

United States Senate
WASHINGTON, DC 20510

March 2, 2020

The Honorable William P. Barr
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

The Honorable Chad F. Wolf
Acting Secretary of Homeland Security
U.S. Department of Homeland Security
3801 Nebraska Avenue, NW
Washington, DC 20528

Dear Attorney General Barr and Acting Secretary Wolf:

We write to voice serious concerns regarding the lack of due process and transparency at the “tent courts” operated by the Department of Homeland Security (DHS) to process asylum seekers at the U.S.-Mexico border.¹ We are concerned that DHS and DOJ’s current operation of the tent courts violates the due process rights of those seeking refuge at our borders and prevents meaningful oversight of the asylum adjudication process. As a result, we request that you provide additional information regarding the operation of these courts and the steps DHS and DOJ are taking, if any, to protect the rights of migrants seeking asylum.

Background

The Trump Administration implemented the Migrant Protection Protocols, also known as the “Remain in Mexico” policy, in January 2019. Remain in Mexico requires migrants seeking asylum in the United States to wait for their court date in Mexico. (The Ninth Circuit Court of Appeals recently upheld an injunction on Remain in Mexico,² but we believe the issues raised in this letter remain valid as long as the tent courts are operational.) Remain in Mexico has forced tens of thousands of asylum seekers from Latin America³ to wait in extremely dangerous

¹ Wall Street Journal, “Tent Courts Open to Hear Immigration Cases Closed to the Public,” Michelle Hackman and Alicia A. Caldwell, September 11, 2019, <https://www.wsj.com/articles/tent-courts-open-to-hear-immigration-cases-closed-to-the-public-11568231419>.

² *Innovation Law Lab v. Wolf*, 9th Circuit Court of Appeals, No. 19-15716, http://cdn.ca9.uscourts.gov/datastore/general/2020/02/28/19-15716_opinion.pdf.

³ Transactional Records Access Clearinghouse, “Details on MPP (Remain in Mexico) Deportation Proceedings,” accessed February 7, 2020, <https://trac.syr.edu/phptools/immigration/mpp/>.

circumstances while their asylum claims are processed.⁴ U.S. Customs and Border Protection Acting Commissioner Mark Morgan testified last week that 59,000 migrants have been returned to Mexico.⁵ Thousands are stranded in encampments in abysmal conditions, including a lack of toilets, showers, and potable drinking water.⁶ There have been at least 816 reported cases of rape, kidnapping, torture, and other violence against these returned migrants, including 201 children who were kidnapped or almost kidnapped.⁷ To make matters worse, the Administration is even failing to follow its own inadequate Remain in Mexico guidelines by refusing to allow the most vulnerable migrants to remain in the United States while their asylum applications are processed.⁸ Recently, it has returned an epileptic child, LGBTQ asylum seekers, and multiple pregnant women to Mexico, in violation of their own Guiding Principles and past statements.⁹

We have previously demanded answers about the Administration's Remain in Mexico policy,¹⁰ and we call for the Administration to end this human rights crisis by immediately terminating Remain in Mexico and swiftly providing fair asylum hearings to the asylum seekers stranded in Mexico.

Rather than administering timely and orderly asylum proceedings for these migrants, however, the Administration is operating tent courts that undermine the due process rights afforded to migrants subject to the Remain in Mexico policy. The tent courts function as "virtual immigration courtrooms" where asylum seekers' hearings are conducted by judges appearing remotely by video teleconference.¹¹

⁴ Human Rights First, "Delivered to Danger," January 21, 2020, <https://www.humanrightsfirst.org/campaign/remain-mexico>.

⁵ Testimony of Mark Morgan, Acting Commissioner of CBP, to the House Committee on Appropriations, Subcommittee on the Department of Homeland Security, February 27, 2020, <https://www.youtube.com/watch?v=Cy9TIybs-k&>.

