

Volume 1

Executive Summary and Summary of Recommendations

2019 UPDATE REPORT

REFORMING THE IMMIGRATION SYSTEM

Proposals to Promote
Independence, Fairness,
Efficiency, and Professionalism
in the Adjudication
of Removal Cases

March 2019



Commission on Immigration



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Prepared by Arnold & Porter for the
American Bar Association Commission on Immigration



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Acknowledgements

The American Bar Association Commission on Immigration is extremely grateful once again to the law firm of Arnold & Porter for its tremendous commitment to drafting this 2019 Update Report, following its expansive work on the original 2010 Report. The Commission recognizes the entire Arnold & Porter team who devoted thousands of pro bono hours over nearly three years to complete this wide-ranging discussion and analysis of changes over the last nine years at the Department of Homeland Security, the Executive Office for Immigration Review, and the U.S. Courts of Appeals, as well as recommendations for representation and for system restructuring.

Special appreciation is due to the Arnold & Porter attorneys who played key roles in the preparation of the Update Report: Gaela Gehring Flores, Sally Pei, Dana Campos, Ronald Schechter, Elizabeth St. John, Lucy McMillan, Kristin Hicks, Kristine Blackwood, and former Arnold & Porter attorney Michael Lee. This update would not have been possible without their skill and perseverance. We specifically recognize Lawrence Schneider of Arnold & Porter for his tireless dedication, expertise, and thoughtful leadership throughout the development of both the original 2010 Report and this 2019 Update Report.

The Update Report was initially intended to evaluate changes in immigration law and policy from the issuance of the original report in 2010 through 2016; however, more significant and widespread systemic changes beginning in 2017 resulted in an expanded focus and longer timeline. As with the original report, this update and its recommendations build upon the Commission's focus to ensure fair and unbiased treatment and full due process rights for immigrants, asylum-seekers, and refugees within the United States.

We extend special thanks to current and former members of the Commission, its Advisory Committee, and liaisons past and present who have assisted with this effort, and especially to former Commission Chair Mary Meg McCarthy who initially envisioned this update and led its development for over two years. We also wish to thank the following individuals who provided instrumental support to the development of the report, either by helping to refine the project or by providing substantive editing: Alex Aleinikoff, Linus Chan, Michael Churgin, Doreen Dodson, Nicolás Espíritu, Mary Giovagnoli, Mark Greenberg, Karen Grisez, Donald Kerwin, Marketa Lindt, Megan Mack, Hon. Alexander Manuel, Cyrus Mehta, Jennifer Minear, Manasi Raveendran, Hon. Ira Sandron, Dora Schriro, and Maureen Onyeagbako. Special recognition is due to Tanisha Bowens-McCatty, Associate Director of the Commission, who tenaciously coordinated this updated report from inception to publication. Finally, we thank the entire Commission on Immigration staff, Director Meredith Linsky and staff members Robert Lang, René Lynn Minor, Jennie Kneedler, Nicole Gasmen, and Rachel Tickner for seeing this report to completion.

Wendy Wayne
Chair, Commission on Immigration
March 2019

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The following is a list of the attorneys, specialists, and legal assistants who devoted tremendous amounts of time and energy at Arnold & Porter to the preparation of this Update Report.

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Table of Contents

ACKNOWLEDGEMENTS	iii
BACKGROUND AND 2019 UPDATE REPORT APPROACH	1
The ABA Commission on Immigration	1
Arnold & Porter	2
Structure and Focus of This Study	2
INTRODUCTION	5
EXECUTIVE SUMMARY	9
Part 1: The Department of Homeland Security	9
A. DHS Enforcement: Significant Changes in Enforcement Priorities and Tactics	9
B. Enforcement through Law Enforcement Partnerships: the Criminal Alien Program, Secure Communities, the Priority Enforcement Program, and 287(g)	10
C. Increasing Reliance on Administrative Removal Proceedings with Insufficient Oversight	11
D. Unfair Laws that Burden the Removal Adjudication System	11
1. Aggravated Felony and Crime Involving Moral Turpitude Removals	11
2. Adjustment to Lawful Permanent Resident Status	12
E. Coordination of Immigration Positions and Policies among DHS Components	12
F. Increased Use of Detention Raises Efficiency and Fairness Concerns	12
G. 2017 and Beyond	14
Part 2: Immigration Judges And Immigration Courts	16
A. Two Systemic Issues Previously Identified in the 2010 Report	17
B. Lack of Judicial Independence and Political Interference with Immigration Courts	17
C. Policies and Practices that Threaten Due Process	19
D. Under-Resourced, Over-Worked Immigration Courts	22
Part 3: The Board of Immigration Appeals	25
Part 4: Judicial Review	26
Part 5: Representation	26
A. Right to Representation	28
B. Sources of Representation and Legal Guidance	29
C. The Recognition and Accreditation Program for Non-Attorney Representatives	30
D. Quality of Representation	30
Part 6: System Restructuring	31
A. 2010 Report	31
B. Recent Developments	32
C. The Need for Independence	32
D. Choice of Article I Court or Administrative Agency	33
E. Specific Features	33
F. 2019 Recommendations	33
SUMMARY OF RECOMMENDATIONS	35

Background and 2019 Update Report Approach

In 2010, the American Bar Association Commission on Immigration published a 300 page report on *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases*. The 2010 Report provided a comprehensive review of the system for determining whether a noncitizen should be allowed to stay in the country or should be deported or removed from the United States. The 2010 study sought to determine how well various aspects of the system were working and identified reforms that could improve the system.

This 2019 Update Report chronicles changes to the system from 2010 through 2018, reviews and updates the 2010 recommendations, and adds some new recommendations.

The ABA Commission on Immigration

The American Bar Association (“ABA” or “Association”) is a voluntary, national membership organization of the legal profession. Its more than 400,000 members, from each state and territory and the District of Columbia, include prosecutors, public defenders, private lawyers, legislators, law professors, law enforcement and corrections personnel, judicial officers, government attorneys, law students, and a number of non-lawyer associates in allied fields. The ABA’s Commission on Immigration (the “Commission”) leads the Association’s efforts to ensure fair treatment and full due process rights for

immigrants and refugees within the United States. Acting with other Association entities, as well as governmental and non-governmental bodies, the Commission:

(1) advocates for statutory and regulatory modifications in law and governmental practice consistent with ABA policy;

(2) provides continuing education and timely information about trends, court decisions, and pertinent developments for members of the legal community, judges, affected individuals, and the public; and

(3) develops and assists the operation of pro bono programs that encourage volunteer lawyers to provide high quality, effective legal representation for individuals in immigration proceedings, with a special emphasis on the needs of the most vulnerable immigrant and refugee populations.

The ABA has issued policy recommendations on many issues relating to immigration, not limited to the issues addressed in the 2010 Report and this 2019 Update Report. Those policy positions are available on the ABA website. Some of these issues include urging the government to end the practice of mass criminal prosecutions at the southern border;¹ supporting federally funded and appointed counsel for indigent immigrants in removal proceedings;² calling for appointed counsel in the legal cases of unaccompanied minors;³ urging transition to a civil detention model, consistent with the *ABA Civil Immigration Detention Standards*;⁴ and promulgating standards relating to

1 AM. BAR ASS’N, HOUSE OF DELEGATES RESOLUTION 109A (Jan. 2019), <https://www.americanbar.org/content/dam/aba/images/news/2019mymhodres/109a.pdf> (last visited Mar. 2019).

2 *Id.*, HOUSE OF DELEGATES RESOLUTION 115 (Aug. 2017), https://www.americanbar.org/content/dam/aba/directories/policy/2017_am_115.docx (last visited Mar. 2019).

3 *Id.*, HOUSE OF DELEGATES RESOLUTION 113 (Feb. 2015), https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2015/2015_hod_midyear_meeting_113.docx (last visited Mar. 2019).

4 *Id.*, HOUSE OF DELEGATES RESOLUTION 102 (Aug. 2012), http://www.americanbar.org/content/dam/aba/directories/policy/2012_hod_annual_meeting_102.doc (last visited Mar. 2019).

the custody, care, and adjudication of unaccompanied children.⁵

Arnold & Porter

In August 2008, the ABA Commission on Immigration requested Arnold & Porter to research, investigate, and prepare the report that was published by the Commission in 2010 concerning issues and recommendations for reforms to the United States adjudication system for the removal of noncitizens. In the summer of 2016, the Commission asked Arnold & Porter to work with the Commission to prepare an update to the 2010 Report.

Arnold & Porter Kaye Scholer LLP (“Arnold & Porter”) is a large, international law firm with more than 1000 lawyers in 15 offices in the United States, Europe, and Asia practicing in more than 30 distinct areas of the law and conducting business on six continents. Arnold & Porter represents small and large companies, governments, and individuals in the United States and around the world, and, through its pro bono program, represents nonprofit entities and disadvantaged individuals, including noncitizens in removal proceedings and a variety of other immigration matters.

Over the course of more than two years, more than 25 Arnold & Porter lawyers and other staff, working closely with Commission members and staff, participated in the research, investigation, and preparation of this 2019 Update Report. All of them participated pro bono. As was the case for the 2010 Report, and as the Commission directed, the Arnold & Porter team approached the update study without preconceived notions or conclusions and sought information and views from all sources and sides.

Structure and Focus of This Study

To conduct this update study, as with the 2010 study, Arnold & Porter divided its team into subgroups that focused on the issues relating to

the four major government entities involved in the process:

- (1) the Department of Homeland Security (“DHS”);
- (2) immigration judges and the immigration courts;
- (3) the Board of Immigration Appeals (“BIA”); and
- (4) the federal circuit courts that review BIA decisions.

In addition, two other subgroups focused on issues that affect the overall system:

- (5) representation in removal proceedings; and
- (6) system restructuring.

The questions asked by the Arnold & Porter team, along with Commission members and staff, included:

- (1) What has changed since 2010 and what are the problems with the current removal adjudication system?
 - Does the existing system provide fair decision making and due process to those who become subject to the system?
 - Does the existing system provide efficient and timely decision making?
 - Do those who are involved in the removal adjudication process (DHS officials, immigration judges, BIA Members, and others) have a sufficiently high level of professionalism?
- (2) Which recommendations in the 2010 Report for steps that could be taken within the existing structure to improve the removal adjudication system have and have not been implemented, which of those recommendations should be renewed or modified, and what new recommendations should be made?
- (3) Should the recommendations in the 2010 Report relating to restructuring of the removal adjudication system be renewed or modified?

⁵ *Id.*, HOUSE OF DELEGATES RESOLUTION 119 (Aug. 2018), <https://www.americanbar.org/content/dam/aba/images/abanews/2018-AM-Resolutions/119.pdf> (last visited Mar. 2019).

To answer these questions, this 2019 Update Report reviews the problems that have been identified by attorneys, judges, government officials, advocacy groups, academics, and others and provides an update to the 2010 Report’s recommendations for addressing those problems. In formulating recommendations for the 2010 Report and for this 2019 Update Report, our goals have been to:

- **Goal 1:** Make immigration judges at both the trial level and the appellate level sufficiently independent, with adequate resources, to make high-quality, impartial decisions free from any improper influence;
- **Goal 2:** Ensure fairness and due process and the perception of fairness by participants in the system;
- **Goal 3:** Promote efficient and timely decision making without sacrificing quality; and
- **Goal 4:** Increase the professionalism of the immigration judiciary.

For the 2010 Report and again for this 2019 Update Report, Arnold & Porter lawyers and other staff, along with Commission members and staff, gathered and reviewed hundreds of articles, reports, legislative materials, and other documents, and conducted scores of interviews with participants in the removal adjudication system —attorneys, judges, government officials, advocacy groups, academics, and others— to gather views from all perspectives concerning the existing problems in the system and to identify possible solutions.

Those who were interviewed generally were told that their comments may be used in preparing the 2019 Update Report and that some of their comments might be included without specific attribution, but that a particular quote or the substance of a comment would not be directly attributed without the interviewee’s approval. We thank all of those who spoke with the Arnold & Porter and Commission team and provided materials and information in connection with this 2019 Update Report.

In the Executive Summary volume of this 2019 Update Report, we summarize our key findings

and recommendations. At the end of the Executive Summary volume is a chart with a Summary of Recommendations that shows the 2010 Report’s recommendations and this 2019 Update Report’s updated recommendations. In the full report volume of this 2019 Update Report, we provide extensive background information, identification and discussion of the issues, and our analysis and updated recommendations for reform.

Introduction

In 2010, the American Bar Association Commission on Immigration published a 300 page report on *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency and Professionalism in the Adjudication of Removal Cases*. The 2010 Report provided a comprehensive analysis of the spectrum of removal procedures in the United States, from arrest and detention of noncitizens to adjudications before the immigration courts, to administrative appeals before the Board of Immigration Appeals, and finally, to review by the federal judiciary.

The 2010 Report also championed two critical foundational reforms: full access to counsel for the indigent and vulnerable and the conversion of the administrative immigration court system housed in the U.S. Department of Justice (“DOJ”) to one that is independent of DOJ or any other department or agency — preferably in the form of an Article I court or alternatively an independent agency within the Executive Branch.

The 2010 Report highlighted some innovations, but primarily found that America’s removal system, from first encounter to last, lacked sufficient safeguards to ensure efficiency, fairness, and due process for noncitizens, including lawful permanent residents. The 2010 Report offered numerous recommendations for improving aspects of the system, suggesting changes in policy, regulation, and law that would ensure fairness and reinforce due process mechanisms. It also offered numerous recommendations addressing the need for expanded resources and greater professionalism among Department of Homeland Security (“DHS”) and DOJ officials. The 2010 Report served as a blueprint for many legislative and administrative reform efforts.

Unfortunately, most of the reform efforts never came to fruition. As we explain in the following pages of this 2019 Update Report, which chronicles changes to the system from 2010 through 2018, there have been virtually no new immigration laws addressing issues covered by the 2010 Report, and few of the 2010 recommendations were adopted by either the Obama or the Trump administrations. At the same time,

certain policies that were in place at the time of the 2010 Report and that promoted the fairness, efficiency, and due process of the immigration system have been undermined.

