Humanistische Union

Restoring Civil Rights After Four Years of Donald Trump

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Welche Auswirkungen die Amtszeit Donald Trumps auf den Zustand der Bürgerrechte in den Vereinigten Staaten hat, schilderte vor drei Jahren bereits Zahra N. Jamal am Beispiel von Texas in den vorgängen (s. Heft 221/222, S. 159 ff.). Der bürgerrechtliche Albtraum ist auch nach dem Auszug Trumps aus dem Weißen Haus nicht vorbei. Im Folgenden bilanziert Christopher Dunn von der American Civil Liberties Union (ACLU) die bürgerrechtlichen Verluste von vier Jahren Trump-Präsidentschaft. Er konzentriert sich dabei auf drei Politikfelder: die Einwanderung, Rassismus in der Polizei sowie die Besetzung der Bundesgerichte. Der Beitrag schließt mit einem Ausblick auf die ersten Schritte der Biden-Administration und ihre Versuche der Schadensbegrenzung bzw. Wiedergutmachung. Wir drucken diesen Beitrag ausnahmsweise im englischen Original ab.

From the day he became President in January 2017 until the week he left office earlier this year, Donald Trump aggressively attacked and undermined civil rights. With millions of refugees fleeing desperate circumstances around the world and the U.S. engulfed in a crisis over police violence against Blacks, the last four years presented an important opportunity for America to support and improve civil rights. Instead, under Trump it inflicted enormous damage on those rights, with worldwide repercussions.

Newly-elected President Joseph Biden has made it a priority to restore and rebuild civil rights. Starting on his very first day in office, he has taken aggressive action to start undoing the enormous damage Trump wreaked. But it may take years to repair that damage, and Biden will be unable to address all of it.

In this essay I focus on three areas of particular importance to those concerned about civil rights in the United States: immigration, racially-biased policing, and the federal courts. Before doing so, I provide a brief overview of the American system of civil rights.

An Overview of the American System of Civil Rights

As in Germany, civil rights in the United States are the product of many factors, including individual attitudes, societal norms, and formal systems. Because I work as a civil rights lawyer, this essay focuses on the role of formal systems in the shaping of civil rights in the U.S., specifically on the role of legal institutions and legal norms.

Governance in the U.S. takes place at the federal, state, and local level, with each level playing a significant role in defining and enforcing civil rights. Each has legislative bodies (for instance, the United States Congress on the federal level) that pass laws affecting civil rights, and these legislative enactments are the primary source of civil rights in the United States. Each level also has elected executive leaders (the President at the federal level, governors at the state level, and mayors at the city level), and they can take

actions on their own that affect civil rights. Finally, there is the United States Constitution and its Bill of Rights (which includes, for instance, protections for free speech and equal protection), which take precedence over any conflicting legislative or executive action anywhere in the U.S. Similarly, each state has its own constitution, and those constitutions similarly take precedence over any conflicting legislative or executive action within their state. In this federal-state-local system, the federal government alone controls the flow of refugees and other immigrants into the United States.

Then there are the courts, which play a uniquely powerful role in the civil-rights landscape in the U.S. In our system, the courts have the final authority to determine whether government action is unlawful and have the authority to force government officials to comply with their rulings. This judicial supremacy means, for instance, that the nine judges of the Supreme Court of the United States can block action by the President and can nullify federal legislation. The supreme courts of the various states have similar authority within their states.

In light of the enormous power of American courts, litigation is a key tool in defending and advancing civil rights here, and civil-rights cases therefore are an important part of the work of the courts, particularly of the federal courts (including the Supreme Court). And the importance of litigation has led to the development of large and influential NGO's that specialize in using the courts to defend and advance civil rights. For instance, the organization where I work – the American Civil Liberties Union – has over 500 lawyers with offices in every state in the country; we appear regularly in state and federal courts, including in the Supreme Court. During the last four years, we filed over 400 cases against the Trump Administration alone.
The Damage Done by Trump

Since Trump's election, civil rights have been under assault at every level of government in the United States. But the most damaging attacks came at the federal level, with Trump devoting much of his energy to changing the legal norms and institutions supporting civil rights. I therefore focus on the federal level and on Trump's actions. And in doing so, I discuss two substantive areas that have been most controversial: immigration and race-based policing. But first, I review what has happened with the federal courts in America.

