Berkeley Law

Center for Law, Energy, & the Environment

Analyzing Environmental Decision-making of Trump-Appointed Federal Judges

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September 2022

I. Introduction

In the fall of 2021, students with Berkeley Law's Center for Law, Energy and the Environment (CLEE) began a project analyzing the environmental decisions of federal court judges nominated by former President Donald Trump.[1] The goal of the project was to identify trends in the environmental decision-making of Trump-appointed federal judges–whether they were outliers in their environmental decisions compared to all other judges, and if so, along what criteria.

Two key considerations drove the inquiry. First, the Trump administration made it an explicit priority to appoint ideologically conservative judges who tend to be skeptical of federal regulatory authority in general and environmental regulations in particular.[2] (In addition, though not directly related to the project, Trump stated a clear interest in–and directed considerable efforts toward–dismantling federal environmental regulations.[3]) Second, since former President Trump appointed more than a quarter of the federal judiciary, these judges will continue to have a significant influence on federal environmental law for quite some time.[4] The goal of this analysis was to evaluate these judges' decisions to determine whether and how they deviate from environmental decisions by other federal judges.

To carry out the analysis, students reviewed decisions to identify prevailing parties (i.e., government, industry, environmental nonprofit) and to analyze decision-making across key

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[1] CLEE started the project in the summer of 2021. Eric Peshkin, a law student at NYU, conducted the first case analysis in summer 2021. Richard Yates, Berkeley Law class of 2022, conducted the analysis in fall 2021 and spring 2022. Grayson Peters, Berkeley Law class of 2024, continued the analysis during summer 2022 and expanded the cohort sizes. Ted Lamm and Ken Alex of CLEE supervised the project. CLEE and the law students thank Samir Abdelnour, Beth Hummer, and Jillian Ames of Hanson Bridgett LLP for their input, assistance, and resources throughout the project.

[2] *See, e.g.*, Elizabeth Shogren, "Trump's Judges: A Second Front in the Environmental Rollback," Yale Environment 360 (Aug. 28, 2017), available at https://e360.yale.edu/features/trumps-judges-the-second-front-in-an-environmental-onslaught; *Interview with Senate Minority Leader Mitch McConnell*, NPR Politics Podcast (May 13, 2022), available at https://www.npr.org/transcripts/1098834454.

[3] *See, e.g., Reversing Environmental Rollbacks*, Center for Law, Energy, & the Environment (2022) https://www.law.berkeley.edu/research/clee/reversing-environmental-rollbacks/.

[4] John Gramlich, *How Trump Compares with Other Recent Presidents in Appointing Federal Judges*, Pew Research Center (Jan. 13, 2021), available at https://pewrsr.ch/2Zx21cQ (calculating that Trump appointed 28% of the federal judiciary). Between 2017 and 2021, Trump appointed 174 federal district court judges, 54 appeals court judges, and three Supreme Court justices.

criteria such as standing, deference to agency decision-making, and treatment of lower court decisions. These criteria were selected based on their propensity to highlight the "success" of environmental claims and litigants in court and their amenability to "yes/no" coding. The students analyzed over 270 cases in each of two cohorts: one group including all environmental decisions by federal judges appointed by former President Trump, and a control group including a randomized selection of all environmental decisions by federal judges not appointed by former President Trump. Decisions in the Trump judge cohort span February 2017 through June 2022; decisions in the control group range from January 2017 to January 2022.

Initial findings from this set of cases indicate that while the environmental decisions of the Trump-appointed cohort are fairly similar to those of the non-Trump control cohort regarding prevailing parties and a number of analytical criteria, two noteworthy deviations emerged:

- Trump-appointed judges appear significantly less willing to grant deference to administrative agencies' interpretations of governing statutes in their regulatory processes
- Trump-appointed judges appear somewhat less likely to side with environmental nonprofit and tribal litigants.

This paper describes the students' methodology, their preliminary findings, and key analytical points and research questions for further scrutiny.

II. Methodology and results

A. Identifying environmental cases

To identify environmental cases for analysis, the team first searched the Westlaw database for lead opinions in cases with the "environmental" subject matter keyword during the relevant timeframes, once for judges appointed by former President Trump and again for all other judges. (Due to the size of the non-Trump cohort, the team divided these results into six groups to facilitate analysis, four of which have been reviewed to date.) The analysis includes District, Circuit, and Supreme Court cases, meaning it includes some cases where the judge in question wrote on behalf of a multi-member majority.

The students then screened out cases that despite the "environmental" label did not include an environmental basis of decision. For example, cases concerning employment law, insurance, or purely procedural matters were clearly excluded, while cases that involved substantive evaluation of both environmental issues (such as air pollution, water quality, and endangered species) and environmental laws (such as the National Environmental Protection Act (NEPA) and Clean Air Act (CAA)) were clearly included. The large number of decisions that involved environmental issues or statutes but were decided partly on procedural or non-environmental grounds, or included multiple bases of decision, required individual evaluation to determine whether including the case in the analytical cohort would inform or cloud the assessment of environmental decision-making.

