CLINIC Analysis: The Trump Administration Used the Administrative Appeals Process to Dramatically Alter Asylum Law

Authored by Legal Intern Grant Chamness, former Legal Intern Allison Mandeville and Defending Vulnerable Populations Managing Attorney Victoria Neilson

Introduction

Under the Immigration and Nationality Act, the attorney general, or AG, is given broad authority to interpret immigration law and to issue regulations. By regulatory authority, the Department of Justice, or DOJ, established the Board of Immigration Appeals, the Board or BIA, which hears most appeals from immigration court. In addition to reviewing the outcomes of individual cases, the BIA issues precedential decisions to "provide clear and uniform guidance" to immigration judges and U. S. Citizenship and Immigration Services, or USCIS, adjudicators on interpretations of law. The attorney general has the authority to self-certify any case and issue a precedential decision that is binding on the BIA as well as immigration judges and USCIS. This adjudicative authority enables the AG to create vast changes in the law.

Advocates have charged that under the Trump administration, DOJ weaponized the immigration courts, including AG and BIA decision-making. In fact, CLINIC is an organizational plaintiff in a federal lawsuit challenging bias within DOJ's immigration adjudication system. It is possible that the Trump administration shifted its focus to executive action, including through decision-making by the attorneys general and BIA, once it became clear that legislative action to further restrict immigration law would not be possible.

In an effort to quantify changes to the administrative appellate process under the Trump administration, CLINIC reviewed the outcomes of all AG precedent decisions issued by Obama-era AGs and compared those outcomes to the decisions issued by Trump-era AGs. CLINIC also analyzed Obama-era BIA decisions on asylum and related relief and compared the outcomes to Trump-era BIA decisions in this area. The data illustrates stark differences in how the AG and BIA operated from one administration to the next, demonstrating how DOJ used the administrative appeals system to reshape immigration law and narrow eligibility for relief for noncitizens.

Methodology

CLINIC reviewed all precedential AG decisions under both the Obama and Trump administrations. The overall number of these decisions was small enough for us to review them all; moreover, every decision had an impact on a broad range of noncitizens. CLINIC focused its analysis of BIA decisions on those involving asylum and related forms of relief, given the Trump administration's systemic assault on asylum seekers. Furthermore, a relatively high percentage of Obama-era BIA decisions concerned interpretations of specific state criminal statutes, often limiting the impact of the decision to those with a particular state criminal conviction.

For each decision, we categorized the **Outcome for the Individual Respondent** as either (1) Favorable; (2) Negative; or (3) Mixed. CLINIC made these determinations from the perspective of the specific respondent in each case. For instance, if the BIA or AG sustained the appeal of the noncitizen or denied the appeal of the Department of Homeland Security, or DHS, the Outcome for the Individual Respondent was "Favorable;" a ruling against the noncitizen was classified as "Negative." We used the "Mixed" classification for cases in which the respondent received both a favorable and unfavorable ruling on different issues. For instance, in *Matter of L-E-A- (I)*, 27 I&N Dec. 40 (BIA 2017), the Board reviewed an immigration judge's, or IJ, decision denying the respondent's application for asylum, withholding of removal, and protection under the Convention Against Torture, or CAT. While the Board dismissed the respondent's appeal from the IJ's denial of asylum, it remanded the case for further proceedings regarding the respondent's request for protection under CAT and to determine the effect of a circuit precedent on the withholding of removal application. We therefore categorized this outcome as "Mixed."

In addition, we organized decisions according to their broader outcome, considering their impact on the law more generally. Like the previous inquiry, we categorized each case's **Broader Legal Impact** as either (1) Favorable; (2) Negative; or (3) Mixed. Determining a decision's broader impact on the law was inherently more subjective than the other categories. As a result, we categorized more cases as having a "Mixed" Impact on Respondents Generally than we did for the Outcome for the Individual Respondent. For instance, in *Matter of E-A-*, 26 I&N Dec. 1 (BIA 2012), the Board outlined the multi-factor balancing test for determining whether a respondent committed a serious nonpolitical crime. Since the test is used on a case-by-case basis, it permits the decision maker to exercise significant discretion. Given this flexibility for the decision maker, *Matter of E-A-* could be classified as either favorable or negative, depending on how one believes decision makers will exercise their discretion. We therefore classified this outcome as "Mixed."

