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The State Of Asylum Law After Trump — And What's Next

By **Kevin Gregg** (February 8, 2021, 5:49 PM EST)

Kevin Gregg

Please allow me to provide a vivid description of the Trump years, as viewed through the eyes of an immigration lawyer: weekly punches to the gut sustained while hanging on for dear life to a merry-go-round spinning out of control.

You can't jump off the merry-go-round because you took out over $100,000 in loans to buy a ticket in the first place, and in any event, what will happen to the other passengers if you jump off? Plus, it's kind of fun to punch back.

On Jan. 20, the merry-go-round slowed down a bit, and the punches stopped. At least those originating from 1600 Pennsylvania Avenue.

In under two weeks — and without a U.S. Senate-confirmed secretary of the U.S. Department of Homeland Security — President Joe Biden and his administration issued orders designed to:

- Keep the Deferred Action for Childhood Arrivals program in place;
- Pause most removals from the U.S. for 100 days to review enforcement priorities;
- Revoke the travel bans on individuals from several Muslim-majority countries;
- Halt construction of former President Donald Trump's border wall;
- Extend Deferred Enforced Departure for Liberians;
- Suspend enrollments in the Migrant Protection Protocols, also known as the Remain in Mexico policy;
- Redesignate temporary protected status for Syrian in the U.S.;

- Create a task force to reunify families separated by policies promoted by former Attorney General Jeff Sessions; and

- Develop a strategy to address the root causes of migration from Central America.

The Biden administration also sent the U.S. Citizenship Act to Congress which, among other things, would modernize many aspects of employment and removal-defense immigration, and provide a path to lawful permanent resident status for thousands of undocumented individuals.

Achieving these and other immigration reforms will require grappling with the not-so-sexy nuts and bolts of the modern administrative state, because boiled down, immigration law is administrative law.

U.S. government agencies in the executive branch decide whether a noncitizen must depart the U.S. as a matter of law, and if applicable, decide whether to physically remove that noncitizen from this country. Whether acting in a quasi-judicial capacity (immigration judges) or quasi-law enforcement (U.S. Immigration and Customs Enforcement and removal), immigration is a realm where administrative power reigns.

But not supreme. As in all areas of administrative law, Congress writes the immigration rules through statute. The agencies have a limited ability to interpret and supplement Congress' statutes through formal regulation, but ultimately, Article III courts get the last word.[1]

Immigration law is unique however, in that it expressly provides the attorney general of the U.S. with authority to issue precedential decisions, a power attorneys general have often delegated to yet another administrative agency, the Board of Immigration Appeals, located in Falls Church, Virginia.

Then came the Trump administration. By my count, Trump's attorneys general issued over a dozen precedential decisions in under four years. This equates roughly to the total combined amount of precedential decisions issued by the Clinton, W. Bush, and Obama attorneys general in the 20 years following implementation of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.

The Trump administration kept it up to the very end. Even then-Acting Attorney General Jeffrey Rosen got in on the action during the last week of the Trump presidency.[2]

Every decision published by the Trump attorneys general was consequential, and nearly every one pushed immigration law in a direction decidedly unfriendly to noncitizens. Perhaps unsurprisingly, the BIA largely followed suit — the BIA is, after all, considered the attorney general's voice when it comes to immigration law.

Nowhere was this adversarial theme more pronounced than with asylum law. In 2018, Sessions made his views on the issue crystal clear with the publication of Matter of A-B-, an expansive decision that vacated the BIA's 2014 decision in Matter of A-R-C-G- and — among many other things — made it exceptionally difficult for victims of domestic violence to obtain asylum relief in the U.S.[3]

Subsequent asylum decisions from Trump's attorneys general and the BIA had a similar feel. In the last year of Trump's presidency alone, the BIA:

- Held that that the group "landowners who resist drug cartels in Guatemala" is not a cognizable particular social group;[4]

- Stated that International Criminal Police Organization red notices are generally reliable evidence that a noncitizen committed a serious nonpolitical crime;[5]

- Made it easier for immigration judges to apply the firm-resettlement bar in asylum cases;[6]

- Provided immigration judges with the authority to deem an asylum application abandoned where a noncitizen misses his filing deadline, even if that noncitizen does not speak English, does not have an attorney, is in immigration detention and missed his deadline by only one week;[7]

- Provided immigration judges with a framework to disregard expert testimony;[8] and

- Made it easier for an immigration judge to deem an asylum seeker's evidence fraudulent.[9]

Not one of the BIA's 2020 precedential asylum decisions favored noncitizens. Few — if any — did so during the entire Trump presidency.

Trump's attorneys general published similarly hostile asylum decisions in 2020 and 2021. According to former U.S. attorneys general William Barr and Rosen, the BIA must analyze every element of asylum, withholding of removal or Torture Convention protection de novo, even where relief or protection is granted by an immigration judge, and even if DHS stipulates to a legal issue.[10]

In addition, criminal conduct, according to their positions, will per se bar a noncitizen from asylum even if the criminal conviction does not match the definition of a single aggravated felony.[11]

Also, according to Barr and Rosen, the persecutor bar to asylum and withholding of removal does not include an exception for coercion or duress, and the DHS has no evidentiary burden on the issue.[12]

Perhaps fittingly, the Trump administration concluded where it began, with Rosen supplementing Matter of A-B- to hold, essentially, that Sessions' view of the "unable or unwilling to protect" standard and nexus requirement trumps[13] any contrary view from any circuit court of appeals.[14]

Whether Rosen's analysis will withstand Biden administration or federal circuit court review remains an open question.

