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January 6, 2020

The Honorable William P. Barr
The Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Mr. Kenneth Cuccinelli
Acting Director
U.S. Citizenship and Immigration Services
20 Massachusetts Avenue, N.W.
Washington, D.C. 20529

Mr. James McHenry
Director
Executive Office for Immigration Review
5107 Leesburg Pike, 18th Floor
Falls Church, Virginia 22041

Mr. Paul Ray
Acting Administrator
Office of Information & Regulatory Affairs
Office of Management and Budget
725 17th Street, N.W.
Washington, D.C. 20503

Mr. Chad Wolf
Acting Secretary
Department of Homeland Security
Washington, D.C. 20528

Dear Attorney General Barr, Director McHenry, Acting Secretary Wolf, Acting Director Cuccinelli, and Acting Administrator Ray:

I write out of grave concern that U.S. Citizenship and Immigration Services (USCIS) and the Executive Office for Immigration Review have provided an insufficient comment period for the recent rulemaking, EOIR Docket No. 19-002; AG Order No. 459-2019. The proposed rule would create seven new bars to asylum and implicates the United States' international and domestic legal obligations. I urge you to extend the comment period to 60 days to ensure that the public is provided a meaningful opportunity to comment as required by law.

The joint notice of proposed rulemaking was issued on December 19th and provided only thirty days for organizations and individuals to provide comments. Given the complexity of the legal and policy issues implicated by this rule, including the potential violation of the United States' domestic and international legal obligations, a thirty day comment period is simply

inadequate, especially when those thirty days include two federal holidays. Executive Order 12866¹ directs agencies to “afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days.” This directive is echoed in Executive Order 13563,² which states: “To the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days.” The notice of proposed rulemaking provides no justification for setting a truncated comment period.

This proposed rule represents a sweeping change to the process and availability of asylum in the United States and the public deserves the time necessary to evaluate and analyze it. To take but one example, the notice includes a proposal to make a conviction for *any* felony a bar to asylum. As even the notice itself concedes, this proposal is likely vastly over-inclusive. The notice specifically asked for comments about whether there are “crimes that are currently designated as felonies in one or more relevant jurisdictions in the United States that should not be categorical bars to asylum.”³ Combing through the federal criminal code as well as the criminal codes of each of the fifty states and providing analysis on the many felonies that clearly should not be a categorical bar to asylum⁴ is an enormous undertaking. And this is but one of *seven* new bars to asylum that the rule proposes, in addition to significant procedural changes to the adjudication of asylum claims.

Further, there are serious questions about the legality of this rule. For example, the Convention and Protocol Relating to the Status of Refugees directs that contracting states shall not impose penalties on asylum-seekers for “illegal entry or presence,”⁵ a command that is at the very least in tension with this rule’s proposal to make illegal reentry a categorical bar to asylum.⁶ I trust that your agencies are interested in fully understanding the implications that this sweeping change to asylum in the United States would have on our international and domestic legal obligations.

¹ Executive Order 12866 of Sept. 30, 1993, 58 Fed. Reg. 190, Oct. 4, 1993, <https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf>.

² Executive Order 13563 of Jan. 18, 2011, 76 Fed. Reg. 14, Jan. 21, 2011, https://www.reginfo.gov/public/jsp/Utilities/EO_13563.pdf.

³ Procedures for Asylum and Bars to Asylum Eligibility, 84 Fed. Reg. 69640, 69647 (proposed Dec. 19, 2019)(to be codified at 8 C.F.R. pt. 1208).

⁴ See, e.g. 18 U.S.C. § 1702 (criminalizing opening someone else’s mail which is punishable by up to five years in prison and thus a federal felony).

⁵ Convention Relating to the Status of Refugees, art. 30, July 28, 1951, 189 U.N.T.S.

⁶ Procedures for Asylum and Bars to Asylum Eligibility, 84 Fed. Reg. 69640, 69648 (proposed Dec. 19, 2019)(to be codified at 8 C.F.R. pt. 1208). 69648; This proposal is also at odds with the 1980 Refugee Act which commands that any asylum-seekers who is “physically present in the United States,” regardless of whether they arrived at a designated port of entry and “irrespective of such alien’s status,” is eligible for asylum. 8 U.S.C. §1158 (a)(1).

This rule has the potential to inflict irreparable harm on those individuals who meet the definition of a refugee but are rendered ineligible for asylum under the rule—by definition, those individuals face the very real threat of torture, death, or other forms of persecution. Although the joint rule discusses alternative forms of relief known as withholding of removal and protection under the Convention Against Torture, these forms of relief impose a higher burden of proof than asylum, meaning that many asylum seekers excluded from eligibility under the rule will face deportation back to harm if they cannot meet this higher burden.⁷ Given the gravity and complexity of this proposed rule, a thirty day comment period is not sufficient.

Thank you for attention to this important matter. If you have any questions, please contact Charlotte Schwartz (Charlotte_Schwartz@blumenthal.senate.gov).

Sincerely,



Richard Blumenthal
United States Senate

⁷ For a discussion of the different standards and benefits associated with asylum versus withholding of removal or protection under the Convention Against Torture, *see* Human Rights First, “Withholding of Removal and the U.N. Convention Against Torture--No Substitute for Asylum, Putting Refugees at Risk,” Nov. 2018, https://www.humanrightsfirst.org/sites/default/files/CAT_Withholding.pdf.



U.S. Citizenship
and Immigration
Services

March 5, 2020

The Honorable Richard Blumenthal
United States Senate
Washington, DC 20510

Dear Senator Blumenthal:

Thank you for your January 6, 2020 letter regarding the Department of Justice and Department of Homeland Security's proposed rule related to asylum eligibility.

Your letter was submitted to the appropriate office to be added to the Notice of Proposed Rulemaking docket as a public comment. It will be carefully considered during the rulemaking process.

Thank you again for your letter and interest in this important issue. Should you require any additional assistance, please have your staff contact the U.S. Citizenship and Immigration Services Office of Legislative and Intergovernmental Affairs at (202) 272-1940.

Respectfully,

A handwritten signature in black ink, appearing to read "Joe Edlow", followed by a long horizontal line extending to the right.

Joseph Edlow
Deputy Director for Policy