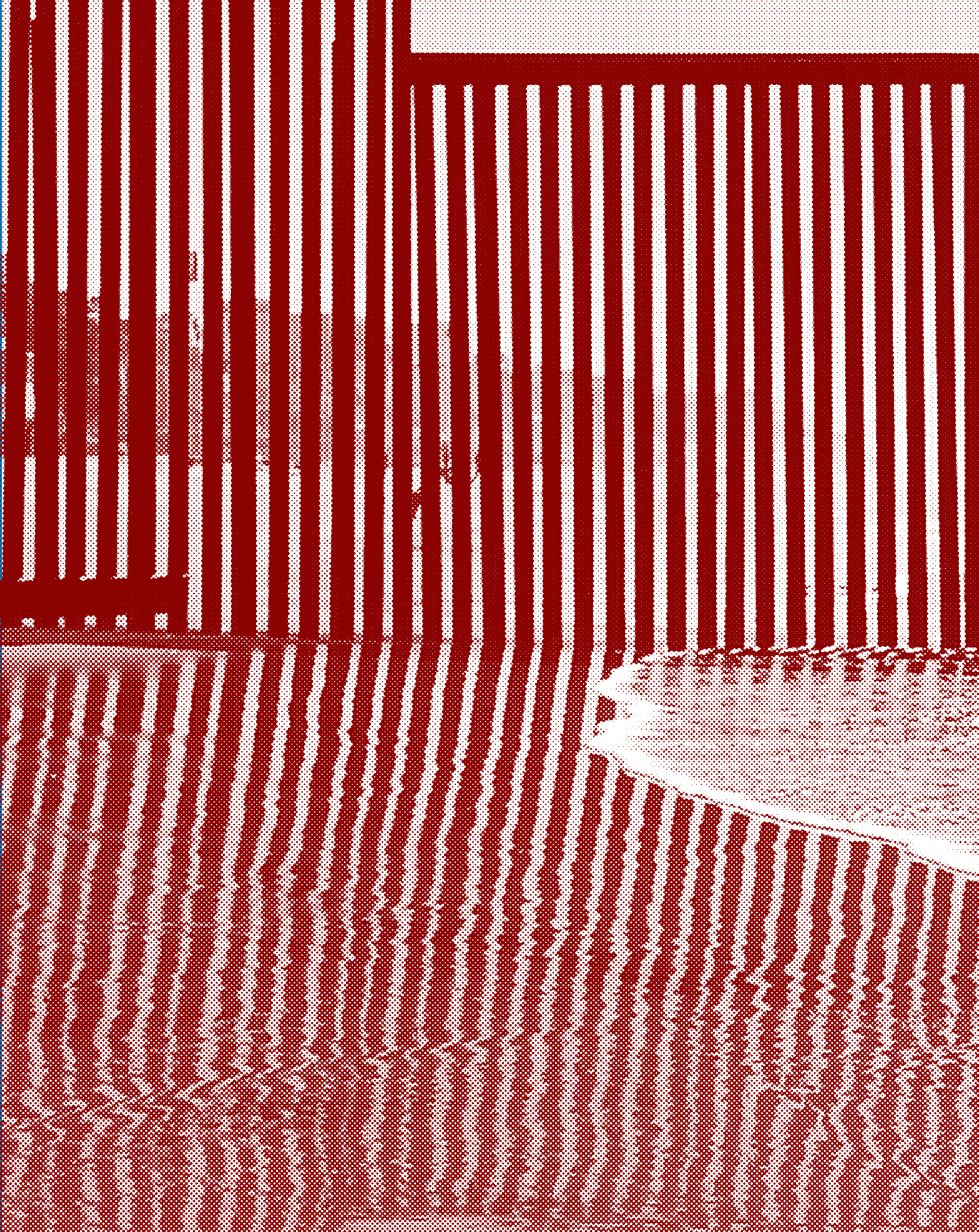


Judicial Illiberalism

By Anil Kalhan

How Captured Courts Are Entrenching Trump-Era Immigration Policies

Joe Biden pledged to end Donald Trump's inhumane and unpopular immigration policies. But Trump's partisan judicial appointees have set out to stop him from using his legitimate executive authority. Do elections really have consequences when judges entrench the policies of a defeated president?