For the most part, this Update Report reaffirms and updates the 2010 recommendations, but in some cases, it was necessary to reject prior recommendations in favor of more drastic reforms. Recent political and legal developments have exposed the fragility of our administrative systems. Today, our immigration courts and other adjudicative systems face untenable backlogs, yet efforts to reduce those backlogs have been largely ineffective, or, at worst, counterproductive to the goals of an independent judiciary. Policies implementing case production quotas and limitations on discretionary decisions of judges to continue or terminate cases raise concerns about due process and fairness within the current immigration court system. At the same time, shifting enforcement priorities and recent policies that promote zero tolerance and full prosecution of those entering the country without authorization exacerbate the backlog, are disruptive to the system, and in the eyes of many call into question the fundamental fairness of the immigration system. Thus, we no longer recommend merely increasing the number of immigration judges to address the growing backlog.

Administrative proposals to reform the immigration removal adjudication system remain critical to many of our recommendations, but since 2017 the administration has sought to roll back reforms, and to use its executive authority to restrict rights. Executive action has resulted in a bar to entry into the United States for people from predominantly Muslim nations; refugee admissions have been reduced to all-time lows, and asylum seekers have faced unprecedented obstacles in applying for protection, including being forced to remain outside of the United States, often in dangerous circumstances, during the pendency of their claims.

Meanwhile, DHS has drastically expanded its enforcement efforts along the border and throughout the interior, rejecting many recent reforms in favor of widespread arrest and prosecution of

families, children, and longtime residents. DHS has championed expanded detention and escalated its efforts to detain children and families. It also has proposed limiting protections for unaccompanied children, changes to public charge guidance, and many other rules and policies that would make it far more difficult for noncitizens to access immigration benefits.

At the same time, DOJ has restricted the authority of immigration judges; and Department leadership has taken it upon itself to reject longstanding precedent from the Board of Immigration Appeals in an attempt to rewrite binding interpretations of the law governing immigration proceedings, while promoting a “zero tolerance” prosecution policy for anyone entering the country without permission.

In some cases, the courts have provided recourse for limiting the worst of these measures, but these litigation victories are hard won, time-consuming and often circuit-specific. Under these circumstances, the call for legislation that systematically reforms our immigration system has become more urgent than ever.

Against this backdrop, our Update Report serves yet again as a marker for what must be done to provide a more just and equitable system. Each Part provides an update and analysis of the relevant developments along with a comparison between the 2010 recommendations and our 2019 refinements, as well as some new recommendations.

In short, Part 1 analyzes DHS’s role in the removal process, with a particular emphasis on the use of prosecutorial discretion, detention, and legal developments that address inequities in removal laws. We continue to recommend significant changes to the Immigration and Nationality Act to ensure that decisions to arrest, charge, detain, and prosecute noncitizens are conducted with sufficient due process and attention to individual equities.

Part 2 analyzes the growing pressure on immigration courts, from expanded caseloads to new quotas, and requirements that continue to undermine independence. We conclude that there are numerous ways to improve the quality of individual adjudications, but without wholesale reform, these efforts will merely provide band-aids to a failing system.

Part 3 addresses reforms made over the last nine years at the Board of Immigration Appeals. While

the Board has implemented several of the quality and process improvements recommended in our 2010 Report, and avoided significant growth in its case backlog and wait times, we ultimately warn that new proposals affecting immigration judges and the Board could reduce these improvements. We also express concern that the Attorney General’s frequent exercise of the certification authority, without more transparency and due process safeguards, could undermine the legitimacy and credibility of the immigration adjudication process.

Part 4 addresses the current state of judicial review, where we note that necessary legal reforms have yet to be made. Given the clear importance of judicial review for immigration matters, we continue to argue for a robust right to bring appeals to the federal judiciary.

As Part 5 notes, one of the few truly positive developments in the adjudication removal system has been the growth of representation for vulnerable populations. However, most of this has come as a result of local or private initiatives or as the result of litigation, and still only ensures representation for the lucky few. As the government continues to prosecute and charge vulnerable families and children, and seeks to restrict avenues of relief and access to counsel for asylum seekers, the need for representation continues to be a critical issue, and one that calls into question the fairness of the entire removal system.

Finally, Part 6 discusses the increasing urgency for making the immigration judiciary independent in light of recent developments discussed in the other parts of this Update Report. We also refine our position on the appropriate framework based on scholarship, analysis, and proposals from other stakeholders that we have reviewed since the 2010 Report was published. We thus continue to recommend the creation of an Article I court, but intend to work with like-minded bar associations and organizations to develop recommendations on specific features. We no longer view an independent agency in the Executive Branch as a sound second alternative.

This is a critical moment in the administration of justice within our immigration system. Systems that were already strained by lack of legislative reform and inconsistent policies are now at the breaking point. In the current environment, policies have been put forth that seek to limit access to asylum, counsel, and the courts themselves. There is little regard for the human

cost of detention and deportation. While enacting policies that more closely adhere to a fair and humane interpretation of the immigration laws could do much to reverse these problems, there is little question that legislation is necessary to return balance and due process to the system.

Executive Summary

Part 1: The Department of Homeland Security

The Department of Homeland Security (“DHS”) continues to serve as the gatekeeper on immigration enforcement matters, and its role as the sole adjudicator of many immigration removal determinations has further expanded since the time of our 2010 Report. The impact of that shift, coupled with dramatic policy reversals following the 2016 presidential election, has led the Commission to reaffirm its original recommendations and to supplement them with new calls for more balanced enforcement measures, rejection of severe and punitive prosecution and detention policies, and a return to meeting our domestic and international legal obligations to protect asylum seekers, unaccompanied minors, and other vulnerable immigrant groups.

While this Part focuses primarily on enforcement issues within Immigration and Customs Enforcement (“ICE”) and U. S. Customs and Border Protection (“CBP”), we note that the current administration has also sharply curtailed many policies aimed at expanding access to immigration benefits within U.S. Citizenship and Immigration Services (“USCIS”), which are outside the scope of the 2010 Report. We have attempted, where possible, to follow the outline of the 2010 Report, measuring progress or regression to date on those issues addressed in that report. This updated report spans the administrations of two presidents: Barack Obama (2009-2017) and Donald Trump (first two years, 2017-2018).

The reversals in policy of the last two years may be caused by different attitudes about immigrants expressed and championed by this administration, but the ease with which the Trump administration has reversed course on these policies demonstrates this country’s inability to enact lasting immigration reform legislation. Thus far, litigation in the federal courts, under both the Obama and

the Trump administrations, has remained one of the surest ways to push back against unlawful or unconstitutional enforcement and detention practices, but administrative policy is an equally powerful tool to effect positive or negative actions. However, administrative policy cannot be relied upon to solve all problems.

The many vulnerabilities and failures of our laws must be addressed through robust, systematic immigration reform, with laws that encourage judicious behavior by enforcement personnel. Even when prosecutorial discretion is fully supported and encouraged at the highest levels, the system itself will not permanently change without new laws that reflect the policies behind that use of discretion. And, as occurred in 2017, when new leadership rejects those policies, it is easy to revert to past practice. The 2010 recommendations remain current today in part because DHS has turned back the clock, placing more noncitizens in jeopardy of removal than at any time since 2010.

A. DHS Enforcement: Significant Changes in Enforcement Priorities and Tactics

While enforcement policy cannot be tracked by documenting removal numbers alone, the available data on removals and returns since 2010 reflect the evolution of DHS’s approach to enforcement, as well as its use of administrative means to limit the removal of certain groups of noncitizens. The adoption of more explicit guidance on the use of prosecutorial discretion, restructuring of enforcement priorities, Deferred Action for Childhood Arrivals (“DACA”), and other administrative actions to allow individuals to more easily access benefits, all contributed to a significant reduction in the number of removals from 2015 through 2016.¹

At the same time, however, the use of expedited removal continued to increase during this period,

fueled in large part by CBP’s adoption of a “consequence delivery model” that emphasized escalating penalties for repeat immigration border crossers as a means to deter recidivism.²

B. Enforcement through Law Enforcement Partnerships: the Criminal Alien Program, Secure Communities, the Priority Enforcement Program, and 287(g)

Between 2009 and 2017, DHS overhauled the Secure Communities program and reduced its reliance on 287(g) agreements. Congressional funding for ICE’s Criminal Alien Program (“CAP”) increased significantly during this period, in part because CAP program assumed the responsibilities of Secure Communities. ICE’s interior removal program relied most heavily on CAP for removals, but many of those removals were generated through the Secure Communities program, as they involved individuals who were not incarcerated but merely encountered or arrested by local law enforcement.

The 2010 Report noted the growth of the Secure Communities program, established in 2008, as a significant source of non-criminal removals with few safeguards. Despite heavy criticism of Secure Communities, by 2013 the program had been implemented in all 50 states, the District of Columbia, and five U.S. territories.³ As the program expanded, however, so did community opposition. By the end of 2014, legal and civil liberties concerns had led some 350 jurisdictions to end or limit their participation in Secure Communities.⁴

Consequently, DHS suspended the Secure Communities program and replaced it with the Priority Enforcement Program (“PEP”).⁵ PEP was designed to limit the use of detainers to a subset of DHS’s three priorities, applying them only to individuals who had been convicted of certain serious crimes and a few additional categories, notably, people who engaged in or were suspected of terrorism or espionage, who presented a danger to national security, or who intentionally participated in a gang to further its illegal activity (if the person was 16 years old or older).⁶

PEP also created a new notification option, whereby local authorities would notify ICE 48 hours *before* an immigrant in local custody was released. The notification option addressed an increasing number

of federal court decisions holding that state and local law enforcement violated due process by holding individuals beyond their release dates.⁷ Although PEP was intended to focus on individuals who fit the PEP subset of immigration priorities, ICE still had discretion to seek transfers from state or local law enforcement custody for individuals who fit any priority enumerated in the 2014 list of priorities.⁸

The 2010 Report observed that partnerships with state and local law enforcement under the 287(g) and Secure Communities programs were playing an increasing role in DHS’s immigration enforcement.⁹ In 2009, ICE had 66 agreements with state and local partners. In 2012, DHS phased out its use of agreements that authorized state and local officers to enforce immigration law directly (as opposed to agreements permitting state and local law enforcement to enforce immigration laws for individuals already incarcerated).¹⁰ At the end of 2016, ICE had 29 agreements in place.¹¹

The elimination of the highly controversial National Security Entry-Exit Registration System (“NSEERS”) program was a highlight of the efforts to end programs that restricted due process. NSEERS was created in 2002 in response to the 9/11 attacks in the United States. The program, which required heightened travel screening for individuals from 25 almost exclusively Muslim-majority countries and led to thousands of removal proceedings, was resource-intensive and heavily criticized. DHS dropped the in-person check-in requirement in 2003, and in 2011 Secretary Napolitano terminated the NSEERS program, though the regulation was left in place.¹² In late 2016, DHS repealed the regulation that had implemented the program, and acknowledged that it was obsolete.¹³

C. Increasing Reliance on Administrative Removal Proceedings with Insufficient Oversight

The 2010 Report charted DHS’s expanded use of administrative removal procedures including expedited removal within the United States, expedited removal for aggravated felons, and reinstatement of removal. This trend has continued in the intervening nine years. Since 2010, the government has made especially liberal use of expedited removal proceedings to summarily remove Central American

migrants who were apprehended at or near the U.S.-Mexico border, in spite of violent country conditions, particularly in Central America's Northern Triangle countries.¹⁴

D. Unfair Laws that Burden the Removal Adjudication System

Since 2010, a number of statutory provisions and agency practices have continued to increase the likelihood of removal once an individual was charged and entered the immigration enforcement system. Laws regarding "aggravated felonies" and "crimes involving moral turpitude" remain overly broad, are often applied retroactively to convictions from many years ago, and prevent many people from accessing due process.

1. Aggravated Felony and Crime Involving Moral Turpitude Removals

There have been no legislative changes since 2010 to restrict the overly broad definitions of "aggravated felony" or "crime involving moral turpitude" ("CIMT") in the Immigration and Nationality Act ("INA"). However, there have been significant developments in the case law regarding these two categories of offenses.

Both the U.S. Supreme Court and Board of Immigration Appeals ("BIA") have repeatedly affirmed use of the "categorical approach" in analyzing whether a criminal offense falls within one of these removal grounds, thereby narrowing the breadth of offenses that fall into each one. Under the categorical approach, only the elements of the criminal offense are relevant, not the actual conduct of the individual.¹⁵ Another area of considerable recent litigation has involved the definition of a "crime of violence" under 18 U.S.C. § 16. In *Sessions v. Dimaya*,¹⁶ the Supreme Court held that § 16(b)'s definition of "crime of violence" as incorporated into the INA was impermissibly vague and violated due process.

2. Adjustment to Lawful Permanent Resident Status

The 2010 Report recommended allowing otherwise eligible noncitizens to remain in the United States during adjudication of their application for lawful permanent residence, even if they were required to file a waiver for unlawful presence. At the time, noncitizen visa applicants were required

to depart the United States and apply for a waiver in their home country, after they applied for the immigrant visa. This led to prolonged family separations and uncertainty for noncitizens who, without a waiver, would be barred from returning to the United States for years.

In January 2013, DHS began permitting eligible noncitizens to apply for a provisional waiver of unlawful presence without departing the United States.¹⁷ In August 2016, the waiver's availability was expanded from immediate family members (specifically, the spouse, children, and parents of U.S. citizens) to all noncitizens who are statutorily eligible to obtain an immigrant visa and a waiver.¹⁸ Applicants must show (1) extreme hardship to a qualifying relative (i.e., U.S. citizen or lawful permanent resident spouses or parents); (2) that they are inadmissible due only to unlawful presence either between 180 days to less than one year in a single stay, or one year or more in a single stay; and (3) that they have not been ordered removed and subsequently attempted to unlawfully enter the United States.¹⁹

E. Coordination of Immigration Positions and Policies among DHS Components

The 2010 Report recommended that DHS create a position to oversee and coordinate all aspects of DHS immigration policies and procedures, to ensure fair and balanced implementation of department-wide policies. This position has not yet been created. In December 2016, Congress elevated the headquarters Assistant Secretary for Policy to an undersecretary and provided the undersecretary with authority to coordinate policy among the DHS component offices.²⁰ This new role has the potential to foster more coordination of immigration policy, though it does not require it. In addition, on October 2017, the DHS Inspector General issued a recommendation to create an Immigration Policy Council to assist in coordination across the Department.²¹ DHS has agreed to the recommendation, but has not offered any additional information.²²

F. Increased Use of Detention Raises Efficiency and Fairness Concerns

Since 2009, DHS has implemented many reforms to the immigration detention system, but with mixed results.