⁶ The Atlantic, "Sick Migrant Children Are at the Whims of U.S. Border Guards," Jeremy Raff, December 19, 2019, <https://www.theatlantic.com/family/archive/2019/12/sick-migrant-children-are-at-the-whims-of-us-border-guards/603901/>.

⁷ Human Rights First, "Delivered to Danger," January 21, 2020, <https://www.humanrightsfirst.org/campaign/remain-mexico>.

⁸ American Immigration Lawyers Association et al., "Advocates Express Concerns and Request Written Response to Unanswered Questions After Laredo Tent Court Tour," February 21, 2020, <https://www.aila.org/advo-media/aila-correspondence/2020/advocates-express-concerns-and-request-written>.

⁹ Human Rights First, "Orders from Above: Massive Human Rights Abuses Under Trump Administration Return to Mexico Policy," Eleanor Acer, Rebecca Gendelman, and Kennji Kizuka, October 2019, <https://www.humanrightsfirst.org/sites/default/files/hrfordersfromabove.pdf>; U.S. Customs and Border Protection, "MPP Guiding Principles," January 28, 2019, <https://www.cbp.gov/sites/default/files/assets/documents/2019-Jan/MPP%20Guiding%20Principles%201-28-19.pdf>; Washington Examiner, "LGBT asylum-seekers exempt from 'Remain in Mexico' policy and can stay in US," Anna Giaritelli, July 16, 2019, <https://www.washingtonexaminer.com/news/lgbt-asylum-seekers-exempt-from-remain-in-mexico-policy-and-can-stay-in-us>.

¹⁰ Letter from Senator Robert Menendez et al. to Secretary of State Mike Pompeo and Acting Secretary of Homeland Security Kevin McAleenan, August 27, 2019, <https://www.warren.senate.gov/imo/media/doc/08-27-19%20DEms%20letter%20to%20State%20&%20DHS%20re%20Remain%20in%20Mexico%20policy.pdf>; Letter from Senator Jeffrey A. Merkley et al. to Acting Secretary of Homeland Security Chad Wolf, November 19, 2019, <https://www.merkley.senate.gov/imo/media/doc/19.11.19%20DHS%20MPP%20Report%20Request%20Letter.pdf>.

¹¹ American Immigration Lawyers Association, "Policy Brief: Questions Remain After AILA Joins Laredo Tent Court Tour," January 30, 2020, <https://www.aila.org/advo-media/aila-policy-briefs/policy-brief-questions-remain-after-aila-joins>.

A series of troubling reports indicates that the Administration has severely limited or denied access to tent courts by attorney observers, the press, and the public, limiting oversight of the courts and preventing asylum seekers from having fair hearings. The remainder of this letter provides additional details on our concerns.

Migrants in Tent Courts Have Inadequate Access to Information and Lack Meaningful Access to Legal Representation

Because asylum seekers are not typically well-equipped to navigate the byzantine asylum system, it is critical that they have access to counsel and other appropriate legal information. Since 2003, the Executive Office for Immigration Review (EOIR) at DOJ has funded a Legal Orientation Program (LOP) for migrants in immigration detention facilities.¹² LOP includes group orientations for asylum seekers led by legal professionals, one-on-one meetings, workshops, and referrals to free or low-cost legal services. This program has been extraordinarily successful, cutting court costs and increasing court efficiency, and improving asylum seekers' ability to understand their available legal options.¹³

When attorneys from the American Immigration Lawyers Association (AILA) visited the tent court in Laredo, Texas, however, they found no LOP offered. Instead, they found only a waiting area with a "Know Your Rights" video playing on a loop—an inadequate substitute for a professionally-administered LOP.¹⁴ AILA asked DHS if it would allow a non-governmental organization that currently contracts with EOIR to provide an LOP in the tent courts, but DHS has not yet answered their request and, to date, has not allowed for LOP to operate from the tent courts.¹⁵

Asylum seekers held in Mexico under Remain in Mexico also have extremely limited access to legal services. DHS claims to provide migrants with a "list of legal services"¹⁶ available to them at little or no cost, but this list consists solely of U.S.-based organizations that may not be able to meet clients in Mexico.¹⁷ Attorneys face severe logistical challenges meeting migrants held in

¹² American Immigration Council, "Legal Orientation Program Overview," September 2018, https://www.americanimmigrationcouncil.org/sites/default/files/research/legal_orientation_program_overview.pdf.

