



AMERICAN IMMIGRATION LAW FOUNDATION

March 3, 2009

Hon. Eric H. Holder Jr.
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

RE: *Matter of Silva-Trevino*, 24 I & N Dec. 687 (A.G. 2008)

Dear Attorney General Holder:

The undersigned immigrant rights, civil rights, and religious organizations and law firms urge you to withdraw the above-referenced opinion issued by former Attorney General Michael Mukasey just before the end of his tenure.

As with *Matter of Compean*, 24 I & N Dec. 710 (A.G. 2009) (involving the right to a remedy when counsel was ineffective), *Matter of Silva-Trevino*, 24 I & N Dec. 687 (A.G. 2008), upsets well-settled precedent, announces a rule that will cause gross unfairness, and was issued without adequate notice or input from the public by the former administration. Basic principles of transparency of government, fairness in immigration proceedings, and the need for careful deliberation prior to reversing longstanding precedent call for withdrawing this opinion immediately.

Indeed, the process leading up to former Attorney General Mukasey's opinion in the *Silva-Trevino* case was problematic. The former Attorney General pulled this case out of tens of thousands decided by the Board of Immigration Appeals (BIA) each year in unpublished opinions. There was no notice that the former Attorney General was considering upsetting longstanding BIA and federal court precedent, and there was no briefing considered either before or after he issued his opinion.

Furthermore, the rule of *Silva-Trevino* – which jettisons categorical analysis in determining whether a prior conviction is a crime involving moral turpitude – applies both in immigration proceedings as well as in thousands of adjudications made by the Department of Homeland Security on routine applications for adjustment of status and for naturalization. Before allowing such a dramatic change in the rules for adjudicating immigration cases, there should, at the very minimum, be a fair consideration of the arguments for preserving that precedent.

The Rule Before *Silva-Trevino*. For almost a century prior to the former Attorney General's ruling in *Silva-Trevino*, a categorical approach has governed the adjudication of immigration cases where charges of removability are based on prior crimes involving moral turpitude. This approach has been applied by the Supreme Court and federal courts of appeals, as well as by the Board of Immigration Appeals, in interpreting what is required to be "convicted" under the Immigration and Nationality Act. *See, e.g., Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 185-86 (2007) (recognizing that courts have uniformly applied the categorical approach in determining whether a conviction falls within the scope of an offense listed in the Immigration and Nationality Act). Moreover, courts have long observed that the categorical approach serves the interests of uniformity and fairness as to immigration consequences of crimes. The approach also ensures that immigration courts do not engage in retrial of convictions determined by criminal courts. We refer you to the extensive briefing submitted by *amici curiae* immigration law experts in support of reconsideration of the former Attorney General's flawed opinion for more background on the origins and importance of the categorical approach.

The Result of *Silva-Trevino*. The former Attorney General's opinion in *Silva-Trevino* in effect abandons the categorical approach and instead institutes an unworkable and fundamentally unfair method for determining whether a criminal court conviction qualifies as a crime involving moral turpitude. The opinion would have the far-reaching effect of punishing thousands of immigrants based on *alleged* facts outside what was established by the criminal court.¹

Removal proceedings are an inappropriate venue for conducting the kind of factual inquiry contemplated by *Silva-Trevino*—a mini-trial on facts relating to a prior criminal case. Such mini-trials could entail re-adjudication of facts settled in the prior proceeding, or trial of facts that never came up in the prior proceeding. Removal proceedings lack many basic procedural protections. For example, non-citizens, including longtime lawful permanent residents, asylees, and others, lack appointed counsel and as a result, often appear pro se. They also may be without financial and other resources to search for and secure old records, identify where defensive witnesses may now be and, if reluctant, how to compel them to give evidence in the hearing. If they are detained, the obstacles to getting a fair opportunity to present or rebut facts are multiplied. In addition, there are no normal discovery procedures.

Worse yet, immigration judges frequently face removability decisions based on very old convictions, including misdemeanors and other low-level offenses. Under *Silva-Trevino*, these judges may be required to conduct mini-trials to determine culpability after criminal records have been destroyed or witnesses' memories have faded. The categorical approach had avoided many of these problems because immigration judges could rely on prior criminal court proceedings, during which defendants are entitled to counsel and other procedural protections, and which are typically adjudicated close in time to witnesses and evidence.

¹ The undersigned organizations take no position on the ultimate resolution of Mr. Silva-Trevino's case.

Lack of Transparency/Notice in Adjudicating *Silva-Trevino*. Despite the serious and broad-ranging consequences of the former Attorney General's opinion, the opinion was issued without notice or the opportunity to comment regarding the broad issues addressed, undermining its analysis and legitimacy. Attorney General Mukasey used an unpublished Board of Immigration Appeals decision as his vehicle to overturn decades of jurisprudence on the application of the categorical approach in immigration law. In so doing, the former Attorney General failed to provide either notice or an opportunity for briefing to the parties and the public regarding his intention to reconsider this long-settled precedent.

