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Biden on Pace to Flip Positions at Supreme Court More Than Trump

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The Biden administration is on track to reverse the government's position in more cases before the Supreme Court than the Justice Department did during the first full high court term of Donald Trump's presidency.

In just under two months, Biden has flipped positions to defend the Affordable Care Act, side with union organizers in a takings case, reject a test put forth by the Trump administration in a voting rights dispute, support a California donor-disclosure law, and argue for a sentence reduction in a case on the new First Step Act.

Changes in the federal government's positions had been relatively rare prior to Trump, as they can undercut the credibility of the federal government's top lawyer at the Supreme Court—the U.S. solicitor general.

The Trump administration took “a number of ideologically driven, non-traditional positions that stretch the boundaries of traditional legal analysis by an SG,” longtime Deputy Solicitor General Michael Dreeben told Bloomberg Law.

“I see the Biden administration as reverting to the mean by taking a more institutional and precedent oriented approach to its submissions to the court,” said Dreeben, who is now at O'Melveny.

But Ilya Shaprio, the director of the Center for Constitutional Studies at the libertarian Cato Institute, said it's “a function of the times.” The ways in which laws are interpreted can fall along partisan lines “at a time when the parties are more ideologically sorted and polarized since at least the Civil War.”

The Justice Department changed positions in four high-profile cases during the first full Supreme Court term of the Trump era. One change pitted the federal government against itself, with the solicitor general arguing against another federal agency, the National Labor Relations Board.

For comparison, it was several terms before the Obama administration changed course in a Supreme Court case, though that was followed by “an unusual cluster” of changes in Barack Obama’s second term, Dreeben noted in a recent law review [article](#).

Biden is on track to beat Trump with at least five changes in high court legal positions so far. And the Biden administration hasn’t even gotten to its first full term—the court’s 2020 term, which lasts from October to approximately June, is straddled by both the Trump and Biden presidencies.

Policy v. Legal Changes

In looking at these changes, it is important to distinguish between the administration’s policy difference versus legal ones, Dreeben said.

For example, within days of taking office, the Biden administration suspended the Trump era “remain in Mexico” policy, which required immigrants arriving via the Southern Border to remain in Mexico while their immigration case was pending.

The Supreme Court later [scrapped](#) the case from its argument calendar at the Biden administration’s request.

“For these cases, the Acting SG’s hands are tied,” said South Texas College of Law Houston professor [Josh Blackman](#), as there is no longer any policy to defend at the court.

Other cases represent a change in legal position, or what Shapiro described as “simply the manifestation of differing ways of seeing the law.”

These are the cases where the solicitor general has the ability to change the federal government’s position.

Harming Credibility

It’s these last line of cases that could implicate the solicitor general’s credibility with the justices.

The office is by far the most frequent player in Supreme Court arguments so it’s important for the office to maintain some consistency between administrations.

“Consistency is a virtue—up to a point,” Dreeben said.

An Obama solicitor general, Donald Verrilli, sometimes caught heat for such changes. In a 2012 case involving the reach of U.S. law abroad, Justice Antonin Scalia [asked](#) Verrilli “why should we defer to the views of the current administration,” given that others had taken the opposite view.

“By this point, I doubt the Justices are much bothered,” Blackman said. “Everyone understands how diametrically opposite the Trump and Biden administrations are.”

Showing Restraint

Dreeben said the administration can manage the damage to the solicitor general’s credibility by doing three things: acknowledge the change with candor, give a reasoned explanation for the change, and be judicious in picking positions to change.

Despite the large number of changes so far, Dreeben said he thinks the Biden administration has been restrained in making them, “picking the ones that are so either non-traditional or egregious or wrong that its reversing course.”

He pointed to a follow-up case that landed Verrilli in trouble, *Nestlé USA, Inc. v. Doe I.*, on the reach of U.S. law.

The Trump administration took a position in briefs and at oral argument that limited application of American law, even to domestic corporations. It “was much more hostile” to the statute at issue than prior Democratic administrations, Dreeben said.

“I have little doubt that if that case came up today, that the Biden administration would not be urging as broad and bright-line rules,” Dreeben said, noting that it hasn’t yet taken a contrary position in that case.

“I think actually there are even more decisions that the Trump administration made in its filings that are potential targets for reversal,” Dreeben said.

Some of those include cases involving public officials’ use of Twitter, seeking the death penalty for the Boston Marathon bomber Dzhokhar Tsarnaev, and Texas’s bid to sue California over its anti-discrimination policy.