

November 29, 2021

Hon. Merrick B. Garland
Attorney General
Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530

Hon. Alejandro N. Mayorkas
Secretary, Department of Homeland Security
2707 Martin Luther King Jr. Avenue SE
Washington, DC 20528

Hon. Susan Rice
Director, Domestic Policy Council
1600 Pennsylvania Avenue NW
Washington, DC 20500

RE: DHS and DOJ Announcement of Dedicated Docket Process for Immigration Hearings

Dear Attorney General Garland, Secretary Mayorkas, and Director Rice:

As the leaders of the cities identified as the municipal sites of the upcoming dedicated immigration docket process, announced on May 28, 2021 by the Department of Justice (DOJ) and the Department of Homeland Security (DHS), we write to express our concerns about this new program for certain asylum seekers.

Our jurisdictions are committed to welcoming all our immigrant residents, including newcomers. We generally echo the administration's concerns about the current immigration system backlog and affirm our commitment to creating a humane immigration system that not only welcomes our immigrant constituents, but also allows them to integrate and contribute to our communities and local economies. But this can only be achieved if we allow our immigrant residents to have meaningful access to justice and due process.

We believe that this dedicated docket program will further erode the due process of families seeking protection in the U.S., will not resolve a backlog in immigration courts, and will prioritize the speed of immigration dockets over ensuring the right to a fair hearing. **As this program is already being rolled out in certain cities, we ask you to immediately halt its implementation and to consider our following concerns and recommendations.**

- 1. Accelerated dockets for recently arrived families risk further eroding due process for immigrants.**

Placing vulnerable populations on accelerated dockets without providing representation significantly undermines due process, as this action will create rather than remove barriers in our immigration legal

system, in direct opposition to the access to the DOJ goals that Attorney General Merrick Garland announced on May 18, 2021.¹

Without representation, families subjected to the accelerated docketing will be forced to argue their cases alone against trained prosecutors under a complex set of immigration laws second in complexity only to the U.S. Tax Code. Accelerating the docketing of recently arrived families means they will have even less chance of finding counsel compared to the average non-citizen in removal proceedings. If not represented, these families will have an extremely slim chance of effectively responding to the added legal complexities brought about by Trump-era asylum regulations that must still be unwound.

The difference a lawyer makes to the outcome of an immigration case is well documented. According to an American Immigration Council study, 63% of non-detained represented immigrants were granted relief in immigration court, while only 13% of unrepresented immigrants were.² Legal representation in immigration court can mean the difference between someone staying with their families, in their communities, or being deported and placed in harm's way. Most importantly, it can mean the realization of a right that everyone should be guaranteed: the right to due process.

Fast-tracking asylum cases, particularly if legal representation is not ensured, sets unrepresented asylum seekers up for failure. This is especially true for people with mental health conditions and disabilities. We note that many of these cases include multiple people, at least one of whom is a child. Often multiple family members have different claims for legal relief, making the fact-finding stage of representation particularly time intensive as each attorney will need to interview and understand the experience of multiple family members, including children who often need time to build rapport and trust with unknown adults before they are able to fully disclose sensitive details and trauma histories. Accelerating dockets places these families and their children at a distinct disadvantage, requiring legal professionals to push sometimes traumatized children, who may not make legally relevant disclosures before they have built a trusting relationship. Providing legal representation also obviates the need for the use of any electronic monitoring. The government's own data shows that families not only appear at high rates for all their hearings when not represented (85.5 % of the time) but with legal representation, they appear at even higher rates (99% of the time).³ Electronic monitoring of families on these accelerated dockets, then, serves no clear purpose, other than to normalize the idea that immigrants are a public safety risk.

2. Legal services providers in our cities do not have capacity to provide additional pro bono legal services.

The dedicated docket process appears to be premised on the faulty assumption that the cities selected for this proposal have extra capacity to provide legal representation on a pro bono basis to a large number of families seeking asylum and facing removal proceedings. The announcement implies that the

¹ Attorney General Merrick Garland, Memorandum for the Deputy Attorney General, Associate Attorney General, 1 Heads of Department Components (May 18, 2021), "We will explore, among other things, how the Justice Department and partners across federal, state, territorial, and tribal governments can alleviate entrenched disparities in our criminal justice system, [and] address barriers to access in our immigration and civil legal systems..."

² <https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court>

³ TRAC, Most Released Families Attend Immigration Court Hearings (June 2019), available at <https://trac.syr.edu/immigration/reports/562/>.

cities were identified as having “established communities of legal services providers” and because those legal services providers will help facilitate referrals of “families to pro bono legal service providers for possible representation.” However, the legal service providers in our cities and counties expressed their strong opposition to the program and conveyed unequivocally that they do not have capacity to provide pro bono legal services in a June 21 letter to the DHS, DOJ, and the White House.⁴

According to data from the Executive Office for Immigration Review (EOIR) analyzed by the Transactional Records Access Clearinghouse (TRAC) at Syracuse University, as of the end of May 2021, 143,532 unrepresented individuals had pending removal cases in the immigration courts located in the original 10 cities named in the May 28 announcement.⁵

Pro bono immigration legal resources continue to be stretched beyond capacity, especially in the last four years. As an example, in 2019, the Legal Orientation Program (LOP) placed only 3.5% of participants with pro bono representation. Despite the efforts of LOP providers across the country, existing pro bono capacity does not come even remotely close to meeting the need for representation in the immigration system. Clients who work with pro bono private bar attorneys often face considerably longer case preparation time as pro bono counsel work under supervision of mentors. If the administration’s intention is efficiency, expedited dockets without any increased capacity for counsel for people facing deportation is counter to the stated goal.