In general, cases in which the core analysis or claim involved environmental considerations (statutory or common law) remained in the analysis; cases where environmental issues were in the background of the central holding were removed. When a case involved multiple issues,

only one or some of which were environmental (and could be disentangled from the non-environmental issues), the analysis only considered the court's resolution of the environmental issues as its "decision." A few examples help illustrate the methodology:

- A straightforwardly environmental case was *Clean Air Council v. United States Steel Corp.*, 4 F.4th 204 (3rd Cir. 2021). The court ruled that U.S. Steel was not obligated to report unfiltered coke gas releases from steel plants to the federal government under CERCLA since the releases were "subject to" the Clean Air Act and thus "federally permitted" releases exempted from mandatory CERCLA reporting. This case involved both an environmental issue (air pollution) and environmental laws (CERCLA and the Clean Air Act).
- The team excluded *United States v. Heinrich*, 2018 WL 4782358 (W.D. Wis. Sept. 17, 2018), in which a man previously subjected to an order to remediate a violation of the Clean Water Act sought relief from judgment under Federal Rule of Civil Procedure 60(b). Because the decision was limited to the purely procedural issue and did not discuss the Clean Water Act or its application to Heinrich, it was left out of the analysis.
- Similarly, the team chose to leave out *Wyoming v. United States Environmental Protection Agency*, 849 F.3d 861 (10th Cir. 2017). In that case, the state of Wyoming successfully challenged the EPA's determination of an Indian reservation's boundaries in the context of tribes' application for authority to administer portions of the Clean Air Act on the reservation. Even though the context of the dispute was the administration of the Clean Air Act, the actual legal issue before the court was how to construe treaties determining the reservation's borders – not an environmental law matter.
- For contrast, the team included *Matthew v. Centrus Corp.*, 15 F.4th 714 (6th Cir. 2021), in which the court ruled that the Price-Anderson Act preempted plaintiffs' state-law claims that they had been injured by a nuclear plant's radioactive contamination of their neighborhood. Although the Price-Anderson Act is not a clearly environmental law – its core purpose was to govern liability issues for the nuclear power industry – the underlying issue, radioactive contamination damaging human health, is environmental.

The goal of this screening process was to ensure that each case that remained in the analysis contributed to, rather than clouded, the results–even if some edge cases were excluded.

B. Analyzing the results

1. Prevailing party - primary analysis

In the first step of the analysis, the team identified prevailing parties and compared them to the parties they defeated in a secondary analysis. To identify the winning and losing parties, the team coded the first named litigants into generic categories: United States, federal agency, state, state agency, local or regional government, Native American tribe, nonprofit organization, business and trade organization, and private individual.[5] This first analysis is

[5] In individual decisions where it was clear that the first named litigant was not directly affected by the court's ruling, i.e., a grant of summary judgment for the second named litigant, the analysis treated the affected litigant as the actual party for purposes of prevailing party analysis. Additionally, to maintain clarity in the analysis, settlements were placed in a separate category where no clear winner could be identified.

necessarily somewhat reductive–since it does not account for the identity of the losing party or the underlying issue in the litigation, and since first-named litigants sometimes represent coalitions of diverse party types–but, applied uniformly, helped to facilitate the analysis.

As the following tables indicate, the "win rate" for most categories of litigants tends to be within a reasonable margin of similarity between the two groups, although a few potentially significant differences stand out.

Litigant Types	**Trump**	**Control**	**Trump**	**Control**
	Total Cases	**Total Cases**	**Win Rate**	**Win Rate**
U.S.	14	22	57%	68%
Federal Agency	63	83	67%	60%
Fed. Gov. Total	**77**	**105**	**65%**	**62%**

Table 1. Number of cases and win rates for U.S. and federal agency as first named litigant.

Trump-appointed judges appear to more frequently rule for individual federal agencies (+7%) although non-Trump appointed judges appear to more frequently rule for the United States as a whole (+11%). Overall, however, both sets of judges rule for the federal government at a fairly equivalent rate, especially given the limitations noted above and total sample size.

Litigant Types	**Trump**	**Control**	**Trump**	**Control**
	Total Cases	**Total Cases**	**Win Rate**	**Win Rate**
State	11	10	64%	60%
State Agency	7	9	100%	80%
Local or Regional Gov.	14	20	43%	60%
State and Local Gov. Total	**32**	**40**	**62%**	**65%**

Table 2. Number of cases and win rates for state, state agency, and local or regional government litigants.