Transforming the Federal Courts

Given the central role of the federal courts in American civil rights, it's worth starting with a review of Trump efforts to change the federal judiciary. In the States we have three levels: federal district courts, which conduct trials; federal appeals courts, which review trial court rulings and are a primary source of legal precedent; and the Supreme Court. We have 94 federal district courts with 677 active judges, 14 appeals courts with 165 active judges, and the Supreme Court with 9 judges (called "justices"). In the American system, federal judges enjoy lifetime appointments and cannot be removed absent the most extraordinary of circumstances.

Moving the federal judiciary to the right was a priority for Trump, and he had a huge impact in only four years. Most notably, he was able to assure conservative control over the Supreme Court through the appointment of three extremely conservative and relatively young justices. Two of these appointments, including the most recent one following the September 2020 death of liberal icon Ruth Bader Ginsburg, were extremely controversial because they occurred only because of manipulation of the confirmation process by Trump allies. Now six of the nine justices on the Court are conservatives.

Trump also leaves a large imprint on the lower federal courts. Trump appointees now hold about one-third (56 out of 165) judgeships on the federal courts of appeals and nearly 30% of the 677 active judgeships on

the federal district courts. Though Trump's appointment of 226 federal judges trails President Obama's appointment of 311 judges, Trump's appointments came in just four years, while Obama had eight full years.

Cracking Down on Immigrants and Refugees

Turning to substance, immigration is the highest profile example of Trump's attack on civil rights and is the area with the greatest international impact. Though the U.S. did not see the influx of migrants that Germany did in 2015 and 2016, Trump's demonization of immigrants was a central theme of his campaign leading up to the 2016 election.

Following his inauguration in January 2017, Trump charged out of the gate with an immediate ban on entry into the United States of citizens from a group of countries with significant Muslim populations, creating chaos at American international airports as arriving passengers faced being detained and sent back. Advocates (including my organization) immediately sued, and lower federal courts blocked implementation of that initial Muslim travel ban. Trump replaced it with a second ban, which the lower courts also blocked. He then replaced that one with a third version, which ended up before the Supreme Court in the spring of 2018.

Perhaps reflecting judicial caution in its first major decision concerning controversial action by a new President, the Supreme Court's June 2018 ruling in Trump v. Hawaii,[1] gave broad deference to the President and largely ignored the political storm that surrounded the travel ban. Written by the conservative Chief Justice, John Roberts, the Court's majority opinion readily dispensed with the main claim that the ban violated the key federal statute that governs immigration. As for the claim the travel ban violated the federal Constitution's equal-protection provision because it was motivated by Trump's animus towards Muslims, the Court acknowledged numerous anti-Muslim statements Trump made as a candidate and then when he because President. Nonetheless, it absolved itself of the responsibility of assessing those statements by holding the travel ban could be sustained no matter his motives: "But because there is persuasive evidence that the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility, we must accept that independent justification."

This dismissal of Trump's well-documented animus – which would drive so much of his administration – drew an angry dissent from the Court's most liberal member, Sonia Sotomayor, who likened the hostility underlying the Muslim travel ban to the animus behind the American government's internment of 120,000 Japanese-Americans during World War II, which the Supreme Court largely had sustained. That stinging charge drew a response from Chief Justice Roberts that may resonate with German readers and will go down in Supreme Court history as perhaps the most significant part of the Court's opinion. Specifically, 75 years after the Court had issued it, the Chief Justice repudiated Korematsu v. United States,[2] the Court's notorious World War II decision upholding the internment:

Finally, the dissent invokes Korematsu v. United States. Whatever rhetorical advantage the dissent may see in doing so, Korematsu has nothing to do with this case. The forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority. ...