For example, in August 2009, then-Director of ICE John Morton announced that ICE would move to a less punitive detention system “wholly designed for and based on civil detention needs and the needs of the people we detain.”²³ ICE made policy changes to move toward more civil detention conditions, but has continued to contract for detention space or commission new buildings designed for criminal incarceration.²⁴

Through 2016, ICE continued to issue new and updated detention standards. Nevertheless, international organizations have found that “the majority of asylum seekers remain detained in jails and jail-like facilities”²⁵ and that “DHS and its component agencies and contractees detain undocumented immigrants in a manner inconsistent with civil detention and instead detain many undocumented immigrants like their criminal counterparts in violation of a detained immigrant’s Fifth Amendment rights.”²⁶

Similarly, while in 2012, ICE issued guidance on detainee transfers to address difficulties in accessing detainees who were often moved far from counsel and their communities, ICE continues to house noncitizens in remote detention facilities and jails and to build new facilities in remote locations with inadequate access to resources.

One particularly worrying development since the 2010 Report was the emergence of a new policy for detention of families and unaccompanied children. In the summer of 2014, as conditions in Central America grew increasingly violent, thousands of children and families traveled to the United States seeking protection.²⁷ The government responded with programs aimed at deterring family migration and unaccompanied child migration, and DHS quickly built or converted facilities to detain women and children for long periods of time.

Government agencies, international organizations, the ABA, and many others have strongly criticized the policy and conditions of family detention.²⁸ In July 2015, then-Secretary Johnson commissioned the DHS Advisory Committee on Family Residential Centers, to

develop recommendations for best practices in family detention facilities.²⁹ The committee recommended ending family detention, except in the rarest of cases, and even then, for as short a time as possible, only placing families in facilities that were “licensed, non-secure, and family friendly.” DHS issued no statement on the Advisory Committee report, and ICE declined to adopt or implement any of the advisory committee’s 284 recommendations.

At the time of the 2010 Report, ICE was in the process of reforming its alternatives to detention (“ATD”) programs. ICE’s use of ATDs grew from 32,065 average daily enrollment in 2011 to 40,864 in 2013.³⁰ Given the rise of families intercepted at the border, ICE also instituted a new Family Case Management program in January 2016, which provided individualized case management services to assist families during their removal proceedings and post-removal order.³¹ For individuals who do not have final orders of removal, ATD programs have been extremely successful with respect to appearance rates: over 99% of individuals with a scheduled court hearing appeared at their hearings while participating in the full-service component of the program.³²

The 2010 Report also recognized that ICE had issued a revised parole policy, which provided that an asylum seeker with a credible fear of persecution should *generally be paroled* from detention, if his or her “identity is sufficiently established, the alien poses neither a flight risk nor a danger to the community, and no additional factors weigh against release.” The policy stated that continued detention of aliens with a credible fear and who are neither a flight risk nor a danger to the community is “not in the public interest.”³³

In March 2013, ICE introduced the Risk Classification Assessment system, an automated system that analyzes public safety and flight risk through ICE database records and interview records and generates a recommendation regarding whether an individual should be released or detained, as well as a suggested custody level.³⁴ While the tool offers some transparency in the decision making process, it does not necessarily result in an adequate classification.

While in absolute terms the numbers suggest that ICE issued more parole grants during the Obama administration, overall, the rate of parole grants actually decreased. In recent years, practitioners who

have worked in the field for more than ten years confirmed that ICE has been denying more parole applications, even for asylum seekers who meet the criteria in the parole directive and would have been paroled in prior years. Practitioners also indicate that ICE relies on onerous or intrusive conditions of release, including unreasonably high bond amounts.

As part of its strategy to deter unlawful family migration, in late 2014, DHS and the Department of State implemented the Central American Minors Refugee and Parole (“CAM”) Program, which provided children from El Salvador, Honduras, and Guatemala and certain qualifying parents with an avenue to apply for refugee status and/or parole to enter the U.S. from abroad.³⁵ Although the initiative created a welcome avenue for relief for qualifying individuals to find refuge in the United States, long processing times and the relatively low number of successful applications challenged its use as a means to alleviate the tremendous need for humanitarian relief for Central Americans. On August 16, 2017, the Trump administration terminated the program and ended the practice of paroling individuals into the country.

G. 2017 and Beyond

Within days of the inauguration of the new administration in 2017, President Trump began to issue a series of executive orders aimed at restricting immigration, both lawful and unlawful, many of which have —by design or effect— undermined numerous initiatives from the prior Administration.

Most notably, the Trump administration during its first two years (2017-2018) has overseen an abrupt change in enforcement priorities. On January 25, 2017, President Trump issued an Executive Order titled “Enhancing Public Safety in the Interior of the United States,” which substantially expanded immigration enforcement within U.S. borders.³⁶ Former DHS Secretary John Kelly issued a memorandum on February 20, 2017 setting forth guidance for DHS personnel regarding these new enforcement priorities.³⁷ In contrast to prior enforcement guidelines, which ranked enforcement priorities in order of importance, Executive Order 13,768 and the DHS implementation memorandum prioritize virtually all undocumented immigrants for removal.³⁸

The current administration has taken additional actions with respect to prosecutorial discretion, including the September 5, 2017, announcement that it would terminate DACA.³⁹ National litigation challenging the actions to terminate DACA is ongoing.⁴⁰ At present, renewal for previous DACA holders is possible only as a result of pending litigation.

Other changes to enforcement policies and priorities have included a renewed emphasis on worksite enforcement, including reversal of the former practice of targeting primarily employers. ICE has shifted its focus to expanding detention, separating families, and redefining unaccompanied minors to allow for greater control by DHS of these populations.

On April 6, 2018, Attorney General Sessions announced a “zero tolerance policy” pursuant to which anyone crossing the border unlawfully would be subject to criminal prosecution.⁴¹ On May 7, 2018, the Attorney General further clarified that if an adult was accompanied by a minor child, the child would be separated from the parent.⁴² However, the government had been separating families even prior to announcement of the policy.

Amidst sustained public outcry over the “zero tolerance policy,” a new Executive Order was issued on June 20, 2018, requiring noncitizen families to be kept together during criminal and immigration proceedings to the extent permitted by law and subject to the availability of appropriations.⁴³ However, by that time, over 2,500 children had been separated from their parents as a result of the zero tolerance and family separation policies. On June 23, 2018, DHS issued a fact sheet describing the government’s efforts to “ensure that those adults who are subject to removal are reunited with their children for the purposes of removal.”⁴⁴ The reunification process continues.

In addition to changes to its enforcement policies, the administration has also narrowed the basis for asylum claims. On June 11, 2018, then-Attorney General Jeff Sessions issued an opinion in *Matter of A-B-*, expressly overturning *Matter of A-R-C-G-*⁴⁵ and “all other opinions inconsistent with the analysis in [that] opinion.”⁴⁶ In *Matter of A-R-C-G-*, the BIA established that “married women in Guatemala who are unable to leave their relationship”⁴⁷ constitute a particular social group for purposes of establishing a claim for asylum. Read narrowly,

Matter of A-B overturns the precedent set by the *BIA* that membership in this specific group satisfies the definition of a refugee.⁴⁸ More broadly, though, the dicta from the opinion suggests a policy shift toward denying asylum claims by women seeking protection from severe domestic violence and individuals who may be susceptible to gang-related violence in their home countries.

The government also attempted to further restrict access to asylum in response to a group of Central American asylum seekers approaching the southern border from Mexico. On November 8, 2018, DHS and DOJ announced a joint Interim Final Rule restricting asylum eligibility in cases where the president invokes section 212(f) of the INA. Under this section, certain persons may be barred from entry into the United States if the president determines that entry is not within the national interest. (83 Fed. Reg. 55,924). The next day, the administration issued a “Presidential Proclamation Addressing Mass Migration Through the Southern Border of the United States,” which suspended entry across the international boundary with Mexico, except at designated points of entry. This Proclamation triggered application of the Interim Final

Rule, and effectively barred individuals who enter the U.S. from Mexico other than at a port of entry from being eligible for asylum. The administration is presently enjoined from enforcing the Interim Final Rule.⁴⁹

On May 17, 2018, then-Attorney General Jeff Sessions issued an opinion in *Matter of Castro-Tum*.⁵⁰ The opinion stated that immigration judges and the *BIA* lack the general authority to indefinitely suspend immigration proceedings by administrative closure.⁵¹ Administrative closure, a docket-management mechanism used for more than three decades by immigration judges and the *BIA* to suspend removal proceedings, does not terminate or dismiss a case, but rather indefinitely suspends them unless and until one party successfully moves to re-calendar the case.⁵² Pre-*Castro-Tum*, immigration judges and the *BIA* administratively closed immigration cases in a variety of situations, such as when government resources were scarce or other immigration proceedings were pending that might affect the outcome of the removal case.⁵³ Now, under *Castro-Tum*, that authority is limited to instances where a previous regulation or settlement agreement has expressly conferred this authority.⁵⁴

Part 2: Immigration Judges and Immigration Courts

The state of the U.S. immigration court system has worsened considerably since our 2010 Report. At that time, we identified numerous issues hindering due process and the fair administration of justice in the immigration court system, ranging from staffing, training and hiring issues to growing backlogs, inconsistent decision patterns (particularly with respect to asylum adjudications) and the adoption of video-conference technologies that impeded fair hearings.

Most of these issues continue to plague the immigration courts, and many have been further exacerbated by destabilizing and disruptive executive branch policies, coupled with crippling Congressional inaction, in the face of increased immigration enforcement. Crucially, the number of cases pending before the immigration courts (which were about 262,000 cases at the time of the 2010 Report) has increased to unprecedented levels. As of December 2018 there were more than 760,000 presently pending cases and an additional 330,000 cases that could be

returned to active dockets in short order as a result of recent Attorney General decisions.⁵⁵ Ballooning dockets have resulted in increasingly long wait times for cases to be heard.⁵⁶

While the backlog and increased wait times negatively affect the fairness and effectiveness of the immigration system — both by requiring people with valid claims of persecution to wait years to be granted asylum, and by allowing individuals with non-meritorious claims to remain in the country for lengthy periods of time — current policies and enforcement priorities that aim to accelerate case resolution without attendant allocation of funds and resources are further imperiling due process and the viability of the immigration courts. Moreover, judicial independence has been called into question with a resurgence of alleged politicized hiring and the adoption of policies that arguably undermine immigration judges’ ability to perform their role as a neutral arbitrator of fact and law. These concerns go to the very essence of an impartial court.

The immigration courts are facing an existential crisis. The current system is irredeemably dysfunctional and on the brink of collapse, and the only way to resolve the serious systemic issues within the immigration court system is through transferring the immigration court functions to a newly-created Article I court. This approach is the best and most practical way to ensure due process and insulate the courts from the capriciousness of the political environment. It is further our view that the public's faith in the immigration court system will be restored only when the immigration courts are assured independence and the fundamental elements of due process are met.

Our recommendations relating to the creation of an Article I court are set forth in Part 6 of this Update Report. In recognition of the fact that institutional changes take time and political will to achieve, Part 2 is largely devoted to providing updates to our prior recommendations in the 2010 Report relating to the immigration courts as they currently exist. We provide a brief update on the two systemic issues identified in the 2010 Report and then reframe the discussion of each of the 2010 recommendations by addressing them in the context of the three most urgent systemic issues facing the immigration courts today:

- (1) lack of judicial independence and political interference with the immigration courts;
- (2) policies and practices that threaten due process; and
- (3) longstanding and widespread under-resourcing of the immigration courts.

While major systemic reform is necessary, the updated recommendations we offer in this Part are designed to ensure that the immigration courts can continue to function until such time as transition to an Article I court becomes a reality.

A. Two Systemic Issues Previously Identified in the 2010 Report

The 2010 Report raised two systemic issues affecting the immigration court system: wide disparities in asylum grant rates among immigration judges; and public skepticism and a lack of respect for the immigration court process.⁵⁷ The 2010 Report did not make specific recommendations directly

addressing either of these issues, stating instead that “improvements made through the implementation of [the 2010] Report’s recommendations [would] help lead to more professional and consistent decision making” in asylum cases and improve the public’s perception and respect for immigration courts and immigration proceedings.⁵⁸

The necessary reforms were not, however, enacted, and thus the immigration courts continue to suffer from lack of public respect and trust (in large part due to the immigration courts’ structural entanglement with the Department of Justice (“DOJ”)) as well irreconcilable inconsistencies of asylum grant rates across courts and immigration judges. As in the 2010 Report, we believe that the implementation of the recommendations set forth in this Update Report will help lead to more professional and consistent decision making in immigration courts, improve judicial independence, and help to ensure due process is met in each immigration proceeding.

B. Lack of Judicial Independence and Political Interference with Immigration Courts

Recent events, including specific executive policies and practices exerting unprecedented levels of control over immigration judges and their job performance, have deteriorated public trust in the immigration court system and undermined judicial independence. One of the more pervasive ways in which judicial independence has been undermined in the last nine years is by ever-changing direction from the executive branch. Each administration has used the immigration courts as an extension of immigration enforcement mechanisms by adjusting enforcement priorities to align with the prevailing political agenda. Executive orders and policies that reshuffle immigration judges’ dockets without input or reference to the status of any other pending matters are disruptive and counterproductive to the independence of the courts and the administration of justice. This approach undermines judges’ ability to independently manage their courtrooms and to administer their dockets in a fair and efficient manner, as well as the public’s perception of judicial neutrality and independence. Efforts should be made to minimize political interference with immigration court operations and proceedings.

