



Why Texas is a legal graveyard for Biden policies

By Tierney Sneed

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If a federal judge is ruling against a Biden administration policy, there is a good chance the judge's courtroom is in Texas.

Texas Attorney General Ken Paxton and conservative groups have launched an unrelenting, and mostly successful, legal war against President Joe Biden's agenda on immigration, health care and other issues.

The stamp that former President Donald Trump has put on the judiciary has helped propel their campaign against the Biden administration. Trump-appointed judges sit in courthouses in remote places like Victoria and Amarillo, where they're all but guaranteed to hear the cases that Texas and its allies file in those divisions.

"If the Biden administration thinks they can force states to comply with their political agenda, my office will fight against their radical attempt at social change," Paxton -- whose reelection bid has gone into a GOP primary runoff with George P. Bush -- said in a statement last year, as he announced a lawsuit filed in Amarillo challenging the gender identity guidance issued by the US Equal Employment Opportunity Commission.

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Texas has reaped the benefits of unique advantages it's had in its legal war against Biden. They include a judicial assignment system in some US district courts in the state that allows plaintiffs to essentially pick their judges, as well as a federal circuit court with jurisdiction over appeals from Texas that has been yanked further to the right with Trump's appointees. Trump entered office with several vacancies ready for him to fill, in part because of Senate Republicans' refusal to advance the nominees of his predecessor.

"As soon as Trump came in, then they fired up the machinery," said Carl Tobias, a University of Richmond School of Law professor who studied who Texas court vacancies that went unfilled under President Barack Obama. "They moved forward with a whole lot of extremely conservative candidates they recommended to the White House. The White House nominated them and they were confirmed -- and you see them all over Texas."

There is some parallel in the wave of court defeats Trump suffered in the lawsuits brought against his administration by Democratic state attorneys general and other liberals.

"The point is not that only Republicans are doing it -- that's not true at all," Steve Vladeck, a CNN legal analyst and University of Texas Law School professor, told CNN. "But I do think that there are both political and procedural asymmetries that are making this both more prevalent and more focused on the Republican side of the aisle."

One of Texas' most successful legal gambits against the Biden administration is a lawsuit -- where it was joined by Missouri-- that has forced Biden to keep alive Trump's controversial "Remain in Mexico" policy for migrants seeking asylum.

The Supreme Court will hear the case this spring, the court announced last month, after lower courts blocked Biden's bid to end the program. The termination of the program was first halted by a Trump appointee, Judge Matt Kacsmaryk, who presides over 95% of the civil cases brought in Amarillo, Texas -- the division where Texas filed its "Remain in Mexico" case.

"I think all attorneys general are rational and they file cases where they think they have the best chance of success," said Joshua Blackman, a professor at the South Texas College of Law Houston and adjunct scholar at the libertarian Cato Institute. "Texas just has a lot of benches, and they've had successes so far."

A head-spinning spree of lawsuits

In some ways, Paxton is continuing the tradition set out by his predecessor, Republican Gov. Greg Abbott, who famously described suing the Obama administration as an element of his daily routine.

"I go into the office, I sue the federal government and I go home," Abbott, then Texas attorney general, said in 2012.

After Biden was sworn into office, Paxton wasted no time in matching Abbott's aggressive pace.

Immigration has been a particularly contentious battlefield in the Texas v. Biden legal wars. But the state been successful on other fronts as well, including in vaccine mandate litigation, where Texas secured rulings blocking Biden vaccine rules for certain health care workers and for employees of the Head Start program for young children.

Texas' legal record has been shaped by where it files its cases. More than a dozen of the lawsuits the state has brought against the administration have been filed in district court divisions where cases are divided between just two judges -- or even mostly assigned to just one judge.

In addition to the Remain in Mexico case, Kacsmaryk has overseen Texas cases challenging vaccine mandates, the gender identity guidance issued by the US Equal Employment Opportunity Commission and the administration's limits on the use of Covid-19 relief funds for tax cuts.

Another Trump appointee, Judge Drew Tipton, is assigned almost all the civil cases filed in Victoria, Texas, as he is the division's only active judge. He halted a deportation moratorium that

Biden tried to implement at the beginning of his presidency and has frozen Biden's efforts to rework the government's immigration enforcement priorities. He is overseeing the state's challenge to Biden's minimum wage hike for federal workers, after Texas and two other GOP states filed the case in Victoria last month.

