

April 30, 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

RE: U.S. Department of Justice Authority to Remove Non-Priority Cases from the Active Docket of the Nation's Immigration Courts

To Attorney General Garland:

As immigration law teachers and scholars, we write to express our opinion on the scope of executive branch legal authority for the Executive Office for Immigration Review (EOIR) to utilize well-established administrative tools to address the historic backlog of cases pending in immigration courts. Each case in the backlog involves an immigrant, many waiting for years to have a “day in court” to defend against charges of removability or to have an application for relief adjudicated. The Attorney General, through EOIR, has the authority to address the immigration court backlog by rapidly and systemically removing nonpriority cases from the active docket.<sup>1</sup>

For years, the immigration court docket remained relatively steady, hovering between 100,000 and 200,000 cases.<sup>2</sup> During the Obama administration, however, the system began to accumulate a substantial backlog, eventually rising to over 500,000 cases.<sup>3</sup> These numbers continued to spike during the Trump administration. Currently, the immigration court backlog sits at 1.3 million cases,<sup>4</sup> which Lisa Monaco, President Biden's nominee for Deputy Attorney General, has acknowledged is a “direct impediment to a fair and effective system.”<sup>5</sup> Addressing the immigration court backlog is critical to restoring the integrity of the immigration court system.

As a consequence of the immigration court backlog, the average wait time for respondents' next immigration court hearing, measured from the time a case entered the immigration court docket, is now over 1,600 days.<sup>6</sup> Less than 50% of all cases now pending in the immigration backlog are even set for an individual merits hearing, which means many cases will require subsequent hearings, resulting in additional delay.<sup>7</sup> This backlog impedes the proper functioning of the immigration court system and its ability to dispense justice. It also undermines core administrative law values that include but are not limited to consistency, efficiency, public acceptability, and transparency.

The immigration backlog also impacts immigration judges, who face crushing caseloads, now approaching 3,000 cases per judge.<sup>8</sup> Such caseloads undermine the ability of immigration judges to reliably and competently complete the complex legal analysis and careful credibility and discretionary determinations that removal cases demand.<sup>9</sup> The backlog also harms immigrants, who face years of legal limbo while their cases are pending. This legal limbo can be destabilizing to families and communities and delay immigrants' access to the legal status many are ultimately granted.

The Attorney General has the legal authority to create a more functional and fair immigration court system, using existing tools of discretion and deferred adjudication. Specifically, the EOIR has the authority under regulations to identify and defer the adjudication of nonpriority cases. The EOIR Director has clear authority to defer adjudication of cases pursuant to 8 C.F.R. § 1003.0(b)(1)(ii). Specifically, the Director has the “power, in his discretion, to set priorities or time frames for the resolution of cases [and] to direct that the adjudication of certain cases be deferred...”<sup>10</sup> Further, the Director has the authority to “issue operational instructions on policy” pursuant to 8 C.F.R. § 1003.0(b)(1). The Attorney General also has broad discretionary authority pursuant to 8 U.S.C. § 1103(g) to “issue such instructions, . . . delegate such authority, and perform such other acts as the Attorney General determines to be necessary” for the administration of the nation’s immigration courts.<sup>11</sup>

The use of deferral authority is not merely theoretical. Systemwide deferrals have recently been implemented by EOIR leadership through policy memorandum.<sup>12</sup> Deferral acts as a pause in adjudication, akin to the historic use of the status docket, as opposed to a final resolution.<sup>13</sup> Indeed, the deferral mechanism can be used as an alternative to the status docket, grounded more firmly in the regulatory scheme, or in tandem, such that deferred cases are placed on the status docket to free up capacity for priority cases. At a future point in time, deferred cases could be recalendared when a determination is made as to the appropriate path to final resolution.<sup>14</sup> Based on current agency authority, termination, generally requires a legal deficiency;<sup>15</sup> dismissal, generally requires a motion from DHS;<sup>16</sup> and administrative closure, is severely constrained.<sup>17</sup> However, deferral power remains available as a mechanism that EOIR leadership can independently and immediately deploy at its discretion. Removing nonpriority cases from the immigration courts’ active docket will substantially improve the functioning of the courts and shrink the proverbial haystack, thereby allowing immigration judges to fairly and expeditiously adjudicate priority cases.