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hen President Joe Biden took the oath of office, expectations ran high for major changes in immigration policy. Biden's predecessor, Donald Trump, had implemented the most far-reaching anti-immigration program in nearly a century, comprising by one count more than 1,000 separate measures. But the Trump presidency never garnered strong public or congressional support for its immigration restrictionist initiatives.

Above: Among the 17 executive orders that President Joe Biden signed on his first day in office, several concerned immigration. These included ending construction of the wall on the U.S.-Mexico border as well as rescinding the ban on immigration from certain predominantly Muslim countries.

Even as xenophobia rapidly took hold among the Republican Party's political, media and legal elites, polls regularly found that substantial majorities of Americans opposed the Trump immigration agenda. In fact, public support for immigration grew even stronger during the Trump years—including among his own supporters.

With this reservoir of popular support, Biden forcefully pledged as a candidate not only to take "urgent action to end the Trump Administration's draconian policies" but also to restart "the work of building a fair and humane immigration system." And within hours of assuming office, his administration began dismantling Trump's legacy on immigration policy. Emphasizing that immigrants "strengthen America's families, communities, businesses and workforce, and economy," he immediately rescinded several of the Trump presidency's signature initiatives, including its Muslim ban and its directives seeking to terminate the Deferred Action for Childhood Arrivals (DACA) program created under President Barack Obama. Biden also directed officials to review and realign all existing immigration policies with his administration's values and to ensure that they advance its goals—including not just

promoting security and safety but also responding effectively to humanitarian challenges, respecting due process of law and safeguarding "the dignity and well-being of all families and communities." Biden also pledged to push for legislation that would provide legalization and a path to citizenship for undocumented immigrants.

More than one-and-a-half years later, the Biden administration's progress in rolling back Trump's anti-immigration legacy—to speak nothing of the more ambitious reforms to which Biden committed as a candidate—has been decidedly uneven. A variety of factors have contributed to this lackluster record. Like much of the president's legislative agenda, his aspirations for immigration legislation have run aground in a dysfunctional, narrowly divided United States Senate. Even within the executive branch, however, where officials have significant policymaking latitude, the Biden administration's progress has been sluggish. Some responsibility lies squarely with the White House itself. Biden and his innermost circle of advisors have been rightly criticized for equivocating on immigration issues and failing to exhibit the political will necessary to reverse Trump's policies—a failure prompting some highly respected, reform-minded officials to leave the administration in frustration.

No less disquieting, however, have been the ways in which right-wing politicians have enlisted a phalanx of reliably partisan Trump judicial appointees to actively subvert Biden's immigration agenda. Together with other conservative judges, these Republican loyalists have demonstrated an eagerness to perpetuate the anti-immigration policies of the candidate who voters decisively rejected in 2020, often engaging in irregular methods, dubious factfinding and suspect legal reasoning to do so. The manner in which these judicial foot soldiers for immigration restrictionism have kneecapped the Biden agenda offers a revealing window into how a federal judiciary

increasingly captured by conservative extremists may continue to operate as an active, enthusiastic collaborator in Republican efforts to entrench illiberal, antimajoritarian power and right-wing policies, across a range of substantive domains, for many years to come.

Capturing the Courts

In the years before Biden's election, conservative legal and political elites were wildly successful in manipulating the judicial confirmation process to pack the federal courts with committed partisan ideologues. With millions of dollars of outside support from dark money groups, Senate Republicans—led by then-majority leader Mitch McConnell of Kentucky, the Senate's self-described "Grim Reaper"—initially waged an aggressive campaign to obstruct Obama's judicial nominees. For the first six years of Obama's tenure as president, when Democrats held the Senate majority, Republicans deployed a variety of tactics to throw sand in the gears of the confirmation process. After taking control of the Senate in 2014, Republicans imposed an even more aggressive blockade and refused to confirm or even consider Obama's judicial nominees to an extent unprecedented in modern history.

The highest profile casualty of this blockade, of course, was Chief Judge Merrick Garland of the U.S. Court of Appeals for the D.C. Circuit, the centrist, elder judicial statesman selected by Obama to fill the Supreme Court vacancy created by the death of Justice Antonin Scalia in 2016. Bolstered by a multimillion dollar, dark-money attack campaign, Senate Republicans effectively refused to recognize the legitimacy of Obama's authority to fill the vacancy at all, preemptively announcing within hours of Scalia's death that they would not consider anyone for the seat until after Obama left office.

