

United States Senate
WASHINGTON, DC 20510

June 23, 2020

James McHenry
Director
Executive Office for Immigration Review
U.S. Department of Justice
5107 Leesburg Pike
Falls Church, VA 22041

Dear Director McHenry:

We write to inquire about the Executive Office for Immigration Review's (EOIR) decision to resume hearings, its process for making that decision, and its communication of that decision to stakeholders.

On May 29, 2020, EOIR announced that hearings for non-detained cases in the immigration court in Honolulu would resume on June 15, 2020.¹ In a series of posts on June 5, 8, and 11, 2020, EOIR announced that hearings for non-detained cases would resume on June 29, 2020 in the Hartford, New Orleans, Boston, Dallas, Las Vegas, Buffalo, and Memphis immigration courts.² EOIR also announced that the Cleveland, Philadelphia, and San Diego immigration courts will resume adjudication of non-detained cases on July 6, 2020.³ These are serious decisions that could affect the health of all people in the courts, as well as the fairness of the proceedings in those cases. Therefore, it is important that those decisions be based on rigorous evidence and public health and due process considerations, and that communication about those decisions be clear and transparent with the people who have stakes in those cases.

It was not until June 11, 2020—well after EOIR announced several reopenings via Twitter—that you issued a memorandum updating the office's practices related to the coronavirus disease 2019 (COVID-19) pandemic.⁴ This memorandum, however, fails to clarify how or why EOIR decided to resume hearings in some locations, how EOIR selected those locations, who is making those decisions, how the decision-makers are weighing public health and due process considerations, and how EOIR can avoid repeating mistakes that threatened people's health in the immigration courts earlier in the pandemic. It also does not acknowledge the difficulties that litigants still face in effectively presenting their cases, as health concerns may continue to deter witnesses from appearing in court and office closures may make it difficult to

¹ Tweet by DOJ EOIR, May 29, 2020, https://twitter.com/DOJ_EOIR/status/1266452835874607104.

² Tweet by DOJ EOIR, June 5, 2020, https://twitter.com/DOJ_EOIR/status/1269029080466444293; tweet by DOJ EOIR, June 8, 2020, https://twitter.com/DOJ_EOIR/status/1270101002780377088; tweet by DOJ EOIR, June 11, 2020, https://twitter.com/DOJ_EOIR/status/1271191943188529153.

³ Tweet by DOJ EOIR, June 15, 2020, https://twitter.com/DOJ_EOIR/status/1272653420747345920; tweet by DOJ EOIR, June 19, 2020, https://twitter.com/DOJ_EOIR/status/1274126888626262016.

⁴ Memorandum from Director James R. McHenry III, "EOIR Practices Related to the COVID-19 Outbreak," June 11, 2020, <https://www.justice.gov/eoir/page/file/1284706/download>.

obtain medical records, tax records, and other supporting documents. The American Immigration Lawyers Association and a coalition of legal organizations have called EOIR’s decision to resume the non-detained immigration court docket as “premature” and have asked that the “overwhelming majority of non-detained hearings ... be postponed for the duration of the national public health emergency.”⁵

The United States is still in the midst of the pandemic. Since May 29, 2020, the date on which EOIR announced the resumption of hearings in immigration courts, there have been more than 500,000 new COVID-19 cases in the United States.⁶ Your memorandum acknowledges the risks of holding in-person proceedings—requiring, for example, face coverings and the observation of “any applicable social distancing guidelines to the maximum extent practicable.”⁷ Despite these risks, you are moving ahead with the reopenings, and it is far from clear that the immigration courts and the parties who will be using them are prepared for those risks. As you note in your memorandum, “there is no one-size-fits-all plan for resuming operations applicable to every location, and specific measures to mitigate risks posed by COVID-19 may be tailored to the particular settings of each location.”⁸ EOIR should expressly enumerate the specific measures to be implemented at each location prior to its reopening, and the process for formulating and implementing those measures. Additionally, EOIR should identify which EOIR staff in each location are authorized to make decisions about court openings and closings during the COVID-19 pandemic. Finally, EOIR should provide guidance to immigration judges to ensure that people are not denied the ability to effectively present their cases.⁹

