

## Postcards from the pandemic – part one

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### US immigration courts: a business-as-usual approach to a once-in-a-century pandemic

For the past three weeks, immigration courts in the United States have been engaged in a twisted ‘one step forward, two steps back’ dance. It is wreaking havoc with the health and safety of the immigration judges who preside over immigration court hearings, as well as all that of the stakeholders that interface with more than 69 courts around the US. The problem lies in the fact that in the US, the immigration courts are housed within the Executive Branch and are part of the US Department of Justice (DoJ). Consequently, immigration judges do not have the independent authority generally associated with a judicial body. The impact of this structural flaw has become particularly acute during the Covid-19 pandemic, which is ravaging communities in the US. It doesn’t have to be like this.

In early March, witnessing the relentless spread of the contagion in China, Italy and many other countries, Americans were already discussing how best to limit the spread of Covid-19. Yet, the nation's Chief Immigration Judge was engaged in a dangerous power play over who had the authority to display public health posters at courthouses on proper hand-washing techniques. Instead of discussing how the courts could continue to further the DoJ's mission in the face of an unfolding and cruel pandemic, immigration judges were being admonished to tear down posters that recommended basic public safety tips, and to ration the precious shared bottles of hand sanitiser. Immigration courthouses around the US were bursting with 100-case hearings, and immigration judges were improvising how to translate social-distancing safety measures to courtrooms filled beyond capacity.

Three weeks already seems like a lifetime ago in terms of the toll that this virus has exacted upon us all. However, the DoJ's leadership has continually proven itself to be tone-deaf to the demands of this pandemic. Instead of closing down immigration courts and heeding the recommendations of the US Centers for Disease Control, the State Governors in many locales around the country and countless experts in global health, to limit non-essential travel and engage in social distancing to stop the spread of the virus, the courts' current operating status today reflects that 66 of the 69 immigration courts remain open. That means that in many of these locations, despite the grave danger of holding hearings in the midst of a health crisis, lack of leadership is predominant, and confusion reigns. There is no standardised system of reporting when and why specific courts get closed, and why they reopen. Yesterday, on 31 March, a few courts were closed for cleaning, but today, 1 April, somehow they are deemed free of Covid-19, and ready to face the pending backlog of well-over a million cases.

The reality is that many of the immigration judges, court staff, Department of Homeland Security attorneys, respondents, guards and staff at the detention centres, and private bar attorneys that interface with the court have contracted the virus, and yet those same individuals are being pressured to continue operating the courts. Hindered by the lack of access to widespread Covid-19 testing, immigration judges and all stakeholders cannot definitively say whether they are sick and are therefore encouraged to work to the brink, even though asymptomatic individuals can be carriers spreading the virus. To the extent that proceedings do go forward, they limp along with a shortage of interpreters available to translate proceedings, files that are incomplete since there are not enough staff members to process the mail and filings, asymptomatic judges fearful of not sharing the burden to hold hearings with their colleagues, not to mention private bar attorneys puzzling over how they can ethically meet the needs of their clients in the face of non-essential travel mandates pending in their jurisdiction.

The short-term answer is shared by stakeholders throughout the nation – shut down the courts for a brief period so that all those that interact with them can readjust, recalibrate, and develop a series of interim measures, such as telephone hearings for the most urgent of cases. If we don't change our approach and recognise that operating with a business-as-usual approach is causing more harm than good, history will not look kindly on whether the US' immigration courts were part of the problem during the pandemic, or part of the solution.

## Note

[1] The author is Vice President Eastern Region of the National Association of Immigration Judges (NAIJ). The views expressed here do not necessarily represent the official position of the United States Department of Justice, the Attorney General, or the Executive Office for Immigration Review. The views represent the author's personal opinions, which were formed after extensive consultation with the membership of NAIJ.

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