ROUND TABLE
of Former Immigration Judges

May 25, 2021

The Honorable Merrick Garland
Attorney General of the United States
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

RE: Trump Administration Attorney General Certifications

Dear Attorney General Garland,

We, the Round Table of Former Immigration Judges, are a group of former Immigration Judges and appellate-level judges of the Board of Immigration Appeals.

Relying on our combined centuries of experience on the bench, we hereby request that you review and rescind many, if not all, of the decisions that former Attorneys General Sessions, Whitaker, Barr, and Rosen certified to themselves. The vast majority of those decisions overturned decades of substantive and procedural immigration law and policy and are antithetical to an unbiased and independent immigration court system. We would welcome the opportunity to meet with you to discuss this pressing issue, among others. Our position on this issue is as follows.

The unprecedented 17 cases that the former Trump-era Attorneys General certified to themselves can be divided generally into three categories: decisions regarding the authority of Immigration Judges to control and manage their own dockets; decisions involving the intersection of criminal and immigration laws; and decisions that significantly contract substantive asylum laws. The Round Table is especially concerned about the decisions that curtail Immigration Judges' authority

and those that curtail the possibility of asylum for the majority of asylum-seekers. We believe that the impact of those two types of decisions have turned the Immigration Courts into nothing more than cogs in the deportation machine, and Immigration Judges into prosecutors instead of fair and impartial adjudicators.

The Executive Office for Immigration Review, which houses both the Immigration Courts and the Board of Immigration Appeals, must be an independent, unbiased, and neutral agency; not a policy arm of a particular administration, but rather one that fairly upholds our nation's immigration laws. Despite being part of the Executive Branch, EOIR should not function as an extension of the Department of Homeland Security, and its judges should not be treated in the same manner as DHS employees. While this tension (the result of housing a neutral tribunal inside of a prosecutorial agency) has always existed, every administration prior to 2017 has, regardless of party, sought to insulate EOIR from DHS' enforcement function. In fact, when former President Bush created the Department of Homeland Security in the wake of the 9-11 terrorist attacks, the administration made the conscious decision to keep EOIR under the DOJ aegis, rather than including it within the DHS umbrella.

Unfortunately, the decisions of the former Attorneys General under the Trump administration managed, in the space of four short years, to undo much of this bipartisan effort. This fact has been noted multiple times by various authorities, from the NY Times Editorial Board to Justice Neil Gorsuch in the recent decision *Niz-Chavez v. Garland*, where he distinctly and purposefully failed to distinguish between DHS and EOIR, calling them both collectively "the government."

The former Attorneys General decisions have also created problems of a practical matter. EOIR is experiencing its worst backlog of cases since its inception. In large part, this backlog has been exacerbated by *Matter of Castro-Tum*, *Matter of L-A-B-R-*, and *Matter of S-O-G- & F-D-B-*, the three Attorney General decisions that severely restrict Immigration Judges' abilities to manage and control their own dockets. For example, in the past, the BIA has used administrative closure as an effective tool to manage cases on appeal. For instance, the BIA would administratively close cases involving individuals from countries that had received Temporary Protected Status designation; or groups of cases involving a legal issue for which the Board Members were developing a precedential decision.

Even more problematic is the fact that, in an effort to strip judges of their ability to continue, close, or terminate cases without the express consent of the Department of Homeland Security, the Department was seeking to ensure the issuance of more orders of removal, but in actuality succeeded only in increasing the case backlog exponentially while reducing the overall case completion rate.

Based on our group's extensive years of experience as EOIR judges, we can attest with complete confidence that the best person to control and manage a judge's docket is the individual judge. Immigration Judges have in-depth knowledge of most, if not all, of the cases on their individual hearing dockets, and are in the best position to determine if a case should be completed on the merits of the pending application, or if the case should be continued, administratively closed, or even terminated, for procedural or due process issues, or to allow for the adjudication of an application pending before USCIS.

There is no down-side to this type of decision; if the non-citizen's application is granted before USCIS, and the respondent is no longer subject to removal, the case automatically can be removed from the docket. This action lessens the need for a lengthy merits court hearing and ensures the completion of the case that had been pending before the court. And if USCIS denies the application, the case can be restored to the court docket, so that both sides can advocate for their positions for or against removal.

