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# Exploring Venue Strategy For Trump-Era Regulatory Litigation

By **Kevin King and MaKade Claypool** (January 6, 2025, 3:34 PM EST)


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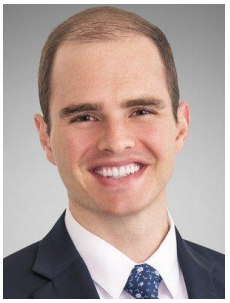
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Litigation challenges to major executive branch policymaking have become the norm — seemingly just as inevitable as death and taxes.

Venue has played a key role in these legal battles: Rightly or wrongly, parties seeking to challenge federal agency action have concluded that litigating in a favorable venue can increase their odds of success.

The U.S. Department of Justice has begun to push back on these efforts.[1] These dynamics will likely continue over the next four years, although changes in the composition of the federal courts may lead challengers to focus on different venues than during the first Trump administration, and competing priorities may lead the second Trump administration to adopt new tactics in response.

Businesses and other regulated parties will play a key role in this process, as well. Whether seeking to challenge or defend forthcoming agency actions, private parties have tools at their disposal to steer regulatory litigation to favorable venues.

This article breaks down those tools, and the trends we are likely to see during the second Trump administration.

**Shifts in Forum Preferences**

Litigants over the last few administrations have gravitated toward courts they viewed as most sympathetic to their arguments.

Challenges to Obama and Biden administration policies, for example, were primarily brought in the U.S. Court of Appeals for the Fifth Circuit, while most challenges during President George W. Bush's administration and President-elect Donald Trump's first administration were brought in the U.S. Court of Appeals for the Ninth Circuit.[2]

Suits filed in California and Texas district courts alone accounted for more than 25% of challenges to major Trump and Biden administration regulations.[3]

Past may not be prologue, however, for the second Trump administration, due to a shift in the Ninth Circuit's bench. District courts in the Ninth Circuit remain predominantly Democrat-appointed — and

sometimes exclusively so for courts like the U.S. District Court for the Northern District of California, where almost 20% of challenges to the first Trump administration's major policies were filed.[4]

But the Ninth Circuit, which reviews appeals from these district courts, has moved toward the center, with the Democrat-appointee majority dropping from 67% in 2016 to 55% in 2024.[5]

As a result, parties are now much more likely to draw a Ninth Circuit three-judge or en banc panel composed primarily of Republican-appointees — more than 75% of whom were appointed during the first Trump administration.

Undoubtedly, courts in the Ninth Circuit will see their fair share of challenges to upcoming Trump administration actions, due in part to plaintiff-friendly circuit precedent. But as litigants weigh their odds of success on appeal, we expect the West Coast's magnetic pull to be less pronounced than it was during the first Trump administration.

Challengers may also look to courts in the U.S. Courts of Appeals for the Second, Fourth and District of Columbia Circuits. Plaintiffs challenging agency actions frequented these forums during the first Trump administration,[6] and that trend will likely continue.

Key district courts in these circuits are also predominantly composed of judges appointed by Democrats — 75% in the U.S. District Court for the District of Columbia, almost 79% in the U.S. District Court for the Southern District of New York, and 90% in the U.S. District Court for the District of Maryland.[7]

As in the Ninth Circuit, however, the calculus changes on appeal. The D.C. Circuit is currently composed of 64% Democrat appointees, the same as in 2016; the Second Circuit sits at 54%, down from 64% in 2016; and the Fourth Circuit sits at 60%, down from 67% in 2016.[8]

All said, the composition of these circuits may make choosing between East Coast and West Coast venues somewhat of a wash, leading litigants to choose based on other factors, such as speed and circuit precedent.

During the Biden administration, challengers frequently filed in single-judge divisions of Texas district courts, effectively selecting the judge assigned to their cases. While no district court appears to provide a direct analogue for left-of-center challengers, those wishing to take a similar tack could look to the U.S. Court of Appeals for the First Circuit.