Immigration courts, as part of an executive agency, are also subject to performance criteria determined by the executive branch, which are often informed by politics and policy rather than neutral, objective concern regarding the fair and unbiased functioning of the courts. In essence, immigration judges are in the untenable position of being both sworn to uphold judicial standards of impartiality and fairness while being subject to what appear to be politically-motivated performance standards.⁵⁹ While this has long been a reality of the immigration courts, the dilemma was elevated to new heights in Spring 2018 when DOJ announced that as of October 1, 2018 to achieve a satisfactory performance rating, immigration judges must (1) complete 700 cases per year; (2) have a remand rate from both the BIA and Circuit Courts of less than 15%; and (3) meet at least half of six benchmarks and not receive an “unsatisfactory” rating in any of them.⁶⁰

The imposition of individual case production quotas and time-based deadlines tied to an immigration judge’s performance evaluation is “unprecedented”⁶¹ and has been widely criticized. Although proponents of the case production quotas view the requirement as a necessary step towards reducing case backlog, critics have denounced the move, arguing that it will undermine judicial independence, expose judges’ decisions to additional legal challenge, create additional backlog, and ultimately threaten due process.⁶²

While it is too early to assess the true impact such performance metrics will have on the independence of the immigration judiciary, the concerns are widely acknowledged and genuine. Such an approach pits personal interest against due process and undermines judicial independence in a critical and direct way. The case production quotas and time-based metrics should be rescinded and replaced with a more robust and transparent review process for immigration judges, where immigration judges are evaluated not only on their command of substantive law and procedural rules, but also impartiality and freedom from bias, clarity of oral and written communications, judicial temperament, administrative skills, and appropriate public outreach. If they are not rescinded, they should, at a minimum, be carefully monitored to determine the impact they have on judicial independence and due process.

The potential negative impact of quantitative performance metrics are further compounded by DOJ policies and actions that discourage the use of other case and docket management tools previously available to immigration judges. In 2017 and 2018, DOJ and EOIR sharply curtailed the use of continuances in immigration proceedings and virtually eliminated the use of administrative closure and termination of proceedings as avenues to resolve cases.⁶³ In the decisions implementing some of these changes, the then-Attorney General reasserted his authority, power, and influence over immigration judges, stating repeatedly that immigration judges may “exercise only the authority provided by statute or delegated by the Attorney General” and that they have no “inherent authority” to use docket management tools unspecified by regulation.⁶⁴ We recommend that Congress enact legislation that expressly restores administrative closure and termination as tools that immigration judges may use in cases involving vulnerable populations, including unaccompanied children and the mentally impaired, or as necessary where justice requires.

Despite such undeniable steps backward, EOIR has improved accountability and transparency in the immigration courts on two fronts. First, on April 4, 2011, EOIR announced its publication of the Ethics and Professionalism Guide for Immigration Judges.⁶⁵ The Guide is binding on all immigration judges, and, as recommended in the 2010 Report, incorporates a section on judicial temperament and professionalism.⁶⁶ We recommend studying the effects of the Guide, including whether there are any conflicts with state judicial and ethical Codes of Conduct and how it intersects and interacts with new performance standards implemented since 2017.

Second, since 2010, DOJ has tracked complaints against immigration judges in a central database and released over 16,000 pages of documents relating to 767 complaints, some substantiated and others not, filed against various immigration judges in response to a FOIA request and a lawsuit filed in 2012.⁶⁷ However, in a move critics say demonstrated the agency’s lack of transparency, DOJ redacted the names of all of the judges identified in the documents, an across-the-board approach that the U.S. Court of Appeals for the D.C. Circuit said could not be sustained.⁶⁸ We continue to support making the disciplinary process for immigration judges

more transparent and independent and continue to recommend that improved data be collected to monitor the performance of immigration judges and immigration courts and to help to identify additional areas in need of improvement.

Finally, while the immigration court system experimented with other case management tools in an effort to increase efficiency, such as vertical prosecution, pretrial conferences, and prosecutorial discretion, none has been adopted nationwide or led to widespread change in practice before the immigration courts. Further, most of these alternative measures rely to a significant degree on the cooperation and compliance of the parties to capture efficiencies. However, because DOJ has failed to enact implementing regulations allowing immigration judges to exercise the contempt power which Congress granted them more than 20 years ago, immigration judges are simply not vested with the power necessary to ensure that such practices can achieve meaningful results. We continue to encourage immigration courts to use case management tools, such as prehearing conferences, to improve efficiency of court proceedings, and immigration judges should be provided with the ability to exercise their discretion to fairly and efficiently manage their dockets.

C. Policies and Practices that Threaten Due Process

Recent shifts in policy and practice have eroded or threaten to erode the fundamental fairness of immigration proceedings. One such threat is the resurgent concern over politicized hiring practices in the wake of recent changes to the hiring criteria and process for immigration judges. The approach adopted from 2007 to 2016 stemmed politicized hiring, but slowed hiring to a glacial pace and did little to address concerns regarding the lack of diversity of immigration judges.⁶⁹ In April 2017, DOJ announced its plan to “streamline” hiring of immigration judges, estimating that the proposed changes would result in a hiring timeline of less than six months.⁷⁰ DOJ began implementing this new approach as of February 2018.⁷¹

While stakeholders broadly agree that improved, faster hiring practices are necessary, DOJ’s new approach has received criticism that it will elevate speed over substance, exacerbate the lack of diversity

on the bench, and eliminate safeguards that could lead to a resurgence of politicized hiring. Indeed, there have been a resurgence in reports of overt politicized hiring of immigration judges by DOJ, leading Congressional Democrats to call for a formal investigation into DOJ’s hiring practices with respect to immigration judges and members of the BIA.⁷² While EOIR and DOJ deny these allegations,⁷³ many commentators remained skeptical.⁷⁴

One of the most troubling aspects of the current hiring regime is the utter lack of transparency. DOJ and EOIR have declined to share the new hiring criteria with stakeholders. Further, to date, no investigation has been conducted into the allegations of politicized hiring. Meanwhile, DOJ has significantly stepped up hiring of immigration judges using these undisclosed standards. EOIR has hired more than 98 new immigration judges in 2017 and 2018.⁷⁵ To the extent the new hiring process in fact trades the “qualification requirements of judges” for speed, due process concerns are likely implicated as such an approach arguably removes safeguards designed to protect against politicized hiring, favors certain categories of candidates, and as a result may allow underqualified or potentially-biased judges to be hired. We continue to support the 2010 Report’s recommendation relating to additional hiring criteria and public participation in the hiring process, and also highlight the need for the hiring process to be insulated from the political process as much as practical. Further, we recommend that to the extent feasible, as much hiring as possible should be completed within the strictures of the new Article I court.

Since 2017, there has been a notable increase in the Attorney General’s use of the referral and certification power pursuant to 8 C.F.R. § 1003.1(h)(1), which empowers the Attorney General to *sua sponte* refer BIA decisions to him or herself and independently re-adjudicate them. From 2009 to 2017, the authority was only exercised four times;⁷⁶ conversely, in the twenty-one months then-Attorney General Jeff Sessions was in office, he referred at least seven BIA decisions to himself for review, and issued six decisions in five of the cases, substantially rewriting immigration law in the process.⁷⁷ These decisions, made unilaterally and with an undeniably ideological bent, threaten not only the viability of certain substantive claims and defenses from noncitizens, but

also directly impact immigration court proceedings and due process protections. Until such time as an Article I immigration court can be established, we recommend that DOJ consider establishing standards and procedures for the Attorney General certification process through rulemaking and further recommend that the Attorney General exercise his or her authority under 8 C.F.R. 1003.1(h)(1) sparingly to clarify, not rewrite, immigration law and to refrain from using it as a political or ideological tool.

Another issue that implicates due process concerns is the heavy reliance on video teleconferencing technology (“VTC”) to conduct immigration proceedings. The 2010 Report highlighted concerns that VTC was undermining the fairness of proceedings by “mak[ing] it more difficult to establish credibility and . . . mak[ing] it harder for respondents to argue their case.”⁷⁸ Given concerns about the fairness of such proceedings, the 2010 Report recommended that use of VTC be limited to procedural (as opposed to substantive) hearings and that respondents should be entitled to knowing and voluntary consent to proceeding via VTC.⁷⁹

Despite such recommendations and continuing concerns about the fundamental fairness of resolving substantive issues via VTC, immigration courts have relied and likely will rely more on VTC to resolve substantive and non-substantive hearings alike and no consent is required.⁸⁰ EOIR invested in upgrading and expanding VTC technology in its hearing locations and opened two immigration adjudication centers (“IACs”) designed to hear cases via VTC from all over the country.⁸¹ An increasing number of both procedural and substantive immigration proceedings (most often for detained noncitizens,⁸² including a recent reported increase in use for detained unaccompanied children held in various Office of Refugee Resettlement (“ORR”) shelters⁸³) are resolved using VTC, despite the myriad of due process concerns raised.⁸⁴

The use of VTC should be limited to non-substantive hearings where the noncitizen has consented to its use. VTC should not be used for unaccompanied children, especially detained children. To the extent ORR facilities use VTC for proceedings involving children in ORR custody, such use of VTC should, at a minimum, be limited to cases where the child is represented and in which both the child and counsel consent to its use; if the child is unrepresented,

VTC should not be used. It is also imperative that technology be improved to limit disruptions, improve reliability, and increase engagement in proceedings.⁸⁵ In addition, “collecting more reliable data on VTC hearings and using the information to assess any effects of VTC on hearing outcomes” could be helpful.⁸⁶ EOIR should also be aware that use of VTC to adjudicate immigration removal proceedings is likely to disproportionately impact disadvantaged detained populations and should take precautions to ensure due process is met in those circumstances. EOIR should also be attentive to opportunities to leverage technology when it is mutually acceptable to the stakeholders, including to alleviate the burden of travel to courtrooms for non-detained noncitizens who must appear for non-substantive status checks.

Increased immigration from Central American countries since 2010 has also highlighted a shortage of qualified interpreters for noncitizens in removal proceedings. A noncitizen’s ability to effectively communicate with the immigration court and make her case can be hampered by interpretation failures and that these failures can undermine due process.⁸⁷ Without reliable, accurate, and consistent translation services, unrepresented noncitizens have little or no ability to meaningfully participate. This problem is particularly pronounced for noncitizens whose primary language is uncommon or a regional indigenous dialect. We recommend EOIR increase efforts to identify, certify, and expand access to qualified interpreters in immigration proceedings, particularly interpreters for uncommon languages and indigenous regional dialects, so that noncitizens’ due process rights are protected.

D. Under-Resourced, Over-Worked Immigration Courts

At the end of FY 2010, the backlog of cases pending before the immigration courts stood at 262,799 cases nationwide.⁸⁸ Since that time, the number of cases pending has nearly tripled to an unprecedented high of 768,257 at the end of FY 2018.⁸⁹ The backlog of cases has increased every year since 2010, with the greatest increases occurring in the last three years.⁹⁰

At the time of the 2010 Report, there were 253 immigration judges on the bench. The number of judges has increased since then, but the increase has

not kept pace with the size of the backlog, nor actually filled the 484 judge positions funded by Congress.⁹¹ As of December 2018, after greatly accelerated hiring, there are still only 415 immigration judges on the bench.⁹² With a backlog of 768,257 cases (as of the end of FY 2018) this amounts to approximately 1,851 backlog cases per immigration judge, an untenable level.

While we recognize the tremendous need for additional resources in the immigration court system, we support hiring additional immigration judges, beyond the level currently authorized by Congress, only if accompanied by significant reforms designed to ensure adequate and non-politicized vetting of immigration judge candidates, enhanced training of immigration judges, sufficient supporting resources, and increased independence of immigration judges. Accordingly, we recommend that additional immigration judges (beyond the level currently authorized by Congress) be hired only under either a restructured Article I court as discussed in Part 6 of this Update Report, or, at a minimum, in conjunction with a concrete plan to adopt and implement the reforms addressed in detail in this Part of the Update Report which strive to promote judicial independence, ensure due process, and provide the necessary procedures, resources, and infrastructure (including law clerks and courtrooms) to support immigration judges and immigration courts in enhancing their independence, fairness, efficiency, and professionalism.

There is tremendous pressure for immigration judges to spend the vast majority of their time on the bench, leaving no time for administrative work. More administrative time to review dockets, submissions, and case law could allow immigration judges to narrow the scope of the hearings, thereby making the system more efficient. Allocating even one day a week to administrative time could also allow immigration judges to reset hearings that run over their allotted time to dates in the near future (rather than years from now as is presently the case), and also allow them time to read up on the law and prehearing submissions so that they are better prepared to efficiently resolve matters.

Immigration judges, in addition to maintaining impossible caseloads with very little administrative time, continue to suffer from a lack of resources. As of January 2019, there were 264 law clerks or attorney-

advisors assigned to the immigration courts.⁹³ While employing a total of 264 law clerks or attorney-advisors for approximately 415 immigration judges positively impacts the ratio of immigration judges to law clerks, it is still far from achieving EOIR's goal of one law clerk for every immigration judge. Indeed, according to Director McHenry, it may require additional appropriations for EOIR to be able to meet that goal.⁹⁴

In addition to needing more law clerks, immigration judges could also benefit from more and better training. There have been some improvements in the area of training since 2010, including conducting more in person training for all immigration judges. Annual training for immigration judges may not be in person going forward, however, due to the increasing size of the judge corps and associated costs.⁹⁵ EOIR conducts some training by VTC, sends trainers to the immigration courts to provide specialized training, and tries to have ongoing training at least once a quarter for new judges and BIA staff attorneys.⁹⁶

We do not, however, view VTC training or spot training as appropriate substitutes for an annual inperson training, and we encourage EOIR to continue to hold inperson training for immigration judges. We also recommend additional trainings and/or presentations by non-lawyers, such as psychiatrists and social workers, so that immigration judges have an understanding of the psychological and social effects of their decisions, an increased awareness of implicit bias, and further help immigration judges to avoid desensitization and to gain an understanding of the potential impact of secondary trauma (also called vicarious trauma).

EOIR expanded the role of Assistant Chief Immigration Judges ("ACIJs") after 2010 to include "portfolio" focused ACIJs (located at headquarters and focused on conduct, professionalism, and training) and a dedicated ACIJ for vulnerable populations who met with immigration court personnel regularly and determined specialized training relating to vulnerable populations.⁹⁷ In July 2017, EOIR eliminated all non-supervisory and non-adjudicatory immigration judge positions, including portfolio ACIJs for subjects such as intergovernmental relations, publications, and vulnerable populations.⁹⁸ There are currently 18 ACIJs, nine of which were appointed since January 2017.⁹⁹ Despite their increasing number and the fact that they may also handle cases and provide trainings, ACIJs

are still largely administrators and do not typically take on docket and court management functions that chief judges do in federal courts. Because the influx of these new ACIJIs is relatively recent, we recommend studying the effect of the increase in ACIJIs, and if those results are positive, adding more ACIJIs to regional courts. Ideally adding new ACIJIs will occur under an Article I court. We also recommend that ACIJIs handle cases, rather than simply serving as supervisors.