Judge Amy Coney Barrett was the third U.S. Supreme Court justice appointed during the Trump administration. Her swearing-in took place just eight days before the 2020 presidential election.

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The gambit paid off when Trump became president and Republicans handed the seat to Neil Gorsuch instead. While Republicans dishonestly rationalized their obstruction of Garland's nomination with the false assertion that the Senate had never before confirmed a Supreme Court nominee during a presidential election year, their opportunism became crystal clear when they rushed to confirm Amy Coney Barrett to replace the late Ruth Bader Ginsburg only a week before the 2020 election. When Barrett was sworn in by Clarence Thomas at a White House celebration hosted by Trump, she became the fifth current member of the Supreme Court to be appointed by a Republican president who initially took office after losing the popular vote.

Republicans' manipulation of the federal judiciary extended far beyond the Supreme Court. During Obama's final two years as president, the Republican-controlled Senate confirmed fewer nominees to the lower federal courts than at any point since 1952, gifting Trump more than 100 federal judicial vacancies. Then, after retaining Senate control in 2016, Republicans abruptly pivoted from obstructing Obama's nominees to fast-tracking Trump's nominees at an unprecedented clip. By the end of Trump's one-term presidency, Republicans had installed more than 230 individuals into lifetime judicial positions—representing fully 28 percent of all active federal judges—and had tilted the ideological balance of several circuits sharply to the right.

To fill these positions, Trump and McConnell enlisted the conservative Federalist Society—"in-sourcing" the organization, as Trump White House counsel Don McGahn, an active member of that organization, candidly boasted—to identify and carefully screen potential nominees to ensure their commitment to right-wing legal dogma. As a result, Trump's appointees overwhelmingly came from the ranks of the Federalist Society network, and studies have found them to be significantly farther to the right, on average, than judges appointed by previous Republican presidents. Trump's appointees also included an unusually large number of conservative activists who had been extensively involved with Republican Party causes, whether as financial donors, political operatives, policy advisors, litigators or in other capacities. Many also lacked the experience and qualifications expected of those serving on the federal bench: The American Bar Association rated 10 of Trump's nominees "not qualified" after assessing their





The Federalist Society logo features a silhouette of Founding Father and fourth President James Madison.

integrity, competence and temperament—a number representing almost half of all “not qualified” ratings issued by the ABA since 1989. (Senate Republicans confirmed eight of those “not qualified” nominees anyway.)

For a significant number of these appointees, that right-wing activism included work contributing to the Trump presidency’s anti-immigration agenda. Steven Menashi, for example—a Trump White House insider appointed to the 2nd Circuit—was an active participant in the “Immigration Strategic Working Group” convened by Trump White House advisor Stephen Miller, the primary architect of Trump’s immigration restrictionist policies. At least eight other Trump appointees were actively involved in litigation in support of the Trump presidency’s immigration policies as lawyers working for Republican state attorneys general.

Even before Biden won the election, Trump appointees at every level of the judiciary were regularly delivering votes in support of their patron’s anti-immigration positions. In the Supreme Court, Trump appointees joined other conservative justices to hand the Trump presidency victories in cases greenlighting its construction of the border wall, upholding its Muslim ban, affirming its comprehensive restrictions on asylum, expanding the scope of mandatory immigration detention and curtailing judicial review of deportation orders. Several of these cases were decided on the Supreme Court’s notorious “shadow docket,” in opaque, unsigned decrees hastily issued upon limited briefing, without oral argument, and with no reasoned explanations. In the lower federal courts, the angry, lengthy opinions that several Trump appointees issued in support of Republican immigration positions, albeit often in dissent, frequently revealed a deeper thirst to rewrite immigration law principles in restrictionist terms.

