

June 10, 2021

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

Dear Attorney General Garland:

Congratulations on your confirmation as Attorney General. We look forward to working with you to restore fairness and transparency at the U.S. Department of Justice (DOJ). In light of the ongoing and irreparable harm that is being inflicted upon immigrant communities, we write to urge you to implement reforms to the Executive Office for Immigration Review (EOIR) and other DOJ immigration policies, that both undo the harms of the prior Administration and move toward a system that ensures the fair and impartial administration of justice.¹

Immigration Court Backlog. The immigration court system has long struggled under the weight of crippling case backlogs. Over the past four years, these backlogs increased exponentially, despite the great lengths to which the prior Administration went implementing policies to “speed up” processing by impeding due process and stripping immigration judges of independence in decision-making and docket management. Today, the average wait time for a hearing before an immigration judge exceeds four years and less than 50 percent of all cases are set for a merits hearing.² As the Department deliberates on actions and policies that “adhere to due process of law” and “safeguard the dignity and well-being of all families and communities,” we encourage you to undertake a leadership-driven review of the 1.3 million cases that comprise the current immigration court backlog, and identify cases that are appropriate for deferred adjudication, consistent with President Biden’s Executive Order 13993.³ Toward this end, we ask you to consider deferring the significant number of cases that involve individuals with pending applications for relief with U.S. Citizenship and Immigration Services (USCIS).⁴ Considerable systemic pressure could be alleviated by removing up to 700,000 cases from the court docket that should not be priorities for court adjudication, including those that await USCIS decisions on the underlying requests for relief.⁵

¹ AILA and Partners Send Letter to President Biden on DOJ Reform of Immigration Courts and Enforcement Priorities (Feb. 1, 2021) <https://www.aila.org/advo-media/aila-correspondence/2021/aila-and-partners-send-letter-to-president-biden>; Letter from Senators Gillibrand, Whitehouse, Warren, Markey, Kaine, Reed, and Blumenthal (Mar. 23, 2021),

<https://www.gillibrand.senate.gov/imo/media/doc/Let. ImmigrationCourtReform.AGGarland.3.23.21.pdf>.

² Greg Chen and Peter Markowitz, *Unclogging the Nation’s Immigration Court System*, THE HILL (Feb. 1, 2021), <https://thehill.com/opinion/immigration/536794-unclogging-the-nations-immigration-court-system?rl=1>; Letter from 82 Law Professors to AG Garland on Immigration Courts (Apr. 30, 2021), <https://www.aila.org/File/Related/21050334a.pdf>.

³ Executive Order 13993, *Revision of Civil Immigration Enforcement Policies and Priorities* (Jan. 20, 2021), 86 Fed. Reg. 7051 (Jan. 25, 2021).

⁴ Transactional Records Access Clearinghouse (TRAC), *The State of the Immigration Courts: Trump Leaves Biden 1.3 Million Case Backlog in Immigration Courts* (Jan. 19, 2021), <https://trac.syr.edu/immigration/reports/637/#f1>.

⁵ *Id.*

Regulatory and Policy Review. As you know, the Trump Administration took aggressive steps to rewrite asylum law and restrict discretionary decision-making and judicial independence. These policy changes—implemented by your predecessors through the certification of BIA decisions⁶ and the promulgation of regulations—must be immediately reviewed and reversed to restore the integrity of the asylum process and the immigration courts, writ large. We further encourage you to rescind policies prohibiting “dark courtrooms,”⁷ and imposing case quotas on judges,⁸ and to review and implement processing changes to ensure that cases are fully prepared, briefed, and considered before a decision is made.⁹ The National Association of Immigration Judges took the unusual step of speaking out in opposition to the case quotas and other policy changes that infringed upon their independence and ability to render consistent and fully informed decisions.¹⁰ Ultimately, long-term structural reform is needed, and we look forward to the eventual enactment of legislation to create an independent Article I immigration court.

EOIR Personnel. We are also concerned with the prior Administration’s overt efforts to politicize the immigration courts by prioritizing individuals with political connections and enforcement-heavy backgrounds—rather than knowledge of immigration law or judicial experience—for placement in EOIR leadership positions.¹¹ Over the past four years, the denial rate of asylum cases in immigration court has continued to climb, reaching a historic 72 percent in fiscal year (FY) 2020, as compared to 54.6 percent in FY 2016.¹² In addition to the aggressive implementation of policy changes to restrict asylum eligibility and judicial discretion, a contributing factor to these increasing denial rates is undoubtedly the selection and appointment of these officials, as well as the elevation of immigration judges with asylum grant rates far below the norm to the BIA.¹³ We urge you to review these and other appointments, as well as EOIR hiring policies in general, to ensure that all personnel decisions are made in a manner that is consistent with the law.

⁶ See e.g., *Obscure but Powerful: Shaping U.S. Immigration Policy through Attorney General Referral and Review*, Migration Policy Institute (Jan. 2021), <https://www.migrationpolicy.org/research/obscure-powerful-immigration-attorney-general-referral-review>.

⁷ James McHenry, Director, Exec. Office for Imm. Review, *No Dark Courtrooms* (PM 19-11) (Mar. 29, 2019), <https://www.aila.org/infonet/eoir-issues-memo-on-no-dark-courtrooms>.

⁸ National Association of Immigration Judges, *Threat to Due Process and Judicial Independence Caused by Performance Quotas on Immigration Judges* (Oct. 1, 2017), https://www.naij-usa.org/images/uploads/publications/NAIJ_Quotas_in_IJ_Performance_Evaluation_10-1-17.pdf.