The Fort Worth division of Texas' Northern District is also a go-to forum for lawsuits against the Biden administration, as 90% of the cases filed there are assigned to either Judge Mark Pittman, a Trump appointee, or Judge Reed O'Connor, a George W. Bush appointee with a very conservative reputation. O'Connor ruled in favor of Navy SEALs who had sought a religious exemption to the military's vaccine mandate and has been assigned a case Texas filed in Fort Worth targeting the administration's mask mandate for air travel.

Almost all civil cases filed in Galveston, Texas, are assigned to Trump appointee Judge Jeffrey V. Brown, who recently blocked Biden's vaccine mandate for federal employees (a decision issued in a privately brought lawsuit). Brown was also presiding over Texas' challenge to Biden's vaccine requirements for federal contractors.

The pattern of targeting courts with this assignment setup is not new with the Biden administration; when it was deployed in the Obama era (when, for instance, O'Connor struck down Obama immigration initiatives and policies concerning transgender rights), it attracted the scrutiny of legal scholars. About a third of the district courts in the country have divisions where one or two judges hear all the cases brought in those divisions, according to a 2018 law review article examining the pattern.

"I kind of thought that maybe when all the attention started being drawn to this issue that some of the courts might try to do something about it," the article's author, Alex Botoman, told CNN. "But it doesn't really seem like they have."

While Democratic attorneys general and their allies were strategic in where they filed cases too, the legal opposition to Trump often ran through courts, like the Northern District of California, where any number of judges could be assigned a case, but all of the judges on the court are appointees of Democrats.

"It's more of a shopping by the district as opposed to granularly, within the district, shopping for an individual judge," Botoman said.

Chief Justice John Roberts noted in his 2021 year-end report the criticisms of judge-shopping in patent cases, which are often filed in two particular federal courts in Texas. Roberts said a committee of the Judicial Conference, the national policy-making body for federal courts, was reviewing the concerns; however, a spokesperson for the court organization said its examination was focused on the patent context.

How Trump reshaped the courts

The imprint that Trump -- with the help of allies in the Senate -- put on the federal judiciary is also boosting the legal war against Biden's agenda in Texas.

"Trump's success, vis-a-vis the federal bench, wasn't just a function of volume," Vladeck said. "It was a feature, not a bug, in the Trump administration to be ideologically extreme."

Neither Tipton nor Kacsmaryk nor Brown had the support of any Democratic senators in their confirmations. (Kacsmaryk, who came under fire for statements he had made about LGBT people and reproductive rights, was opposed by Republican Sen. Susan Collins of Maine as well).

Some Trump-appointed district judges filled vacancies that opened first under the Obama. Senate practice for district judgeships requires that their home state senators -- who, in Texas, are both Republican -- approve of the nominees before they move forward, enabling those senators to stall efforts to fill those seats. Obama left the White House with 11 district court vacancies in Texas still open.

"We have jurisprudentially conservative judges and a jurisprudentially conservative AG, so I'm not terribly surprised at these sorts of rulings," Blackman said. "During the Trump years he had lawsuits filed in San Francisco and Brooklyn, and -- shocking -- Trump lost those cases."

Trump's legacy extends to the New Orleans-based 5th US Circuit Court of Appeals, where six of the 17 active justices are his appointees, and another six were appointed by other Republican presidents. That court has played key roles in upholding lower court decisions against Biden.

For instance, Kacsmaryk's ruling blocking Biden from ending the Remain in Mexico policy was left in place by a 5th Circuit panel that included two Trump appointees and third judge appointed by President George H.W. Bush. On Monday, a separate panel declined a Justice Department request to allow the Navy to make deployment decisions based on the vaccination status of the Navy SEALs challenging the requirement in court. Two of those circuit judges were Trump appointees and the third a nominee of President Ronald Reagan.

On the rare occasions where the Biden administration has secured favorable rulings in cases against Texas, the 5th Circuit has stepped in to reverse those decisions. After a 5th Circuit appellate panel reinstated the Biden deportation policies frozen by Tipton, the full appeals court voted to reverse that decision and put the Biden policies back on hold.

The 5th Circuit also favored Texas in its battle with the Biden administration over the state's six-week abortion ban. After clinics and the Justice Department secured orders blocked the law from an Austin-based Obama appointee, the 5th Circuit intervened to reinstate the law, which was ultimately left in effect by the Supreme Court. (US District Judge Robert Pitman, who issued decisions blocking the law, is assigned half of the cases filed in the Austin division -- an example of how Texas' assignment system may have benefited the state's opponents as well).

"A critical piece of it is if by some chance something gets through, it goes to the 5th Circuit," Tobias said. "And that's packed with Trump's folks, as well as a number of other conservative Republican appointees, and it's clearly the most conservative appellate court in the country."