Entrenching Trumpism

Since Biden’s inauguration, Republican politicians and activists have taken full advantage of this apparent zest for immigration restrictionism among many of Trump’s appointees. Led by Texas Attorney General Ken Paxton—who was a featured speaker at the January 6, 2021 rally that directly preceded the violent assault on the Capitol, and who has been the subject of a separate criminal indictment and other ongoing investigations for official misconduct—Republican state attorneys general and other conservative advocates have filed a raft of lawsuits against Biden’s immigration policies. These lawsuits have sought not only to sabotage Biden’s immigration policies but also to make the Trump presidency’s own anti-immigration legacy permanent. Conservative advocates have frequently exploited what Stephen Vladeck, a professor at the University of Texas School of Law, describes as a “little-known quirk” in the case assignment process, which enables litigants in some federal districts, including several in Texas, to circumvent normal random assignment protocols and effectively handpick the judges hearing their cases.

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Immediately following Biden’s inauguration, for example, Paxton filed suit challenging the qualified, 100-day moratorium on some deportations that the incoming administration instituted pending its review of all the enforcement policies that it had inherited. Remarkably, the seeds of this lawsuit were planted by the lame-duck Trump presidency itself. Only weeks before Biden assumed office, Trump administration officials entered into a series of irregular agreements with Republican officials in multiple states promising that immigration officials would maintain Trump-era enforcement policies even after Biden became president. While the legality of these agreements was doubtful, Paxton invoked their existence as a principal basis for his lawsuit. As one unnamed Trump administration official openly explained, “[t]he whole point [was] 110 percent to screw the incoming administration from doing anything for six months.”

To guarantee a sympathetic adjudicator, Paxton filed suit in an outlying Texas judicial division under rules providing for assignment of virtually all civil cases to a single judge, Drew Tipton. Before his nomination, Tipton had been highly active in Republican circles and had donated \$11,000 to Texas’s two Republican senators—both of whom serve on the Senate Judiciary Committee and have collected large sums of money from would-be judicial nominees. Only five months before Biden’s election, Tipton was rewarded with a swift, party-line confirmation.

Tipton quickly delivered in Paxton’s lawsuit, issuing a sloppy, poorly reasoned order only a few days later that blocked the Biden administration’s partial moratorium, which never went into effect. In a related case, Tipton deployed the same reasoning to prevent the Biden administration from establishing and implementing new immigration enforcement priorities—a responsibility that judges across the ideological spectrum have long recognized to be squarely within the authority of executive branch officials. Tipton effectively appointed himself as a judicial super administrator over the immigration agency’s operations, demanding that officials provide him with detailed monthly reports on every known individual who might potentially be subject to immigration enforcement actions and specific explanations for every one of the agency’s enforcement-related decisions.

On appeal, a 5th Circuit panel pointedly rejected the legal rationale that Tipton applied in these cases. (In a parallel lawsuit filed in Ohio raising the same issue, a 6th Circuit appellate panel forcefully did the same, emphasizing the executive branch's "longstanding discretion in enforcing the many moving parts of the nation's immigration laws.") However, other judges on the 5th Circuit—which Republicans gave an extreme ideological makeover under Trump—later vacated the earlier panel's decision without explanation, suggesting that they might be prepared to embrace Tipton's reasoning and clearing the way for Paxton's lawsuit to proceed. Duly emboldened, Tipton proceeded to issue a final judgment relying on the same incorrect factual assertions and flawed legal reasoning as his previous rulings, effectively denying altogether the legitimacy of the Biden administration's authority to establish immigration enforcement priorities that depart from those of its predecessor.

Similarly, to challenge the Biden administration's efforts to terminate the Trump presidency's so-called Migrant Protection Protocols (MPP)—frequently referred to as the "Remain in Mexico" program—Paxton filed suit in a judicial division in Texas where another recent Trump appointee, Matthew Kacsmayk, hears virtually all civil cases. Although federal law guarantees all individuals arriving in the United States the right to apply for asylum and receive a hearing if they have a credible fear of persecution, MPP authorized officials to return many individuals seeking asylum at the U.S.-Mexico border to Mexico, where they must wait while their claims are pending in the United States.

Lower federal courts in California had previously enjoined MPP after concluding that the program was

unlawful. In early 2020, however, the Supreme Court issued a one-sentence shadow docket order permitting the Trump presidency to move forward with the program. Under MPP, officials returned tens of thousands of asylum-seekers to dangerous conditions in camps across the border in Mexico, where hundreds have been victims of murder, rape, kidnapping and other violent crimes. The Trump administration itself largely suspended MPP due to COVID-19, relying on even more draconian anti-asylum measures instead. When the Biden administration terminated the program, its secretary of homeland security, Alejandro Majorkas, issued a detailed memo explaining that MPP had never been particularly effective, incurred costs that far outweighed its benefits and was inconsistent with the new administration's values, immigration policy goals and foreign policy strategies.