Less than one percent of the cases in the EOIR backlog satisfy the Biden administration’s current enforcement priorities.<sup>18</sup> Accordingly, consistent with the administration’s own priorities, EOIR could exercise its discretion to defer nonpriority immigration cases. As a first step, EOIR could establish categories of nonpriority cases that can be identified and deferred at a headquarters level without the need for a case-by-case file review.<sup>19</sup> This is the path recently recommended by a group of United States Senators and over 150 leading immigration, civil rights, and human rights organizations.<sup>20</sup> These Senators and organizations have proposed specific categories of such nonpriority cases that could be systematically identified through existing EOIR data, including: cases that have been pending for more than five years and cases that involve respondents who have potential affirmative pathways to status, such as applications for adjustment of status or new asylum claims, that could be adjudicated by the USCIS.<sup>21</sup> These are non-exhaustive examples of the types of nonpriority cases that could be systematically identified and deferred. EOIR should explore these and other similarly identifiable nonpriority categories.

This letter outlines the legal foundation and method by which the Attorney General can restore the fairness and integrity of the nation’s immigration courts. The legal authority, under the existing statutory and regulatory framework, to remove nonpriority cases from the active docket of the immigration courts is clear. Thank you for your attention. For any follow up inquiries, please contact Professor Peter L. Markowitz at [peter.marowitz@yu.edu](mailto:peter.marowitz@yu.edu) or at 646-592-6537.

<sup>1</sup> While this letter focuses on EOIR’s authority to manage the court docket, we do not mean to suggest that the Department of Homeland Security (DHS) does not play an important corresponding role in establishing enforcement policies and priorities for the initiation and resolution of proceedings. In fact, DHS has exclusive authority to decide whether to institute proceedings, *see Matter of W-Y-U-*, 27 I. & N. Dec. 17, 19 (BIA 2017) and, as noted *infra* note 21, DHS’s discretion to dismiss removal proceedings could also play a critical role in permanently removing nonpriority cases from the immigration court docket.

<sup>2</sup> TRAC Immigration, *Backlog of Pending Cases in Immigration Courts* (data through Feb. 2021), [https://trac.syr.edu/phptools/immigration/court\\_backlog/apprep\\_backlog.php](https://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog.php).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *The Nomination of the Honorable Lisa Oudens Monaco to be Deputy Attorney General Before the S. Comm. on the Judiciary*, 117th Cong. (2021) (statement of Hon. Lisa Oudens Monaco).

<sup>6</sup> TRAC Immigration, *The State of the Immigration Courts: Trump Leaves Biden 1.3 Million Case Backlog in Immigration Courts* (data through Feb. 2021) [hereinafter “TRAC, *The State of the Immigration Courts*”], <https://trac.syr.edu/immigration/reports/637/#f1.9>.

<sup>7</sup> *Id.*

<sup>8</sup> According to EOIR, there are approximately 466 immigration judges nationwide sharing the 1.3 million cases. EOIR, *Adjudication Statistics, Immigration Judge (IJ) Hiring* (Jan. 2020), <https://www.justice.gov/eoir/page/file/1104846/download>. However, an unknown number of these judges serve in an administrative capacity and thus do not carry a docket of their own. TRAC Immigration, *Crushing Immigration Judge Caseloads and Lengthening Hearing Wait Times* (data through Oct. 25, 2019), <https://trac.syr.edu/immigration/reports/579/>. The crushing caseloads are driving many experienced immigration judges to leave EOIR, further exacerbating the backlog. Amulya Shankar, *Why US Immigration Judges Are Leaving the Bench In Record Numbers*, THE WORLD (July 20, 2020), <https://www.pri.org/stories/2020-07-20/why-us-immigration-judges-are-leaving-bench-record-numbers> (interview with former Immigration Judge Ashley Tabaddor, then president of the National Association of Immigration Judges).