Practitioners, immigration judges, and government officials all agree that electronic case management and filing are key to a more efficient and reliable system.¹⁰⁰ In December 2017, EOIR acknowledged that it had made “little appreciable progress” towards establishing an electronic filing system since 2001,¹⁰¹ but in July 2018, it launched a pilot e-filing and document storage program which

has since been rolled out in several immigration courts.¹⁰² EOIR’s goal is to extend the e-filing and document storage program, ECAS, to all immigration courts in 2019.¹⁰³ We commend EOIR for this effort and support EOIR’s goal of fully implementing its ECAS system to all immigration courts.

Immigration courts are also suffering from a lack of physical space.¹⁰⁴ Current courtrooms available are no longer large enough to accommodate the needs of the ballooning immigration system. EOIR currently has space for approximately 426 to 428 immigration judges, including the new IAC in Fort Worth, Texas and the reopened IAC in Falls Church, Virginia,¹⁰⁵ and it has new space in the pipeline for 2019 and 2020. Except for space provided by DHS in detention facilities, EOIR is not able to acquire space for immigration judges beyond its appropriations.¹⁰⁶

Part 3: The Board of Immigration Appeals

The Executive Office for Immigration Review (“EOIR”) has taken important steps to improve processes used by the Board of Immigration Appeals (“BIA” or “Board”), providing a positive example in an immigration system struggling under the weight of serious structural and resource issues. EOIR has addressed several of the recommendations related to the BIA in the 2010 Report by implementing certain quality and process improvements, creating a pilot program to solicit amicus curiae briefs from interested parties, launching an electronic court filing system that will encompass the BIA, and expanding the size of the Board. To date, the BIA has also avoided significant growth in its case backlog and wait times.

Nevertheless, many of the recommendations from the 2010 Report remain unaddressed, and new proposals affecting immigration judges and the Board could undermine the improvements to date. Therefore, to support continued reform to help the Board best serve its role of applying immigration laws uniformly throughout the United States, we maintain the majority of our recommendations from the 2010 Report and make several new recommendations. For example, affirmances without opinion (“AWOs”) have declined since 2010, but short opinions by single members of the Board continue to be the predominant form of BIA decision making, with

many such opinions disposing of the matter based on only one of the issues presented. The number of precedent decisions the Board issues is still very low, as is the rate of oral argument. We therefore continue to recommend that the Board utilize more oral arguments and three-member panels, and also implement a policy that written decisions should address all non-frivolous arguments raised by the parties. We also encourage the BIA to issue more precedent decisions and recommend that the Board develop a process to resolve circuit splits by developing new precedent when presented with an appropriate case.

Moreover, if the Department of Justice (“DOJ”) implements the recommendations in Part 2 of this 2019 Update Report, the backlog in the immigration courts should decrease as a result of an increase in the number of decisions issued, potentially resulting in a larger volume of appeals to the BIA. The appeals caseload may also increase as EOIR continues to add and fill immigration judge positions and immigration enforcement increases. Moreover, several of our recommendations (such as increased use of three-member panels and oral arguments) will require additional staffing beyond current levels. Therefore, we continue to recommend increased resources for the Board to fund additional support staff, and we also

include a new recommendation that EOIR focus on developing a more professionally diverse Board by hiring members from a broader range of professional backgrounds, including practitioners with experience representing noncitizens and individuals reflecting a broader mix of racial, ethnic, gender, gender identity, sexual orientation, disability, religious, and geographically diverse backgrounds.

We also recommend that the Board continue to improve transparency and public input into the decision making process. The Board should make non-published opinions available to the public, and EOIR should continue its efforts to implement an integrated, system-wide electronic filing and case management system in all locations. As part of its amicus briefing requests, EOIR should also post all underlying decisions at issue to provide an opportunity for meaningful public briefing. Additionally, to the extent the immigration courts remain within the current administrative structure, DOJ should establish a more transparent process for the Attorney General's

exercise of his or her authority to self-refer BIA cases. Specifically, as discussed below, DOJ should consider establishing standards and procedures for Attorney General review through the rulemaking process, including procedures providing notice and a meaningful opportunity for the parties to brief the specific legal questions the Attorney General intends to review, and for amici to weigh in, before a decision is rendered.

In addition to the reforms described above, we also believe the Board must address the issue that noncitizens who are legally entitled to pursue a petition for review of the BIA's decision from abroad essentially lose this right, from a practical standpoint, once they have been involuntarily removed to their home country. Specifically, the BIA should implement a process that allows for a temporary stay of removal or deportation pending appeal to ensure the right of a noncitizen to appeal is meaningful and balanced appropriately against the government's legitimate interest in finality of litigation.

Part 4: Judicial Review

In the nine years since the 2010 Report, the landscape for judicial review of immigration decisions has remained mostly unchanged. There have been no amendments to the statutory framework that severely restricts the availability of judicial review.

The 2010 Report set forth several recommendations aimed at mitigating the harshest effects of the jurisdiction-stripping provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), as well as the REAL ID Act of 2005. Those recommendations included, in particular, suggestions that Congress reinstate the abuse-of-discretion review that had been previously available; take steps to prevent the Attorney General from unilaterally shielding actions from review by labeling actions "discretionary"; restore the courts' pre-1996 ability to remand cases to the BIA or Immigration Court for additional fact-finding; and amend the Immigration and Nationality Act ("INA") to extend the deadline for filing a petition for review. The 2010 Report further recommended that the BIA amend its regulations to require that each final removal order in which the

government prevails include essential information about the right to appeal.

None of these 2010 recommendations has been adopted, and in the last nine years, the landscape for judicial review of removal orders has remained mostly unchanged. While the Supreme Court in the intervening years has held that the Attorney General may not unilaterally shield actions from review, many barriers to obtaining judicial review of immigration decisions remain. Review by the federal judiciary is essential to ensure consistency, fairness, and due process in the administration of our nation's immigration system. We therefore renew our previous recommendations to strengthen this critical structural protection.

Immigration cases continue to make up a significant proportion of the federal courts of appeals' civil docket nationwide, though the flood of immigration appeals has somewhat abated since the mid-2000s. Many interviewees noted the importance of legal representation to the efficient and fair disposition of immigration appeals. A number of circuits—most notably the Ninth and Second Circuits—have developed formal programs

to provide pro bono counsel to pro se parties with meritorious or complex appeals, including immigration appeals. These programs have proven extremely popular and successful, with many more volunteer attorneys than cases each year. We

recommend that the courts of appeals consider establishing or expanding such programs to provide pro bono representation to pro se appellants in immigration cases, where such representation would assist the court in disposing of the appeal.

Part 5: Representation

Representation is associated with dramatically more successful case outcomes for immigrant respondents.¹⁰⁷ Yet, “removal proceedings are the only legal proceedings in the United States where people are detained by the federal government and required to litigate for their liberty against trained government attorneys without any assistance from counsel.”¹⁰⁸ Evidence shows that noncitizens represented by counsel seek more meritorious relief, have higher success rates than their pro se counterparts, and immigration judges and commentators agree that the presence of counsel helps courts adjudicate cases more fairly, efficiently, and quickly.¹⁰⁹

Despite these considerations, Congress has not taken legislative action since the 2010 Report to expand the right of representation in the immigration context. Moreover, while overall representation rates in immigration court have increased from 43% in 2011 to 61% in 2016,¹¹⁰ “the raw number of unrepresented immigrants facing deportation in recent years is at historic highs.”¹¹¹ In 73,524 cases that were completed in fiscal year 2016, the respondents lacked representation.¹¹² The statistics do not account for the wildly variable rates of representation among different noncitizen populations based on factors as arbitrary as detention status or where physically in the U.S. the noncitizen is adjudicating his or her case.¹¹³ For instance, one study found that during the six-year study period from 2007 to 2012, only 14% of detained respondents were represented by counsel, whereas 66% of their non-detained counterparts obtained representation.¹¹⁴ Families and children negotiating complex removal proceedings are also substantially less likely to secure representation,¹¹⁵ and the court before which a noncitizen proceeds can reduce the individual’s chance of success by more than 70%.¹¹⁶

In the legislative vacuum, stakeholders have pursued various approaches, including private and public funding and litigation, to work towards ensuring more representation of noncitizens in

removal proceedings. This piecemeal approach, while laudable and effective at increasing representation for certain categories of noncitizens, has created an idiosyncratic patchwork of legal representation in which some noncitizens are provided representation in removal proceedings while other similarly situated noncitizens are not.

The programs established in the last nine years have provided a critical legal lifeline to protect the vulnerable, promote due process, and enhance the legitimacy and fairness of the immigration system as a whole. However, executive actions, for instance with respect to the Legal Orientation Program (“LOP”), have brought into sharp focus the precarious existence of programs that lack a statutory mandate in volatile political climates. An uncertain future combined with the lack of uniformity with which representational and informational services are administered underscores the need to stabilize, standardize, and expand initiatives designed to ensure higher quality and more representation for noncitizens in removal proceedings. As reflected in our updated recommendations, Congressional action will be critical to ensure the continued existence and expansion of programs and to thereby safeguard due process in immigration proceedings.

A. Right to Representation

One of the major advances towards ensuring access to counsel in immigration proceedings that occurred in the last nine years was the launch of the first publicly-funded universal representation project for indigent noncitizens in removal proceedings.¹¹⁷ Through local-government funding, the New York Immigrant Family Unity Project (“NYIFUP”) has provided a free attorney to nearly all detained financially eligible noncitizens in New York City since mid-2014.¹¹⁸ NYIFUP’s success has inspired similar projects and movements throughout the country at

the state and local levels and has gained substantial national traction in diverse jurisdictions since 2017.¹¹⁹

Another major advancement, achieved through more adversarial means, resulted from the 2010 class action lawsuit *Franco-Gonzalez v. Holder*, in which the court entered a permanent injunction requiring the U.S. government to provide a “qualified representative” to unrepresented noncitizens who are found mentally incompetent to represent themselves in immigration proceedings due to a serious mental health condition and are detained in California, Arizona, or Washington.¹²⁰ The *Franco-Gonzalez* decision led the Department of Justice (“DOJ”) and Department of Homeland Security (“DHS”) to announce a nationwide policy to provide safeguards for unrepresented immigration detainees who have an indicia of mental incompetence and to the creation of the National Qualified Representative Program (“NQRP”), which provides a specific safeguard — legal representation — for such individuals who are found mentally incompetent to represent themselves because of a serious mental health condition.¹²¹

Efforts to bring about similar change through litigation on behalf of detained noncitizen children have thus far been unsuccessful, however.¹²² The stakes could not be higher for this vulnerable population: “among children with representation, 73% are allowed to remain in the United States while only 15% of unrepresented children are allowed to stay.”¹²³ The last nine years have seen the emergence and dissolution of several discrete government-funded programs to provide representation to unaccompanied children who are otherwise forced to navigate the complex immigration system alone.¹²⁴ These programs provided only partial coverage to children in removal proceedings, and only one such program remains funded as of the writing of this Update.

Representation plays a critical role in ensuring due process, fairness, and efficiency in immigration proceedings. Providing counsel to noncitizens in immigration proceedings will also have the beneficial effect of bestowing more legitimacy to the immigration system as a whole. For these and the aforementioned reasons the ABA supports the appointment of counsel at federal government expense to represent all indigent persons in removal proceedings before Executive Office for Immigration Review (“EOIR”), and if necessary to advise such individuals of their rights to appeal to the federal Circuit Courts

of Appeals.¹²⁵ Until the former recommendation is accomplished, we also encourage state, local, territorial, and tribal governments to provide legal counsel in removal proceedings to all indigent persons in their jurisdictions who lack the financial means to hire private counsel and who lack pro bono counsel and finally, to prioritize government-funded counsel for detained individuals in removal proceedings until Congress takes such action. We further recommend legislative action be taken to stabilize, standardize and expand programs designed to provide noncitizens in removal proceedings, particularly for vulnerable populations like children and individuals with mental disabilities, with more high-quality information and representation and to reach noncitizens regardless of where in the country they find themselves fighting their immigration cases.

In order to limit controversy over whether the provision of government-funded representation is permitted, the 2010 Report recommended that Congress should take action to eliminate the “no expense to the government” limitation of section 292 of the Immigration and Nationality Act (“INA”). This language has the arguable effect of prohibiting representation for many noncitizens in a system that itself recognizes the dire need for representation to protect individual rights and ensure due process and efficiency. We continue to strongly support this recommendation.

B. Sources of Representation and Legal Guidance

There have also been significant efforts to provide more immigrants with access to high-quality legal information and to help them gain access to pro bono representation. Only a very small percentage of immigrants in removal proceedings — less than two percent according to one study — are able to obtain access to some sort of pro bono legal representation.¹²⁶ Since the 2010 Report, LOP, which educates detained immigrants and asylum seekers about their rights and responsibilities, various aspects of immigration law, and the immigration court process, has expanded to several new detention facilities and the government launched five Immigration Court Helpdesks (“ICHS”) to provide legal education and resources on the immigration process to non-detained immigrants.¹²⁷ Studies consistently demonstrate that LOP creates

efficiency and cost savings; however despite demonstrated benefits DOJ has expressed skepticism over the program and has begun its own study of the program, the first Phase of which has been released and expressed greatly divergent conclusions than prior and contemporaneous studies.¹²⁸

While both LOP and ICH, at present, continue to receive funding, given DOJ's apparent skepticism of LOP this concession may prove but a temporary reprieve.¹²⁹ Legislative action is thus necessary to stabilize LOP and ICH and fortify them against arbitrary political action which could threaten to undermine due process and the fundamental fairness of the immigration court system.¹³⁰

Contrary to DOJ's recent actions and assessment, we continue to recommend that LOP be expanded to provide guidance to more immigrants in removal proceedings, including to expand LOP's reach into all immigration detention facilities, and to provide services to non-detained noncitizens and those facing expedited removal proceedings. Finally, we believe that the expansion of LOP should complement, rather than detract from the overarching goal of direct government-funded representation to indigent immigrants.¹³¹

C. The Recognition and Accreditation Program for Non-Attorney Representatives

In December 2016, EOIR formally announced its final rule for Recognition and Accreditation Programs ("R&A final rule").¹³² The stated purpose of the rule is to "promote the effective and efficient administration of justice before EOIR and DHS by increasing the availability of competent, non-lawyer representation for low-income and indigent persons" and "reduce the likelihood that such persons become victims of fraud and abuse."¹³³

The R&A final rule made numerous substantive changes to the R&A program, many of which were directed at improving the quality of representation and legal guidance provided through such programs.¹³⁴ The R&A final rule also significantly updates eligibility and procedural elements of the program to address administrative concerns.