Remarkably, even though the program had never even existed in the decades before Trump came to power and almost certainly violates the immigration statute, Kacsmayk incorrectly concluded not only that MPP was permissible, but that it was legally *required*—implicitly (and implausibly) suggesting that every administration before Trump had somehow breached its legal obligations. On that basis, he ordered the Biden administration to restart the long-dormant program—even though officials made clear that doing so would require sensitive foreign policy negotiations and coordination with the Mexican government. Kacsmayk lavished praise upon the Trump presidency for creating an "effective" program and falsely accused the Biden administration of "contribut[ing] to the current border surge" by terminating MPP. Like Tipton, Kacsmayk also demanded detailed monthly reports from the Biden administration so that he could oversee

Under the Migrant Protection Program, officials returned thousands of asylum-seekers to camps in Mexico via border crossings such as this one in Juárez, Mexico.





Human Rights Watch charged that, “Asylum seekers swept up in the MPP program,” such as those held in the tent camp in Matamoros, Mexico pictured here, “face[d] kidnapping, sexual assault, exploitation, lack of basic necessities, abuse and other dangers... with no meaningful access to due process in the United States.”

and supervise its enforcement operations and diplomatic negotiations from the bench.

A right-wing 5th Circuit panel deployed similarly overheated rhetoric and flawed reasoning to affirm Kacsmaryk’s decision. Subsequently, in yet another cursory, three-sentence shadow docket decree, the Supreme Court’s conservative majority refused to disturb these lower court rulings, over the dissents of Justices Stephen Breyer, Sonia Sotomayor and Elena Kagan. Although the Supreme Court reversed the lower court decisions on the final day of its most recent term, its relatively narrow ruling leaves ample room for conservative litigants and right-wing lower court judges to continue to interfere with the Biden administration’s efforts to terminate MPP and other Trump-era immigration policies. The court’s most conservative members also made clear, both at oral argument and in dissent, that they were sympathetic to the substance of Kacsmaryk’s decisions.

In April 2022, Mark Brnovich, the attorney general of Arizona, went judge-shopping clear across the country in Louisiana to attack the Biden administration’s decision to reverse yet another Trump presidency immigration initiative, and arguably one of its least defensible. At the outset of the pandemic, the administration instituted a sweeping directive that relies on obscure, never previously used provisions within the Public Health Service Act as a pretext for authorizing summary expulsion of noncitizens at the U.S.-Mexico border—without due process or the opportunity to apply for asylum to which they are legally entitled.

The public health rationale advanced in support of this so-called Title 42 expulsion order has been widely understood to be a sham, articulated in bad faith to implement sweeping asylum restrictions that the Trump presidency had not been able to successfully put in place using ordinary immigration law authority. In fact, the principal architect of Trump’s immigration restrictionist agenda,

Stephen Miller, had reportedly been looking for excuses to use this little known (and legally dubious) expulsion authority long before the COVID-19 pandemic from the earliest days of the Trump presidency. Public health experts, including officials within the Centers for Disease Control and Prevention (CDC) itself, have roundly rejected any claimed public health basis for the Title 42 directive, which immigration officials have used to summarily expel individuals approximately 2 million times since it was first instituted.

For well over a year, the Biden administration dragged its heels and left Trump’s Title 42 expulsion directive in place, a decision that one State Department official, Harold Koh, criticized just before leaving his position as “illegal,” “inhumane” and “not worthy of this administration that I so strongly support.” When the Biden administration finally announced in April 2022 that it intended to terminate the Title 42 directive, Brnovich, together with several other Republican state attorneys general, immediately filed suit to challenge the decision. The public health opportunism among Title 42’s anti-immigration defenders is particularly striking because many of these same conservatives have responded to measures genuinely intended to promote public health, such as the Biden administration’s vaccine and mask mandates, by essentially insisting that the pandemic is over. Only days before filing his Title 42 lawsuit, for example, Brnovich himself joined other Republican attorneys general in a lawsuit before a Trump judicial appointee in Florida that successfully blocked the CDC’s order mandating masks on public transportation.