¹³ *Id.*; U.S. Department of Justice, "Cost Savings Analysis - The EOIR Legal Orientation Program," April 4, 2012, https://www.justice.gov/sites/default/files/eoir/legacy/2013/03/14/LOP_Cost_Savings_Analysis_4-04-12.pdf.

¹⁴ American Immigration Lawyers Association, "Policy Brief: Questions Remain After AILA Joins Laredo Tent Court Tour," January 30, 2020, <https://www.aila.org/advo-media/aila-policy-briefs/policy-brief-questions-remain-after-aila-joins>.

¹⁵ *Id.*

¹⁶ U.S. Department of Homeland Security, "Migrant Protection Protocols," January 24, 2019, <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols>.

¹⁷ Letter from American Immigration Lawyers Association to Acting Secretary of Homeland Security Kevin McAleenan, June 3, 2019, <https://www.aila.org/infonet/aila-sends-letter-to-dhs-acting-secretary-mpp>.

Mexico—it reportedly can take up to four hours to cross the border by car¹⁸—and many lawyers are reasonably fearful of traveling beyond the border in the first place.¹⁹

AILA reports that there is no safe meeting place on the Mexico side of the border where attorneys may speak with their client and prepare their case,²⁰ making it critically important that there be ample time to discuss cases when they finally meet in tent courts before hearings. But DHS is severely curtailing the amount of meeting time between clients and attorneys to as little as 15 minutes.²¹ AILA and other organizations have requested for DHS to commit to allow attorneys ample time prior to hearings to consult with their clients, but DHS continues to limit the time that attorneys are allowed to speak with their clients.²² Given that migrants are frequently forced to wait in the tent court waiting rooms for hours before and after their hearings, it is unacceptable that they are allowed only a negligible amount of time to meet with counsel. These limitations undermine attorneys' ability to do the thorough fact-finding and due diligence necessary to present the strongest case on their clients' behalf.

DHS is further handicapping attorneys at tent courts by barring them from bringing electronics into hearings. AILA reports that ICE attorneys are allowed complete access to technology during hearings, including use of the internet, but that attorneys representing migrants are not allowed to use computers or cellphones.²³ This puts migrants at a significant disadvantage by limiting their attorneys' ability to research legal precedent, preventing them from responding to novel arguments in real time.²⁴

Furthermore, the fact that immigration judges are not physically present in the tents but presiding remotely via video teleconference (VTC) denies migrants meaningful interaction with their judge. For example, judges are unable to hand migrants documents in order to let them check for errors, which potentially harms their case.²⁵ The union representing immigration judges has said that face-to-face interaction is important for assessing the credibility of migrants' cases.²⁶ In fact,

¹⁸ NPR, "Trump Administration's 'Remain In Mexico' Program Tangles Legal Process," Monica Ortiz Uribe, May 9, 2019, <https://www.npr.org/2019/05/09/721755716/trump-administrations-remain-in-mexico-program-tangles-legal-process>.

¹⁹ Wall Street Journal, "Immigration Tent Courts at Border Raise Due-Process Concerns," Michelle Hackman and Alicia A. Caldwell, December 14, 2019, <https://www.wsj.com/articles/immigration-tent-courts-at-border-raise-due-process-concerns-11576332002>.

²⁰ Letter from American Immigration Lawyers Association to Acting Secretary of Homeland Security Kevin McAleenan, June 3, 2019, <https://www.aila.org/infonet/aila-sends-letter-to-dhs-acting-secretary-mpp>.