Based on the analysis to date, the most significant potential difference between Trump-appointed judges and non-Trump appointed judges is the gap in rulings in favor of local and regional governments. Trump judges ruled for local and regional governments 17% less than non-Trump judges. However, the small sample size limits this finding somewhat.

Litigant Types	**Trump**	**Control**	**Trump**	**Control**
	Total Cases	**Total Cases**	**Win Rate**	**Win Rate**
Business/Trade Org	97	119	**50%**	**41%**
Nonprofit Org	60	79	**33%**	**48%**
Private Individual	38	47	**45%**	**32%**

Native American Tribe	4	9	**0%**	**55%**

Table 3. Number of cases and win rates for business and trade organization, nonprofit organization, private individual, and Native American tribe as first-named litigants.

While the 55 percent difference in win rates for Native American tribes between the Trump and control groups is large, it is only based on 13 cases. Thus, this trend is not generalizable to Trump judges with this small cohort size. There are also potentially noteworthy differences in the win rates for both business and nonprofit litigants: Trump-appointed judges also appear to have ruled more frequently for business litigants (+9%) and against nonprofit litigants (-15%). Business and nonprofit litigants were among the most frequent parties in environmental suits the team analyzed. Even so, increasing the total number of decisions analyzed would further clarify whether these differences are significant.

2. Prevailing party – second-level analysis

The team also conducted a second-level analysis to understand the litigation outcomes on a more granular level. For example, there is a qualitative difference between a court ruling for a federal agency and against an environmental nonprofit, as opposed to a ruling for a federal agency against an industry litigant.

The following table shows an example of this analysis by prevailing party: the parties against which federal agency litigants prevailed.

Prevailing Party: Federal Agencies vs. Nonprofits				
	Total Cases	**Nonprofit wins**	**Federal agency wins**	**Federal agency win percentage**
Trump	39	13	26	67%
Control	54	22	32	59%

Table 4. Comparison of federal agency and nonprofit litigant victories in agency-nonprofit litigation. Federal agencies prevailed in 67% of cases against nonprofits under Trump-appointed judges and 59% of cases under non-Trump appointed judges.

Trump-appointed judges ruled for federal agencies in 26 of 39 disputes with environmental nonprofit litigants, or 67% of the time. By contrast, control judges ruled for federal agencies in 32 of 54 suits, or 59% of the time. So, it appears that Trump judges are 8% more likely to rule in favor of federal agencies against nonprofits than control judges, although the significance of this result is limited by the sample size. This result is notable given that, as discussed below, Trump judges are generally less deferential to federal agencies than non-Trump judges.

3. Specific criteria

In addition to prevailing parties, the team tracked several specific decision-making criteria:

- The team identified the court's **treatment of lower court decisions and agency actions** (e.g., affirm, vacate, remand, enjoin) where applicable, and coded these actions on an "affirm/reverse" basis. These results were broadly similar across the cohorts.

- The team categorized whether the court discussed litigants' **standing to bring the case**, which is a source of significant substantive dispute in environmental litigation. If the court discussed standing, the team identified whether the court dismissed the suit for lack of standing or found litigants had proper standing and could thus continue with their litigation.
- When a decision involved an agency action or rule, the team's analysis tracked whether the court granted **deference to the agency's statutory interpretation**. Under the most common deference framework, the *Chevron* doctrine, a court grants deference to a reasonable agency interpretation of an ambiguous statutory provision.[6] The analysis indicates that deference is one of the areas with the largest disparity, with a greater than sixty-point difference between Trump and control judges. This finding shows that, according to the analysis thus far, Trump-appointed judges are granting deference to agencies in environmental cases with significantly less frequency than non-Trump judges. See the following table for our findings on specific claims and doctrines.
- The team also tracked whether the court **struck down an agency regulation as arbitrary and capricious**.[7] While Table 5 indicates that Trump judges did this at a 5 percent higher rate than control judges, this is relatively consistent considering the small sample size.
- Finally, the team analyzed whether the court found that litigants raised a **valid constitutional claim**. These cases were rarer, as Table 5 shows. Claims included arguments under the Fifth Amendment takings clause, due process, and First Amendment speech.

Criterion	**TRUMP**	**CONTROL**	**TRUMP**	**CONTROL**
	Total Cases	**Total Cases**	**Affirm Rate**	**Affirm Rate**
Lower Court Decision	47	24	**60%**	**62%**
Agency Decision	48	51	**71%**	**65%**
	Total Cases	**Total Cases**	**"Yes" Rate**	**"Yes" Rate**
Standing	58	42	**69%**	**69%**
Deference (some type)	21	45	**19%**	**82%**
Arbitrary & Capricious	32	41	**37%**	**32%**
Constitutional Challenge	9	10	**11%**	**10%**

Table 5. This table shows how judges assessed lower court and agency decisions, and how they assessed specific decision-making criteria. "Affirm rate" refers to how often judges affirmed lower court or agency decisions. "'Yes' Rate" refers to how often judges said "yes" to a particular claim or doctrine in cases where those claims or doctrines were at issue. "'Yes' Rate" refers to how often judges said "yes" to a particular claim or doctrine in cases where those claims or doctrines were at issue. Specifically, a "yes" indicates that the court found a party had

[6] Chevron U.S.A. v. Natural Resources Defense Council, 468 U.S. 837 (1984). In addition, the team counted other forms of deference in its analysis (e.g., *Auer* and *Skidmore*).