These changes are laudable in their aim: to increase access to qualified non-lawyer representation to noncitizens in immigration proceedings while attempting to balance concerns over potential

abuse. Careful monitoring of the R&A program will be required to ensure the rule is meeting its stated purpose. We also recommend adopting several discrete rule enhancements to further deter unscrupulous practices and protect against inadequate, even if well-intentioned, non-lawyer guidance and representation.

First, we recommend that EOIR establish parameters to prevent unqualified individuals from improperly handling immigration cases. Specifically, we recommend requiring recognized organizations to have a structure in place to promote attorney supervision, mentoring and support to help protect against even well-intentioned misfeasance.

Second, we recommend that in addition to introductory courses on immigration law and administrative procedure, that EOIR and Office of Legal Access Programs ("OLAP") develop and require accredited representatives to participate in continuing education relating to immigration law, preferably requiring participating in at least two legal trainings annually. Immigration law is fast developing and dynamic. Regular continuing education is thus critical to ensure quality information and guidance is being provided to noncitizens relying on the assistance of accredited representatives.

D. Quality of Representation

The quality of legal representation in the immigration law context has been an issue of concern for decades and continues to be a critical issue today. Recent proposed rule changes to issue ineffective assistance of counsel regulations, however, have been stalled since 2016.

EOIR should continue to investigate and prosecute fraud and unauthorized practice through various mechanisms, including the Fraud and Abuse Prevention Program, the departmental working group on *notarios*, and the Attorney Discipline System. EOIR should move forward and publish the in-progress regulation concerning ineffective assistance of counsel in immigration proceedings. Additionally, we recommend the creation of a centralized reporting system to identify and publicize those engaged in fraud along with the publication of a guide to assist victims of fraud with information, support, and services to help them recover from fraud.

In September 2015, EOIR published a final rule enhancing eligibility requirements for the service providers included on its pro bono service providers list.¹³⁵ The final rule permits EOIR’s Director to add or remove providers from the list, and requires approved providers to recertify their eligibility every three years.¹³⁶ The aim of the rule change was to improve the functioning and integrity of the list by providing immigrants in removal proceedings a reliable resource listing individuals and entities that provide a significant and consistent source of pro bono representation in immigration cases and who remain eligible to provide such legal services.¹³⁷ We support such continued efforts to expand access to

high-quality pro bono representation in immigration proceedings.

Finally, despite recommendations to the contrary, the Attorney General has not taken any action to enact regulations to allow immigration judges the ability to exercise their contempt power. Congress granted this authority more than twenty years ago in 8 U.S.C. § 1229a(b)(1). Absent implementing regulations, this authorization has no teeth. We continue to support the recommendation that the Attorney General should take action to enact regulations to allow immigration judges the ability to exercise their contempt power, as authorized by Congress more than twenty years ago.

Part 6: System Restructuring

In our 2010 Report, we discussed the need to restructure the immigration judiciary as an independent entity, identified the goals of any such restructuring, defined alternative restructuring approaches and the major features of each, compared those approaches with respect to specific criteria, and made recommendations as to the overall approach and specific features. In the Update Report, we revisit these topics in light of recent developments and the views and proposals of various scholars and organizations.

A. 2010 Report

The 2010 Report identified four goals of any major system restructuring:

Independence: Immigration judges at both the trial and appellate level must be sufficiently independent, with adequate resources, to make high-quality, impartial decisions without any improper influence, particularly where that influence makes the judges fear for their job security.

Fairness and perceptions of fairness: Not only must the system actually be fair, it must appear fair to all participants, particularly to the noncitizen who may not have any other experience with our government.

Professionalism of the immigration judiciary: Immigration judges should be talented and experienced lawyers who treat those appearing before them with respect and professionalism.

Increased efficiency: An immigration system must process immigration cases quickly without sacrificing quality, particularly in cases where noncitizens are detained.

After making the case for an independent immigration judiciary, the 2010 Report then identified three alternative approaches for providing such a system:

- (a) Article I Court: An independent court system established under Article I of the Constitution to replace all of the Executive Office for Immigration Review (“EOIR”), including the immigration courts and Board of Immigration Appeals (“BIA”), which would include both a trial level and an appellate level tribunal;
- (b) Independent Agency: A new executive branch adjudicatory agency, which would be independent of any other executive department or agency, to replace EOIR and contain both trial level administrative judges and an appellate level review board; and

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- (c) **Hybrid:** A hybrid approach placing the trial level adjudicators in an independent administrative agency and the appellate level tribunal in an Article I court.

We compared the three alternative models primarily based on six criteria, including (1) independence; (2) perceptions of fairness; (3) the quality and professionalism of judges; (4) efficiency and relative cost and ease of administration; (5) accountability; and (6) impact on Article III courts. We recommended the creation of an Article I court system for the entire immigration judiciary as a first preference and the creation of an independent agency in the Executive Branch as a good second option. In either case, the system would include both a trial level and an appellate level tribunal. The specific features of the two approaches would differ primarily with respect to the selection, tenure, and removal of judges.

B. Recent Developments

While the basic structure of the immigration adjudication system has not changed since 2010, we have considered recent developments that have made the need for an independent immigration judiciary more urgent and bolstered the case for an Article I court system, including:

- A dramatic and unprecedented increase in the case backlog, resulting in increasingly over-worked and under-resourced courts;
- Politically motivated prioritization of cases that interferes with the courts' ability to control their dockets and complete cases;
- A systematic elimination or undermining of tools that are or could be used by immigration judges to control their dockets (e.g., continuances, administrative closure, and termination) and continued failure to issue regulations giving judges contempt power;
- The establishment of case production quotas that have threatened the independence of immigration judges by emphasizing speed over fairness in deciding cases;

- Concerns about resurgent politicization of the process for hiring judges that lacks transparency and arguably elevates speed over substance;
- Reassignment of cases by EOIR based on disagreement with the results; and
- Increased use of case certification by the Attorney General on both substantive and procedural matters, without adequate transparency and due process safeguards.

C. The Need for Independence

All of the reasons for an independent immigration judiciary discussed in the 2010 Report remain valid. Additionally, the recent developments discussed above tend to strengthen the need for an independent immigration judiciary. We have also considered the views of various scholars and stakeholder groups, including the National Association of Immigration Judges (“NAIJ”), the American Immigration Lawyers Association (“AILA”), the Federal Bar Association (“FBA”), and the American Bar Association itself favoring the creation of an independent immigration judiciary, as well as EOIR’s views opposing such restructuring. We conclude that the current system is irredeemably dysfunctional and on the brink of collapse, and that the only way to resolve the serious systemic issues within the immigration court system is through transferring the immigration court functions to a newly-created independent court. This approach is the best and most practical way to insulate the courts from the disruptive sway of politics and ensure due process and the rule of law.

D. Choice of Article I Court or Administrative Agency

We have re-evaluated the choice between an Article I court and an independent administrative agency in light of the recent developments discussed above and the views of other organizations favoring an Article I court, including NAIJ, AILA and FBA. An agency is more likely to perpetuate the bureaucratic, hierarchical structure of EOIR and would be more vulnerable to political pressures and influence.

We, therefore, continue to recommend an Article I court system for the entire immigration judiciary and now view it as much superior to an independent agency in the Executive Branch.

E. Specific Features

Regarding the specific features and attributes of an Article I court, we have considered the restructuring proposals of various stakeholder groups and scholars, including especially a proposal from the FBA to establish an Article I court having specific features designed to de-politicize the appointment of judges and decentralize court administration. Under this proposal, the court would have an appellate division with 18 judges serving terms of 15 years, appointed by the President subject to Senate confirmation, with no more than 9 judges belonging to the same political party; a trial division with judges appointed by the appellate division and serving 15-year terms; and a chief trial judge determined by seniority for each geographic area served by the trial division. We believe the ABA should now work with the FBA and other stakeholders to reach consensus on the specific features of an Article I court. However, while we encourage flexibility in negotiating these specifics, we believe that the judicial review component should provide that final decisions of the new court would be subject to review in the regional federal courts of appeals, with the scope of review being no less broad than under current law regarding review of BIA decisions.

F. 2019 Recommendations

Based on the foregoing discussion, we continue to recommend the restructuring of the current immigration court system to be independent of the Department of Justice or any other federal department or agency, as follows:

- (1) We support the creation of an Article I court system for the entire immigration judiciary, but suggest that the specific features regarding qualifications, selection, tenure, removal, administration, supervision, discipline and judicial review to be revisited in conjunction with other stakeholders; provided that, with respect to judicial review, final decisions of the new court

should be subject to review in regional federal courts of appeals, with the scope of review being no less broad than under current law regarding review of BIA decisions.

- (2) We now view an Article I court system for the entire immigration judiciary as much superior to an independent agency in the Executive Branch.

Endnotes

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- 9 See 2010 Report at 1-22–1-23.
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- 14 HUMAN RIGHTS WATCH, YOU DON’T HAVE RIGHTS HERE: US BORDER SCREENING AND RETURNS OF CENTRAL AMERICANS TO RISK OF SERIOUS HARM (2014) [hereinafter HRW, YOU DON’T HAVE RIGHTS HERE], <https://www.hrw.org/report/2014/10/16/you-dont-have-rights-here/us-border-screening-and-returns-central-americans-risk>.
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- 16 138 S. Ct. 1204 (2018).
- 17 8 C.F.R. § 212.7(e); 8 C.F.R. § 212.7(e); INA § 212(a)(9)(B)(v).
- 18 Expansion of Provisional Unlawful Presence Waivers of Inadmissibility, 81 Fed. Reg. 50,244 (July 29, 2016) (codified at 8 C.F.R. pts. 103 & 212); see also U.S. Citizenship and Immigration Services, Provisional Unlawful Presence Waivers, <https://www.uscis.gov/family/family-us-citizens/provisional-waiver/provisional-unlawful-presence-waivers> (last updated Jan. 5, 2018) [hereinafter USCIS, Provisional Waivers].
- 19 The waiver is only available for those eligible noncitizens pursuant to INA Act § 212(a)(9)(B), not those who are barred from reentry after accruing a year or more of unlawful permanent status pursuant to INA § 212(a)(9)(C). Applicants must be 17 years of age or older and be physically present in the U.S. to file the application and provide biometrics. See 8 C.F.R. § 212.7(e); see also USCIS, Provisional Waivers, *supra* note 18.
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- 32 GAO-15-26, ALTERNATIVES TO DETENTION, *supra* note 30, at 30.
- 33 ICE, Directive 11002.1, Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture, at 3 (Dec. 8, 2009), https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_alien_found_credible_fear.pdf.
- 34 Mark L. Noferi & Robert Koulisch, *The Immigration Detention Risk Assessment*, 29 GEO. IMMIGR. L.J. 45, 47-48 (2014).
- 35 See USCIS, In-Country Refugee/Parole Processing for Minors in Honduras, El Salvador and Guatemala (Central American Minors – CAM), <https://www.uscis.gov/CAM> (last updated Nov. 15, 2017) [hereinafter USCIS, CAM]; David Nakamura, Trump administration ends Obama-era protection program for Central American Minors, WASH. POST Aug. 16, 2017, https://www.washingtonpost.com/politics/trump-administration-ends-obama-era-protection-program-for-central-american-minors/2017/08/16/8101507e-82b6-11e7-ab27-1a21a8e006ab_story.html.
- 36 Exec. Order No. 13,768, 82 Fed. Reg. 8,799 (Jan. 25, 2017).
- 37 See Memorandum from John Kelly, Sec’y, Dep’t of Homeland Security, to Kevin McAleenan, Acting Comm’r, U.S. Customs and Border Protection, Thomas D. Homan, Acting Director, ICE, Lori Scialabba, Acting Director, USCIS, Joseph B. Maher, Acting Gen. Counsel, Dimple Shah, Acting Assistant Sec’y for Int’l Affairs, Chip Fulghum, Acting Undersecretary for Mgmt. Enforcement of the Immigration Laws to Serve the National Interest (Feb. 20, 2017) [hereinafter 2017 Kelly Enforcement Memorandum], https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf.
- 38 Exec. Order No. 13,768 § 5.
- 39 Statement from President Donald J. Trump (Sept. 5, 2017), <https://www.whitehouse.gov/briefings-statements/statement-president-donald-j-trump-7>.
- 40 See, e.g., *Batalla Vidal v. Nielsen*, No. 1:16-cv-04756 (E.D.N.Y.); *Regents of the University of California v. DHS*, No. 3:17-cv-5211 (N.D. Cal.); *Texas v. Nielsen*, No. 18-00068 (S.D. Tex.).
- 41 Press Release, Dep’t of Justice, Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry (Apr. 6, 2018), <https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry>.
- 42 Dep’t of Justice, Attorney General Sessions Delivers Remarks Discussing the Immigration Enforcement Actions of the Trump Administration (May 7, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions>.
- 43 Exec. Order No. 13,841, 83 Fed. Reg. 29,435 (June 25, 2018).
- 44 DHS, Fact Sheet: Zero-Tolerance Prosecution and Family Reunification (June 23, 2018), <https://www.dhs.gov/news/2018/06/23/fact-sheet-zero-tolerance-prosecution-and-family-reunification>.
- 45 26 I&N Dec. 388 (BIA 2014).
- 46 *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018) at 346.
- 47 26 I&N Dec. at 388-89.
- 48 In order to be eligible for asylum, a noncitizen must demonstrate that he or she meets the definition of “refugee” in the Immigration and Nationality Act, in part that he or she is unwilling or unable to return to her country of nationality because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion. See 8 U.S.C. § 1101(a)(42).
- 49 See *East Bay Sanctuary Covenant v. Trump*, No. 18-cv-06810, 2018 WL 6660080 (N.D. Cal. Dec. 19, 2018).
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50 27 I&N Dec. 271 (A.G. 2018).

