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AMICUS CORNER

BY: AMANDA KARRAS,
IMLA Deputy General Counsel and Director of Legal Advocacy

About Face? Revisiting a Prior Administration's Pending Cases

President Biden's policy agenda will have impacts on local governments ranging from transportation and infrastructure projects, to addressing climate change and racial equity, to changes on stances regarding immigration from the prior administration. In the more immediate future, President Biden has proposed a $1.9 trillion coronavirus relief package titled the American Rescue Plan, which includes (as of this writing) a proposal for $350 billion in critical aid to state, local, and territorial governments.[1] And while there can be no doubt that President Biden's agenda will impact local governments (hopefully including a large infusion of badly needed economic aid), a less certain outcome of the transition is what happens to the litigation the Department of Justice is involved in when a new President with a drastically different political agenda comes into power?

According to experts, including two former Acting Solicitors General, the federal government typically does not change legal positions in pending cases, even when a new President has a dramatically different policy preference from a previous President.[2] Both Paul Clement, who led the Solicitor General's office during the transition from President Clinton to President Bush, and Neal Katyal, who led the office during the transition from President Bush to President Obama, agreed that it was highly unusual for the Solicitor General to take a different position in a case litigated by a prior administration, particularly those pending before the Supreme Court. And in a recently published law review article, Michael Dreeben, who was an attorney in the Solicitor General's office for more than 30 years, agrees:

> … during my time at the Solicitor General's Office—spanning fourteen Solicitors General and Acting Solicitors General— this was an unspoken way of doing business. If our Office had staked out a legal position in the Court, with rare exceptions that was the position of the United States, full stop.[3]

Mr. Katyal indicated the office under his charge did not change any positions during the transition period. In fact, during that transition, there was a controversial criminal procedure case involving the question of whether the Constitution requires a state to provide DNA evidence to a convicted felon.[4] Many criminal defense advocates, including the Innocence Project, were sorely disappointed when the federal government did not change its position under Mr. Katyal, particularly because President Obama had been an advocate for DNA evidence when he was a state senator in Illinois.[5]

Mr. Clement similarly recalled that there was not a single case in which the new Bush administration had changed a position taken in a Supreme Court brief by the prior administration. He recalled only one or two cases where the new administration changed its position from what had been the Department of Justice's position in a lower court brief once that case got to the Supreme Court. One such instance, according to Mr. Clement, was the University of Michigan affirmative action cases.[6]

While maintaining the prior administration's legal position before the High Court is the norm, that was not the case under Noel Francisco, President Trump's Solicitor General. In fact, Mr. Francisco changed positions so many times during his first

Supreme Court term, that Justice Sotomayor quipped during oral argument for *Janus v. American Federation of State, County, and Municipal Employees, Council 31*: "I don't understand what you're arguing. This is such a radical new position on your part… Mr. -- Mr. General, by the way, how many times this term already have you flipped positions from prior administrations?"[7] The answer in Mr. Francisco's first term was that the federal government changed positions four times in that year alone.[8]

The prior flip flopping, as Justice Sotomayor put it, may have an impact on how the Solicitor General's office will handle cases under the new Biden administration. Will the new administration insist on flipping back to the position the prior administrations had taken before President Trump? Or will the office instead try to recalibrate the Solicitor General's presence before the Court and maintain consistency from the Trump administration to the Biden administration. Because the Solicitor General's office is often referred to as the "tenth Justice," the office's credibility is on the line and changes in position under the new administration will not be made lightly. Then again, Mr. Dreeben argues that the Solicitor General's office should feel less pressure to maintain the "stare decisis" of the office if, after rigorous consideration, it believes the prior position is legally incorrect.[9]

Along those lines, there are a number of pending cases pending before the Supreme Court at both the merits and petition stages that may result in a change in position, either from the Solicitor General's office, or as a result of a change in policy.[10] For example, Acting Solicitor General Elizabeth Prelogar has asked the Court to hold two immigration cases in abeyance that were previously set to be argued in late February and early March. *Biden v. Sierra Club* (formerly *Trump v. Sierra Club*), involves a dispute over former President Trump's border wall construction. And *Pekoske v. Innovation Law Lab* involves the question of the legality of the prior administration's Migrant Protection Protocol (MPP) - aka the "Remain in Mexico" policy. President Biden signed executive orders asking agency heads to review the issues involved in both cases, to undertake actions undoing the previous policies, and to assess the legality of the programs.[11] In light of those executive orders, the Solicitor General's office asked the Court to take these cases off its calendar. In a brief order, the Court agreed to do so, but technically, the cases are not yet moot, and the Biden administration has not fully undone the MPP.[12] That said, it seems likely that they will become moot after agency review of the new directives. A change in policy for these issues saves the Solicitor General's office from having to reverse a legal position as it will instead be able to simply argue to the Court that the cases are moot given the new policy directives.