Apart from U.S. District Court for the District of Rhode Island, each district court in that circuit has a supermajority of Democrat appointees. The U.S. District Court for the District of Massachusetts, for example, has one of the largest Democrat-appointed majorities in the country, sitting at 85%.[9]

And, unlike other circuits, all active judges on the First Circuit were appointed by Democrats — 80% of these judges were appointed by President Joe Biden — potentially making it a recurring battleground in the years ahead.[10]

Of course, a specific panel may differ when factoring in participating senior judges, who bring the court's Democrat-appointed majority down to 75%, and the currently vacant seat that will likely be filled by Trump.[11]

As it has been, court composition will likely continue to be a rough, though imperfect, heuristic for gauging the favorability of a given venue. But litigants should also be aware of significant cross-currents that complicate the calculus.

Those seeking to defend Trump administration policymaking may continue to focus on courts within the Fifth Circuit, given these courts' pivotal role in scrutinizing action taken by the Obama and Biden administrations. Yet precedent in these and other conservative-leaning courts tends to favor parties who challenge agency action.

Indeed, research from Institute for Policy Integrity concluded that when Republican-appointed judges presided over challenges to major policies during the first Trump administration, the government lost almost 60% of the time.[12]

Competing cross-currents may similarly affect left-of-center courts where precedent tends to be more deferential to agency action.

**Tools and Obstacles**

Once parties identify their preferred courts, they can use several tools to influence venue accordingly.

The type of agency action can limit which venues are available: Some actions must be reviewed initially in the district courts — the default approach under the Administrative Procedure Act — while other types of action, such as nationally applicable legislative rules, are often directly reviewable in the circuit courts.

In most cases, the party initiating the suit has a choice between at least two circuits or district courts. Generally, litigants should consider the following principles when forming their venue strategy.

***Selecting Who Will Sue***

Whether filing in district or circuit court, the governing venue statutes generally allow a party to file wherever a plaintiff or petitioner resides.[13] Partnering with local plaintiffs has become a common tactic when challenging agency action — most frequently by joining individuals or businesses affected by a regulation, or by suing through a trade association's local or regional chapter.

But these strategies are not always successful, particularly when there are arguments that the local party on whom venue depends lacks standing.

For example, when a coalition of states sued in the U.S. District Court for the Southern District of Georgia to enjoin the Biden administration's student loan cancellation program in Missouri v. U.S. Department of Education, the court transferred the case in October 2024 to a different district because the state of Georgia had only shown an indirect injury stemming from the program.[14]

Relatedly, in U.S. Food and Drug Administration v. R.J. Reynolds Vapor Co., the U.S. Supreme Court will soon consider whether a North Carolina vaping company can join Mississippi- and Texas-based retailers to its suit as a means of securing venue in the Fifth Circuit.[15]

***Leveraging Rules Surrounding Whom to Sue***

The district and circuit court venue statutes also allow parties to sue in courts where federal defendants or respondents are located.[16] Because many agencies are currently headquartered in or around the nation's capital, forums like the D.C. and Maryland district courts are usually open to litigants from across the country.[17]

While this hook for venue was less frequently invoked during the Biden administration, those challenging Trump administration regulations may find it more useful: It offers an indisputable ground for venue, and channels litigation through courts often viewed as being more sympathetic to left-of-center challenges.

***Focusing on Where the Agency Action Arose and Where Its Effects Will Be Felt***

When litigating in district court, venue is also proper wherever a substantial part of the events undergirding the claims occurred.[18] Similarly, litigation in circuit courts can turn on affected locales, although less frequently so.[19]

Indeed, in U.S. Environmental Protection Agency v. Calumet Shreveport Refining LLC, the Supreme Court will soon address the Clean Air Act provisions that determine whether EPA actions are nationally applicable, and thus reviewable only in the D.C. Circuit, or locally applicable, and thus reviewable in the appropriate regional circuit.[20]

Pursuing venue based on the facts of an agency dispute has seen mixed success in recent years.

For example, in Associated General Contractors of America Inc. v. Federal Acquisition Regulatory Council, trade associations unsuccessfully sued in the U.S. District Court for the Western District of Louisiana to enjoin nationally applicable government contracting requirements. The court held in March 2024 that venue was improper because the associations failed to show that Louisiana-specific facts undergirded their claims for nationwide relief.[21]

Yet other companies, such as SpaceX, have successfully argued that constitutional challenges arising from an administrative enforcement proceeding in California can be brought in Texas because the proceeding would affect the company's Texas operations, as the Fifth Circuit held last August in Space Exploration Technologies v. National Labor Relations Board.[22]

***Strategizing When to Sue and How Many Suits to File***

For major rules, many different stakeholders will often raise similar claims in courts across the country. Over time, that dynamic can lead to precedential snowballs, where an initial win or loss compounds as the remaining courts follow suit.