51 *Id.* at 283.

52 Attorney General Sessions noted that while he is “cognizant of the need to return [administratively closed] cases to the active docket so that these matters can proceed expeditiously,” he is concerned that the immediate re-calendaring of previously closed decisions would likely overwhelm the immigration courts. *Id.* at 293. Accordingly, Sessions ordered that, although all currently administratively closed cases may remain closed unless DHS or other respondent requests re-calendaring, he expects that the re-calendaring process will proceed in a “measured but deliberate fashion that will ensure that cases ripe for resolution are swiftly returned to active dockets. *Id.*”

53 *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012); *see also Matter of W-Y-U*, 27 I&N Dec. 17 (BIA 2017).

54 *Matter of Castro-Tum*, 27 I&N Dec. 271.

55 TRAC, BACKLOG OF PENDING CASES IN IMMIGRATION COURTS (2018), http://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog.php (last visited December 4, 2018) [hereinafter TRAC, BACKLOG OF PENDING CASES]; TRAC, IMMIGRATION COURT BACKLOG SURPASSES ONE MILLION CASES (Nov. 6, 2018), <http://trac.syr.edu/immigration/reports/536/> [hereinafter TRAC, IMMIGRATION COURT BACKLOG SURPASSES ONE MILLION CASES]. At the end of FY 2010, by comparison, the backlog of cases pending before the immigration courts was about 300,000 cases nationwide.

56 TRAC, BACKLOG OF PENDING CASES, *supra* note 55; TRAC, AVERAGE TIME PENDING CASES HAVE BEEN WAITING IN IMMIGRATION COURTS AS OF SEPTEMBER 2018 (2018), http://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog_avgdays.php (last visited December 7, 2018).

57 2010 Report Executive Summary at ES–27–28; 2010 Report at 2–15, 2–16.

58 *Id.* at ES–27–28.

59 Statement of Judge A. Ashley Tabaddor, President National Association of Immigration Judges, Before the Senate Judiciary Committee, Border Security and Immigration Subcommittee Hearing on “Strengthening and Reforming America’s Immigration Court System” 2 (Apr. 18, 2018), <https://www.judiciary.senate.gov/imo/media/doc/04-18-18%20Tabaddor%20Testimony.pdf>.

60 Memorandum from EOIR Director James McHenry, Immigration Judge Performance Metrics (Mar. 30, 2018), <http://www.aila.org/infonet/eoir-memo-immigration-judge-performance-metrics> [hereinafter Immigration Judge Performance Metrics].

61 Judge A. Ashley Tabaddor Testimony before Senate on Strengthening and Reforming America’s Immigration Court System, *supra* note 59 at 7–8.

62 *Compare id.*; American Immigration Council, Joshua Briesblatt, *Immigration Judge Quota Could Result in Assembly Line Justice*, IMMIGRATION IMPACT (Apr. 4, 2018), <http://immigrationimpact.com/2018/04/04/immigration-judge-quotas/> with Testimony of Andre R. Arthur, Resident Fellow of Law and Policy, Center for Immigration Studies, Before the Senate Judiciary Committee, Border Security and Immigration Subcommittee Hearing on Strengthening and Reforming America’s Immigration Court System (Apr. 18, 2018), <https://cis.org/Testimony/Strengthening-and-Reforming-Americas-Immigration-Court-System>.

63 *See* EOIR, Memorandum from MaryBeth Keller, Chief Immigration Judge, “Operating Policies and Procedures Memorandum 17-01: Continuances,” (July 31, 2017), <https://www.justice.gov/eoir/file/oppm17-01/download>; *Matter of L-A-B-R*, 27 I&N Dec. 405 (A.G. 2018); *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018); *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (A.G. 2018).

64 *See Matter of Castro-Tum*, 27 I&N Dec. 271, 290, 292–93 (A.G. 2018); *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462, 464–65 (A.G. 2018).

65 Press Release, DOJ, Executive Office for Immigration Review Releases Immigration Judge Ethics and Professionalism Guide (Apr. 4, 2011), <https://www.justice.gov/eoir/IJEthicsGuide04042011>.

66 *See* DOJ, Ethics and Professionalism Guide for Immigration Judges, 2 § IX, <https://www.justice.gov/sites/default/files/eoir/legacy/2013/05/23/EthicsandProfessionalismGuideforIJs.pdf> (last visited Dec. 9, 2018).

67 Zoe Tillman, *DOJ Can’t Shield Names of All Immigration Judges Who Face Complaints, DC Circuit Rules*, NAT’L L. J. (July 29, 2016), <https://advance.lexis.com/api/permalink/ef39108f-85b7-43d3-9f12-33d7d8910c2b/?context=1000516>; *see also AILA v. EOIR*, 830 F.3d 667, 669–670 (D.C. Cir. 2016).

68 830 F.3d at 669–70.

69 *See* U.S. GOV’T ACCOUNTABILITY OFF., GAO-18-469T, Immigration Courts: Observations on Restructuring Options and Actions Needed to Address Long-Standing Management Challenges (2018) [hereinafter 2018 GAO Report], <https://www.gao.gov/assets/700/691343.pdf> (“[F]rom February 2014 through August 2016, EOIR took an average of 647 days to hire an immigration judge — more than 21 months.”); U.S. GOV’T ACCOUNTABILITY OFFICE, Immigration Courts: Actions Needed to Reduce the Backlog and Address Long-Standing Management and Operational Challenges 40 (2017) [hereinafter 2017 GAO Report] (“From 2011 to August 2016, EOIR took an average of more than 2 years — 742 days — to hire new immigration judges” and even after the end of the hiring freeze in February 2014, EOIR still took an average of 647 days to hire an immigration judge). One factor that contributed both to the lengthy hiring process and the lack of diversity in the selection process is the need for immigration judges to obtain certain security clearances. *Id.* The background checks take an average of 41 days, but the process is much faster for candidates with government experience, such as government trial attorneys, who have already cleared security checks. *Id.* at 40–43. This problem continues today, but is overshadowed by larger concerns over the hiring processes adopted and implemented in 2017 and 2018.

70 Press Release, DOJ, Attorney General Jeff Sessions Announces the Department of Justice’s Renewed Commitment to Criminal Immigration Enforcement (Apr. 11, 2017), <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-announces-department-justice-renewed-commitment-criminal>; Statement of James McHenry, Acting Director EOIR before House Subcommittee on Immigration and

Border Security, Overview of the Executive Office for Immigration Review 3 (Nov. 1, 2017), <https://judiciary.house.gov/wp-content/uploads/2017/10/Witness-Testimony-James-McHenry-EIOR-11-01-2017.pdf>.

71 See 2018 GAO Report, *supra* note 69 at 11.

72 U.S. House Committee on The Judiciary, Democrats, Press Release: *Top Dems Request Inspector General Investigation of Allegations of Illegal Hiring Practices at the Department of Justice* (May 8, 2018), <https://democrats-judiciary.house.gov/news/press-releases/top-dems-request-inspector-general-investigation-allegations-illegal-hiring>; Letter from Senate and House Democrats to Judge Michael E. Horowitz, Inspector General (May 8, 2018), <https://www.aila.org/advo-media/whats-happening-in-congress/congressional-updates/senate-and-house-democrats-request-ig-investig>.

73 See, e.g., Brooke Singman, *DOJ fires back at Dems' claim of political bias over immigration judge hiring*, Fox News (Jun. 6, 2018), <https://www.foxnews.com/politics/doj-fires-back-at-dems-claim-of-political-bias-over-immigration-judge-hiring> (citing a letter from DOJ Assistant Attorney General Stephen Boyd refuting the charges); Subcommittee on Border Security and Immigration, Senate Committee on the Judiciary, *Hearing on Strengthening and Reforming America's Immigration Court System*, Questions for the Record to EOIR Director McHenry (Apr. 18, 2018), <https://www.judiciary.senate.gov/imo/media/doc/McHenry%20Responses%20to%20QFRs.pdf>.

74 See, e.g., Patricia Alvarez, *Jeff Sessions is Quietly Transforming the Nation's Immigration Courts: The attorney general has stepped up the hiring of immigration judges, ordered them to hear more cases, and shown a preference for those who've previously been prosecutors*, THE ATLANTIC (Oct. 17, 2018), <https://www.theatlantic.com/politics/archive/2018/10/jeff-sessions-carrying-out-trumps-immigration-agenda/573151/> [hereinafter *Quietly Transforming the Nation's Immigration Courts*]; Jeffrey Chase, *EOIR's Hiring Practices Raise Concerns* (May 27, 2018), <https://www.jeffreyschase.com/blog/2018/5/27/eoirs-hiring-practices-raise-concerns> ("There seems to be little if any doubt among EOIR employees that [delaying or withdrawing immigration judge appointments to candidates whose political views are not believed to align with those of the present administration] is in fact happening.")

75 See EOIR, Press Release, Executive Office for Immigration Review Announces Largest Immigration Judge Investiture Since At Least 2010, Hiring Times Reduced by More Than 50% (Aug. 16, 2018), <https://www.justice.gov/opa/pr/executive-office-immigration-review-announces-largest-immigration-judge-investiture-least>; EOIR, Press Release, EOIR Announces Largest Ever Immigration Judge Investiture (Sept. 28, 2018), <https://www.justice.gov/opa/pr/eoir-announces-largest-ever-immigration-judge-investiture> (announcing the investiture of an additional 46 immigration judges); Press Release, EOIR, Executive Office for Immigration Review Swears in 16 Immigration Judges (Nov. 16, 2018), <https://www.justice.gov/eoir/page/file/1112111/download>.

76 Alberto R. Gonzales & Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General's Review Authority*, 101 IOWA L. REV. 841, 857-58 (2016), <https://ilr.law.uiowa.edu/assets/Uploads/ILR-101-3-Gonzales.pdf>.

77 See Jonathan Blitzer, *Jeff Sessions is out, but his dark vision for immigration policy lives on*, THE NEW YORKER (Nov. 8, 2018), <https://www.newyorker.com/news/news-desk/jeff-sessions-is-out-but-his-dark-vision-for-immigration-policy-lives-on>; Alison Frankel, *Jeff Sessions' 'unprecedented' legacy in immigration court*, REUTERS (Nov. 8, 2018), <https://www.reuters.com/article/us-otc-sessions/jeff-sessions-unprecedented-legacy-in-immigration-court-idUSKCN1ND35C> (further noting that the Attorney General had certified additional matters, including the *Matter of M-G-G*—prior to resigning in November 2018). Interim Attorney General Whitaker further certified two BIA decisions to himself within his first month in the position. See *Castillo-Perez*, 27 I&N Dec. 495 (A.G. 2018) (reviewing the standard for determining “good moral character” in connection with application for cancellation of removal and multiple convictions of driving while intoxicated or driving while under the influence), *Matter of L-E-A-*, 27 I&N Dec. 494 (A.G. 2018) (examining whether, and under what circumstances, an immigrant may establish an asylum claim based on membership in a “particular social group” based on familial relations).

78 2010 Report at 2–27.

79 *Id.* at 2–41.

80 See Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109-4 NW. U. L. REV. 933, 934 (2015), <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1217&context=nulr> [hereinafter *Remote Adjudication*]; *Quietly Transforming the Nation's Immigration Courts*, *supra* note 74 (noting increased hiring of immigration judges to staff up two “adjudication centers—in Falls Church, Virginia, and Fort Worth, Texas—where cases from around the country will be heard through video conferencing.”).

81 See 2017 GAO Report, *supra* note 69, at 51-52; Statement of James McHenry, Acting Director EOIR before House Subcommittee on Immigration and Border Security, “Overview of the Executive Office for Immigration Review” (Nov. 1, 2017) at 4 (“We have recently updated more than 175 existing VTC systems and deployed an additional 84 new VTC systems to allow for more geographic flexibility for hearing cases. In fact, we are in the process of reopening one VTC hearing location with five immigration judges and establishing a new one with up to fifteen immigration judges in order to increase our adjudicatory capabilities. Further, in partnership with the Department’s Bureau of Prisons (BOP) and DHS, we have deployed 44 VTC units to 22 locations to upgrade our Institutional Hearing Program (IHP).”), <https://judiciary.house.gov/wp-content/uploads/2017/10/Witness-Testimony-James-McHenry-EIOR-11-01-2017.pdf>. The IACs in particular pose interesting questions, the answers to which could have tremendous due process implications.

82 *Remote Adjudication*, *supra* note 80, at 947, 972-1000.

83 See Emily Birnbaum, *Trump administration using video hearings for detained migrant children: report*, THE HILL (Nov. 8, 2018), <https://thehill.com/latino/415795-trump-administration-using-video-hearings-to-speed-up-proceedings-for-detained-kids> (last visited Jan. 18, 2019).

84 For instance, advocates and judges reported that the respondents (many of whom appear pro se) can only see a small portion of the courtroom, are unable to determine who is speaking, and may have little privacy in the facility from which their testimony and argument is being broadcast. VTC may also create logistical problems for the use and handling of documents, adds a layer of complexity for interpreters who are not in the room with the noncitizen, and keeps noncitizens isolated from friends and family who may appear in the courtroom to support their loved one. *Remote Adjudication*, *supra* note 80 at 941, 994. Such problems undermine due process by negatively affecting a noncitizen respondent’s ability to effectively put on his or her case. These concerns were echoed in the findings of an independent auditor hired by EOIR to study the immigration courts. DOJ, EOIR Legal Case Study Summary Report 23 (Apr. 6, 2017)

<http://www.aila.org/infonet/foia-response-booz-allen-hamilton-report> (finding “faulty VTC equipment, especially issues associated with poor video and sound quality, [could] disrupt cases to the point that due process issues may arise” and that use of VTC technology rendered it “difficult for judges to analyze eye contact, nonverbal forms of communication, and body language,” all of which may be critical to credibility determinations; recommending limiting the use of VTC to non-substantive matters). A 2015 study also confirmed that VTC is most commonly used in proceedings for detained noncitizens, and that for most cases, VTC is used for all or most of the proceedings in a matter rather than only for certain types of non-substantive proceedings. *Remote Adjudication*, *supra* note 80 at 941, 994. The fact that VTC is used largely for detained noncitizens should also raise concern. Detained noncitizens are far less likely to be represented by counsel, are more physically isolated, and may be subjected to greater emotional and psychological strains as a result of their detention. *Id.* at 947, 953, 972-1000. Use of VTC with this population may compound such issues and foster more disengagement that may negatively impact fair resolution of their cases. That study also demonstrated that use of VTC negatively impacts the noncitizen respondents’ engagement in the legal proceeding. *Id.* at 977-1000.