Attorney General Mukasey's lack of adherence to the hallmarks of due process and fair adjudication are inconsistent with the process of past Attorneys General who have issued such notice and sought briefing in cases on certification. *See, e.g., Matter of R-A-*, 24 I & N Dec. 629, 630 n.1 (A.G. 2008) (describing how Attorney General Ashcroft had provided an opportunity for additional briefing following certification); *Matter of E-L-H-*, 23 I & N Dec. 700 (A.G. 2004) (including order of Attorney General Reno for briefing following certification); *Matter of Soriano*, 21 I & N Dec. 516 (A.G. 1997) (issued following invitation by Attorney General Reno for briefing); *Matter of Hernandez-Casillas*, 20 I & N Dec. 262 & n.11 (A.G. 1990) (describing Attorney General Thornburgh's consideration of briefs submitted during the certification process).

As a result of the lack of process in this case, interested parties – including immigration law practitioners and experts – were left no recourse but to file post-decision *amici curiae* briefing in support of the petitioner's motion for reconsideration. The former Attorney General refused to consider the important legal issues addressed in this briefing. In a one-paragraph order dated January 15, 2009 (two business days before the past administration left office), Attorney General Mukasey denied the motion for reconsideration, and simply stated "there is no entitlement to briefing when a matter is certified for Attorney General review." Office of the Attorney General, Order No. 3034-2009. Thus, there was no opportunity for consideration – either before or after the opinion was issued – of legal and factual arguments relevant to whether longstanding precedent should be overturned.

The former Attorney General's failure to provide for an open and transparent process when he issued his far-reaching opinion stands in stark contrast to the position of the new administration and your own views in favor of more transparent and fair government processes. As you stated during your confirmation hearings, in response to a question from Senator Feingold that addressed problems of "secret law" under the past administration:

I firmly believe that transparency is a key to good government. Openness allows the public to have faith that its government obeys the law. Public scrutiny also provides an important check against unpersuasive legal reasoning – reasoning that is biased toward a particular conclusion.

<http://judiciary.senate.gov/nominations/111thCongressExecutiveNominations/upload/FeingoldTOHolder.pdf> (Question and Answer 2). In this case, former Attorney General Mukasey did not provide any opportunity for the public scrutiny that would have allowed for a check on the "unpersuasive legal reasoning" of his opinion.

Far-reaching impact of *Silva-Trevino*. Without further action to withdraw the opinion and permit full and fair adjudication, *Silva-Trevino* will result in a surge of litigation in immigration courts and courts of appeals across the country. All of the federal courts of appeals have long applied a categorical approach in the immigration context, and many may now be asked to reconsider their long-standing precedents. The former Attorney General's decision will also create confusion and discord in immigration courts across the country as immigrants, their counsel, and the courts grapple with the implications of conflicting law in thousands of cases addressing this issue.

Conclusion. In light of the former Attorney General's wholesale denial of even the minimum standards of due process and fair adjudication before reversal of a hundred years of legal precedent, the undersigned respectfully urge you to withdraw the *Silva-Trevino* opinion. If certification of this issue is desired, we request that you set a briefing schedule and allow interested parties—including various experts and the immigration bar—to submit briefs on the implications of any change in settled law on this issue.

Respectfully submitted,

ORGANIZATIONS

American Immigration Law Foundation
American Immigration Lawyers Association
American Civil Liberties Union
American Gateways (formerly the Political Asylum Project of Austin)
Asian American Justice Center
Asian Law Caucus
The Bronx Defenders
Capital Area Immigrants' Rights (CAIR) Coalition
Catholic Legal Immigration Network, Inc. (CLINIC)
Central American Legal Assistance
Florence Immigrant and Refugee Rights Project (FIRRP)
Florida Immigrant Advocacy Center
Hebrew Immigrant Aid Society
Immigrant Defense Project
Immigrant Law Center of Minnesota
Immigrant Legal Advocacy Project
Immigrant Legal Resource Center
Immigrant Rights Clinic at NYU School of Law
Immigrant Rights Project, Boesche Legal Clinic, University of Tulsa College of Law
Immigration Clinic, Suffolk University Law School
Immigration Equality
Immigration Impact Unit of the Massachusetts Committee for Public Counsel Services
Immigration Justice Clinic, Benjamin N. Cardozo School of Law
The Immigration Law Clinic, University of Arizona Rogers College of Law
Immigration Law Clinic, University of Detroit Mercy School of Law
Immigration Services Project, Neighborhood Defender Service of Harlem

The Legal Aid Society
The Legal Assistance Foundation of Metropolitan Chicago
Massachusetts Immigrant and Refugee Advocacy Coalition
Mexican American Legal Defense and Educational Fund (MALDEF),
Southeast Regional Office
National Council of La Raza
National Immigrant Justice Center, a program of the
Heartland Alliance for Human Needs and Human Rights
National Immigration Law Center
National Immigration Project of the National Lawyers Guild
New York State Defenders Association
Northwest Immigrant Rights Project
Pennsylvania Immigration Resource Center
South Asian Americans Leading Together (SAALT)
University of California, Davis School of Law Immigration Law Clinic
The Washington Defender Association's Immigration Project

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