You have previously received communications of senators’ concerns about EOIR’s administration of the immigration courts during the COVID-19 pandemic. On March 11, 2020, you received a letter about EOIR’s policies regarding sharing of public health information about COVID-19 in the immigration courts; that letter expressed concern “that COVID-19-related policy decisions appear to be driven primarily by publicity-related—rather than public health—considerations.”¹⁰ On March 21, 2020, you and Attorney General William Barr received a letter about your delay in closing the immigration courts, which was “irresponsible and putting people’s health at risk.”¹¹ Now, we fear that you are rushing to reopen the courts without a

⁵ American Immigration Lawyers Association, “AILA and Partners Send Letter to EOIR on Premature Decision to Resume the Non-Detained Docket,” press release, June 15, 2020, <https://www.aila.org/advo-media/aila-correspondence/2020/letter-eoir-resumption-nondetained-docket>.

⁶ Centers for Disease Control and Prevention, “Coronavirus Disease 2019 (COVID-19): Cases in the US,” June 22, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

⁷ Memorandum from Director James R. McHenry III, “EOIR Practices Related to the COVID-19 Outbreak,” June 11, 2020, p. 2, <https://www.justice.gov/eoir/page/file/1284706/download>.

⁸ *Id.*

⁹ EOIR’s guidance to immigration judges regarding the reopenings has reportedly been minimal. Courthouse News Service, “Legal Community Says Immigration Court Reopening Lacks Transparency, Safety Measures,” Bianca Bruno, June 18, 2020, <https://www.courthousenews.com/legal-community-says-immigration-court-reopening-lacks-transparency-safety-measures/>.

¹⁰ Letter from Senators Elizabeth Warren and Edward J. Markey to Director James McHenry, March 11, 2020, <https://www.warren.senate.gov/imo/media/doc/2020.03.11%20Letter%20to%20Executive%20Office%20for%20Immigration%20Review,%20re.%20COVID-19%20guidance%20in%20immigration%20courtrooms.pdf>.

¹¹ Letter from Senator Elizabeth Warren to Attorney General William P. Barr and Director James McHenry, March 21, 2020, <https://www.warren.senate.gov/imo/media/doc/DOJ%20and%20EOIR%20letter%20-%20immigration%20court%20closure%20-%202020.03.21.2020.pdf>.

rigorous process or sufficient communication with stakeholders. For instance, Texas and Nevada have not yet “flattened the curve”; the number of COVID-19 cases is on an upward trajectory in both states¹²—yet you have already decided to resume non-detained hearings in the Dallas and Las Vegas immigration courts.

We therefore request that you provide answers to the following questions by June 30, 2020:

1. Please describe the process you are using to decide whether and when to reopen the non-detained docket at each immigration court.
 - a. Which public health experts are you consulting in making these decisions?
 - b. What public health criteria are you using to make these decisions?
 - c. Has the Centers for Disease Control and Prevention (CDC) provided guidance or been consulted in these decisions? If so, please provide that guidance.
 - d. Are state health authorities providing input in these decisions? If not, how are you ensuring that there is no conflict between the decision for a specific immigration court and the guidelines implemented by that immigration court’s state?
 - e. What role, if any, are U.S. Attorneys’ offices playing in the decision to reopen immigration courts? If they are playing a role, why are they playing that role?
 - f. What role, if any, are immigration attorneys playing in the decision to reopen immigration courts?
 - g. How are you documenting the steps that each immigration court must take before reopening?
 - h. How are you confirming the completion and adequacy of the steps that each immigration court must take before reopening?
 - i. Please specifically describe the processes used in making the decisions to open the immigration courts in Honolulu, Boston, Buffalo, Dallas, Hartford, Las Vegas, Memphis, New Orleans, Cleveland, Philadelphia, and San Diego.
2. How will you ensure that sufficient social distancing will take place in the immigration courts?
 - a. Why did your memorandum not require that guaranteed sufficient social distancing be a criterion for reopening?
 - b. How can you ensure that resuming master calendar hearings—where dozens of people can be in a room at once for extended periods—will be safe?
3. How will you protect individuals who have preexisting conditions or are otherwise particularly vulnerable to the risks of COVID-19?
4. Your memorandum notes that some individuals might be turned away from the immigration court buildings, and that if they are *pro se*, they “should contact the immigration court as

¹² Johns Hopkins University & Medicine, “America Is Reopening. But have we flattened the curve?,” June 12, 2020, <https://coronavirus.jhu.edu/data/new-cases-50-states>.

soon as possible.”¹³ How?