The dissent's reference to Korematsu, however, affords this Court the opportunity to make express what is already obvious: Korematsu was gravely wrong the day it was decided, has been overruled in the court of history, and – to be clear – has no place in law under the Constitution.

The Muslim travel ban was just the first of Trump's many attacks on immigrants and refugees. His

administration effectively halted the flow of lawful refugees seeking safety in the United States through a wide range of executive actions, including a drastic reduction in the number of permissible entries and a dismantling of the refugee resettlement system for the few who gained admission. Domestically, he dramatically increased the arrest, detention, and deportation of undocumented persons already in the United States, abandoning an Obama policy that focused on those who had committed serious crimes. And he turned his back on those fleeing persecution in Central America, instituting a program that forced tens of thousands of asylum seekers detained inside the United States to go to dangerous places in Mexico and pursue their asylum claims from there.

Civil-rights advocates, including my organization, challenged many of these actions in court and scored some significant successes, but none of these controversies made it to the Supreme Court before Trump left office. However, two other major immigration-related controversies did, and Trump suffered losses in both.

In the first, Trump tried to add to the 2020 census a question about whether a person was a citizen, a transparent effort to scare non-citizen immigrants away from participating in the census. If they did not participate and thus were not counted, that would have helped parts of the country that supported Trump's political party because they would end up with more seats in Congress and a greater share of federal funding. Perhaps having seen enough of Trump's deceit and bias by the time it decided the case in June 2019, the Supreme Court blocked the citizenship question after concluding the administration had been dishonest in its attempts to explain why it had added the question.[3]

The second case arose out of Trump's termination of an Obama program that allowed hundreds of thousands of young people who are not citizens but who had been raised as children in the U.S. to remain here without fear of deportation to countries they had never known. In the last major immigration case it decided while Trump was President, the Supreme Court last June blocked his effort to end the program, finding that he had violated technical aspects of a federal statute that governs action by the President and by federal agencies.[4]

But Trump was not done. Just before he left office, he entered into written agreements with Texas and three other states in which the federal government purported to agree not to change immigration policy without first giving the states six-months' notice of the change and allowing them to comment on the changes.[5] Similarly, he reportedly entered into a labor contract with the union representing border agents that barred changes to immigration-enforcement policy unless the union approved.[6] These were naked – and undoubtedly unenforceable – attempts to tie the hands of the incoming Biden Administration.

Stoking Unrest Over Police Violence

Racial discrimination long has pervaded and perverted the American criminal-justice system, and police violence against Blacks has been a flashpoint for decades. That tension exploded last year following the murder of George Floyd by police officers in Minneapolis, Minnesota. Across the United States we saw months of sustained protests, many of which spiraled into violence.

Historically, the federal government has played a small role when it comes to combatting civil-rights violations by state and city police departments. For example, the New York City Police Department (NYPD), which is the largest municipal police department in the U.S. and which I have sued many times over the last 25 years, has never been the target of meaningful civil-rights action by the federal government, even following the notorious "I can't breathe" chokehold death of Eric Garner in 2014. During the Obama Administration, however, the federal government was more aggressive than prior administrations and did sue some local police departments over civil-rights violations. (The person who led those efforts is a former

colleague of mine and will serve as the third-highest official in President Biden's Department of Justice.)

But even those modest efforts ended as soon as Trump took office. Not only did his administration stop taking action against state and city police departments, it moved to end court orders the Obama Administration had obtained.

And then the George Floyd murder happened in last May. When much of the country erupted in anger over police violence against Blacks, the federal government could have stepped in to investigate police departments, could have offered support and assistance to departments that were committed to addressing systemic racism, and could have provided important moral support to Blacks and their supporters as they took to the streets to call for major reforms.

The Trump Administration did none of that. Rather, Trump doubled down on his embrace of law enforcement and his racist views. Remarkably, his Department of Justice threatened to prosecute protesters under federal laws that criminalize attempts to overthrow the government. The federal government's use of criminal law to suppress dissent in the States goes back to the Alien and Sedition Act of 1798, which led to a wave of prosecutions against newspaper publishers, a national debate about freedom of speech, and the defeat of President John Adams by Thomas Jefferson in 1800. And an existing American statute authorizes 20 years imprisonment for "[w]hoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States ... by force or violence, or by the assassination of any officer of any such government."

