

State Watchdogs: As Biden Takes Office, Republican Attorneys General Likely to Challenge Administration on Many Fronts

WRITTEN BY

Stephen C. Piepgrass | Rachel Miklaszewski | Christopher Carlson

During the past four years, Democratic state attorneys general filed a record number of lawsuits against the Trump administration's executive orders.[1] Now as the Biden administration takes office, and with the shoe on the other foot, a coalition of six Republican state attorneys general come committed to use "all available means to combat potential federal overreach." If the partisan divide remains in Congress, as foreshadowed by the current COVID-relief legislation, President Biden's supporters will urge him to follow the lead of Presidents Obama and Trump and pass landmark policies through executive orders and federal agency regulations. If President Biden takes this road more traveled, we expect even more of the 26 Republican attorneys general to coalesce and file actions to halt such policies.[2]

On January 27, a coalition led by West Virginia Attorney General Patrick Morrisey and joined by the Arkansas, Indiana, Mississippi, Montana, and Texas attorneys general sent President Biden a letter requesting a chance to collaborate in creating constitutionally sound laws.[3] The letter expresses concern that President Biden's first-week actions show that he may be "following the unfortunate path of executive unilateralism." The coalition emphasizes that if the president violates the Constitution, statutes, or the Administrative Procedures Act, these state attorneys general will "take action." In that vein, the letter highlights several "core constitutional tenets" and lays out specific potential Biden administration policies that they believe will result in violations:

- **Limited federal power.** The letter calls for the Biden administration "to not propose or publicly support any new federal law outside the bounds of the federal government's limited power," and if such a law passes, the letter urges the president to veto it.
- **Limited presidential power.** The letter vows "to defend America against illegal executive actions," highlighting Biden policies like climate change, health care, land and water use, immigration, and "spending sprees without congressional authorization." More broadly, the letter urges the administration to take actions that accord with the rule of law and in doing so, resist "strong-arming businesses into changing practices to adhere to an unreasonable and twisted interpretation of long-extant statutes."
- **Individual constitutional rights.** The Republican state attorneys general urge the Biden administration to respect "rights enshrined in the Constitution," specifically the First Amendment's free exercise of religion and the Second Amendment's right to keep and bear arms.
- **Administrative process and reasoned decision making as premised in the Administrative Procedure Act.** The Republican state attorneys general say that they will "step up to the plate when our States are harmed by agency malfeasance" and stand "guard against potentially abusive uses" of "settle and sue strategies."

Background on State AG Partisan Coalitions

While state attorneys general have historically challenged federal policies in defense of states' rights, the practice of forming partisan multistate coalitions to oppose federal efforts has drastically increased during and following the Obama administration in no small part because the Supreme Court, in *Massachusetts v. E.P.A.*, 549 U.S. 497, 519-21 (2007), allowed "special solicitude" to states when suing the federal government.

Although *Massachusetts v. E.P.A.* was based on a challenge during the Bush administration, Republican attorneys general used this precedent in actions against President Obama. In Obama's first term, Republican state attorneys general brought 14 lawsuits, and in the second, the number more than doubled.^[4] The most famous lawsuit was the Republican state attorneys general's attack on the Affordable Care Act (commonly known as "Obamacare"), in which the court ultimately upheld the individual mandate. But there were other successful actions, including challenges to President Obama's Clean Power Plan, Clean Water Rule, and immigration and deferred deportation policies.

Under the Trump administration, the trend of partisan state attorneys general coalitions challenging federal policies increased. Democratic state attorneys general filed more than 100 complaints, doubling the actions filed against the Obama administration. As the Trump administration ramped up the use of executive orders, blue-state AGs took him to court. Notably in the first weeks of the Trump administration, five states sued the federal government regarding the travel ban, which limited immigration from seven predominantly Muslim countries. Other lawsuits included challenging Trump's attempt to end the Deferred Action for Child Arrivals (DACA); challenging the "zero tolerance" immigration policy that caused family separations and resulted in a nationwide order to reunite all children with their parents within 30 days; and challenging the U.S. Postal Service to "reverse operational changes that the attorneys general alleged would slow down mail during the 2020 election."

Some of these Democratic challenges to Trump administration policies remain pending. If the Biden administration changes these challenged policies by filing court notices of reconsideration of the administrative rules in question, Democratic state attorneys general will likely resolve these lawsuits and accept the change. But a change in policy also could open the door for Republicans to intervene to keep the challenged rule. For example, when the Trump administration took office in 2016, it stopped defending the Affordable Care Act in court, ending the potential for Republican state-based litigation. But Democratic state attorneys general intervened, challenging Trump's decision not to defend the policy.

Several reasons exist as to why the United States experienced this expansion in partisan lawsuits from state attorneys general coalitions. One explanation is that the expansion of federal executive power over the last couple decades opens the door for additional counterweights. Indeed, this closely reflects the Republican state attorneys general's January 27 letter that says, "State Attorneys general in particular serve as an important check and balance as the President carries out his constitutional charge."

Another explanation is that most state attorneys general are elected. Therefore, during election years, attorneys general can point to lawsuits against the federal government to show they are taking a stand on issues popular with their respective political bases.

Finally, the position of state attorneys general often acts as a stepping stone to higher political offices.^[5] Increased recognition for leadership on headline-grabbing lawsuits can aid their political advancement. Incidentally, this increased potential for recognition has led many accomplished lawyers to join state solicitors

general offices to take advantage of the opportunity to challenge federal regulatory actions in a high-profile forum.