A clear example of the fallacy behind the reasoning of the trio of the above decisions, and particularly *Matter of Castro-Tum*, is found in cases involving cancellation of removal versus I-130 visa petition/I-601A waiver consular processing. Literally thousands and thousands of respondents are both statutorily eligible for cancellation of removal, which can only be pursued before an immigration judge, and the I-601A waiver option, which cannot be pursued in immigration court. The regulations had addressed this scenario—for those individuals who would be eligible for a I-601A waiver (which intersects largely with those eligible for cancellation of removal), if certain circumstances were met, an Immigration Judge could administratively close the case to allow the non-citizen to travel abroad to obtain their lawful permanent residency through consular processing. If they did not depart, the case could be recalendared before the Immigration Court by either party, at any time, so that the court would regain jurisdiction. If the noncitizen's request for residency were denied by the consulate, that non-citizen would be already outside of the U.S., and therefore would no longer be in the country without valid status. And if the noncitizen were successful in obtaining residency, a simple termination would permanently remove the case from the court system, helping to reduce the backlog.

Matter of Castro-Tum removed this simple and highly useful option from Immigration Judges' authority. Because DHS attorneys would, as a national policy, no longer consent to administrative closure of these cases, they remained on the court dockets. As a result, all of these cases required lengthy merits hearings on cancellation of removal, asylum, or other relief, thus increasing the backlog exponentially, without a valid legal, policy or administrative benefit. This reality is

demonstrated by the fact that of the four federal circuit courts that have considered *Matter of Castro-Tum*, three of them have vacated it, including the Seventh Circuit, in which the majority decision was authored by Justice Amy Coney Barrett when she sat in that circuit.

Thus, rescinding *Matter of Castro-Tum* and the other cases restricting Immigration Judges' authority is not only legally correct but is a matter of sound policy as well.

Turning to substantive immigration law, the former Attorneys General took great pains to eviscerate decades of well-established asylum law as part of the Trump administration's all-out assault on the ability of asylum-seekers, primarily those from Central America, to obtain legal refuge in the U.S. Not only did these decisions demonstrate the former Attorneys General's willingness to advance the administration's bias, but they also signaled the de facto default of the U.S. on its international treaty obligations under the 1967 Protocol and the U.N. Convention Against Torture.

The focus of the A.G. decisions, and particularly *Matter of A-B-*, *Matter of L-E-A-*, and *Matter of A-C-A-A-*, all of which severely impact the definition of what constitutes a particular social group, demonstrates the animus held by the past administration towards asylum-seekers, particularly victims of domestic abuse and horrific gang violence (two categories that are not mutually exclusive). It should be noted that, in all three of these cases, the Attorneys General overruled decisions not only in which the BIA granted asylum to the individual respondents, but also where DHS had stipulated to some of the statutory eligibility requirements, including the formulation of the particular social group at issue. Thus, even when the law enforcement agency seeking to remove the respondents agreed that they were each members of a valid particular social group, thus falling within the protection of the Immigration and Nationality Act, the former Attorneys General decided otherwise. In so doing, they ignored decades of agency and circuit court precedent, and further undermined the concept of Immigration Judges and Board Members' roles as independent and neutral adjudicators.

In fact, in *Matter of A-C-A-A-*, the former Attorney General went so far as to require the BIA to review each finding regarding the statutory elements of asylum de novo, regardless of the thoroughness of the IJ's decision or any stipulation reached by the parties. Imagine, for a moment, if that were required in criminal cases—that an appeals court had to review each element of a plea agreement, approved by the trial court judge, even if those elements were not the subject of either party's appeal. The plea system would cease to exist, many Constitutional protections would be eliminated, and the criminal court system would grind to a halt. As a result of these decisions, issued to promote a specific administration's

policy preference rather than the rule of law, the same has now happened with the Immigration Court system.

In addition, these decisions put forth the premise that, even where the particular social group is a valid one, U.S. asylum law will not offer protection where the persecutors are deemed private actors, even if societal norms or governmental failures to protect its citizens are the underlying reasons behind the acts of persecution. This legal ideology is grounded in racism and misogyny, and its roots can be found in our own legal history. In its decision in *United States v. Cruikshank*, 92 U.S. 542 (1875), arising from Reconstruction and the 1873 Colfax Massacre, in which a group of Ku Klux Klansmen killed more than a hundred African American men who sought to exercise their political rights, the Supreme Court ruled that the Constitutional rights to assembly, to bear arms, and, most importantly, to due process and equal protection, only applied to actions of the federal government and did not apply to the states or private citizens. This decision ushered in the rise of the infamous Jim Crow era and over a hundred years of blatant discrimination against minorities and women. This is certainly not the legacy that the Department of Justice wishes to embrace when considering the plight of asylum-seekers fleeing from the very same types of violence at the hands of private actors.

In fact, President Biden signaled as much when he issued an Executive Order on February 2, 2021, in which he directed that his administration would, "within 180 days of the date of this order, conduct a comprehensive examination of current rules, regulations, precedential decisions, and internal guidelines governing the adjudication of asylum claims and determinations of refugee status to evaluate whether the United States provides protection for those fleeing domestic or gang violence in a manner consistent with international standards."