That the American's government's response to police killings of Blacks was to threaten protesters with criminal sedition prosecutions perfectly illustrates the Trump Administration's approach to civil rights, police violence, and racial discrimination. And though the federal government never followed through with its threats to prosecute protesters under our sedition laws, the message was unmistakable and had global consequences. Around the world, we have seen many other governments become increasingly repressive, with dissidents being targeted for arrests, beatings, detention, and even death.

Of course, the great irony of Trump's response to police protests became clear this past January, when the President inspired a mob to storm the U.S. Capitol in a violent effort to block Congress from certifying Biden's election win. That turn of events led to a hotly-debated civil-rights question: Should Trump be prosecuted for sedition under the very statute he threatened to use against those protesting police violence against Blacks?

Undoing the Damage

It will take years, even decades, to undo some of the damage Trump did to civil rights in the U.S. Fortunately, however, much can be repaired quickly because Trump was unwilling or unable to get his civil-rights rollback enacted in the form of legislation through Congress. Rather, he acted almost entirely by unilateral executive action, which is the type of government action a new President can erase unilaterally. And President Biden is doing just that.

On his first day in office – January 20 – Biden took a series of dramatic steps to restore civil rights and to reverse Trump's executive action. Biden's very first executive order addressed racial discrimination. Entitled "Advancing Racial Equity and Support for Underserved Communities Through the Federal Government"[7], the order announced a sweeping commitment by the federal government to racial equity and advancement that stood in stark contrast to the Trump Administration's racist worldview:

It is therefore the policy of my Administration that the Federal Government should pursue a comprehensive approach to advancing equity for all, including people of color and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality. Affirmatively advancing equity, civil rights, racial justice, and equal opportunity is the responsibility of the whole of our Government. Because advancing equity requires a systematic approach to embedding fairness in decision-making processes, executive departments and agencies (agencies) must recognize and work to redress

inequities in their policies and programs that serve as barriers to equal opportunity.

Another executive order Biden issued on January 20 addressed discrimination based on gender identity and sexual orientation, a form of discrimination Trump had supported energetically. As with racial equity, this order – titled "Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation"[8] – announced a broad commitment to fighting discrimination, including in hot-topic areas of access to bathrooms and participation in sports:

Every person should be treated with respect and dignity and should be able to live without fear, no matter who they are or whom they love. Children should be able to learn without worrying about whether they will be denied access to the restroom, the locker room, or school sports. Adults should be able to earn a living and pursue a vocation knowing that they will not be fired, demoted, or mistreated because of whom they go home to or because how they dress does not conform to sex-based stereotypes. People should be able to access healthcare and secure a roof over their heads without being subjected to sex discrimination. All persons should receive equal treatment under the law, no matter their gender identity or sexual orientation.

That first day also saw dramatic action on immigration: President Biden rescinded the Muslim travel ban;[9] paused all deportations for 100 days and ordered a review of immigration arrest and detention priorities;[10] rescinded a Trump directive that non-citizens not be counted when reapportioning seats in Congress following the census;[11] and suspended the program that had sent asylum seekers to Mexico.[12] Two weeks later, he issued more orders on immigration, one seeking to reunify families separated at the border with Mexico by the immigration police [13] and one seeking to resume the process of admitting and resettling refugees.[14]

Encouraging as it is that Biden can wipe away Trump executive action, that strategy is not without complication. Executive action is subject to various limitations under American law, and civil-rights advocates often were able to invoke those limitations in lawsuits to block Trump initiatives. Trump supporters already are using the same strategy to attack executive action by Biden.