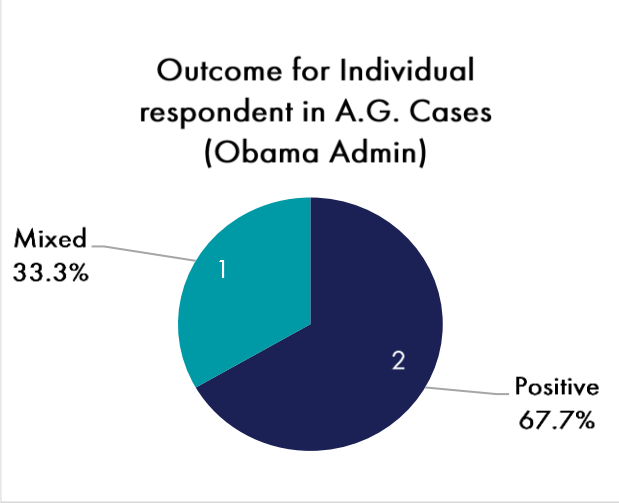
AG Decisions: Obama vs. Trump

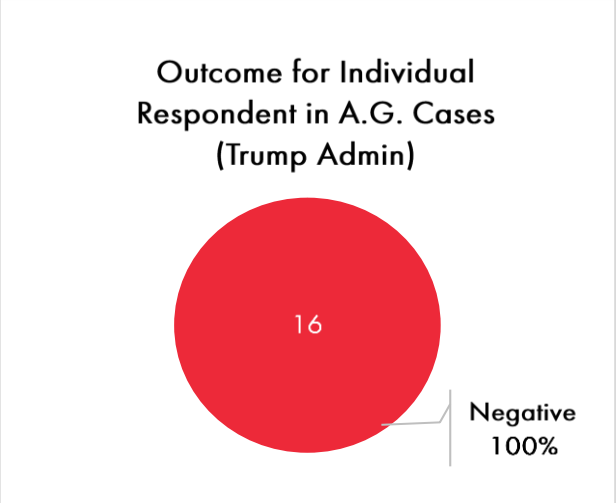
CLINIC reviewed all precedential decisions issued by attorneys general during the Obama era and during the Trump era. The use of this authority changed drastically from one administration to the next, both in the unprecedented number of decisions issued by Trump-era AGs and in the negative outcome for noncitizens. Seemingly following the playbook outlined in a law review article by Bush-

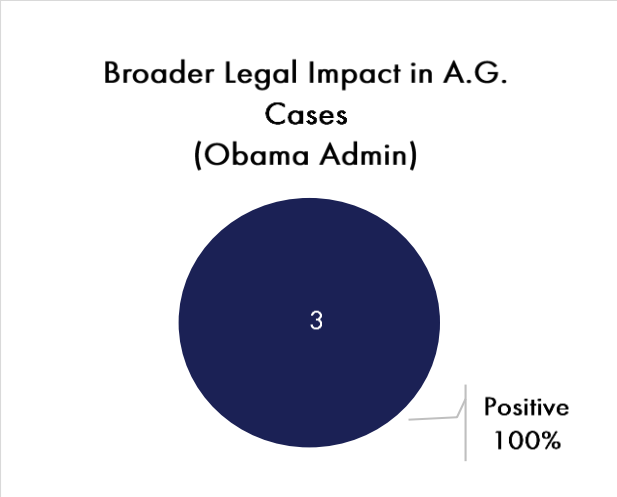
era Attorney General Alberto Gonzalez, the Trump-era AGs used this adjudicative authority, which had always been used sparingly in the past, to rewrite the substance and procedure of immigration law.