<sup>9</sup> *See Quinteros v. Att’y Gen. of United States*, 945 F.3d 772, 794 (3d Cir. 2019) (McKee, J. concurring) (acknowledging the “incredible caseload foisted upon [immigration courts]” and how immigration judges being “horrendously overworked” contributes to the denial of fair and impartial hearings); *Chavarria-Reyes v. Lynch*, 845 F.3d 275, 280 (7th Cir. 2016) (J., Posner dissenting) (noting how “crushing workloads” cause immigration judges to routinely “botch” cases); United States Government Accountability Office, *Immigration Courts: Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges* 30-1 (June 2017), <https://www.gao.gov/assets/gao-17-438.pdf> (reporting that increased caseloads have prevented immigration judges from “conduct[ing] administrative tasks, such as case-related legal research or staying updated on changes to immigration law”); *see also* Julia Preston, *Deluged Immigration Courts, Where Cases Stall for Years, Begin to Buckle*, N.Y. TIMES (Dec. 1, 2016), [www.nytimes.com/2016/12/01/us/deluged-immigration-courts-where-cases-stall-for-years-begin-to-buckle.html?\\_r=0](http://www.nytimes.com/2016/12/01/us/deluged-immigration-courts-where-cases-stall-for-years-begin-to-buckle.html?_r=0).

<sup>10</sup> 8 C.F.R. § 1003.0(b)(1)(ii). This management authority can also be exercised by the Chairman of the Board of Immigration Appeals (BIA) and the Chief Immigration Judge. 8 C.F.R. §§ 1003.1(a)(2)(i)(C), 1003.9(b)(3) (identifying the similar subordinate authority of the Chairman of the BIA and the Chief Immigration Judge).

<sup>11</sup> *See also*, 8 U.S.C. § 1103(a)(1) (reserving to the Attorney General certain powers related to the “administration and enforcement of . . . laws relating to the immigration and naturalization of aliens”); 6 U.S.C. § 521 (“[T]he Executive Office for Immigration Review . . . shall be subject to the direction and regulation of the Attorney General”).

<sup>12</sup> *See e.g.*, EOIR, Policy Memorandum: *Immigration Court Practices During The Declared National Emergency Concerning the COVID-19 Outbreak*, PM 20-10, fn.2 (Mar. 18, 2020), available at <https://www.justice.gov/eoir/file/1259226/download> (deferring all non-detained cases at the outset of the pandemic for a limited period of time); EOIR, *Notice: Executive Office for Immigration Review Operation During Lapse in Government Funding* (Oct. 1, 2013), available at <https://www.justice.gov/eoir/legacy/2013/10/24/Shutdown09302013.pdf> (deferring all non-detained cases during government shutdown).

<sup>13</sup> *See* Memorandum from EOIR Director James R. McHenry III, *EOIR Policy for Use of Status Dockets in Immigration Court Proceedings* (Aug. 16, 2019), <https://www.justice.gov/eoir/page/file/1196336/download> (explaining how “[v]arious types of status dockets under different labels have existed at individual immigration

courts for many years”). While the McHenry Memorandum established historically narrow criteria for use of the status docket, the parameters for such use have been subject to change as a matter of administration policy. *Id.*

<sup>14</sup> Such eventual pathways may include later individualized determinations to administratively close or dismiss cases or to return them to the active docket, once capacity exists, for full adjudication. Notably, while individuals await final resolution, a deferral order, like administrative closure, would neither confer nor disturb respondents’ entitlement to work authorization.

<sup>15</sup> *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462, 465-67 (A.G. 2018). *But see, e.g.*, 8 C.F.R. § 214.14(c)(1)(i) (providing for termination pursuant to joint motion for adjudication of a U visa); 8 C.F.R. § 1245.13(l) (providing for termination upon the of adjustment of status to certain Cubans and Nicaraguans); 8 C.F.R. § 1239.2(f) (providing for termination to pursue naturalization in certain circumstances).

<sup>16</sup> 8 C.F.R. § 239.2(c); 8 C.F.R. § 1239.2(c); *see also Matter of S-O-G- & F-D-B-*, 27 I&N Dec. at 466.

