DOJ Immigration Reform Must Overturn Harmful Precedent

By **Andrew Wachtenheim** (July 26, 2021)


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Earlier this month, in a significant victory for immigrant rights, the U.S. Court of Appeals for the Second Circuit struck down a key part of a U.S. Department of Justice administrative opinion that allowed the federal government to use criminal convictions pending appeal as the basis for deportation, detention or denying protection.[1]

While the ruling in the case, Brathwaite v. Garland, is an important and consequential decision for immigrants and their advocates, the court's intervention illuminates a much larger problem. Over the last two decades, a disturbing body of administrative opinions has developed at the DOJ.[2]

The opinions, just like the one overturned in Brathwaite, cruelly attach harsh immigration consequences that Congress did not authorize to past arrests and convictions. The decisions have caused tens of thousands of people to be denied lawful status or citizenship, held in detention, or deported, with incontrovertible racially discriminatory effect on Black, Latinx and Asian immigrants.

The Immigrant Defense Project and partner organizations have litigated against these harmful opinions for 20 years, filing dozens of briefs and serving as a resource to fellow attorneys, including in Brathwaite.[3] The community impact of these decisions is devastating — putting people through the prolonged pain and dangers of detention, and long-term, often permanent, separation — as is the systemic toll of persistently undercutting state laws and policies that seek to curb mass incarceration.

The present moment offers a powerful opportunity for U.S. Attorney General Merrick Garland to take action. Because immigration courts are housed under the DOJ, the attorney general can use the unique power of certification to replace the flawed opinions and mitigate what has amounted to racial discrimination on a massive scale.[4]

In fact, in a formal institutional policy and report, the American Bar Association's House of Delegates has laid out a clear blueprint for change, identifying scores of legally ungrounded and discriminatory opinions that should be discarded.[5] The attorney general could adopt these recommendations quickly to restore the scant protections afforded to immigrants under current law, and help ensure immigrants are not left behind by state criminal legal system relief and reforms in the future.

Several damaging Trump-era DOJ opinions that have trampled on basic rights under federal law remain on the books today.

In 2019, former Attorney General William Barr threw out decades of precedent recognizing the equal rights of noncitizens and U.S. citizens to fully benefit from state resentencing determinations in Matter of Thomas and Matter of Thompson, when he decided noncitizens must go through specific, often unavailable legal procedures for resentencing decisions to be honored in immigration proceedings.[6]

In addition, in the 2018 decision in Matter of Velasquez-Rios, the Justice Department determined it does not recognize certain state sentencing reform laws for noncitizens,[7] a

decision civil and immigrant rights organizations and law professors have condemned as unconstitutional, counterfactual and discriminatory.[8]

While some of the most punitive opinions were issued by former President Donald Trump's DOJ, previous administrations also issued opinions that went beyond the law and have had catastrophic consequences for decades.

Consider the 2010 Second Circuit case Wellington v. Holder.[9] Wellington was a green card holder and spouse of a U.S. citizen, deported because of a misdemeanor drug possession conviction that a New York criminal court had expunged 15 years earlier. This occurred because of Matter of Roldan, a 1999 Board of Immigration Appeals decision issued under the Clinton administration[10] and expanded by former Attorney General John Ashcroft,[11] in which the DOJ decided immigration law would not recognize what it deemed state rehabilitative statutes that expunge, dismiss, vacate and otherwise remove past convictions.

Years later, the Second Circuit would find in its 2017 Harbin v. Sessions decision, that the government had been misusing that same drug possession statute — one of the most frequently charged drug possession statutes in New York state, levied against almost 40,000 people annually — to wrongfully deport noncitizens.[12] But the damage was already done to hundreds, if not thousands, of families that had been separated.

For years the U.S. Supreme Court provided a life-saving check on the DOJ's worst excesses, striking down DOJ opinions and litigation positions on these issues in nearly a dozen cases.

But in the past two years, Justices Brett Kavanaugh[13] and Neil Gorsuch[14] have written majority opinions that eviscerate remaining relief options for noncitizens, making, as Justice Stephen Breyer said in a dissenting opinion earlier this year in Pereida v. Wilkinson, "the administration of immigration law less fair and less predictable."[15]

Changes at the DOJ are not a cure-all. Federal laws passed in 1996 radically changed U.S. immigration, creating a jail-to-deportation pipeline.

Alina Das, professor of clinical law and co-director of the Immigrant Rights Clinic at the New York University School of Law, describes the system as one that "relies on the tools of criminalization and mass incarceration — policing, prosecution, and prison — to punish immigrants with deportation."[16] To create a humane migration policy, these laws must be repealed.

But even now the DOJ opinions go far beyond what Congress has authorized, and have eroded what meager and inadequate restraints Congress envisioned. Garland can start to fix these injustices by overruling these administrative precedents through the certification process and replacing them with precedent opinions that are consistent with congressional intent, meet U.S. treaty obligations and mitigate some of the racist discrimination that is built into our immigration system.