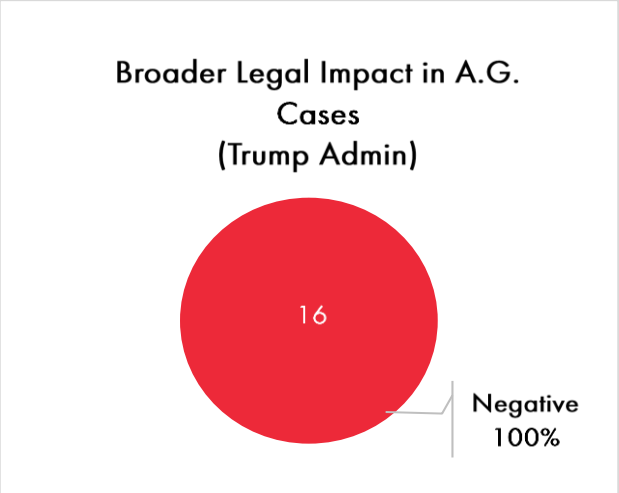
First, the data reveals that the number of AG decisions increased dramatically under the Trump administration. During the Obama administration, AGs used the self-referral power in only four cases — the fewest of any administration. Obama's AGs issued substantive decisions in only three of these cases. In the fourth, *Matter of Chairez and Sama*, 26 I&N Dec. 686 (A.G. 2015), Attorney General Loretta Lynch stayed the Board's decisions in two cases, pending her review. Before she could issue a substantive decision, though, the U.S. Supreme Court decided *Mathis v. United States*, 136 S.Ct. 2243 (2016). Since *Mathis v. United States* resolved the legal issue in *Matter of Chairez and Sama*, the attorney general lifted her stay and remanded the cases to the Board. *Matter of Chairez and Sama*, 26 I&N Dec. 796 (A.G. 2016). Ultimately, this low usage rate reflects the historical trend of AGs exercising the referral authority less and less over successive administrations. However, the Trump administration self-referred 16 cases — more than any other administration. This record volume is even more significant given that the Trump administration held office for only one term. Altogether, Trump's AGs used the self-referral power nearly four times as often as any prior administration.

Second, the data reveals that the focus of AG decisions shifted towards asylum and related forms of relief under the Trump administration. While none of the AG decisions under the Obama administration focused on asylum law, seven of the 16 AG decisions under the Trump administration involved asylum and related forms of relief.







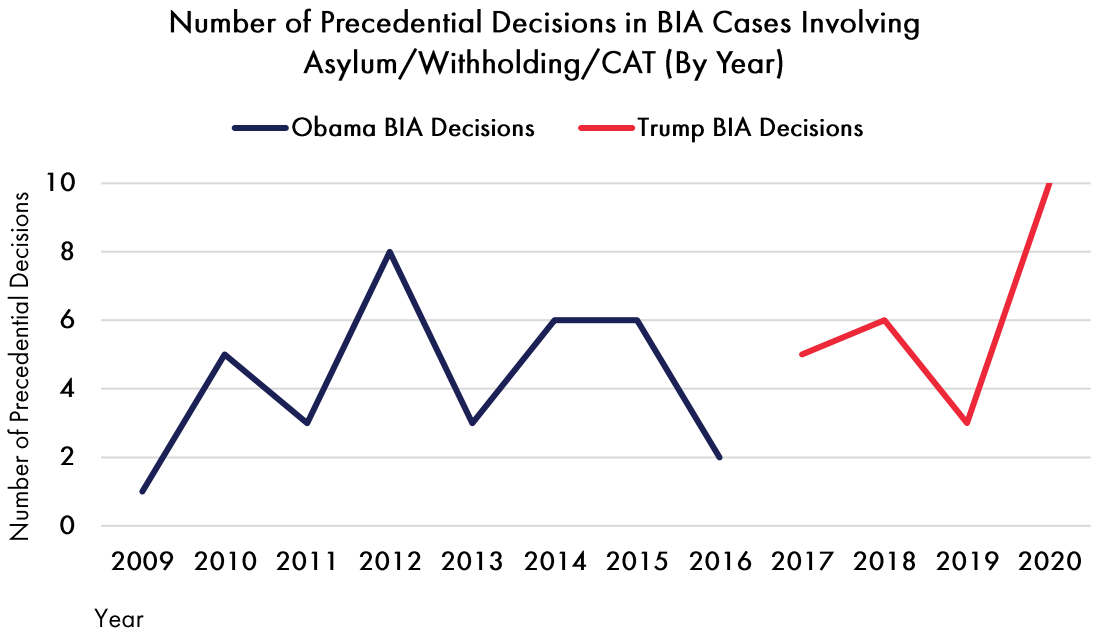


Third, the data reveals that the outcome of AG decisions became decidedly anti-immigrant under the Trump administration. Notably, every decision issued by Trump's AGs resulted in a negative outcome for the individual respondent and a negative impact on noncitizens generally. The consistency with which AGs under the Trump administration issued anti-immigrant decisions is even more significant given that these decisions altered well-settled precedents in asylum law to an unprecedented degree. From restricting asylum eligibility for victims of domestic and gang violence to increasing the difficulty of establishing a cognizable family-based PSG, AGs under the Trump administration issued precedential decisions undermining asylum law.

