

Why Biden Must Tread Carefully With U-Turns In Court

By Jack Karp

Law360 (March 2, 2021, 4:14 PM EST) -- The Biden administration has not been shy about reversing the government's stance in high-profile court cases, U-turns some experts say are necessary but others warn could harm the government's credibility in court and encourage future presidents to change course more often.

Cases involving the Affordable Care Act, unions' access to California farmworkers and Arizona voting regulations are just some of the court battles in which President Joe Biden's Department of Justice has reversed course so far.

It's not unusual for a new administration to review its litigating positions in pending court cases, attorneys say, and some of Biden's changes may be necessary to undo unorthodox positions taken by the Trump administration.

But Biden's DOJ has to be careful about which cases it shifts gears in and how it justifies those shifts, attorneys warn, or it could undermine judges' trust in the government's credibility and make it more likely that future administrations will do the same.

"The government jealously guards its reputation as a straight shooter and honest broker before the federal and state courts," said Allon Kedem, a partner in the appellate and U.S. Supreme Court practice at Arnold & Porter who worked in the Office of the Solicitor General and the DOJ's Office of Legal Counsel through two presidential administrations.

"And any time you are revealing to the court that you no longer stand behind something you formerly told the court, that comes along with some reputational risk," he said.

Changing Course

The DOJ informed the Supreme Court in February that it no longer believes a California regulation requiring farms to give unions access to work sites is unconstitutional, a 180-degree turn from the position the Trump administration had taken in an amicus brief.

"It was probably a little bit unexpected," said Joshua Thompson, a senior attorney with the Pacific Legal Foundation who will be arguing that case at the Supreme Court on behalf of the growers challenging California's rule. "That sort of a reversal on an amicus brief was atypical."

A few days later, Biden's DOJ also pulled the government's support for Arizona Republicans' efforts to overturn a Ninth Circuit decision that the state's voting regulations discriminated against minorities, a case being argued before the justices Tuesday.

And earlier in the month, the DOJ told the justices it was reversing former President Donald Trump's position that the Affordable Care Act should be scrapped in cases challenging that law.

"Following the change in administration, the Department of Justice has reconsidered the government's position in these cases," Deputy Solicitor General Edwin Kneedler wrote in a letter to the high court.

That was "a fairly extraordinary step" since the ACA cases had already been briefed and argued, said Michael R. Dreeben, a partner at O'Melveny & Myers LLP who spent 24 years as deputy solicitor general.

Biden has been similarly aggressive about changing course in the lower courts, dropping a Trump administration challenge to California's net neutrality statute, withdrawing his predecessor's amicus brief supporting a Ninth Circuit challenge to California's automatic retirement savings program, and scuttling a lawsuit accusing Yale University of discriminating against Asian American and white applicants just months after Trump filed it.

The reversals aren't surprising given how many of the litigating positions taken by the Trump administration marked a "stark departure from institutional interests and historic positions" taken by the government, according to Dreeben and others.

In the ACA case, for instance, Biden is simply returning to typical DOJ litigation practices since Trump had sought to invalidate the entire statute even though the DOJ usually defends federal laws, said Joe Palmore, co-chair of Morrison & Foerster LLP's appellate and Supreme Court practice and a former assistant to the solicitor general.

"Reversing a position like that to protect long-standing governmental interests and to revert to a sounder legal framework is not a surprise," Dreeben said.

Prudence and Candor

But the Biden administration should consider two factors when reversing its positions in cases like these, according to attorneys.

First, it must exercise prudence in selecting the cases in which it switches positions.

The Trump administration's sometimes "legally tenuous" positions left Biden with a "target-rich environment" of cases that may merit a potential change of course, and the current administration must be careful about selecting only the most egregious or consequential ones to reverse direction in, Dreeben said.

Second, the administration must be able to explain how its change in position is guided by legal principles and not politics.

Judges want to know the government is using the same legal principles as the court, according to Dreeben and others, and it can create problems if the court thinks a switch is the product of ideology or

politics rather than law.

"Courts react better when the explanation for the change is candid and also when they perceive that the new administration is being judicious and thoughtful about changes," Palmore said.