²¹ Wall Street Journal, "Immigration Tent Courts at Border Raise Due-Process Concerns," Michelle Hackman and Alicia A. Caldwell, December 14, 2019, <https://www.wsj.com/articles/immigration-tent-courts-at-border-raise-due-process-concerns-11576332002>.

²² <https://www.aila.org/advo-media/aila-correspondence/2019/aila-sends-letter-to-congress-demanding-public>; <https://www.aila.org/advo-media/aila-policy-briefs/policy-brief-questions-remain-after-aila-joins>

²³ <https://thinkimmigration.org/blog/2020/01/30/after-aila-attends-tour-of-the-laredo-tent-court-questions-still-abound/>

²⁴ American Immigration Lawyers Association et al., "Advocates Express Concerns and Request Written Response to Unanswered Questions After Laredo Tent Court Tour," February 21, 2020, <https://www.aila.org/advo-media/aila-correspondence/2020/advocates-express-concerns-and-request-written>.

²⁵ Wall Street Journal, "Immigration Tent Courts at Border Raise Due-Process Concerns," Michelle Hackman and Alicia A. Caldwell, December 14, 2019, <https://www.wsj.com/articles/immigration-tent-courts-at-border-raise-due-process-concerns-11576332002>.

²⁶ *Id.*

an EOIR-commissioned report has explained that VTC technology does not provide for the ability to transmit nonverbal cues, which can impact an immigration judges' assessment of an individual's demeanor and credibility.²⁷ The report concluded that proceedings by VTC should be limited to procedural matters because appearances by VTC may interfere with due process.²⁸

Lack of Transparency Prevents Sufficient Oversight

When the tent courts were opened in September 2019, they were completely closed to the public, and only asylum seekers appearing for cases and their attorneys of record could enter.²⁹ This appeared to be in violation of DOJ regulations requiring public access to immigration hearings.³⁰ Since January 2020, DHS has allowed press and members of the public, including attorney observers, to observe the courts in a limited capacity. For example, while master calendar hearings (MCHs)—typically short, preliminary hearings which are the first time that a migrant meets with a judge³¹—are open to the public in most immigration courts, rooms in the tent courts where MCHs were held were at first closed to the public. DHS has since allowed attorney observers to access only an arbitrarily limited set of MCHs; when attorneys visited the tent courts in January, they were reportedly denied permission to access three of the four MCH courtrooms, and were not given a reason why.³²

Especially because of the degree to which these facilities impose roadblocks to accessing counsel and due process, it is critical that the public be allowed full access to the tent courts. But it is clear that DHS's new policies have not been enough to ensure sufficient oversight of these facilities.³³

Since the opening of the tent courts, members of the public, press, and attorney observers have encountered difficulty accessing merits hearings in tent courts. Merits hearings take place in shipping containers with room for only seven people, frequently leaving no room for an observer. One immigration attorney said, "I don't know why they put us in these tiny rooms to hold the hearings other than to say there's no space for anyone else to be present."³⁴

²⁷ U.S. Department of Justice Executive Office for Immigration Review, "Legal Case Study: Summary Report," April 6, 2017, <https://www.aila.org/casestudy>.

²⁸ *Id.*

²⁹ American Immigration Lawyers Association, "Policy Brief: Questions Remain After AILA Joins Laredo Tent Court Tour," January 30, 2020, <https://www.aila.org/advo-media/aila-policy-briefs/policy-brief-questions-remain-after-aila-joins>.

³⁰ 8 CFR 1003.27, <https://www.law.cornell.edu/cfr/text/8/1003.27>

³¹ BuzzFeed, "Immigration 'Tent Courts' Aren't Allowing Full Access To The Public, Attorneys Say," Adolfo Flores, January 13, 2020, <https://www.buzzfeednews.com/article/adolfoflores/immigration-tent-courts-arent-allowing-full-public-access>.