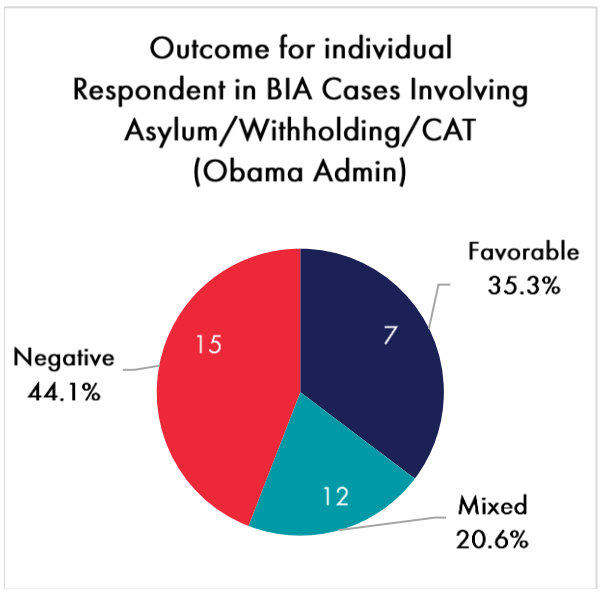
BIA Decisions: Obama vs. Trump

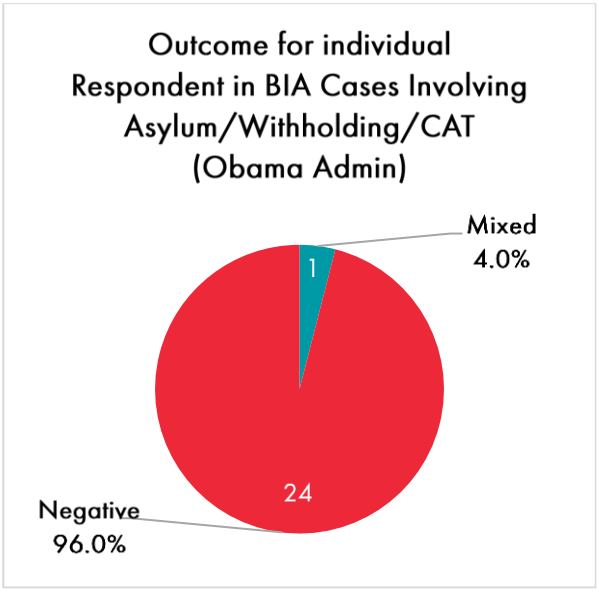
As noted above, CLINIC chose to focus its BIA analysis on decisions involving asylum or related forms of relief.

While the attorney general is a political appointee, BIA members are career DOJ employees and, under past administrations, there has not been a dramatic shift in the outcomes of BIA decisions from administration to administration. However, our analysis reveals that, like the AG decisions, the asylum-related BIA decisions during the Trump era were virtually all negative. These results are not surprising given the apparent politicization of BIA member appointments during the Trump administration. This politicization included reassigning Board members hired under the Obama administration, not onboarding those who had already been offered positions under Obama, and adding as Board members IJs with asylum denial rates of over 90 percent. Of course, the BIA was also bound by the increasingly restrictive AG decisions in rendering its decisions, but the Board itself chose to publish primarily negative decisions in asylum cases.



