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At Supreme Court, Trump's Solicitor Flipped Positions. Biden's Team Is Sure to Follow Suit.

In 2018 arguments in *Janus v. AFSCME*, Justice Sonia Sotomayor asked Trump administration solicitor general Noel Francisco: “By the way, how many times this term already have you flipped positions from prior administrations?”

By [Marcia Coyle](#) | November 18, 2020 at 02:56 PM



Office of the Solicitor General at the U.S. Department of Justice in Washington, D.C. Photo: Mike Scarcella/ NLJ

The new Joe Biden presidential administration may want to move quickly to undo key Trump administration policies involving immigration, labor, abortion and more, but a new U.S. solicitor general may need to proceed more carefully in the U.S. Supreme Court.

The Trump administration quickly reversed litigation positions in a number of cases in 2017, raising questions at the court and more broadly about the duty to defend statutes. A former Justice Department lawyer described the Trump solicitor’s maneuvering to change stances as “aggressive,” and suggested the Biden Justice Department could move just as swiftly to abandon earlier-argued positions in key cases.

How quickly the Biden administration could move in the Supreme Court will be complicated by the fact that there's unlikely to be a Senate-confirmed solicitor general on day one of a new administration. Confirmation may not occur for several months. In the meantime, one of the office's career deputies or a new principal deputy solicitor general may serve as the acting solicitor general position.

Regardless of who is in the acting position, the justices undoubtedly would not be surprised if the acting solicitor general notifies the court that the United States will no longer challenge the constitutionality of the Affordable Care Act in the argued cases [*Texas v. California*](#) and [*California v. Texas*](#). President-elect Joe Biden is a strong supporter of the act, which was enacted during the Obama-Biden administration in 2010.

That move would not moot the health insurance case because the challenge was brought by Texas and 18 other Republican-led states. The United States had intervened as a party. But "it certainly would be signaling more to the public at large," said Goldstein & Russell partner Sarah Harrington, a former assistant to the solicitor general for eight years.

But it's also harder and more complicated to change litigation positions after a case has been argued, said former assistant to the solicitor general Joseph Palmore, co-chair of Morrison & Foerster's Supreme Court and appellate litigation practice.

"I suppose the SG could send a letter withdrawing the government's brief," Palmore said. "I'm not aware of precedent if the SG wanted to do more than that. If the SG wanted to file a new brief, he or she would have to get permission from the court."

Or perhaps there could be several points of view on what to do about the ACA case, suggested another veteran high court advocate. "I can hear some people saying, 'Let it go. It's going to work itself out. There seem to be five votes to uphold it, and we're not associated with that position.' Some people may say, 'We need to file something telling them this administration doesn't support this position.' Or, 'Let's file a supplemental brief.'"



Justice Elena Kagan testifies before the House Committee on Appropriations during a Supreme Court Budget hearing, on March 7, 2019. Photo: Diego M. Radzinski / ALM

The problem with switching legal positions with changes in administrations is the special relationship of trust between the Supreme Court and the office of solicitor general, an office that is tasked with acting in the interests of the United States, not one political administration.

“I think changing positions is a really big deal that people should hesitate a long time over, which is not to say that it never happens,” Justice Elena Kagan, former solicitor general in the Obama administration, [said](#) in public comments two years ago. When she held the job, she said, she was told, “You were supposed to think long and hard and then you were supposed to think long and hard again before you changed anything.”

Democratic and Republican solicitors general have felt the sting of some justices’ unhappiness with switched positions.

In the 2012 argument in *Kiobel v. Royal Dutch Petroleum*, Obama administration Solicitor General Donald Verrilli Jr. acknowledged the government’s position had changed on the issue before the court. Justice Antonin Scalia [asked](#), “Why should we listen to you rather than the solicitors general who took the opposite position?” And Chief Justice John Roberts Jr. added, “Whatever deference you are entitled to is compromised by the fact that your predecessors took a different position.”

In 2018 arguments in *Janus v. AFSCME*, Justice Sonia Sotomayor [asked](#) Trump administration solicitor general Noel Francisco: “By the way, how many times this term already have you

flipped positions from prior administrations?” Francisco said three, but by the end of the term, it would be at least four.

A Biden administration wish list for change may include two Trump administration cases that the justices have agreed to decide. They have not been scheduled yet for arguments and some veteran Supreme Court advocates suggested the justices have delayed scheduling to see what happens after the election.

In one of the two cases, [*Trump v. Sierra Club*](#), the Trump administration wants to overturn a federal appellate court decision blocking the use of Defense Department funds to build the border wall along the Arizona and California borders. In [*Wolf v. Innovation Law Lab*](#), the administration has asked the justices to reverse a ruling against its “Remain in Mexico” immigration policy.

“When the government is the petitioner, it has more control” over what can be done with a case in which a policy has changed with administrations, said Harrington, the former assistant to the solicitor general. In the border wall case, she said, the new Biden administration could reverse course and the SG could ask for the case to be dismissed—even after any oral argument.

Where an agency rule or regulation is involved, as with the so-called “remain in Mexico” policy, Palmore said, the least disruptive tactic from the office’s perspective is “to have something to cite, an actual operative document or action from the relevant agency to cite to for either changing a position or pausing a case. If the agency makes an announcement quickly they are reconsidering action relevant to a pending court case, the SG can notify the court and ask that case be paused.”



*Abortion rights advocates and challengers rallied outside the U.S. Supreme Court on March 4.
Photo: Diego M. Radzinski/ ALM*

Two other petitions that have not yet been granted review are also likely to interest a new Biden administration. What is under review in the cases [*American Medical Association v. Azar*](#) and [*Oregon v. Azar*](#), is the Trump administration's 2019 "gag rule" barring certain abortion-related communications by family-planning providers. The U.S. Court of Appeals for the Ninth Circuit upheld the rule; the U.S. Court of Appeals for the Fourth Circuit struck it down.

The Biden administration could try to reach an agreement with the petitioners by advising that the regulation will be changed, one appellate lawyer said. The administration could ask the court to dismiss the challenge as moot after the adoption of any new regulation.

One other pending petition that has been lingering on the docket and which may be the easiest for the court and the new administration to resolve: [*Trump v. Knight First Amendment Institute*](#). The Justice Department, representing Trump, has contended Twitter has no authority to stop him from "blocking" his critics from following his account. The case has teed up thorny First Amendment issues in the modern era.

"Presumably when Biden becomes president, the petition becomes moot because Trump is no longer a government official," Harrington said.

Harrington and other DOJ solicitor office veterans said the justices want the solicitor general to be honest about why a government position has changed. The old justification, usually in a footnote, that "upon further reflection," a different position emerged, is no longer sufficient.

“I think the chief justice has signaled he just wants the administration to be forthright when the change in position is based on a change in administrations,” Harrington said. “There are ways to do it without raising hackles.”