³² American Immigration Lawyers Association, "Policy Brief: Questions Remain After AILA Joins Laredo Tent Court Tour," January 30, 2020, <https://www.aila.org/advo-media/aila-policy-briefs/policy-brief-questions-remain-after-aila-joins>.

³³ American Immigration Lawyers Association, "Policy Brief: Questions Remain After AILA Joins Laredo Tent Court Tour," January 30, 2020, <https://www.aila.org/advo-media/aila-policy-briefs/policy-brief-questions-remain-after-aila-joins>.

³⁴ BuzzFeed, "Immigration 'Tent Courts' Aren't Allowing Full Access To The Public, Attorneys Say," Adolfo Flores, January 13, 2020, <https://www.buzzfeednews.com/article/adolfoflores/immigration-tent-courts-arent-allowing-full-public-access>.

Journalists have been disallowed from bringing even pen and paper while they observe hearings. One attorney reported that, when asked why they were being turned away, “guards at the facility were unable to articulate any sort of written policy, or any law that prevents members of the public from doing something as simple as putting in pencil and paper to be able to make notations.”³⁵

The public is also unable to view VTC hearings from the perspective of judges that oversee them. At the Laredo tent court, judges presiding over the merits hearings are physically based in the Fort Worth Immigration Adjudication Center (IAC). IAC facilities, from which judges adjudicate hearings remotely, are located all over the country, and are closed to the public.³⁶ As a result, if observers are not allowed into the tent court facilities, it is impossible for the public or the press to observe from either side, posing a challenge to determining whether migrants are being given a fair hearing.

DHS has said, “in an effort to ensure consistency, clarity, and transparency, the acting secretary directed [component agencies] to formalize guidance for public access to these facilities, consistent with immigration courts across the country,”³⁷ but no such formal guidance has been published. Observers continue to encounter obstacles when trying to observe the tent courts, preventing transparency and meaningful oversight.³⁸

Questions on Use of Tent Courts

Because it is critical that vulnerable asylum seekers be given fair hearings, and because transparency is necessary for ensuring due process, we have questions about the operations at the tent courts. Accordingly, we ask that you provide answers to the following questions by March 16, 2020.

1. Please provide the following, broken down by day, for each day since the tent courts have been open, separately for the courts in Laredo and Brownsville:
 - a. The number of merits hearings held.
 - b. The number of merits hearings held in which the judge appeared via VTC.
 - c. The number of merits hearings held in which the judge appeared via VTC from an IAC.
 - d. The name and location of all IACs from which judges appeared.

³⁵ Texas Public Radio, “Problems At Tent Courts And A Growing Tent Encampment; One Year Into Remain In Mexico,” Reynaldo Leños, Jr., January 30, 2020, <https://www.tpr.org/post/problems-tent-courts-and-growing-tent-encampment-one-year-remain-mexico>.

³⁶ American Immigration Lawyers Association, “Policy Brief: Questions Remain After AILA Joins Laredo Tent Court Tour,” January 30, 2020, <https://www.aila.org/advo-media/aila-policy-briefs/policy-brief-questions-remain-after-aila-joins>.

³⁷ Wall Street Journal, “U.S. Opens Immigration ‘Tent Courts’ to Public,” Michelle Hackman, December 29, 2019, <https://www.wsj.com/articles/u-s-opens-immigration-tent-courts-to-public-11577620801>.

³⁸ American Immigration Lawyers Association et al., “Advocates Express Concerns and Request Written Response to Unanswered Questions After Laredo Tent Court Tour,” February 21, 2020, <https://www.aila.org/advo-media/aila-correspondence/2020/advocates-express-concerns-and-request-written>.