This is both morally and legally the right thing to do. In federal court case after case, advocates have argued that these DOJ opinions are incorrect, causing lasting damage both to immigrant communities and the legal system as a whole, which relies on constitutional norms and predictable application of statutory construction principles in order to function properly.

The Second Circuit's decision in Brathwaite is just one example of a federal court rejecting Justice Department precedent as arbitrary and unreasonable, ignoring the so-called realities

of appellate practice and creating evidentiary burdens on noncitizens that are frequently impossible to satisfy. It is time for Garland to rectify prior actions of his agency that have gone far beyond the law to construct an anti-immigrant regime targeting communities of color.

A broad coalition is calling for these changes, ranging from the American Bar Association — the largest voluntary organization of lawyers and law students in the world — to national organizations representing communities that have been directly affected.[17]

The attorney general has already used certification to reverse some of the horrendous damage done to the asylum system and immigration courts, but due to the work of his predecessors, immigration law continues to use the criminal legal system as a weapon to exclude some of the most vulnerable members of our communities.[18] Garland must stand up to this injustice and ensure every person has due process under the law.

With unique agency authority over this area of law, Garland has the opportunity to keep families together, and reduce the terrible and discriminatory harms of incarceration and over-policing for individuals who have built their homes in the U.S. Doing so is imperative to restoring fundamental fairness and equal protection in the immigration system.

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Disclosure: The author represented the American Immigration Lawyers Association as amici in Velasquez-Rios v. Wilkinson and Desai v. Wilkinson.

[1] Brathwaite v. Garland, __ F.4th __, 2021WL2690960 (2d Cir. 2021), available at https://www.immigrantdefenseproject.org/brathwaite-v-garland-decision/.

[2] American Bar Association, Resolution and Report 103B Adopted by the House of Delegates (Feb. 22, 2021), available at https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2021/103b-midyear-2021.pdf.

[3] Mr. Brathwaite was represented by Prisoners' Legal Services of New York, and amici curiae by Appellate Advocates.

[4] 8 C.F.R. § 1003.1(h). Pierce, S. (2021). Migration Policy Institute. Obscure but Powerful: Shaping U.S. Immigration Policy through Attorney General Referral and Review (2021), available at https://www.migrationpolicy.org/sites/default/files/publications/rethinking-attorney-general-referral-review_final.pdf.

[5] American Bar Association, Resolution and Report 103B Adopted by the House of Delegates (Feb. 22, 2021), available at https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2021/103b-midyear-2021.pdf.

[6] Matter of Thomas & Matter of Thompson, 27 I. & N. Dec. 674 (A.G. 2019), available at https://www.justice.gov/eoir/page/file/1213201/download.

[7] Matter of Velasquez-Rios, 27 I. & N. Dec. 470 (BIA 2018), available at https://www.justice.gov/eoir/page/file/1098611/download.

[8] Brief of Amici Curiae American Immigration Lawyers Association et al. in Support of Petitioner, Velasquez Rios v. Wilkinson and Desai v. Wilkinson, Nos. 18-72990, 18-73218 (9th Cir. 2021), available at https://www.immigrantdefenseproject.org/wp-content/uploads/2020/10/Velasquez-Rios-amicus-FINAL-in-support-of-PFREB-CA9.pdf. The author represented the amici in this matter.

[9] Wellington v. Holder, 623 F.3d 115 (2d Cir. 2010), available at https://law.justia.com/cases/federal/appellate-courts/ca2/09-4111/09-4111-ag_opn-2011-03-27.html.

[10] Matter of Roldan, 22 I. & N. Dec. 512 (BIA 1999) (en banc), available at https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3377.pdf.

[11] Matter of Marroquin, 23 I. & N. Dec. 705 (A.G. 2005), available at https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3507.pdf.

[12] Harbin v. Sessions, 860 F.3d 58 (2d Cir. 2017), available at https://law.justia.com/cases/federal/appellate-courts/ca2/14-1433/14-1433-2017-06-21.html.

[13] Barton v. Barr, 140 S. Ct. 1442 (2020), available at https://www.supremecourt.gov/opinions/19pdf/18-725_f2bh.pdf.

[14] Pereida v. Wilkinson, 141 S. Ct. 754 (2021), available at https://www.supremecourt.gov/opinions/20pdf/19-438_j4el.pdf.

[15] Pereida v. Wilkinson, 141 S. Ct. 754 (2021) (Breyer, J., dissenting), available at https://www.supremecourt.gov/opinions/20pdf/19-438_j4el.pdf.

[16] Das, A. (2020). No Justice in the Shadows: How America Criminalizes Immigrants. Bold Type Books.

[17] https://www.lawyerlegion.com/associations/american-bar-association.

[18] For example, Garland restored immigration judge discretion over their docket management in Matter of Cruz-Valdez, 28 I. & N. Dec. 326 (AG 2021), reversing a prior opinion issued by former Attorney General Jeff Sessions. Garland also reversed a Sessions-era precedent on gender-based asylum claims in Matter of A-B-, 28 I. & N. Dec. 307 (AG 2021).