Nevertheless, the Trump appointee in Louisiana to whom the case was assigned, Robert Summerhays, wasted little time in following the same playbook as his fellow judicial travelers in Texas. In a pair of decisions whose language and reasoning essentially abandoned the pretense

that the Title 42 order was a legitimate public health measure, as opposed to a backdoor set of immigration restrictions, he blocked the Biden administration's termination of the Trump-era directive. Like Tipton and Kacsmayk, Summerhays also ordered detailed reports so he could micromanage the immigration agency's operations.

The strident, often overwritten opinions that Trump's lower court appointees have frequently issued in these cases have been long on restrictionist bombast and short on legal and factual merit. Nor have these opinions been limited to a handful of district judges in states like Texas and Louisiana. In the 9th Circuit, for example, a cluster of Trump appointees have written and joined intemperate dissenting opinions in support of unsuccessful claims that the Biden administration must perpetuate other Trump-era immigration policies, including a ban on asylum applications from many individuals and broad, controversial interpretations of the economic grounds of exclusion and deportability.

With at least 17 anti-immigration lawsuits filed by Republican state officials to date, and others undoubtedly yet to come, more judicial decrees seeking to cement in place the anti-immigration policies of the 2020 election's losing candidate almost certainly are on the horizon. Litigation in Texas challenging the Biden administration's efforts to strengthen DACA, for example, has been ongoing before an anti-immigration Republican appointee, Andrew Hanen, since the start of Biden's presidency. And the list of Biden immigration policies that conservative litigants hope to subvert in court will likely grow longer. Even if those advocates do not always succeed in steering these cases to handpicked conservative loyalists in the lower courts, eventually all of these cases could make their way to a Supreme Court that has been no less degraded and corrupted by the politics of illiberal, antimajoritarian entrenchment. Although the Biden administration ultimately may succeed, with great effort, in reversing many of the restrictionist policies that conservatives have sought to perpetuate, it remains decidedly unclear whether a Supreme Court that has been captured by partisan extremists will consistently permit it to do so.

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Immigration, Illiberalism and Democracy

In claiming power to entrench Trump's immigration policies, these right-wing judicial appointees have both echoed and further validated many Republicans' refusal to accept the outcome of the 2020 election or the legitimacy of the Biden administration. As researchers led by political scientist Robert Pape have meticulously documented, hostility toward immigrants and people of color has been a key driver of the movement behind the violent, antidemocratic insurrection on January 6, 2021. While those far-right views do not command majority support, neither have they been decisively rejected or repudiated within conservative circles. In fact, to a considerable degree Republican political, legal and media elites have either embraced or acquiesced to the antimajoritarian, ethnonationalist worldview and agenda underlying the insurrection. In early 2022, for example, the Republican National Committee adopted a resolution characterizing the insurrection as "legitimate political discourse." Not to be outdone, in June the Texas State Republican Party adopted a platform that not only expressly denies that Biden was "legitimately elected" but also champions the Trump anti-immigration policy agenda in considerable detail.

The success of the various Republican lawsuits seeking to make Trump's anti-immigration policies permanent suggest that many right-wing judicial appointees are philosophically sympathetic to this same worldview and agenda. Moreover, to advance and entrench that program, these appointees appear to be fully prepared to cast aside prevailing legal principles and dish out large servings of Stephen Colbert-style judicial "truthiness," conveying a sense of fundamental truth in both tone and content that the facts of these cases do not support. As a result, even though Biden was elected in part based on his pledge to repair the damage to immigration policy that was inflicted by the Trump presidency, federal courts that also were degraded during the Trump years have acted aggressively to, in the words of Karen Tumlin, the founder and director of the Justice Action Center, "keep a shadow Trump administration in office on immigration issues."

Nor has this antimajoritarian power grab been limited to immigration policy. Across a range of different policy areas—including voting rights, public health, civil rights, gender equality and environmental policy—Republican politicians and activists have repeatedly turned to sympathetic federal judges in a highly successful effort to undermine both the Biden administration's policy agenda and democratic processes generally. It turns out that, contrary to the popular adage, elections may not "have consequences" after all—at least not when judges are prepared to act illiberally to entrench policies that the electorate has rejected. ■

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