The issue of so-called sanctuary jurisdictions is another immigration area that could be impacted by the new administration. There have been a number of lawsuits filed by local governments against the Department of Justice regarding the imposition of immigration related conditions on the Byrne Jag grant, a formula grant providing federal criminal justice funding to state and local governments. The vast majority of courts to review the issue have concluded that the Attorney General exceeded his statutory authority under the Administrative Procedure Act in imposing the conditions on a formula grant and that the conditions were therefore ultra vires.[13] However, the Second Circuit is the lone court to rule in favor of the Department of Justice, concluding the conditions were lawfully imposed.[14]

In November 2020, the Department of Justice filed a petition for Supreme Court certiorari from the Ninth Circuit's decision in favor of San Francisco on the Byrne Jag issue. Meanwhile, a coalition of states and New York City have filed a petition for Supreme Court certiorari from the Second Circuit's decision. In its response to the New York City petition, the Department of Justice, under former President Trump, agreed that the Supreme Court should grant certiorari in both cases.

Ordinarily, a clear circuit split involving a Department of Justice petition would be ripe for the Court to grant certiorari. However, on January 20, 2021, President Biden issued an Executive Order "on the Revision of Civil Immigration Enforcement Policies and Priorities," which rescinded President Trump's executive order regarding sanctuary jurisdictions.[15] Thereafter, the Solicitor General's office issued a letter to the Supreme Court, asking the Court to hold the petitions in both the San Francisco and New York cases in abeyance "pending a determination by the current Administration of its position concerning the issues presented in the petition."[16] Unlike the border wall or MPP programs, which would seem easier to deal with at a policy level at least in the abstract, the issues in the Byrne Jag lawsuits involve previously imposed conditions on formula grants since 2017.

Certainly, going forward, the Department of Justice could choose not to impose the immigration related conditions (and it would seem a likely bet that it will choose that course both because of the policy directive and because of a current forward looking nationwide injunction).[17] But the cases pending before the Supreme Court involved the imposition of conditions on grants from 2017 and 2018 and conflicting rulings from the lower courts. Perhaps there is a way to handle the issue at the agency level retroactively, but that is far from certain.[18]

The Solicitor General could reverse course, and ask the Court to decline to accept certiorari, but the Court could simply ignore such a request and grant

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certiorari anyway, given the circuit split on the issue. Furthermore, even if the Court declines certiorari, the Second Circuit's unfavorable ruling would remain in effect for several states and local governments. If the Court does grant certiorari, the question for the new Solicitor General will be whether to reverse course on the merits and argue that the conditions were imposed unlawfully.[19] As noted above, Mr. Dreeben argues it would be appropriate for the Solicitor General's office to do such an about face if it believes the prior position is legally incorrect.[20] And in this case, where every court to review the issue, save one, has sided with the local governments, there would seem to be strong evidence that the law is on their side.

That said, most commentators agree that if the Solicitor General is to change course, she should cash in those chips sparingly. And indeed, it comes as no great surprise that she has already reversed positions of the United States in the Affordable Care Act (ACA) case: *California v. Texas*. In this case, Texas and a group of states filed suit claiming that when Congress enacted the Tax Cuts and Jobs Act and zeroed out the tax penalty for failing to obtain health insurance, the individual mandate could no longer be considered a tax (which was the rationale the prior ACA case for upholding the law). The Texas coalition argues that the individual mandate is not severable from the entire ACA, meaning the entire law would be unconstitutional. The Trump administration originally took the position in district court that the individual mandate was unconstitutional, but would be severable from the rest of the law. That same administration then changed position at the Supreme Court, arguing that the entire law is unconstitutional. It is worth noting that this position was unusual for the Solicitor General's office to take because typically, the office would defend Congressional Acts where it can (it is the lawyer for the federal government, after all), and here there is a strong likelihood that the individual mandate is severable (all signs point to that being the outcome of this case).