- e. The outcomes of merits hearings. The information should include the following data:
 - i. Whether the judge appeared via VTC from an IAC or from a brick and mortar court, and the name of their location.
 - ii. How many merits hearings the judge had on their docket on that date.
 - iii. The outcome of family member cases, including those that were not consolidated.
 - f. The number of merits hearings held to which an attorney observer, journalist, or member of the public:
 - i. requested access.
 - ii. requested and was granted access.
 - iii. requested and was denied access. Please also provide the reason for the denials of access.
 - g. The number of master calendar hearings held to which an attorney observer, journalist, or member of the public:
 - i. requested access.
 - ii. requested and was granted access.
 - iii. requested and was denied access. Please also provide the reason for the denials of access.
 - h. The number of *in absentia* orders issued, separated by immigration judge.
2. Please provide the list of immigration judges formerly, presently, and prospectively tasked with hearing Remain in Mexico cases, and the location of the courts for which the immigration judges are adjudicating these cases.
 3. Please provide any guidance or policy regarding how DOJ assigns immigration judges to a Remain in Mexico docket at the tent courts, including any special criteria or qualification required for a judge to be assigned Remain in Mexico cases.
 4. DHS is reportedly planning to open a third tent court in Yuma, Arizona.³⁹ Please describe any plan that DHS has to open more tent courts, in addition to the ones in Laredo and Brownsville, Texas, and the current status of those plans.
 - a. The Trump Administration's Fiscal Year 2021 budget proposal provides for "modernization of [DOJ's Executive Office for Immigration Review's] information technology systems."⁴⁰ Does this or any other part of the budget proposal suggest an expansion of the use of tent courts? If so, please specify which parts. If not, please explain how these plans will be funded.
 5. Why are attorneys representing clients in tent courts not allowed access to electronic devices and the internet, while ICE attorneys are allowed such access? Will DOJ and DHS end this restriction? If so, when? If not, why not? Can DHS commit to working with Federal Protective Service to ensure that attorneys representing respondents will be permitted to bring in laptops, phones, or other electronic equipment?
 6. Will DHS and DOJ allow outside groups to administer LOPs within the tent courts, as is done in traditional immigration courts? If so, when? If not, why not?

³⁹ Wall Street Journal, "U.S. Opens Immigration 'Tent Courts' to Public," Michelle Hackman, December 29, 2019, <https://www.wsj.com/articles/u-s-opens-immigration-tent-courts-to-public-11577620801>.

⁴⁰ U.S. Office of Management and Budget, "A Budget for America's Future," February 10, 2020, p. 68, <https://www.govinfo.gov/content/pkg/BUDGET-2021-BUD/pdf/BUDGET-2021-BUD.pdf#page=72>.

7. Will DHS allow attorneys additional time and space to meet privately with clients in tent courts before and after hearings? If so, when, and how much time in advance of hearings will attorneys be granted to meet with their client? If not, why not?
8. Does DOJ plan to expand the use of IACs for tent court cases? If so, what IACs does DOJ intend on using? How did DOJ make this decision?
9. Why are IACs closed to the public? Will the DOJ grant public access to IACs? If not, why not?
10. What efforts are being made to improve public access to master calendar and merits hearings?
11. Please share all written guidance about tent court operations, including all rules and procedures related to public and attorney access to tent courts. Additionally, please share all documents relating to the development of such rules and procedures.
12. Under what conditions may a member of the public or an attorney observer attend a master calendar hearing? Under what conditions may a member of the public or an attorney observer attend a merits hearing? Please provide any written policy shared with the tent court operators on this issue.
13. Attorney observers and members of the public have been turned away from tent courts by private security guards for seemingly arbitrary reasons. What rules or guidance are provided to private security guards regarding public access to proceedings? How does DHS ensure compliance with these rules or guidance? How will DHS ensure proper compliance in the future if it has not done so to date?

Sincerely,



Elizabeth Warren
United States Senator



Jeffrey A. Merkley
United States Senator



Kamala D. Harris
United States Senator