Based on all of this, readers could be forgiven for concluding that the state of asylum is now a failed one. And maybe it is. Indeed, scholars more experienced than I might point out that the "state" has been governed by warring factions since the publication of Matter of Acosta over 30 years ago.[15]

But as in life, so too with any legal article worth reading: It's important to highlight the good even when there's a lot of bad, and asylum law is no exception.

For example, in Matter of O-F-A-S-, Barr did not rule against the noncitizen and instead, overturned the BIA to hold that the Convention Against Torture does not have an exception for torture by rogue or low-level government actors.

And even when the attorney general or the BIA ruled against asylum seekers last year, they still provided helpful quotes and analyses, including:

- Acknowledging that "expert testimony generally warrants being admitted in most cases";[16]

- Conceding that immigration judges should not consider red notices probative where the issuing country abuses the Interpol process;[17]

- Recognizing that there exists an inherently high risk of error in immigration proceedings; [18]and

- Reminding immigration judges that "an adverse credibility finding must be based on the totality of the record — not a selective reading of certain facts, evidence or inconsistencies to support a particular result."[19]

The Biden administration is less than three weeks old. Hope abounds in the immigration community, but for many, that hope is tempered. After all, Biden acted primarily through executive order, and opponents have already brought federal court challenges. More will surely follow.

The immigration community also, of course, remembers vividly how — less than a decade ago but in another era — a bipartisan-supported comprehensive immigration reform bill crashed and burned in the U.S. House of Representatives.

To achieve meaningful and long-overdue reforms, Congress must act with a purpose, and incoming Attorney General Merrick Garland must write voraciously. Neither is assured.

Regardless of what happens over the next four years, it's worth remembering that the U.S. remains a beacon of hope for immigrants throughout the world, inspiring local governance and providing a destination for persecuted peoples to begin life anew.

Personally, I hope that all immigration stakeholders can find some common ground. I began my career working for immigration judges and have great respect for our imperfect immigration court system.

While immigration judges are best analyzed on a case-by-case basis, my experience with this particular social group leads me to define it as one comprised primarily of honorable yet understaffed public servants assigned intimidating caseloads, governed by an ever-shifting legal and administrative landscape, committed to reaching the right result.

Are there exceptions? Of course. But after four years of a concerted effort to place asylum beyond the reach of most noncitizens, I'm comforted by the fact that even in the final week of Trump's presidency, the BIA recognized that:

> The immigration court system has no more solemn duty than to provide refuge to those facing persecution or torture in their home countries, consistent with the immigration laws.[20]

Impossible to argue with that. The future is uncertain, but bright.

Kevin A. Gregg is a partner at Kurzban Kurzban Tetzeli and Pratt PA.

[1] But see National Cable & Telecommunications Association v. Brand X Internet Services, 545 U.S. 967 (2005) and Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc. , 467 U.S. 837 (1984), not to mention the various jurisdiction-stripping provisions at INA § 242. These caveats require their own blogs entirely, and indeed, have their own law school courses.

[2] Matter of A-B-, 28 I&N Dec. 199 (A.G. 2021).

[3] Matter of A-B-, 27 I&N Dec. 316 (A.G. 2018); Matter of A-R-C-G-, 26 I&N Dec. 338 (BIA 2014).

[4] Matter of E-R-A-L-, 27 I&N Dec. 767 (BIA 2020), vacated and remanded by Albizures-Lopez v.

Barr , No. 20-70640, 2020 WL 7406164 (9th Cir. Dec. 10, 2020) (meaning the BIA's decision has no precedential value whatsoever).

[5] Matter of W-E-R-B-, 27 I&N Dec. 795 (BIA 2020).

[6] Matter of K-S-E-, 27 I&N Dec. 818 (BIA 2020).

[7] Matter of R-C-R-, 28 I&N Dec. 74 (BIA 2020).

[8] Matter of J-G-T-, 28 I&N Dec. 97 (BIA 2020) and Matter of M-A-M-Z-, 28 I&N Dec. 173 (BIA 2020).

[9] Matter of O-M-O-, 28 I&N Dec. 191 (BIA 2021).

[10] Matter of R-A-F-, 27 I&N Dec. 778 (A.G. 2020) and Matter of A-C-A-A-, 28 I&N Dec. 84 (A.G. 2020)

[11] Matter of Reyes, 28 I&N Dec. 52 (A.G. 2020).

[12] Matter of Negusie, 28 I&N Dec. 120 (A.G. 2020).

[13] Double entendre intended.

[14] A-B-, 28 I&N Dec. 199.

[15] Matter of Acosta, 19 I&N Dec. 211 (BIA 1985).

[16] J-G-T-, 28 I&N Dec. 97.

[17] W-E-R-B-, 27 I&N Dec. 795.

[18] Negusie, 28 I&N Dec. 120.

[19] O-M-O-, 28 I&N Dec. 191.

[20] Id.