It would seem obvious that President Biden, who ran on the idea of expanding the ACA and providing greater health care coverage for Americans, would want to change positions in this particular Supreme Court case from the posture under the Trump administration. The thorny problem for the new Acting Solicitor General was that the case has already been briefed and argued. So even if President Biden wants to change course in this case, procedurally, it is not that simple. Nevertheless, on February 10, 2021, Edwin Kneedler, the Deputy Solicitor General, sent a letter to the Supreme Court stating: "Following the change in Administration, the Department of Justice has reconsidered the government's position in these cases. The purpose of this letter is to notify the Court that the United States no longer adheres to the conclusions in the previously filed brief of the federal respondents."[21] Specifically, in the two page letter, Mr. Kneedler explains that it is now the position of the United States that the individual mandate is constitutional and that even if it is not, that provision is severable from the remainder of the Act.[22] Finally, Mr. Kneedler notes that the United States is not requesting supplemental briefing in the case, given that it was briefed and argued months ago.[23] This two page letter is unlikely to change the outcome of the case, but is an example of where the importance of optics and politics for the President may have outweighed the Solicitor General's interest in a consistent legal position for the United States.

In sum, Ms. Prelogar will be engaged in a bit of a highwire act for the next several months, balancing institutional concerns of the integrity and credibility of the Solicitor General's office while also working for a President with sharply contrasting policy preferences from those of his predecessor. ML

Notes

1. *See* Press Release from National Association of Counties Regarding Coronavirus Aid Package, available at: https://www.naco.org/resources/press/counties-house-and-senate-leadership-pass-president-bidens-coronavirus-relief-package (last visited on 2/4/21).
2. *See* Constitutional Priorities in the First 100 Days, Georgetown Law School Event, Recorded on 1/27/21 and available at: https://www.facebook.com/events/3896656360366223/ (hereinafter "Constitutional Priorities"). While both Mr. Clement and Mr. Katyal served as Acting Solicitor General, Mr. Clement was later confirmed by the Senate to serve as the 43rd Solicitor General of the United States.
3. Michael R. Dreeben, *Stare Decisis in the Office of the Solicitor General,* The Yale Law Journal Forum, Jan. 15, 2021, available at: https://www.yalelawjournal.org/pdf/DreebenEssay_kdn1z8ge.pdf
4. The case was District Attorney's Office for the Third Judicial District, et al. v. Osborne, 557 U.S. 52 (2009).
5. *See* Tony Mauro, *SG Won't Disavow Bush Position in Controversial DNA Case,* The BLT: The Blog of LegalTimes, Feb. 20, 2009, available at: https://legaltimes.typepad.com/blt/2009/02/sg-wont-change-position-in-controversial-dna-case.html
6. *See* Constitutional Priorities, *supra* note 2.
7. *See* Transcript of Oral Argument for *Janus v. AFSCME,* available at: https://www.oyez.org/cases/2017/16-1466. To be fair, Solicitor General Donald Verrilli, Jr. was taken to task by Chief Justice Roberts in 2012 for a change in position from the Bush administration to the Obama administration in *Kiobel v. Royal Dutch Petroleum,* when during oral argument, the Chief quipped: "Whatever deference you are entitled to is compromised by the fact that your predecessors took a different position." Transcript of Oral Argument for *Kiobel,* available at: https://www.oyez.org/cases/2011/10-1491.

