

United States Senate

WASHINGTON, DC 20510-3205

March 23, 2021

The Honorable Merrick B. Garland
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear Attorney General Garland,

Please accept our deepest congratulations on your confirmation as Attorney General of the United States. We thank you for your commitment to prioritizing and promoting fairness, transparency and due process throughout the U.S. Department of Justice. In furtherance of these goals, we urge you to review and address the needs of the Immigration Court system to ensure that proceedings are fair, the most vulnerable individuals are protected, and that the independence and authority of immigration judges is fully restored.

We respectfully request your consideration of the following priorities outlined below. Included in these priorities are the most immediate and necessary changes to Immigration Court protocols within the Executive Office for Immigration Review (EOIR), which include returning discretion to immigration judges and restoring their ability to manage their own caseload and docket. Further, recognizing that legal representation dramatically increases the fairness of legal proceedings and improves court appearance rates and efficiency, we urge you to mandate the broad expansion of government-funded legal representation programs with the goal of guaranteeing counsel to those facing removal who are particularly vulnerable, such as children, or those who cannot afford an attorney. Finally, we highlight the need for long-term structural changes to meet future demands. Such changes include increased use of technology to enhance efficiency and cost-savings, and preparation for an eventual shift to an Article I court system to ensure judicial independence and protection from political interference.

Immigration Court Leadership and Personnel

- DOJ should consider carefully reviewing EOIR leadership and if appropriate, replace the previous administration's politically motivated leadership and conduct an assessment of all personnel decisions made during the Trump administration to correct any decisions that were not consistent with the law or acceptable norms.

- The new EOIR director should provide continuing legal education on the standards of judicial conduct including a yearly training conference with continuing legal education opportunities, to minimize improper biases and ensure compliance with the law.
- DOJ should consider re-evaluating assignments of Board of Immigration Appeals (BIA) members and appellate Immigration Judges. Several BIA members and appellate immigration judges were selected during the Trump administration as part of a court-packing effort that politicized hiring and compromised the integrity and quality of appellate review. DOJ should review the selection process used for these appellate members and re-evaluate their positions and assignments.

Fair and Independent Courts

- DOJ should consider immediately halting and reversing efforts to decertify the judges' union, the National Association of Immigration Judges (NAIJ).
- DOJ should consider rescinding opinions certified by previous Attorneys General, regulations, and other policies that are contrary to law, the principles of due process, and judicial independence. DOJ should restore the authority stripped of immigration judges, including to order administrative closure, grant continuances, and make findings of good moral character, and should specifically rescind *Matter of Castro-Tum*, *Matter of L-A-B-R-*, and *Matter of S-O-G- & F-D-B-*.
- DOJ and EOIR should consider reversing policies that cruelly and inappropriately blocked access to asylum and other forms of relief and that contribute to the unjust and unnecessary detention and criminalization of immigrants. Several Attorney General decisions and regulations targeted “particular social group” claims, including claims based on domestic violence, gang violence, familial ties, gender, sexual orientation, and gender identification. Among other problematic policies, the Attorney General and EOIR should reverse and/or rewrite *Matter of A-B-*, *Matter of L-E-A-*, *Matter of A-C-A-A-*, and the final rule titled Procedures for Asylum and Withholding of Removal: Credible Fear and Reasonable Fear Review. Strong reliance in interpretation should be placed on the guidance issued by the United Nations High Commissioner for Refugees, pursuant to the recognized legislative intent of the Refugee Act of 1980. *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).
- DOJ should consider eliminating all counterproductive policies that put pressure on trial and appellate judges to expedite cases at the expense of due process, such as case completion quotas that the Trump administration imposed on immigration judges as part of performance evaluations. This also includes undoing the “streamlining” policies at EOIR that speed cases at the expense of due process, including the “no dark courtrooms” policy, the enhanced case flow processing memo, and the final rule titled *Appellate*

Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 Fed. Reg. 81,588 (Dec. 16, 2020).