Most notably, the day after Biden ordered the 100-day halt to deportations, Texas sued to block the order. Led by a governor and attorney general who are Trump allies, Texas relied on the same federal statute – the Administrative Procedure Act – that had been used to block the addition of the citizenship question to the census and to block Trump's effort to end the Obama program helping immigrant youth to remain in the States. And sure enough, a federal judge (whom Trump had appointed) issued a temporary restraining order blocking the deportation pause nationwide.

While executive orders offer immediate relief, an important long-term strategy for protecting civil rights in the States lies in the appointment of federal judges. Because his party won control of the United States Senate, which has the power to confirm or block the President's judicial nominations, Biden should have considerable freedom in appointing judges who support civil rights. But Biden comes into office with only about 25 total judicial vacancies (Trump arrived with over 100), so he won't be able to appoint a large number of judges, at least not initially. And importantly, there is no reason to believe that any of the conservative justices on the Supreme Court will step down.

A more radical approach to the federal judiciary lies in proposals to increase the number of federal judges, including increasing the number of justices on the Supreme Court. While this would be highly unusual, many are enraged by the way that Trump's party blocked an Obama Supreme Court nomination in 2016 and then rushed through a Trump appointee to replace Justice Ginsburg, who died just six weeks before last fall's election that swept Trump's party out of power.

Finally, between executive action and judicial appointments lies legislation. Advocates here have a long list of new laws they'd like to see enacted on a wide range of topics, including voting rights, discrimination, education, and even reparations for the victims of American slavery. Legislative reform is the most democratic and often longest-lasting type of legal reform, but the prospects for major civil-rights legislation

under President Biden are limited. At the federal level in the U.S., legislation must be passed by both the House of Representatives and by the Senate (and signed by the President). Biden's party holds a slim majority of the House and controls the Senate only because it is evenly split and Vice-President Kamala Harris gets to cast the deciding vote.

Given this situation, it will be extremely difficult for Biden to enact meaningful civil-rights legislation. And the situation may get only worse in two years, when the entire House and one-third of the Senate will stand for election. These "mid-term" elections recently have favored the party not holding the presidency, and the loss of the Senate alone would doom any chance of new civil-rights legislation.

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After four years of Trump's assault on civil rights, the United States now is moving forward in a very different direction under President Biden, and he already has made significant progress in undoing damage that Trump inflicted. But we have enormous work to do, both in terms of addressing civil rights inside the United States and in supporting and advancing human rights around the world. Ominously, however, the hateful forces that Trump unleashed remain dangerous, and they will fight efforts to restore civil rights every step of the way.

CHRISTOPHER DUNN is the legal director of the New York affiliate of the American Civil Liberties Union.

Anmerkungen:

[1] 138 S.Ct. 2392 (2018).

[2] 323 U. S. 214 (1944).

[3] Department of Commerce v. New York, 139 S.Ct. 2551 (2019).

[4] Department of Homeland Security v. Regents of the University of California, 140 S.Ct. 1891 (2020).

[5] Agreement Between Department of Homeland Security and the State of Texas (Jan. 8, 2021).

[6] Z. Kanno-Youngs and C. Savage, "Trump Official's Last-Day Deal With ICE Union Ties Biden's Hands", N.Y. Times, Feb. 1, 2021.

[7] Executive Order 13985 (Jan. 20, 2021).

[8] Executive Order 13988 (Jan. 20, 2021).

[9] Proclamation on Ending Discriminatory Bans on Entry to the United States (Jan. 20, 2021).

[10] Executive Order 13993 (Jan. 20, 2021); Department of Homeland Security Memorandum, "Review ofand Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities" (Jan.20, 2021).

[11] Executive Order 13986, “Ensuring a Lawful and Accurate Enumeration and Apportionment Pursuant to the Decennial Census” (Jan. 20, 2021).

[12] Department of Homeland Security, Statement on Suspension of New Enrollments in the Migrant Protection Protocols Program (Jan. 20, 2021).

[13] Executive Order 14011, “Establishment of Interagency Task Force on the Reunification of Families” (Feb. 2, 2021).

[14] Executive Order 14012, “Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion for New Americans” (Feb. 2, 2021).

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