8. By way of comparison, in President Obama's eight years, the Solicitor General flipped positions a total of four times. *See* Dreeben, *supra* note 3, at 549-51.
9. *See Id.* at 556-62
10. As of this writing, the author was able to ascertain two cases in which the Solicitor General has already notified the Court of its change in position. One was in California v. Texas, the Affordable Care Act case, which is discussed more fully below. The other was in Cedar Point Nursery v. Hassid, a case involving the question of whether a California regulation that allows union organizers access to an employer's property for limited amounts of time is a per se physical taking. In a letter submitted on February 12, 2021, Ms. Prelogar informed the Court of the United States' change in position. Ltr. From Acting Solicitor General Elizabeth Prelogar to Hon. Scott Harris, Clerk of the Supreme Court of the United States, Feb. 12, 2021, available at: https://www.supremecourt.gov/Docket PDF/20/20-107/68955/20210 212160515182_20-107%20letter.pdf
11. *See* Proclamation on the Termination Of Emergency With Respect To The Southern Border Of The United States And Redirection Of Funds Diverted To Border Wall Construction, Jan. 20, 2021, available at: https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/proclamation-termination-of-emergency-with-respect-to-southern-border-of-united-states-and-redirection-of-funds-diverted-to-border-wall-construction/; *see also* FACT SHEET: President Biden Outlines Steps to Reform Our Immigration System by Keeping Families Together, Addressing the Root Causes of Irregular Migration, and Streamlining the Legal Immigration System, available at: https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/02/fact-sheet-president-biden-outlines-steps-to-reform-our-immigration-system-by-keeping-families-together-addressing-the-root-causes-of-irregular-migration-and-streamlining-the-legal-immigration-syst/
12. On February 16, 2021, the White House issued a press release regarding the MPP, indicating that beginning on February 19th, the United States would begin to process eligible individuals in the MPP program to pursue their asylum cases in the United States. *See* The MPP Program and Border Security Joint Statement by Assistant to the President and National Security Advisor Jake Sullivan and Assistant to the President and Homeland Security Advisor Elizabeth Sherwood-Randall, Feb. 16, 2021, available at: https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/16/the-mpp-program-and-border-security-joint-statement-by-assistant-to-the-president-and-national-security-advisor-jake-sullivan-and-assistant-to-the-president-and-homeland-security-advisor-and-deputy-na/
13. City of Chicago v. Barr, 961 F.3d 882, 891-909 (7th Cir. 2020); City & Cty. of San Francisco v. Barr, 965 F.3d 753 (9th Cir. 2020); City of Providence v. Barr, 954 F.3d 23, 30-45 (1st Cir. 2020); City of Philadelphia v. Att'y Gen. of the United States, 916 F.3d 276, 284-291 (3d Cir. 2019); cf. Colorado v. U.S. Dep't of Justice, 455 F. Supp. 3d 1034, 1047-1054 (D. Colo. 2020), appeal docketed, No. 20-1256 (10th Cir. July 13, 2020); ; City of Evanston & United States Conference of Mayors v. Sessions, No. 18 C 4853, 2018 U.S. Dist. LEXIS 204500 (N.D. Ill. Aug. 9, 2018). In addition to APA claims, local governments also claimed the imposition of the conditions was unconstitutional either under the Spending Clause, the separation of powers doctrine, and/or the Tenth Amendment. While several courts did conclude the imposition of the immigration conditions violated the Constitution, most did not reach the question, resting instead on the fact that they are ultra vires under the APA.
14. New York v. United States Dep't of Justice, 951 F.3d 84 (2d Cir. 2020).
15. *See* Executive Order on the Revision of Civil Immigration Enforcement Policies and Priorities, available at: https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-the-revision-of-civil-immigration-enforcement-policies-and-priorities/
16. Ltr. From Acting Solicitor General Elizabeth Prelogar to Hon. Scott Harris, Clerk of the Supreme Court of the United States, Jan. 27, 2021, available at: https://www.supremecourt.gov/DocketPDF/20/20-666/167414/20210127163042025_LETTER%20for%2020-666%20San%20Francisco.pdf
17. City of Chicago, *supra* note 11 at 931-32 (7th Cir. 2020); *see also* Chicago v. Wilkinson, No. 17-CV 05720, Amended Final Judgment and Order, (Feb. 8, 2021, Docket No. 240); Chicago v. Wilkinson, No. 18-CV-06859, Amended Final Judgment and Order, (Feb. 5, 2021, Docket No. 128).
18. For example, presumably the DOJ could decide to stop litigating the cases in the lower courts and simply abide by the Chicago program-wide injunction, which would mean that it would be enjoined from imposing the conditions on all grant recipients for 2017 forward. But it is less clear how to square the conflicting rulings involving a nationwide injunction from the Seventh Circuit and a contrary ruling in the Second Circuit. Would the nationwide injunction apply to local governments within the Second Circuit?
19. If the Solicitor General's office did reverse course in this way, the Supreme Court could appoint someone to argue the prior position as amicus curiae.
20. *See* Dreeben *supra* note 3, p. 556-562
21. Ltr. From Deputy Solicitor General Edwin Kneedler to Hon. Scott Harris, Clerk of the Supreme Court of the United States, Feb. 10, 2021, available at https://www.supremecourt.gov/DocketPDF/19/19-840/168649/20210210151147983_19-840%2019-1019%20CA%20v%20TX.pdf. Ms. Prelogar is recused from the case, in all likelihood because she filed an amicus brief in the case when she was in private practice.
22. *Id.*
23. *Id.*