[7] Administrative Procedure Act (APA), 5 U.S.C. § 706(2). The APA is the statutory framework courts must follow in determining the validity of administrative agency actions.

standing, granted agency deference, determined an action to be arbitrary and capricious, or ruled that an agency action violated the Constitution. Note that claims or doctrines may have been raised either by the litigants or by the judges themselves.

Based on this analysis, Trump-appointed judges are 63% less likely to grant administrative agencies deference, which is the most striking finding of this analysis to date. This disparity in deference means that where non-Trump appointed judges are finding that agencies have the power to interpret ambiguous statutory authority and implement important environmental protections, Trump judges are largely questioning these agency actions.

III. Conclusions and takeaways

As explained above, the team's initial findings indicate that the Trump-appointed cohort of decisions is largely consistent with the non-Trump control cohort. However, we found a few deviations. The following sections discuss Trump judges' apparent deviations from the norm, restricting environmental regulations and litigation by limiting agency deference and litigant standing. The analysis concludes by raising other questions for future research.

A. Deference

The most significant research finding thus far is that Trump-appointed judges are considerably less willing to grant an administrative agency deference for its interpretation of an ambiguous statute under judicial deference frameworks. Trump-appointed judges granted agencies deference in only 19% of the 21 cases where deference was raised in the litigation. On the contrary, the control group judges granted agencies deference in 82% of the 45 cases involving the issue. This means that from a comparative perspective–and an admittedly small case cohort–Trump appointees appear to be disproportionately restricting the ability of agencies to issue environmental rules based on interpretations of broad statutory mandates.

As the analysis continues, one possible research question is whether this figure actually undercounts this discrepancy. Because we only analyzed deference where the court raised the issue, it is possible that the Trump-appointed judges are less likely to engage with this doctrine in cases that are "deference eligible." As the current figures indicate, control judges are about twice as likely to deal with deference as Trump-appointed judges. In addition, 82% of the time that Trump judges raise deference, the court ultimately decided to deny agencies deference. Further refinement of the methodology may identify whether the judges are circumventing the traditional judicial framework–i.e., failing to engage in *Chevron* and similar analyses–in order to find against litigants on different grounds.[8]

B. Standing

Judges in both cohorts found that litigants had standing to sue at identical 69% rates, across all litigant types. However, Trump judges are more likely to discuss standing in their environmental decisions. Trump judges discussed standing in 58 of 147 analyzed decisions, a total of 39%.

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[8] The Supreme Court recently used the "major questions doctrine" to invalidate the EPA's rescinded Clean Power Plan and did not discuss *Chevron*. *See* West Virginia v. Environmental Protection Agency, 597 U.S. __ (2022).

Control judges, on the other hand, discussed standing in only 42 of 186 analyzed decisions, a total of just 23%. Possible explanations might be that Trump-appointed judges are more sensitive to the issue of standing or that defendants appearing before Trump-appointed judges are more likely to strategically challenge standing. Going forward, it will be important to continue tracking the rate at which courts ultimately find standing, and to analyze which types of litigants–e.g., individuals, environmental groups, or trade groups–are litigating in the cases analyzed.

C. Other questions and next steps

The results of this preliminary analysis highlight a couple of key differences in decision-making–deference and standing in particular–as well as a number of potential differences that may solidify with analysis of more cases. In addition, the analysis to date points to some areas of analytical refinement that could provide context for the data and clarify its implications. Key examples include:

- Distinguishing reversals of agency actions by the presidential administration responsible for the agency action
- Distinguishing reversals of lower court decisions by prevailing party
- Distinguishing between nonprofits, for example to identify national environmental groups, local environmental groups, and other groups with mixed or uncertain alignment

Further options for research refinement include analyzing dissents to identify where judges may be telegraphing their decisions to the Supreme Court or adding analytical categories, although in both cases options may be limited to develop “yes/no” amenable inquiries.

As the cohort size grows with the newest decisions of Trump-appointed judges, the analysis will become more robust; the results to date are necessarily limited by the relatively small number of decisions and the analytical limitations needed to develop a workable process. But even these preliminary results suggest significant environmental implications for the appointment of federal judges.