85 See 2017 GAO Report, *supra* note 69, at 59 (according to the Administrative Conference of the United States (“ACUS”) best practices for using VTC for hearings, in addition to soliciting user feedback, agencies should ensure that conditions allow participants to see, be seen by, and hear other participants).

86 *Id.* at 51.

87 See, e.g., Laura Abel, Brennan Center for Justice at New York Univ. School of Law, *Language Access in Immigration Courts* (2011), http://www.brennancenter.org/sites/default/files/legacy/Justice/LangAccess/Language_Access_in_Immigration_Courts.pdf.

88 TRAC, BACKLOG OF PENDING CASES, *supra* note 55.

89 *Id.* The number of backlogged cases continues to rise. As of November 2018, the reported backlog reached over 800,000 cases (809,041) and that number is likely to continue to grow given the lapse in appropriations and subsequent shut down of the non-detained dockets. See TRAC, IMMIGRATION COURT BACKLOG TOOL, http://trac.syr.edu/phptools/immigration/court_backlog/ (last modified Nov. 2018); Notice, DOJ, EOIR, *Immigration Court Operating Status During Lapse in Appropriations* (Dec. 26, 2018), <https://www.justice.gov/eoir/file/1122956/download> (stating that “[n]on-detained docket cases will be reset for a later date after funding resumes”).

90 TRAC, BACKLOG OF PENDING CASES, *supra* note 55.

91 Laura Meckler & Alicia A. Caldwell, *The Glitch in Trump’s Immigration Campaign: Overloaded Courts*, WALL ST. J., May 23, 2018, at 6, <https://www.wsj.com/articles/u-s-immigration-courts-long-crowded-are-now-overwhelmed-1527089932>.

92 While EOIR has made efforts to rehire some retired immigration judges, as of the summer of 2018, none had been rehired. Telephone call with Director James McHenry, Deputy Director Katherine Reilly and Chief of Staff Kate Sheehy, Executive Office of Immigration Review, on July 24, 2018, continued on August 2, 2018 and updated on December 20, 2018 (“EOIR Interview”). EOIR believes it will be able to hire a small number in the coming months, with the first ones scheduled to begin in January 2019. *Id.*

93 EOIR Interview, *supra* note 92.

94 *Id.*

95 *Id.*

96 *Id.*

97 See EOIR, Former Director Juan Osuna’s Statement Before the U.S. Senate Committee on the Judiciary Hearing on “The Unaccompanied Alien Children Crisis: Does the Administration Have a Plan to Stop the Border Surge and Adequately Monitor the Children?” to Revise Docketing Practices Relating to Certain Priority Cases (Feb. 23, 2016), <https://www.justice.gov/eoir/testimony-juan-p-osuna-us-senate-02232016>.

98 EOIR Interview, *supra* note 92.

99 See Office of Chief Immigration Judge, Biographical Information, <https://www.justice.gov/eoir/office-of-the-chief-immigration-judge-bios> (last visited Dec. 9, 2018).

100 See, e.g., American Immigration Council, *Immigration Courts Are Rolling out an Electronic Filing Pilot Program in July*, IMMIGRATION IMPACT (July 6, 2018), <http://immigrationimpact.com/2018/07/06/immigration-courts-electronic-filing-pilot-program/> (characterizing the roll out of electronic filing pilot as “an important advancement for these courts that still heavily rely on paper documentation”); Press Release, DOJ, EOIR Launches Electronic Filing Pilot Program (July 19, 2018), <https://www.justice.gov/eoir/pr/eoir-launches-electronic-filing-pilot-program> (stating that “[o]nce fully implemented, ECAS will further enable timely, fair, and uniform adjudication of immigration cases across the agency” and that the system is “expected to benefit EOIR’s adjudicators and staff, as well as, [stet] the legal representatives and respondents who appear before EOIR’s courts . . . through cost and time savings from the electronic filing and remote record retrieval capabilities it will support.”) [hereinafter EOIR Launches Electronic Filing Pilot Program].

101 MERITALK, “DOJ’s Executive Office for Immigration Reviews Plans to Deploy Critical E-Filing System” (Dec. 6, 2017), <https://www.meritalk.com/articles/dojs-executive-office-for-immigration-reviews-plans-to-deploy-critical-e-filing-system/>.

102 See EOIR Launches Electronic Filing Pilot Program, *supra* note 100.

103 *Id.*

104 Daniel Kowalski, *Hon. Denise Noonan Slavin & Hon. Dorothy Harbeck, A View from the Bench, Nat’l Ass’n of Immigration Judges*, FED. LAWYER 68 (Oct./Nov. 2016).

105 EOIR Interview, *supra* note 92.

106 *Id.*

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- 107 VERA INSTITUTE OF JUSTICE, EVALUATION OF THE NEW YORK IMMIGRANT FAMILY UNITY PROJECT: ASSESSING THE IMPACT OF LEGAL REPRESENTATION ON FAMILY AND COMMUNITY UNITY 7 (Nov. 2017) [hereinafter NYIFUP ASSESSMENT], <https://www.vera.org/publications/new-york-immigrant-family-unity-project-evaluation>; NATIONAL IMMIGRATION LAW CTR., BLAZING A TRAIL: THE FIGHT FOR RIGHT TO COUNSEL IN DETENTION AND BEYOND 9 (Mar. 2016), <https://www.nilc.org/wp-content/uploads/2016/04/Right-to-Counsel-Blazing-a-Trail-2016-03.pdf>; Ingrid V. Eagly & Steven Shaffer, *A National Study of Access to Counsel in Immigration Court*, 164 UNIV. PA. L. REV. 1, 57 (Dec. 2015) [hereinafter 2015 *National Study of Access to Counsel*], http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2581161.
- 108 NYIFUP ASSESSMENT, *supra* note 107.
- 109 See, e.g., 2015 *National Study of Access to Counsel*, *supra* note 107 at 2, 49, 57-58; LENNI B. BENSON & RUSSELL R. WHEELER, ENHANCING QUALITY & TIMELINESS IN IMMIGRATION REMOVAL ADJUDICATION, Report for the Admin. Conference of the U.S. 56 (June 7, 2012), <https://www.acus.gov/sites/default/files/documents/Enhancing-Quality-and-Timeliness-in-Immigration-Removal-Adjudication-Final-June-7-2012.pdf>.
- 110 See DOJ, EOIR, OFFICE OF PLANNING, ANALYSIS, AND STATISTICS, FY 2016 STATISTICS YEARBOOK F1 (Mar. 2017), <https://www.justice.gov/eoir/page/file/fysb16/download> [hereinafter FY 2016 STATISTICS YEARBOOK]. This statistic was not published in EOIR's FY 2017 Statistical Yearbook. See generally DOJ, EOIR, STATISTICS YEARBOOK FISCAL YEAR 2017 [hereinafter FY 2017 STATISTICS YEARBOOK], <https://www.justice.gov/eoir/page/file/1107056/download>.
- 111 See NYIFUP ASSESSMENT, *supra* note 107 at 8 (citing Office of Immigration Statistics, 2015 *Yearbook of Immigration Statistics* (Washington, DC: Department of Homeland Security, 2016), 103 and Table 39, <https://perma.cc/9UT8-37UV>).
- 112 Karen Berberich & Nina Siulc, Vera Institute of Justice Fact Sheet, *Why Does Representation Matter? The Impact of Legal Representation in Immigration Court 1* (Nov. 2018) [hereinafter *Impact of Legal Representation in Immigration Court*] (citing the EOIR FY 2016 STATISTICS YEARBOOK at F1), https://storage.googleapis.com/vera-web-assets/downloads/Publications/why-does-representation-matter/legacy_downloads/why-does-representation-matter.pdf.
- 113 See 2015 *National Study of Access to Counsel*, *supra* note 107 at 30-47 (cataloging the unequal access to representation for noncitizens based on detention status, geographic location, and country of origin).
- 114 *Id.* at 32.
- 115 *Impact of Legal Representation in Immigration Court*, *supra* note 112 at 1.
- 116 See, e.g., FY 2017 STATISTICS YEARBOOK, *supra* note 110 at 29, Table 14 (asylum granted in 3% of all asylum cases resolved before the Atlanta immigration court and in 5% in cases resolved on the merits in FY2017 whereas the New York City immigration court granted asylum in 41% of cases disposed by any means and nearly 80% of cases resolved on the merits in the same fiscal year); FY 2016 STATISTICS YEARBOOK, *supra* note 110 at K2 (the asylum grant rate for the Atlanta immigration court was only 2% in FY2015 whereas the New York immigration court's grant rate was 85%); DOJ, EOIR, OFFICE OF PLANNING, ANALYSIS, AND STATISTICS, FY 2015 STATISTICS YEARBOOK K2 (Apr. 2016) (showing similar grant rate discrepancies across immigration courts), <https://www.justice.gov/eoir/page/file/fysb15/download>.
- 117 See Brooklyn Defender Servs., New York Immigrant Family Unity Project, <http://www.bronxdefenders.org/programs/new-york-immigrant-family-unity-project/> (last visited Dec. 20, 2018); Vera Institute of Justice, Universal Representation for Detained Immigrants, Learn More, <https://www.vera.org/projects/universal-representation-for-detained-immigrants/learn-more> (last visited Dec. 20, 2018).
- 118 NYIFUP ASSESSMENT, *supra* note 107 at 7.
- 119 *Id.* at Director's Note. See also Lindsay Nash, *Universal Representation*, 87 FORDHAM L. REV. 503 (2018), <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=5550&context=flr>; Press Release, Vera Institute of Justice, SAFE Cities Network Launches: 11 Communities United to Provide Public Defense to Immigrants Facing Deportation (Nov. 9, 2017), <https://www.vera.org/newsroom/press-releases/safe-cities-network-launches-11-communities-united-to-provide-public-defense-to-immigrants-facing-deportation>; Press Release, Vera Institute of Justice, SAFE Network Announces Expansion and Celebrates Successes at One Year (Nov. 15, 2018), <https://www.vera.org/newsroom/press-releases/safe-network-announces-expansion-and-celebrates-successes-at-one-year-a-dozen-communities-united-to-provide-public-defense-to-immigrants-facing-deportation>; Nina Siulc & Karen Berberich, Vera Institute of Justice, Fact Sheet, A Year of Being SAFE: Insights from the SAFE Network's First Year (Nov. 2018), https://storage.googleapis.com/vera-web-assets/downloads/Publications/a-year-of-being-safe/legacy_downloads/a-year-of-being-safe.pdf.
- 120 See *Franco-Gonzalez v. Holder*, 10-CV-02211 DMG (DTBx), Dkt # 593, Partial Judgment and Permanent Injunction (C.D. Cal. Apr. 23, 2013) (holding that the government's failure to provide class members with reasonably accommodation, i.e. a Qualified Representative, constituted a violation of Section 504 of the Rehabilitation Act of 1973).
- 121 See Press Release, Executive Office for Immigration Review (EOIR), Department of Justice and Department of Homeland Security Announce Safeguards for Unrepresented Immigration Detainees with Serious Mental Disorders or Conditions (Apr. 22, 2013), <https://www.justice.gov/eoir/pr/department-justice-and-department-homeland-security-announce-safeguards-unrepresented> (last modified July 15, 2015); EOIR, Phase I of Plan to Provide Enhanced Procedural Protections to Unrepresented Detained Respondents with Mental Disorders (Dec. 31, 2013), <https://cliniclegal.org/resources/articles-clinic/eoir-announces-implementation-guidance-its-program-protect-incompetent> (outlining the specific safeguards provided to those that show an indicia of mental incompetency and those who are ultimately deemed mentally incompetent to represent themselves in immigration removal proceedings as a result of a serious mental health condition); DOJ, EOIR, National Qualified Representative Program (NQR), <https://www.justice.gov/eoir/national-qualified-representative-program-nqrp> (last modified Nov. 16, 2016); Vera Institute of Justice, National Qualified Representative Program, <https://www.vera.org/projects/national-qualified-representative-program/learn-more> (last visited Dec. 20, 2018).
- 122 See *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1040, n.8 (9th Cir. 2016) (dismissing claims brought on behalf of minors in detention asserting a right to counsel in removal proceedings before the Immigration Judge for lack of jurisdiction).
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- 123 See Press Release, National Immigrant Justice Center, NIJC Celebrates Expansion of Chicago Immigration Court Helpdesk (Aug. 30, 2016), <https://www.immigrantjustice.org/press-releases/nijc-celebrates-expansion-chicago-immigration-court-helpdesk> [hereinafter NIJC Immigration Court Helpdesk]; TRAC, REPRESENTATION FOR UNACCOMPANIED CHILDREN IN IMMIGRATION COURT (Nov. 25, 2014), <http://trac.syr.edu/immigration/reports/371/>.
- 124 See Update Part 5, Section III.A.2.b.
- 125 See AM. BAR ASS'N, POLICY AND PROCEDURES HANDBOOK, 17A115 (2018-2019), https://www.americanbar.org/content/dam/aba/administrative/board_of_governors/2018_2019_policy_and_procedures_handbook.pdf.
- 126 See 2015 *National Study of Access to Counsel*, *supra* note 107 at 25-28 (finding that “pro bono legal services in removal proceedings are extremely scarce” and that less than 2% of all immigrants facing removal during the study period received pro bono representation from nonprofit organizations, law school clinics, or large law firms).
- 127 Vera Institute of Justice, Legal Orientation Program, LOP Facilities, <https://www.vera.org/projects/legal-orientation-program/legal-orientation-program-lop-facilities> (last visited Dec. 20, 2018); EOIR Notice, EOIR Announces Creation of Information Helpdesks 1 (Aug. 26, 2016), https://www.justice.gov/sites/default/files/pages/attachments/2016/08/26/eoirannouncescreationofinformationhelpdesks082616_0.pdf; Vera Institute of Justice, Immigration Court Helpdesk, