

Later today, Trump will set in motion a wave of actions by the executive branch. And as day follows night, those actions will be followed a wave of legal challenges. That's what happened in Trump's first term, and the challenges then were successful more often than not.

To give some specifics: California filed 123 separate lawsuits in Trump's first term – about one new lawsuit every two weeks. And California was far from the only one. The Trump Administration's litigation record was awful – winning only one case in four by some estimates.

The Trump folks should do a better this time. But they may not improve that much, and could still lose more often than they win. Money invested in litigating against the Administration will be well spent.

Why did Trump lose so often? The main reason is that, rather than invest the time and expertise to create rules that would hold up in court, the Administration rushed the process and put out rules taking extreme positions with a notable lack of good data and careful analysis. In other words, they were fast and loose. They got a little better over time, but not as much as you might think. They suffered setbacks even in front of judges appointed by Trump himself.

In his first Term, Trump appointees to environmental positions often lacked expertise in the field and didn't trust staff experts given their fear of the "deep state." As a result, the records produced to support rollbacks tended to be weak, increasing the chances of reversal under judicial review.

But surely, you're thinking, Trump has learned from that experience. Perhaps, but the learning has been spotty. Many of Trump's cabinet appointees have been seriously under-qualified. The second Trump Administration seems at least as hostile as the first was to the agency staff who could help build evidentiary records to support regulations and strengthen legal arguments on arcane statutory issues.

Admittedly, some lower level political appointees will be more experienced than their bosses. The question is how much space they'll have to control the regulatory process without ill-advised political intervention. They will have to rely on permanent staff for much of the expertise and work, at the same time when they'll be tasked with doing other things to drive civil servants out of government.

And there's no indication that Trump is at all interested in moderating his actions to

make them more legally defensible; if anything, he seems more confident that he can get away with anything. Consider Elon Musk's wild effort to crush government regulation. These factors could cancel out whatever value the first term may have had as a learning experience.

I suspect the Trump people are also likely to over-rely on the argument that Biden-era regulations violated the major question doctrine. That doctrine bars agency regulations in "extraordinary cases" with vast political and economic significance. That's an appealing argument for the Trump folks because it economizes on the need for specialized legal or policy expertise.

There's an old legal adage to the effect that "if you don't have the facts, argue the law, and if you don't have the law, pound on the table." Today, that might be amended to say, pound on the table and holler "major questions doctrine." That may work some of the time, but probably not that often. I'm pretty sure that when the Court said the doctrine applied in "extraordinary cases," it didn't mean "just about every case."

It's true that the bench has shifted ideologically in the direction of the Trump Administration. That's an important advantage for the Administration. But it could tempt agencies into taking bolder positions that will be too much even for more conservative judges.

Another change will weigh against the Administration. Trump's agencies won't be able to take advantage of the *Chevron* doctrine, which gave agencies more leeway in interpreting statutes. His own Supreme Court appointees led the charge to eliminate *Chevron*, which will make it harder for him to win cases now.

Given how badly the Trump agencies did in court last time, you have to wonder how hard they were trying to write legally defensible regulations. Think about the incentives of someone like Leo Zeldin at EPA. As far as we can tell, he isn't passionate about environmental issues. But he does care — a lot— about making his boss happy. He can do that with immediate dramatic actions even though many may lose in court. "Shock and awe" may be important then careful craftsmanship to Zeldin's career — it will certainly get more attention on Fox News. If the rules are upheld in court, well and good, but if not, Zeldin can always follow Trump's lead and blame the judges.

You can imagine a lot of ways that all this could play out, and maybe I should just

say “time will tell.” But that seems like too much of a waffle. Putting everything together, I think his litigation record will improve over his first term, but will still be below par for jrecent presidents.