissibility on Public Charge Grounds; Implementation of Vacatur, 86 Fed. Reg. 14,221 (Mar. 15, 2021).

[11] Id.

[12] Letter from John R. Rady, Appellate Counsel, Securities and Exchange Commission, to Michael E.

Gans, Clerk of Court (8th Cir. Apr. 4, 2024) (No. 24-1522).

[13] In re MCP No. 185, No. 24-7000, slip op. at 4 (6th Cir. Jan. 2, 2025).

[14] See Am. Council of Life Insurers v. United States Dept. of Labor, No. 4:24-cv-00482, 2024 WL 3572297, at *9 (N.D. Tx. July 26, 2024).

[15] See Plaintiffs' Second Am. Compl. at 2–4, Coalition for Workforce Innovation v. Su, No. 1:21-cv-00130-MAC (E.D. Tx. Mar. 5, 2024).

[16] See State v. Su, No. 23-15179, 2024 WL 4675411, at *12–13 (9th Cir. Nov. 5, 2024).

[17] Petition for Writ of Certiorari, Garland v. Vanderstok (No. 23-852).

[18] Petition for Writ of Certiorari, NRC v. Texas (No. 23-1300).

[19] Petition for Writ of Certiorari, Food and Drug Admin. v. Wages and White Lion Investments, LLC (No. 23-1038).

[20] Exec. Order. No. 13990, 86 Fed. Reg. 7,037, 7,037–38 (Jan. 20, 2021).

[21] Id. at 7,039–40.

[22] Mot. To Hold Cases in Abeyance Pending Implementation of Exec. Order and Conclusion of Potential Reconsideration, California v. Regan (D.C. Cir. Feb. 1, 2021) (No. 20-1357).

[23] Order, California v. Regan (D.C. Cir. Feb. 12, 2021) (No. 20-1357).

[24] That said, courts have authority to place conditions on intervenors' participation, see, e.g., WildEarth Guardians v. Salazar, 272 F.R.D. 4, 20 (D.D.C. 2010), and intervenors are generally limited to the issues raised by the original parties. See, e.g., Core Communications, Inc. v. FCC, 592 F.3d 139, 145–46 (D.C. Cir. 2010).

[25] See City of Cleveland v. NRC, 17 F.3d 1515, 1517 (D.C. Cir. 1994); Illinois Bell Tel. Co. v. FCC, 740 F.2d 465, 477 (7th Cir. 1984).

[26] Fed. R. Civ. P. 29(a)(2).

[27] See Town of Chester, N.Y. v. Laroe Estates, Inc., 581 U.S. 433, 439 (2017) (Article III standing requirements apply to intervenors at least where they seek different relief than the original parties).

[28] See Heckler v. Cmty. Health Serv. of Crawford Cnty, 467 U.S. 51, 60 (1984); see also Audio Technica U.S., Inc. v. United States, 963 F.3d 569, 575–76 (2020); Casa De Maryland v. U.S. Dep't of Homeland Sec., 924 F.3d 684, 705 (4th Cir. 2019).

[29] See, e.g., Letter from E. Kneedler, Deputy Solicitor General, to S. Harris, Clerk of Court (Feb. 10, 2021) (No. 19-1019).

[30] Supreme Court justices questioned government attorneys about side-switching early on in the

Trump and Biden Administrations. See Tr. of Oral Arg. at 28–29, Husted v. Philip Randolph Inst., 584 U.S. 756 (2018) (No. 16-980) (Justice Sotomayor telling Solicitor General Noel Francisco that it is "quite unusual that your office would change its position so dramatically," and asking Francisco to explain how the government decided to change its position); Tr. of Oral Arg. at 33–34, Terry v. United States, 593 U.S. 486 (2021) (No. 20-5904) (Chief Justice Roberts asking Deputy Solicitor General Eric Feigin how the Solicitor General's office decides to change positions); id. at 52–53 (Justice Barrett noting that the government changed its position "pretty late"). See also Tr. of Oral Arg. at 43–44, Kiobel v. Royal Dutch Petroleum, 569 U.S. 108 (2012) (No. 10-1491) (Justice Scalia highlighting the government's changed position and asking Solicitor General Donald Verrilli "why should we listen to you rather than the solicitors general who took the opposite position").

[31] See Arizona v. City and County of San Francisco, Ca., 596 U.S. 763, 765 (2022) (Roberts, C.J., concurring) (discussing the government's decision to voluntarily dismiss multiple appeals involving the public charge rule after a change in administration).

[32] See, e.g., Am. Med. Ass'n v. Becerra, 141 S. Ct. 2170 (2021) (granting voluntary dismissal of the government's petition for certiorari, leaving an adverse Fourth Circuit judgment in place).

[33] See, e.g., Rojas v. United States, 142 S. Ct. 421 (2021) (vacating judgment and remanding to the Third Circuit "for further consideration in light of the confession of error by the Solicitor General in her brief for the United States").

[34] See, e.g., United States v. Rojas, No. 19-2056, 2022 WL 4551857, at *1 (3d Cir. Sept. 26, 2022) (vacating and remanding a case for dismissal after the government's confession of error and statement that it will not continue the prior administration's prosecution).

[35] 970 F.3d 372 (D.C. Cir. 2020).

[36] Loper Bright Enter. v. Raimondo, 144 S.Ct. 2244 (2024).

[37] Id. at 2273.

[38] Sinclair Wyoming Refining Co. v. EPA, 101 F.4th 871, 885 (D.C. Cir. 2024) (adopting interpretation advocated by private-industry intervenors).

[39] See Limnia, Inc. v. Dep't of Energy, 857 F.3d 379 (D.C. Cir. 2017).

[40] Id. at 120.

[41] Mot. For the Pets. to Hold the Briefing Schedule in Abeyance and to Remove the Case from the February 2021 Arg. Calendar, Mayorkas v. Innovation Law Lab, 141S. Ct. 2842 (2021) (No. 19-1212).

[42] United States v. Munsingwear, Inc., 340 U.S. 36 (1950).

[43] Mayorkas v. Innovation L. Lab, 141 S. Ct. 2842 (2021).