⁹ See generally, American Immigration Lawyers Association Policy Brief: *Why President Biden Needs to Make Immediate Changes to Rehabilitate the Immigration Courts* (Feb. 12, 2021) (hereinafter “Immigration Court Policy Brief”), at 3-4, <https://www.aila.org/advo-media/aila-policy-briefs/policy-brief-why-president-biden-needs-to-make>.

¹⁰ Maria Sacchetti, *Immigration judges say proposed quotas from Justice Dept. threaten independence*, WASH. POST (Oct. 12, 2017), https://www.washingtonpost.com/local/immigration/immigration-judges-say-proposed-quotas-from-justice-dept-threaten-independence/2017/10/12/3ed86992-ae1-11e7-be94-fabb0f1e9ffb_story.html.

¹¹ See Immigration Court Policy Brief, *supra* note 9.

¹² Greg Chen, “The Urgent Need to Restore Integrity to America’s Politicized Immigration Courts,” *Just Security*, November 12, 2020, <https://www.justsecurity.org/73337/the-urgent-need-to-restore-independence-to-americas-politicized-immigration-courts/>.

¹³ *Id.* (Data from 2019 reveal that six immigration judges whom Attorney General William Barr elevated to serve as Board members had asylum grant rates that averaged 2.4 percent, far below the norm of 29 percent. The Chief Immigration Judge appointed under President Trump was previously the chief prosecutor for Immigration and Customs Enforcement and lacked any bench experience; the Chief Appellate Judge was a Trump advisor on immigration policy and a former prosecutor.)

Legal Representation. Removal proceedings have been referred to as “death penalty case[s] in a traffic court setting,” and yet there is no right to appointed counsel in immigration court.¹⁴ Although representation is essential to due process and dramatically increases court appearance rates and efficiency, at least 40 percent of non-detained individuals face these proceedings without counsel.¹⁵ Currently the federal government funds representation for only a limited number of unaccompanied children and people with mental disorders or disabilities.¹⁶ We encourage you to expand legal representation and orientation programs for these vulnerable populations and others, and to request appropriate funding from Congress to accomplish this objective.¹⁷

Criminal Prosecutions. Vital to ensuring a fair and humane immigration enforcement system is a robust policy of prosecutorial discretion with respect to immigration-related federal offenses. We applaud the Department’s swift action rescinding the Trump Administration’s “zero tolerance” policy and ask that you also review and rescind the 2017 policy prioritizing migration-related prosecutions as well as policies that target humanitarian workers, labor organizers, and family members under the Immigration and Nationality Act’s harboring and smuggling provisions.¹⁸ The aggressive prosecution of people for unauthorized entry and reentry and related offenses has effectively criminalized thousands of individuals, preventing many from pursuing viable claims to asylum, contrary to U.S. treaty obligations and principles of due process.¹⁹

COVID-19. Finally, as the nation continues to manage the COVID-19 pandemic, we ask that you ensure that the immigration courts and all institutions under its authority abide by Centers for Disease Control and Prevention guidelines and take special precautions to protect vulnerable populations.

¹⁴ Dana Leigh Marks, *Immigration Judge: Death Penalty Cases in a Traffic Court Setting*, CNN (June 26, 2014), <https://www.cnn.com/2014/06/26/opinion/immigration-judge-broken-system/index.html>.

¹⁵ TRAC, *Who Is Represented In Immigration Court?* (Oct. 16, 2017), <https://trac.syr.edu/immigration/reports/485/>.

¹⁶ Greg Chen and Jorge Loweree, *Policy Brief: The Biden Administration and Congress Must Guarantee Legal Representation for People Facing Removal*, (Jan. 15, 2021), <https://www.aila.org/advo-media/aila-policy-briefs/legal-representation>.

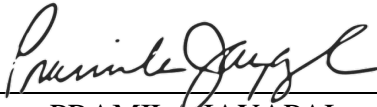
¹⁷ See Rafael Bernal, *House Democrats call for paid legal representation in immigration court*, THE HILL (May 3, 2021), <https://thehill.com/latino/551444-house-democrats-call-for-paid-legal-representation-in-immigration-court>.

¹⁸ Jefferson Sessions, Attorney General, *Renewed Commitment to Criminal Immigration Enforcement*, (Apr. 11, 2017), <https://www.justice.gov/opa/press-release/file/956841/download>.

¹⁹ Justice Strategies and Grassroots Leadership, *“Zero Tolerance” policy greatly accelerates immigrant criminalization through end of 2018*, (Mar. 18, 2019), <https://justicestrategies.org/sites/default/files/publications/Zero%20Tolerance%E2%80%9D%20accelerates%20immigrant%20criminalization%20through%202018.pdf>; Human Rights First, *Punishing Refugees and Migrants: The Trump Administration’s Misuse of Criminal Prosecutions*, (Jan. 18, 2018), <https://www.humanrightsfirst.org/resource/punishing-refugees-and-migrants-trump-administrations-misuse-criminal-prosecutions>; National Immigrant Justice Center, *A Legacy of Injustice: The U.S. Criminalization of Migration*, July 2020, https://immigrantjustice.org/sites/default/files/uploaded-files/no-content-type/2020-07/NIJC-Legacy-of-Injustice-report_2020-07-22_FINAL.pdf.

Thank you for your attention to these important matters. We stand ready to work with you to restore the foundational principles of justice, fairness, and transparency to the immigration system, and would appreciate a briefing on these issues at your earliest convenience.

Sincerely,


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Member of Congress

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JERRY NADLER
Member of Congress

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ALMA S. ADAMS, PHD
Member of Congress

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KAREN BASS
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