3. The LOP model alone will not provide sufficient due process or access to justice.

It is our understanding that the administration has launched a Legal Orientation Program (LOP) to support families enrolled in the dedicated docket process. However, LOPs are insufficient to address the need created by the dedicated docket. Even the highest-quality legal orientation cannot impart the legal knowledge and skills necessary to effectively defend oneself against removal and make a case for relief eligibility.

The LOP model was developed to respond to detained dockets and physical isolation that prevent most people in detention from being able to find counsel or basic legal information about the court process. It was never intended to be a substitute for counsel. While the LOP provides critical legal information to adults held in ICE custody, ensuring a modicum of legal assistance in an otherwise adversarial and complex adjudicatory system, LOPs are unable to offer legal advice—the key analysis necessary to win an individual case.

Equally important, the LOP serves as a crucial gateway for connecting people in detention with *pro bono* attorneys, in the limited circumstances in which they are available. However, most LOP participants are unable to secure counsel or the outcomes that people achieve when they are represented. When

⁴ See [https://www.nwirp.org/uploads/2021/06/Letter to DOJ DHS WH re Dedicated Dockets.pdf](https://www.nwirp.org/uploads/2021/06/Letter%20to%20DOJ%20DHS%20WH%20re%20Dedicated%20Dockets.pdf).

⁵ According to TRAC’s analysis of EOIR data, these are the numbers of cases that are pending before the relevant immigration court that are coded as not having representation: Denver - 4,778; Detroit - 1,703; El Paso - 9,545; Los Angeles - 13,647; Miami - 38,555; Newark - 26,851; New York City - 20,816; San Diego - 6,849; San Francisco - 15,190; Seattle - 5,598. See Transactional Records Access Clearinghouse, Syracuse University, “State and County Details on Deportation Proceedings in Immigration Court,” available at: <https://trac.syr.edu/phptools/immigration/nta/>. It should be noted that these numbers capture primarily individuals in the non-detained dockets of these immigration courts. In many of these cities, nonprofit legal services providers are also trying to provide assistance to individuals in immigration detention, the large majority of whom are facing removal hearings without legal representation.

represented, detained immigrants are 10.5 times more likely to succeed in their legal cases than their unrepresented counterparts.⁶ This means many people who would prevail in court with counsel are instead deported because they have not had a fair chance to defend their cases. Further, the current asylum system is still mired in Trump-era regulations that make it virtually impossible for most asylum seekers to obtain asylum *pro se*.

An LOP-only system under these accelerated docket conditions, without the ability to provide legal advice or capacity for referrals to free-of-charge lawyering, falls far short of providing due process. In the face of the current stacked asylum system, this no counsel option is a due process disaster.

We strongly believe that the administration should ensure that no immigrant is forced to go through immigrant court proceedings without legal defense. Programs that provide counsel for unrepresented detained immigrants who have been found mentally incompetent to represent themselves in their immigration proceedings could be expanded to accommodate the legal needs of the families placed in the dedicated docket program. The government has the legal authority to fund this expansion. While there is not currently a right to government-funded counsel for most people facing deportation, the Immigration and Nationality Act does not bar the government from dedicating resources to representation if funding is otherwise authorized or where federal discretionary funding is available.

4. Accelerated dockets will not resolve the immigration court backlog and have a failing record.

We share the administration's concerns regarding the backlog in the immigration adjudication systems. The tremendous delays in processing cause family separations, distress, and uncertainty. This is an extremely undesirable outcome for all parties. But while families currently may account for a disproportionate share of new court filings, they represent only a very small portion of overall pending court cases. Accelerating their cases will likely have no meaningful impact on the overall backlog, as EOIR previously concluded⁷ when it first tried prioritizing family cases in 2014, and may further delay adjudications for immigrants who have been waiting for years for resolution.

When similar "rocket dockets" have been tried under both the Obama and Trump Administrations, they accomplished little more than to undermine due process for individuals seeking protection and to exacerbate dysfunctions within the immigration court system.⁸ If the Biden-Harris Administration continues to pursue this accelerated family docket program, it risks creating another program that would use the justice system to serve a deterrence goal rather than to deliver due process.

5. Conclusion

Given the above stated concerns, we urge you to immediately halt the "dedicated docket process" announced on May 28 and instead work with local governments, immigrants' rights groups, civil liberties

⁶ A National Study of Access to Counsel in Immigration Court, available at:

https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9502&context=penn_law_review

⁷ <https://www.justice.gov/eoir/page/file/1112036/download>

⁸ See, e.g., Jayashri Srikantiah, Lisa Weissman-Ward, "The Immigration 'Rocket Docket': Understanding the Due Process Implications," August 15, 2014, available at

<https://law.stanford.edu/2014/08/15/the-immigration-rocket-docket-understanding-the-due-process-implications/>;

Sarah Pierce, "As the Trump Administration Seeks to Remove Families, Due-Process Questions over Rocket Dockets Abound," July 2019, available at <https://www.migrationpolicy.org/news/due-process-questions-rocket-dockets-family-migrants>.

advocates, and legal service providers in our cities to provide legal representation to every family in deportation proceedings.

Sincerely,

Elected Officials Representing Municipalities Impacted by the May 28 Announcement:

Mayor Philippe Bien-Aime, City of North Miami, Florida

Mayor Bill de Blasio, City of New York, New York

Mayor Jenny A. Durkan, City of Seattle, Washington

Mayor Michael B. Hancock, City of Denver, Colorado

Mayor Kim Janey, City of Boston, Massachusetts

Judge Ricardo Samaniego, El Paso County, Texas

Chair Hilda L. Solis, Los Angeles County, California