The starting point for this action is to carefully review, and rescind, the former Attorney General decisions that so drastically curtail asylum law by implementing the previous administration's virulent anti-immigration policies, and to restore the U.S. to its rightful place as a country that provides asylum to those who meet the definition of refugee under U.S. and international law.

The Round Table urges you to review and rescind all the decisions issued by former Attorneys General Sessions, Whitaker, Barr, and Rosen as soon as possible. Every day that passes with those decisions still in place is a day in which hundreds, if not thousands, of noncitizens are denied fundamental fairness and the application of just and humane immigration laws.

Sincerely,

Hon. Steven Abrams, Immigration Judge, New York, Varick St., and Queens Wackenhut, 1997-2013

Hon. Silvia R. Arellano, Immigration Judge, Phoenix and Florence, AZ, 2010-2019.

Hon. Terry A. Bain, Immigration Judge, New York, 1994-2019

Hon. Sarah M. Burr, Assistant Chief Immigration Judge and Immigration Judge, New York, 1994-2012

Hon. Teofilo Chapa, Immigration Judge, Miami, 1995-2018

Hon. Jeffrey S. Chase, Immigration Judge, New York, 1995-2007

Hon. Joan V. Churchill, Immigration Judge, Washington, D.C./ Arlington, VA - 1980 - 2005

Hon. Lisa Dornell, Immigration Judge, Baltimore, 1995-2019

Hon. Bruce J. Einhorn, Immigration Judge, Los Angeles, 1990-2007

Hon. Cecelia M. Espenoza, Appellate Immigration Judge, Board of Immigration Appeals, 2000-2003

Hon. Noel A. Ferris, Immigration Judge, New York, 1994-2013

Hon. James R. Fujimoto, Immigration Judge, Chicago, 1990-2019

Hon. Gilbert Gembacz, Immigration Judge, Los Angeles, 1996-2008.

Hon. Alberto E. Gonzalez, Immigration Judge, San Francisco, 1995 - 2005

Hon. John F. Gossart, Jr., Immigration Judge, Baltimore, 1982-2013

Hon. Paul Grussendorf, Immigration Judge, Philadelphia and San Francisco, 1997-2004

Hon. Miriam Hayward, Immigration Judge, San Francisco, 1997-2018

Hon. Charles M. Honeyman, Immigration Judge, New York and Philadelphia, 1995-2020

Hon. Rebecca Jamil, Immigration Judge, San Francisco, 2016-2018

Hon. William P. Joyce, Immigration Judge, Boston, 1996-2002

Hon. Carol King, Immigration Judge, San Francisco, 1995-2017

Hon. Elizabeth A. Lamb, Immigration Judge, New York, 1995 - 2018

Hon. Donn L. Livingston, Immigration Judge, Denver, New York, 1995 - 2018

Hon. Margaret McManus, Immigration Judge, New York, 1991-2018

Hon. Robin Paulino, Immigration Judge, San Francisco, 2016-2020

Hon. Charles Pazar, Immigration Judge, Memphis, 1998-2017

Hon. Laura Ramirez, Immigration Judge, San Francisco, 1997-2018

Hon. John W. Richardson, Immigration Judge, Phoenix, 1990-2018

Hon. Lory D. Rosenberg, Appellate Immigration Judge, Board of Immigration Appeals, 1995-2002

Hon. Susan G. Roy, Immigration Judge, Newark, 2008-2010

Hon. Paul W. Schmidt, Chairperson and Appellate Immigration Judge, Board of Immigration Appeals, 1995-2003; Immigration Judge, Arlington, VA, 2003-2016

Hon. Patricia M. B. Sheppard, Immigration Judge, Boston, 1993-2006

Hon. Ilyce S. Shugall, Immigration Judge, San Francisco, 2017-2019

Hon. Helen Sichel, Immigration Judge, New York, 1997-2020

Hon. Denise Slavin, Immigration Judge, Miami, Krome, and Baltimore, 1995-2019.

Hon. Andrea Hawkins Sloan, Immigration Judge, Portland, 2010-2017

Hon. Tuê Phan-Quang, Immigration Judge, San Francisco, 1995-2012

Hon. William Van Wyke, Immigration Judge, New York, York, PA, 1995-2015

Hon. Gustavo Villageliu, Appellate Immigration Judge, Board of Immigration Appeals, 1995-2003; Immigration Judge, Miami, 1990-1995

Hon. Polly A. Webber, Immigration Judge, San Francisco, 1995-2017