- DOJ should consider developing and implementing a transparent process for individuals to file complaints against judges, without fear of retaliation. The current complaint process suffers from a lack of transparency, which makes it difficult for practitioners to file complaints and judges to respond. A new complaint process should be based on models from the American Bar Association, Institute for the Advancement of the American Legal System, and National Center for State Courts.
- DOJ should consider reversing the EOIR Fee Rule, which drastically increases the fees for accessing these important forms of relief and procedural protections. Among other changes, the rule called for 300% increases for applications for cancellation of removal and suspension of deportation, and nearly 900% increases for notices of appeals, motions to reopen, and motions to reconsider to the BIA. Individuals in proceedings before EOIR have the right to pursue relief from removal, administrative appeals to the BIA, and other procedural protections.
- DOJ should consider enacting policies that ensure all court operations uphold the highest standards of due process. Immigration Adjudication Centers, the “blackbox” facilities where judges appear by video with little transparency or public oversight, should be restructured to conform to current immigration court models.
- DOJ should reassess the geographical location of individual immigration courts. The selection of court locations should include as the primary goal the location's distance from the community it serves. Large distances and remote court locations make it difficult for noncitizens, family, attorneys, and witnesses to appear in court.
- DOJ should consider filling all vacant Court Administrator positions and stop the practice of having various courts share an Acting Court Administrator.
- DOJ should consider committing to supporting long-term structural reform of immigration courts to ensure independence, integrity and due process. Such reforms should include support for the creation of an independent Article I immigration court system separate from DOJ.

DOJ Immigration Court Docket Prioritization

- DOJ should consider conducting a database-driven review of the pending 1.3 million immigration court cases and systematically remove from the docket nonpriority cases, unless deferral would prejudice the parties, including: 1) cases pending for over five years where no aggravated felony is alleged; 2) cases eligible for relief that can be adjudicated by USCIS; 3) cases previously closed under the Obama administration; and

4) cases in which the grounds for removability are based solely on drug-use offenses. Removing nonpriority cases from the docket will improve court efficiency and fairness.

- The administration should also consider rescinding all policies which result in wholesale “docket shuffling” which have hindered effective case adjudication.
- Until the “re-docketing” of cases is completed, DOJ should consider suspending immigration court removal proceedings except in certain categories of cases, such as cases in which the respondent could be prejudiced or when requested by the respondent. The Case Flow Management program should be discontinued immediately.

Access to Counsel and Legal Orientation Programs

- DOJ and DHS should consider a commitment to guarantee legal counsel for every person facing removal if they cannot afford it and take immediate steps to expand legal representation programs for vulnerable populations. These departments should facilitate meaningful, zealous legal representation by all attorneys and accredited representatives, including remote representation when required to ensure safety during the COVID-19 pandemic.
- Until universal representation is implemented, EOIR should consider establishing a policy to grant continuances to individuals who are unrepresented or other policy to ensure no one faces removal without legal representation without a knowing and explicit waiver. All policies implemented by the Trump administration that curtail or impede access to counsel should be rescinded.
- The EOIR Director should consider rapidly expanding various legal access programs including the Legal Orientation Program, the Legal Orientation Program for Custodians of Unaccompanied Minors, and the Immigration Court Help Desk, which provide critical information about the immigration court process, promote court efficiency, and protect due process.
- Even when immigrants have legal counsel, that counsel is only effective if individuals can adequately contact, visit, and work with their representative. This is a particular challenge for individuals in immigration detention, who face tremendous barriers communicating with their lawyers in order to prepare their cases. The DOJ should consider implementing new policies to ensure proper access to counsel for contact, visits, and communication. The ICE Director should consult with DOJ regarding the authorization of detention facilities to ensure accessibility to legal counsel.


COVID Protection, Public Health, and Safety


- DOJ should consider policies that ensure courts abide by social distancing guidelines and safety measures for all judges, attorneys, and defendants, including specific safety precautions and measures to protect vulnerable populations and individuals with pre-existing conditions.
- DOJ should consider reconvening joint health and safety committee meetings between EOIR and NAIJ to ensure the monitoring of health, safety and security in the immigration courts and for recommendations of improvements.
- DOJ should consider policies that ensure that the courts do not issue *in absentia* orders of removal for such individuals unable to appear for their court date during the COVID-19 pandemic.
- When closing a court due to a spike in COVID-19 cases, DOJ should consider a notification process to inform any individual who may have been at the court and in contact with someone who tested positive, so that they can take the appropriate precautionary measures.
- DOJ should consider temporary accommodations that make it easier for remote video hearings to take place during the COVID-19 pandemic to ensure the health and safety of all court participants.
- DOJ should consider reviewing current procedures to guard Immigration Judges' privacy and protect their personally identifiable information and ensure that such information is not accessible online.


We appreciate your continued leadership and partnership in these matters and look forward to working with you to ensure successful and timely reform of the immigration court system.

Sincerely,


Kirsten Gillibrand
United States Senator

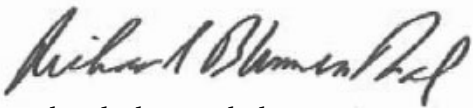

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