Credibility and Complications

Whether necessary to correct unreasonable postures taken by Trump or not, the switches could create problems, including potentially undermining the government's credibility and harming the long-term consistency of its positions, experts say.

"Most administrations change positions with care because of institutional interests in maintaining credibility with the courts and consistency," said Ilana Eisenstein, a former assistant to the solicitor general who has since joined DLA Piper as co-chair of the firm's appellate practice. "The government likes to be seen as different than typical litigants and instead as having a long-term stake in the interpretation of statutes and the Constitution."

The danger to this perception was apparent during oral arguments in *Janus v. AFSCME* in 2018, when Justice Sonia Sotomayor confronted then-Solicitor General Noel Francisco about how many times he had "flipped positions from prior administrations."

"The obvious undertone was that she thought there was something worthy of note in the frequency with which the Trump administration had changed positions," Arnold & Porter's Kedem said.

Consistency reinforces the idea that the government is presenting sound legal positions grounded in institutional interests, Dreeben said. But he said he was less concerned about potential damage to the government's credibility.

As long as the government makes it clear that a change is not a product of ideology or politics, "then I don't think that it damages the government's position," he said.

But the about-faces pose other issues as well.

A change in position may also require a change in attorneys, since it could appear "unseemly" for a single government lawyer to present different positions at different points in the same case, Kedem said.

At the Supreme Court, a reversal of position could lead to a "GVR," when the justices grant certiorari, vacate a decision and remand a case to the lower court for reevaluation in light of the government's new position, he added.

And position flips could also complicate oral arguments, said Thompson of the Pacific Legal Foundation. If the government requests time for oral argument, that time is typically taken from the side the government supports, he said. But it's unclear what happens when the government switches sides in the middle of a case.

The government hasn't requested oral argument time in his case, Thompson said, "but I can foresee how in other cases that could be a bigger issue."

Changing Position Doesn't Mean Changing Outcomes

Experts disagree as to whether changes in the government's stance affect the outcomes of the cases they're made in.

Kedem said such reversals absolutely impact a case's resolution.

"There is no litigant that gets more respect from the courts, especially the Supreme Court, than the United States, and a change in position is taken extraordinarily seriously," he said.

But other attorneys said the impact of such changes is limited since courts know to look at the government's views in some cases as political rather than legal positions.

"Courts, and especially the U.S. Supreme Court, treasure their independence from the executive, and they will not want to be seen as moved by the political tides," Eisenstein said.

And in cases such as the ACA case, the government could potentially be reversing its position after the court has already decided the outcome, she pointed out.

Thompson said the government's reversal is not likely to sway the justices one way or the other in his own case, which will be argued before them in March.

Where Biden's about-faces could have an impact is on the approach new administrations take when reviewing their own litigating positions, some experts said. The frequency with which first Trump and now Biden have swapped legal positions could lay the groundwork for future presidents to change course more often, damaging the consistency of the government's stances in court.

"The next administration looks to what was done under its predecessor as a baseline," Kedem said.

The Biden administration may not be finished setting that baseline.

On Monday, the solicitor general informed the Supreme Court in a brief that the government no longer thinks a California law requiring charitable organizations to disclose tax information about their donors is outright unconstitutional. The Trump administration had told the justices in November that the requirements infringe on the freedom of association. Oral arguments in that case are expected this spring.

And an Alien Tort Statute case currently at the Supreme Court is primed for another reversal, according to Dreeben. In May, the Trump administration **told the court** the law doesn't apply to domestic corporations like Nestle, which has been accused of aiding slavery on Ivory Coast farms. That case, like the ACA case, has already been briefed and argued.

The Office of the Solicitor General and the DOJ declined to comment for this story.

If the administration does decide it's necessary to swap positions in that or any other cases, as long as those decisions are based on sound legal principles, it should go ahead and make the switch regardless of the potential complications, Dreeben said.

"To the extent that the SG's office regards itself as having a duty of candor to the integrity of the law and

provides changed views because it believes that is the better view of the law," he said, "I think that would be a sound development."

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