

‘Slammed’: What Has Driven Departures From Trump’s Justice Department

"There's just a higher volume of politically oriented cases, or cases the political appointees are interested or involved in, which makes things more difficult," one former U.S. Justice Department appellate lawyer says.

By C. Ryan Barber | September 18, 2019



U.S. Department of Justice building in Washington, D.C. Photo by Diego M. Radzinski/ ALM

At least seven U.S. Justice Department lawyers have left the civil division's appellate staff in recent months, an unusual and sudden spike in departures that has diminished the team of lawyers defending U.S. government policies in federal appeals courts across the country.

Between March and July, the departures depleted a staff in a key litigating component that is unaccustomed to such high turnover in a short amount of time, according to veterans of the civil division's appellate team. One former Justice Department lawyer said the departures represent a "huge percentage" of the staff.

The string of departures offers a new view into a Justice Department strained by President Donald Trump's administration and a demanding caseload ever more dominated by politically charged matters that often have come with tighter deadlines than more routine appellate cases. Indeed, the Trump Justice Department, through its appellate team, has raced to the U.S. Supreme Court in numerous instances in an effort to speed up challenges to rulings that went against the White House.

"Everybody's kind of been slammed just with the volume of litigation that has been going on in the department," said Catherine Dorsey, a partner at Baron & Budd who joined the firm in June after a nearly 17-year career on the appellate staff of the Justice Department's civil division. "There's just a higher volume of politically oriented cases, or cases the political appointees are interested or involved in, which makes things more difficult."

A DOJ official declined to comment on the departures but said the civil appellate staff has hired new lawyers in recent months. There are about 55 lawyers now on the civil appellate team, the official said, describing that total as higher than normal for a staff that is considered at full strength with 60 lawyers. The DOJ official said job postings for roles on the appellate staff have consistently drawn strong interest, attracting more than 200 applicants.

At least one lawyer on the civil appellate staff, Martin Totaro, is on detail from the U.S. Securities and Exchange Commission, court records show. Totaro this summer joined the Justice Department team defending Trump against allegations he is illegally profiting off of his business empire in violation of the Constitution's anti-corruption clauses.

To be sure, not all of the departures were necessarily driven by a distaste for any Trump administration policy or the workload that has been created through litigation over new or rescinded rules. Some lawyers left for career opportunities that might have lured them away from the Justice Department regardless of the political party or president in power, according to people familiar with the departures.

But veterans of the civil division's appellate staff said the number of departures this year has dwarfed more routine turnover in an office that is widely regarded not just for attracting strong lawyers but also retaining them.

Across presidential administrations, the appellate staff of the Justice Department's civil division has maintained a tradition of allowing career lawyers to avoid defending policies they strongly oppose. But there is an unspoken understanding that, for the tradition to survive, career lawyers can only sparingly choose not to participate in a case.

Under the Trump presidency, the appellate staff of the Justice Department's civil division has taken up the defense of the travel ban, the administration's push to prevent transgender people from serving in the U.S. military, the bid to include a citizenship question on the U.S. census and subpoena fights involving Trump's financial information. More recently, the Justice Department's appellate team successfully challenged a ruling that had stopped the Trump administration from implementing an effective ban on asylum along the southern U.S. border.

As new cases challenging Trump administration policies arrived, it became increasingly difficult for some attorneys on the appellate staff to avoid being asked to defend in court policies they found questionable, former Justice Department lawyers told The National Law Journal.

“No matter what your politics are, the burden that exists from all of this creates a snowball effect. People who were viewed to be a little more sympathetic to the Trump administration’s positions got assigned a lot of these cases,” said Matthew Collette, a partner at the law firm Massey & Gail who **stepped down** (<https://www.law.com/nationallawjournal/2018/10/25/another-doj-appellate-veteran-leaves-post-amid-trickle-of-departures/>) last year as deputy director of the civil division’s appellate staff, ending a 30-year career at the Justice Department. “The burden was even more on them.”

The turnover has come as the Trump administration faces mounting criticism over how Justice Department appellate lawyers are litigating some cases. In a number of cases, the Trump-era Justice Department has dashed through federal appeals courts—to get to the Supreme Court more quickly—in an effort to erase rulings that have gone against the White House. Civil appellate lawyers work closely with the U.S. solicitor general, coordinating which cases to appeal and how to argue them.

Just last week, Justice Sonia Sotomayor lamented the Trump Justice Department’s regular race to the Supreme Court, bypassing full review in the lower courts. Sotomayor voted against her colleagues’ decision to allow the Trump administration to raise new hurdles for migrants seeking asylum in the U.S. A federal appeals court has not yet addressed the merits of the White House’s new restrictions.

“Historically, the government has made this kind of request rarely; now it does so reflexively. Not long ago, the court resisted the shortcut the government now invites,” Sotomayor wrote.

New leaders, and where some DOJ appellate lawyers have gone

The Justice Department’s civil division is led by Jody Hunt, who served as chief of staff to former U.S. Attorney General Jeff Sessions. Other Trump-era appointees in the Justice Department’s civil division include Hashim Mooppan, a former Jones Day partner who now serves as the deputy assistant attorney general in charge of the appellate staff, one of six litigation branches within the civil division.



Jody Hunt testifies before the Senate Judiciary Committee during his confirmation hearing on March 7, 2018. Photo Credit: Diego M. Radzinski/ALM

In the U.S. Court of Appeals for the Fourth Circuit, Mooppan defended Trump against claims he is violating the Constitution's anti-corruption clauses, which broadly prohibit sitting presidents from receiving financial gains, or "emoluments," from foreign or state governments. Mooppan also argued in defense of the Trump administration's appointment of then-White House budget director Mick Mulvaney as acting director of the Consumer Financial Protection Bureau.