5. In March, it was reported that employees in at least one New York court were told “to issue absentia deportation orders if immigrants weren’t showing up, even if the coronavirus was the suspected cause.”¹⁴ How will you ensure that the courts do not issue *in absentia* orders of removal for such individuals?
 - a. Please provide any guidance that EOIR has issued to staff since February 2020 about how to handle *in absentia* orders during the COVID-19 pandemic.
 - b. Will you impose a moratorium on *in absentia* removal orders during the pandemic? If not, why?
6. Will you eliminate the need for written motions for continuance requests if any parties to the proceedings are subject to stay-at-home orders or other restrictions caused by COVID-19? If not, why?
7. EOIR previously had to shut down immigration courts after they were visited by people who were sick or tested positive for COVID-19.¹⁵ On multiple occasions, EOIR closed an immigration court but failed to notify the public in a timely way of the closure and the reason for it.¹⁶
 - a. How will EOIR decide when and how to re-close courts?
 - b. Who is authorized to decide whether an immigration court is closed? Do local immigration judges have permission to close immigration courtrooms for COVID-19-related reasons?
 - c. What are the criteria for that decision?
 - d. How will EOIR notify the public of such decisions? Will EOIR commit to specifying in the notice if the court was closed for COVID-19-related reasons?

Sincerely,



Elizabeth Warren
United States Senator



Richard Blumenthal
United States Senator

¹³ Memorandum from Director James R. McHenry III, “EOIR Practices Related to the COVID-19 Outbreak,” June 11, 2020, p. 3 n. 6, <https://www.justice.gov/eoir/page/file/1284706/download>.

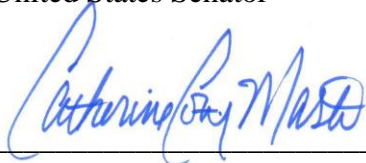
¹⁴ ProPublica, “Immigration Courts Are Telling Employees to Come to Work—Ignoring Health Risks and Local Shelter-in-Place Orders,” Dara Lind, March 20, 2020, <https://www.propublica.org/article/immigration-courts-are-telling-employees-to-come-to-work-ignoring-health-risks-and-local-shelter-in-place-orders>.

¹⁵ Roll Call, “Coronavirus cases prompt DOJ to close more immigration courts,” Camila DeChalus, March 24, 2020, <https://www.rollcall.com/2020/03/24/coronavirus-cases-prompt-doj-to-close-more-immigration-courts/>.

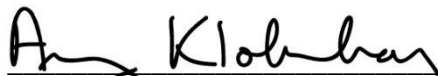
¹⁶ San Antonio Express-News, “Immigrants languish in detention as immigration courts close from coronavirus fears,” Silvia Foster-Frau, May 16, 2020; <https://www.expressnews.com/news/us-world/border-mexico/article/Immigrants-languish-in-detention-as-immigration-15274007.php>; The Appeal, “‘Is my life not as valuable as yours?’ Immigration Judges want all courts shut down as coronavirus cases soar,” Liz Robbins, March 23, 2020, <https://theappeal.org/is-my-life-not-as-valuable-as-yours-immigration-judges-want-all-courts-shut-down-as-coronavirus-cases-soar/>.



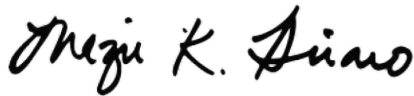
Cory A. Booker
United States Senator



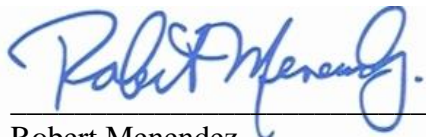
Catherine Cortez Masto
United States Senator



Amy Klobuchar
United States Senator



Mazie K. Hirono
United States Senator



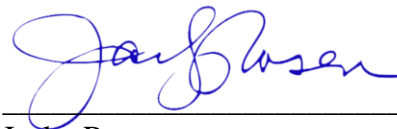
Robert Menendez
United States Senator



Edward J. Markey
United States Senator



Kamala D. Harris
United States Senator



Jacky Rosen
United States Senator



Sheldon Whitehouse
United States Senator



Kirsten Gillibrand
United States Senator