<sup>17</sup> 8 C.F.R. § 1003.10(b); *see also Matter of Castro-Tum*, 27 I. & N. Dec. 271 (A.G. 2018). Ultimately, EOIR should individually evaluate all pending cases to determine whether they meet the administration’s priorities. To achieve this, the Attorney General should also ensure that immigration judges have the ability to prioritize their cases and “exercise their independent judgment and discretion.” 8 C.F.R. § 1003.10(b). Indeed, you were clear in your confirmation hearing that the solution to the immigration court backlog must include “some ability to give to the judges to prioritize their cases.” *The Nomination of the Honorable Merrick Brian Garland to be Attorney General of the United States: Day 1 Before the S. Comm. on the Judiciary*, 117th Cong. (2021) (statement of Hon. Merrick B. Garland). The primary tool used by immigration judges to remove cases from the active docket has historically been “administrative closure.” However, this authority was recently and imprudently curtailed, such that § 1003.10(b) now divests judges of administrative closure authority. *See also Matter of Castro-Tum, supra*. You can reaffirm and restore the authority for all immigration judges to administratively close nonpriority cases on a case-by-case basis. We express no opinion herein on the merits of current agency precedent regarding termination or dismissal but note that such precedent is subject to your review and could potentially be expanded in the future.

<sup>18</sup> There are currently three enforcement priorities: (1) people suspected of engaging in terrorism or who pose a national security threat; (2) people apprehended at the border after November 1, 2020; and (3) people deemed to be a public safety threat, which includes primarily certain individuals with aggravated felony convictions.

Memorandum from ICE Acting Director Tae Johnson, *Interim Guidance: Civil Enforcement and Removal Guidance* (Feb. 18, 2021), [https://www.ice.gov/doclib/news/releases/2021/021821\\_civil-immigration-enforcement\\_interim-guidance.pdf](https://www.ice.gov/doclib/news/releases/2021/021821_civil-immigration-enforcement_interim-guidance.pdf). Out of the 1.3 million people with cases pending in immigration court right now: less than 100 have any type of terrorism or national security charge, virtually all had cases initiated before November 1, 2020, and less than 0.01% involve aggravated felony charges. TRAC, *The State of the Immigration Courts, supra* note 6. There is no publicly available data on the number of cases that would fall within the new narrowed gang-based public safety priority group, but it is doubtful this category would substantially increase the percentage of priority cases since less than 0.01% of all cases involve any type of criminal removal ground.

<sup>19</sup> While it is critical that such cases can be systematically identified this does not mean that consideration of individualized circumstances is foreclosed. Notices of intent to defer could permit respondents to lodge objections if they would be prejudiced by deferral and DHS attorneys to object if it believes a respondent’s case is not appropriate for deferral. Indeed, deferral could act to facilitate individualized prosecutorial discretion determinations, if DHS coordinates to consider whether deferred cases are appropriate for dismissal, and if affirmative applications in deferred cases are ultimately processed by U.S. Citizenship and Immigration Services (USCIS).

<sup>20</sup> Letter from Eight U.S. Senators to Attorney General Garland (Mar. 23, 2021),

<https://www.aila.org/File/DownloadEmbeddedFile/88403>; Letter from 165 Organizations to President Biden (Feb. 1, 2021), <https://www.aila.org/advo-media/aila-correspondence/2021/aila-and-partners-send-letter-to-president-biden>.

<sup>21</sup> For the affirmative pathway to ultimately be realized, in most instances, the removal proceedings will eventually need to be dismissed or terminated. In this regard, DOJ should coordinate its docket review effort with DHS. DHS has the authority to move to dismiss such cases, and immigration judges have the authority to dismiss such cases, because the notice to appear was “imprudently issued” or continuation is “no longer in the best interest of the government.” 8 C.F.R. § 239.2(c) (permitting DHS to move to dismiss any case where the notice to appear was “imprudently issued” or where “continuation is no longer in the best interest of the government” (incorporating grounds enumerated in 8 C.F.R. § 239.2(a))); 8 C.F.R. § 1239.2 (same); *see also Matter of S-O-G- & F-D-B-*, 27 I. & N. Dec. at 464 (reaffirming DHS authority to move to dismiss on such bases). Indeed, DHS has previously made clear that when relief is “appropriate for adjudication by [US]CIS” DHS attorneys “should consider moving to dismiss proceedings.” Memorandum from William J. Howard, U.S. Immigration and Customs Enforcement, Principle Legal Advisor, *Prosecutorial Discretion*, (Oct. 24, 2005), AILA Doc. No. 06050511.

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