Multiple challenges to a single rule can also lead to divisions among the circuit courts, potentially prompting Supreme Court review.

Filing in many jurisdictions can also provide more widespread relief as courts continue to question the wisdom and availability of nationwide, or "universal," injunctions.

At the outset of litigation, parties should also consider two procedural mechanisms that frequently affect venue: the first-to-file doctrine and the federal lottery statute.

Under the first-to-file doctrine, a district court can transfer, stay or dismiss litigation when another party has raised similar issues in an earlier-filed lawsuit.

Take the litigation surrounding the Federal Trade Commission's rule banning noncompete clauses: After several parties sued in different district courts in Texas, the U.S. District Court for the Eastern District of Texas last May transferred a later-filed case, Chamber of Commerce v. FTC, to a neighboring court to be consolidated with an earlier-filed challenge.[23]

The federal lottery statute, by contrast, creates less of an incentive to rush to the courthouse because all challenges filed directly in circuit courts are consolidated into a single circuit. In high-profile cases that draw immediate challenges from multiple parties, the Judicial Panel on Multidistrict Litigation selects the circuit at random from the courts where cases are filed during an initial 10-day window.[24]

For example, nine lawsuits challenging the U.S. Securities and Exchange Commission's climate disclosure rule were filed across six circuits, and then consolidated in the U.S. Court of Appeals for the Eighth Circuit in March 2024 pursuant to this circuit lottery process in In re: SEC, The Enhancement and Standardization of Climate-Related Disclosures for Investors.[25]

Both those challenging and seeking to defend Trump administration policies can employ these strategies to influence venue.

If in district court, strategies could include being the first to file or — if trying to avoid first-to-file implications — ensuring that the plaintiffs and claims in a later-filed suit differ meaningfully from already filed lawsuits.

If in circuit court, strategies include filing within the initial 10-day window and coordinating the filing of multiple petitions for review in favorable venues, both of which increase the chances of a favored court being selected through the lottery process.

***Using Prelitigation Tactics to Influence Venue***

Even before an agency finalizes its action, parties can take steps to influence venue during the administrative process.

In the Clean Air Act context, for example, parties can encourage an agency to base its decisions on nationwide considerations to steer venue toward the D.C. Circuit.

Parties who generally favor a rule can also use prelitigation tactics. For example, otherwise-supportive parties sometimes file comments asking the agency to go further or consider alternatives, and then file a lawsuit in their preferred forum if the agency fails to respond or declines to adopt these proposals, as a means of influencing where third parties' challenges to the agency rule are heard.

In some cases, the supporter then dismisses its affirmative lawsuit and continues to participate as an amicus or intervenor in support of the agency.

A similar series of events occurred in the SEC climate disclosure litigation noted above: Several parties sued in the D.C. Circuit based on the SEC's purported failure to go far enough in mandating climate disclosures, then later voluntarily dismissed their cases once the cases were consolidated in the Eighth Circuit, and now participate as amici in support of the SEC in the ongoing litigation.[26]

**Conclusion**

Litigation will likely play a prominent role in shaping policy outcomes during the second Trump administration. Democrats representing so-called blue states have already pledged to lead the charge,[27] and private individuals and trade associations affected by the Trump administration's regulatory and deregulatory actions will undoubtedly join the fray as well.

There are tools stakeholders can employ to influence venue for those lawsuits — to steer suits challenging Trump administration policies to left-of-center courts in the First, Second, Fourth, Ninth and D.C. Circuits; or to steer suits seeking deregulatory outcomes to the Fifth Circuit and other conservative-leaning courts.

Whatever the strategy, venue will continue to play an early and important role in determining which side has the upper hand in court.

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[1] See, e.g., Tierney Sneed, DOJ Ramps Up Its Allegations that Texas is 'Judge-Shopping' in Cases Against Biden, CNN (Mar. 7, 2023), https://www.cnn.com/2023/03/03/politics/justice-department-texas-judge-shopping/index.html; see also Supp'l Br. in Support of Mot. to Transfer, Texas v. Dep't of Homeland Sec., No. 6:23-cv-7, ECF 74 (S.D. Tex. Feb. 28, 2023).