James Burnham, a former Jones Day associate, leads the federal programs branch, the group primarily responsible for defending administration policies in federal trial courts. Burnham **stepped into** (<https://www.law.com/nationallawjournal/2019/04/12/us-justice-department-names-james-burnham-to-key-civil-division-post/>) the role in April, succeeding Brett Shumate, who last month **joined** (<https://www.law.com/nationallawjournal/2019/08/29/jones-day-adds-key-trump-doj-alum-as-another-partner-gets-judicial-nod/>) Jones Day as a partner.

The Justice Department's 2019 budget for the federal programs branch noted "a greater number of and more complicated challenges to the administration's laws, regulations and policies."

The civil division's leaders also include Scott Stewart, a deputy assistant attorney general who formerly clerked for Justice Clarence Thomas and who was an associate at Gibson, Dunn & Crutcher. David Morrell, a former Jones Day associate and Thomas clerk, joined the civil division in May from the Trump White House. Ethan Davis, the principal deputy assistant attorney general in the civil division, formerly was a King & Spalding partner and clerked for Justice Neil Gorsuch.

Lawyers who have left the appellate staff in recent months have taken positions among other government ranks and at various advocacy groups.

After less than two years on the civil division's appellate staff, Rachel Homer joined Protect Democracy, a progressive organization that is opposed to the Trump administration. Homer earlier clerked for U.S. District Judge John Bates in Washington and Judge Diane Wood on the U.S. Court of Appeals for the Seventh Circuit.



Megan Barbero, then a DOJ appellate lawyer, argues in an ACA case in the Second Circuit in 2015. Screen grab from C-SPAN. Watch the full video here

(<https://www.c-span.org/video/?323944-1/the-roman-catholic-diocese-york-adv-kathleen-sebelius-oral-argument>)

Megan Barbero **jumped**

(<https://www.law.com/nationallawjournal/2019/03/21/senior-doj-appellate-lawyer-jumps-to-us-house-general-counsels-office/>) to the U.S. House general counsel's office in March, where she is working under the leadership of Douglas Letter, a former top civil division lawyer who left the Justice Department in 2018 after spending more than 30 years there. Letter is leading court cases that are challenging the Trump administration's refusal to comply with various subpoenas.

Another civil division lawyer, Tara Morrissey, formerly at Jones Day, left the Justice Department appellate team this year to become **deputy chief counsel** **(<https://www.chamberlitigation.com/who-we-are/tara-morrissey/>)** at the litigation arm of the U.S. Chamber of Commerce. Morrissey, a former clerk to Justice Samuel Alito Jr., had first joined the civil division in 2014.

After less than a year on the civil division's appellate staff, James Xi left to clerk for Justice Brett Kavanaugh on the Supreme Court. He first joined the civil division in October.

Carly Zubrzycki stepped down recently after serving nearly four years on the civil appellate staff. Zubrzycki started a **fellowship** **(<https://hls.harvard.edu/faculty/directory/11958/Zubrzycki>)** at Harvard Law School. Tyce Walters, who joined the civil appellate team in 2015, will soon join Latham & Watkins.

More broadly, departures of Justice Department lawyers can chip away at a prized asset: collective experience, former DOJ lawyers said.

"When you have a large chunk of experienced attorneys leaving in a short period of time, it is very disruptive. There is also the major problem of the loss of the institutional memory," said Robert Loeb, a partner at Orrick, Herrington & Sutcliffe who spent 25 years as a career appellate lawyer in the Justice Department's civil division. "Attorneys build a wealth of knowledge on the issues facing the

government. They learn who are the experts at the various government agencies. The experienced attorneys have the knowledge base to be a check on outlier arguments.”

Read more:

[‘A Very Difficult Time’: Challenges for Career Lawyers at Trump’s DOJ](https://at.law.com/HqdB1i?cmp=share_twitter)

[\(https://at.law.com/HqdB1i?cmp=share_twitter\)](https://at.law.com/HqdB1i?cmp=share_twitter)

[Draining the Reservoir: The Steady Erosion of Credibility at the DOJ](https://at.law.com/RPJZnt?cmp=share_twitter)

[\(https://at.law.com/RPJZnt?cmp=share_twitter\)](https://at.law.com/RPJZnt?cmp=share_twitter)

[Here’s the New DOJ Team Leading Trump’s Census Case Maneuvering](https://at.law.com/DeGVB9?cmp=share_twitter)

[\(https://at.law.com/DeGVB9?cmp=share_twitter\)](https://at.law.com/DeGVB9?cmp=share_twitter)

[Senior DOJ Appellate Lawyer Jumps to US House General Counsel’s Office](https://at.law.com/gXt2Ke?cmp=share_twitter)

[\(https://at.law.com/gXt2Ke?cmp=share_twitter\)](https://at.law.com/gXt2Ke?cmp=share_twitter)

[King & Spalding Nabs Ex-DOJ Official Who Quit After Obamacare Shift](https://at.law.com/K76bWg?cmp=share_twitter)

[\(https://at.law.com/K76bWg?cmp=share_twitter\)](https://at.law.com/K76bWg?cmp=share_twitter)

[Meet the Justice Department Team That Won’t Defend the Affordable Care Act](https://at.law.com/xMwct8?cmp=share_twitter)

[\(https://at.law.com/xMwct8?cmp=share_twitter\)](https://at.law.com/xMwct8?cmp=share_twitter)