Finally, the impact of these lawsuits has grown due to trial court judges' increasing use of nationwide or universal injunctions — injunctions where the court, in order to grant the plaintiff complete relief, limits the government from enforcing a policy on anyone, not just the plaintiffs. Courts have used this practice with increased frequency over the past decade to halt various policies.^[6] Scholars critical of these practices indicate that an increase of universal injunctions correlates with a politicization of the judiciary and forum shopping because parties wishing to halt federal executive action will bring lawsuits in courts favorable to them so that one court's injunction will bind the government not just with those parties or in that jurisdiction, but rather across the entire nation.^[7] In this system, where individual judges play a greater role in shaping national policy, partisan state attorneys general wield more influence since they have a strong knowledge of their state's judiciary and can bring actions that ultimately shape national policy — not just their own jurisdiction.

Predictions of Upcoming Actions from Republican State AGs

The letter from the coalition of six Republican state attorneys general denotes a proverbial shot over the bow, making it clear that Republican state attorneys general are ready and willing to challenge the Biden administration's policies — especially those put into place by executive order. Areas to watch and highlighted in the letter include: environmental policy, health care, energy, and business regulations^[8], federal spending, immigration, and the Second Amendment.

Already, Texas Attorney General Ken Paxton challenged a Biden executive order to freeze immigration deportations for 100 days, and a Texas district court judge granted, and then extended, the request for a temporary restraining order on the Biden administration.^[9] A coalition of Democratic state attorneys general filed an amici brief in this case, supporting the Biden administration.^[10] On February 23, the court will decide whether to issue a preliminary injunction in this case. Arizona also filed suit against the Biden administration for the 100-day deportation freeze.^[11] As the Biden administration continues to hand additional executive orders, more challenges will likely occur on this and other issues.

In addition, a coalition of 18 state attorneys general, led by Missouri Attorney General Eric Schmitt, urged Biden to reverse his decision to cancel Operation Talon, an ICE operation that focuses on removing illegally-present, convicted sex offenders from the United States.^[12] And in nonimmigration matters, a coalition of 13 Republican attorneys general wrote letters urging Biden to reverse his cancellation of the Keystone XL pipeline permit, indicating that the state attorneys general were “reviewing available legal options to protect our residents and sovereign interests.”^[13]

Finally, both Democrat and Republican state attorneys general also will use other methods apart from lawsuits to defend or challenge the current administration. For example, recently, a group of Democratic state attorneys general urged Congress to cancel \$50,000 of student loan debt.^[14] And both sides will likely participate in writing amicus briefs or “friend of the court” briefs, a practice that has dramatically increased in recent decades in cases with public policy ramifications.^[15] Expect to see Republican state attorneys general filing briefs in support of private litigants and interest groups challenging the federal government, while Democratic state attorneys general file briefs in support of the government.

Conclusion

During the previous administrations, state attorneys general have solidified their grant of authority to challenge federal regulations (Republican attorneys general/Obama administration) and employed this grant of authority to obtain nationwide injunctions of executive orders (Democratic attorneys general/Trump administration). Now, Republican attorneys general are prepared to play the same role as a counterweight to the Biden administration's preferred policies on climate change, health care, immigration, and spending that will implicate business decisions and the lives of all Americans.

[1] <https://www.nbcnews.com/politics/politics-news/state-attorneys-general-have-sued-trump-s-administration-138-times-n1247733>.

[2] <https://www.law360.com/articles/1332633>.

[3] https://www.scribd.com/document/492349828/2021-01-27-Letter-President-Biden#from_embed.

[4] <https://www.theatlantic.com/politics/archive/2018/10/both-republicans-and-democrats-have-weaponized-their-ags/574093/>.

[5] For example, Biden chose California Attorney General Xavier Becerra, who spearheaded suits against the Trump administration, to head the Department of Health and Human Services. On the other side, current Texas Governor Greg Abbot formerly served as the state AG.

[6] <https://www.scotusblog.com/2018/02/academic-highlight-debate-nationwide-injunctions/>.

[7] <https://www.scotusblog.com/2018/02/academic-highlight-debate-nationwide-injunctions/>. See also Samuel L. Bray, Multiple Chancellors: Reforming the National Injunction, 131 Harv. L. Rev. 417 (2017) (proposing a brightline rule against universal injunctions); Amanda Frost, In Defense of Nationwide Injunctions, 93 N.Y.U. L. Rev. 1065 (2018); Szymon S. Barnas, Can and Should Universal Injunctions Be Saved?, 72 Vand. L. Rev. 1675 (2019).

[8] As mentioned above, the letter criticized business regulations based on novel interpretations of "long-extant statutes."

[9] <https://www.law360.com/articles/1353642/texas-court-halts-deportation-freeze-for-14-more-days->

[10] Br. for Amici Curiae States of New York, California, Connecticut, Delaware, The District of Columbia, Illinois, Maryland, Massachusetts, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, Virginia, and Washington in Support of Defs., February 12, 2021, No. 6:21-cv-00003, ECF No. 81.

[11] <https://www.law360.com/articles/1351960>.

[12] <https://www.scag.gov/wp-content/uploads/2021/02/02493569.pdf>.

[13] <https://www.law360.com/articles/1354021/multiple-ags-urge-biden-to-undo-keystone-xl-permit-scrap>.

[14] <https://www.law360.com/articles/1356852/cancel-50k-of-student-debt-per-borrower-dem-ags-urge>.

[15] <https://www.scotusblog.com/2020/12/a-decade-long-surge-in-amicus-briefs/>.

RELATED INDUSTRIES + PRACTICES

- [State Attorneys General](#)