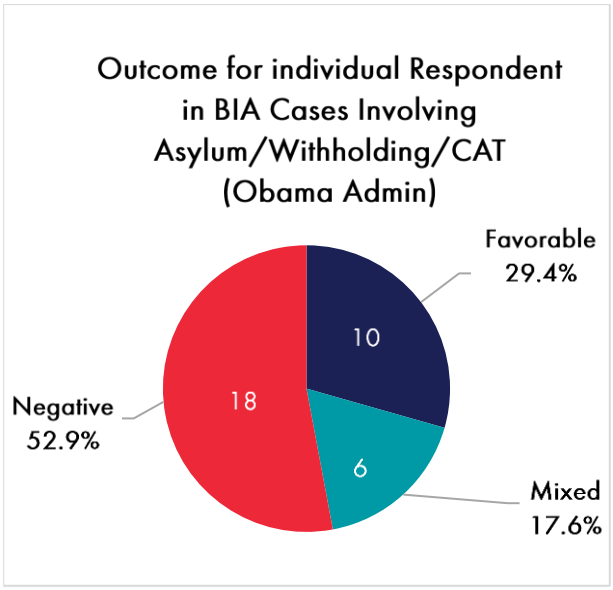
First, the data reveals that the rate at which the BIA issued decisions affecting asylum law dramatically increased. During the two terms of the Obama administration, the BIA issued 34 precedential decisions impacting asylum law, an average of 17 per term. During the Trump administration, the BIA issued decisions at a more aggressive rate. In one term, it issued 25 decisions that materially impacted asylum law — this is a nearly 50 percent increase.

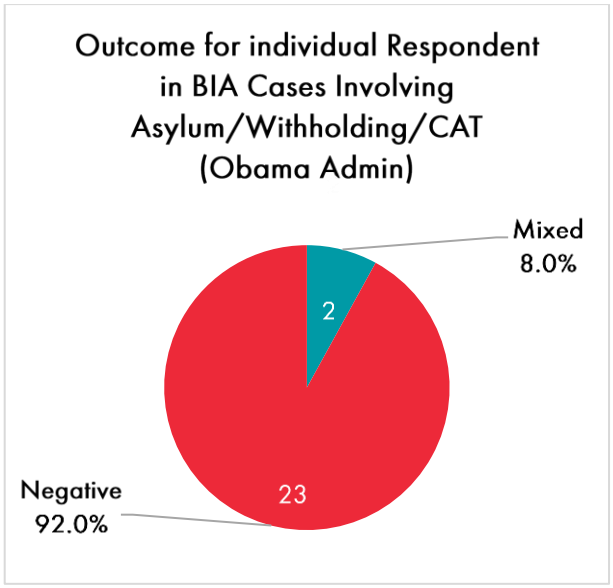




Second, the data reveals that BIA decisions involving issues of asylum law became overwhelmingly negative. Under Obama, the BIA decisions had favorable outcomes 35.3 percent of the time, mixed outcomes 20.6 percent of the time, and negative outcomes 44.1 percent of the time. This distribution

of outcomes does not reflect a clear pro- or anti-immigrant bias towards asylum by the BIA under the Obama administration. Significantly, however, the BIA under the Trump administration issued decisions with negative outcomes for asylum and related relief in 24 of its 25 precedential decisions.





Third, the impact of BIA decisions on respondents more generally also reveals an anti-immigrant shift from one administration to the next. Under the Obama administration, a slight majority of BIA decisions, 52.9 percent overall, resulted in policy changes that restricted asylum eligibility for noncitizens. Meanwhile, 29.4 percent of BIA decisions resulted in pro-immigrant policy change, and 17.6 percent had a mixed impact. Trump-era BIA decisions on asylum and related forms of relief overwhelmingly restricted eligibility for relief — 92 percent of these decisions resulted in policy changes that narrowed eligibility criteria for asylum seekers; the remaining 8 percent had a mixed effect.

Conclusion

Overall, CLINIC's analysis of the data reveals how fundamentally the AG and BIA differed from the Obama administration to the Trump administration. Under the Trump administration, these adjudicative bodies were repurposed to issue anti-immigrant policy to an unprecedented degree. It is heartening that Attorney General Merrick Garland has vacated three of the most damaging Trump-era AG decisions, *Matter of A-B- (I)*, 27 I&N Dec. 316 (A.G. 2018), *Matter of A-B- (II)*, 28 I&N Dec. 199 (A.G. 2021), and *Matter of L-E-A-(II)*, 27 I&N Dec. 581 (A.G. 2019), but the Biden administration has significant work to do to restore faith in the immigration adjudication system.