[2] See Institute for Policy Integrity, Biden Rules Through 2023, https://policyintegrity.org/tracking-major-rules/biden-rules-to-date (updated June 21, 2024).

[3] See id.

[4] Ballotpedia, Current Federal Judges By Appointing President and Circuit, https://ballotpedia.org/Current_federal_judges_by_appointing_president_and_circuit (accessed Nov. 14, 2024); Institute for Policy Integrity, supra note 1. The percentages in this article refer to judges in active service and exclude judges who have taken senior status.

[5] Ballotpedia, supra note 3.

[6] Institute for Policy Integrity, supra note 1.

[7] Ballotpedia, supra note 3. At the time this article was published, the District Court for the District of Columbia had two vacancies with nominations pending. See United States Courts, Current Judicial Vacancies, https://www.uscourts.gov/judges-judgeships/judicial-vacancies/current-judicial-vacancies (accessed Nov. 14, 2024).

[8] Ballotpedia, supra note 3.

[9] Id.

[10] Id.

[11] See Future Judicial Vacancies, supra n.7; see also Anthony Adragna, Schumer Explains Reported GOP Deal on Judges, Politico (Nov. 21, 2024), https://www.politico.com/live-updates/2024/11/21/congress/schumer-on-gop-judges-deal-00191038 (describing agreement to cede four appeals court nominations in exchange for the appointment of lower-level judicial appointees).

[12] See Institute for Policy Integrity, Roundup: Trump-Era Agency Policy in the Courts, https://policyintegrity.org/trump-court-roundup#ref-10-a (accessed Nov. 15, 2024).

[13] 28 U.S.C. § 1391(e)(1) (venue proper in district court where "plaintiff resides"); see also, e.g., 15 U.S.C. 78y(a)-(b) (challenges to SEC orders or rules can be brought in the circuit court where plaintiff "resides or has his principal place of business").

[14] Missouri v. U.S. Dep't of Educ., No. 224-cv-103, 2024 WL 4374124 (S.D. Ga. Oct. 2, 2024).

[15] See FDA v. R.J. Reynolds Vapor Co., No. 23-1187, 2024 WL 4394118 (U.S. Oct. 4, 2024) (granting petition for writ of certiorari).

[16] See supra n.13.

[17] President-elect Trump has stated that he may relocate certain agencies; if so, this aspect of the venue analysis could change. See Agenda47, https://www.donaldjtrump.com/agenda47/agenda47-president-trumps-plan-to-dismantle-the-deep-state-and-return-power-to-the-american-people (Mar. 21, 2023).

[18] See supra n.13.

[19] See, e.g., 42 U.S.C. 7607(b)(1) (judicial review under Clean Air Act considers whether action is "locally or regionally applicable.").

[20] See EPA v. Calumet Shreveport Refining, LLC , No. 23-1230, 2024 WL 452974 (U.S. Oct. 21, 2024) (granting petition for writ of certiorari).

[21] Associated General Contractors of Am. v. Federal Acquisition Regulatory Council, 720 F. Supp. 3d 461 (W.D. La. 2024).

[22] See Space Exploration Technologies, Corp. v. NLRB, No. 24-40315, 2024 WL 3765764 (5th Cir. Aug. 9, 2024) (vacating district court's order to transfer case to California).

[23] See, e.g., Chamber of Commerce of U.S. v. FTC, No. 6:24-cv-148, 2024 WL 1954139 (E.D. Tex. May 3, 2024).

[24] 28 U.S.C. §2112.

[25] In re: SEC, The Enhancement and Standardization of Climate-Related Disclosures for Investors, Issued March 6, 2024, MCP No. 180 (J.P.M.L. Mar. 21, 2024), accessible at https://www.jpml.uscourts.gov/sites/jpml/files/MCP-180-Consolidation_Order-3-21-2024.pdf.

[26] See Iowa v. SEC, No. 24-1633, Doc. No. 5399670 (8th Cir. May 31, 2024).

[27] See, e.g., Lisa Kashinsky & Rachel Bluth, How Blue States Are Plotting to Thwart Trump, Politico (Nov. 8, 2024), https://www.politico.com/news/2024/11/08/blue-states-democrats-trump-resistance-00188493.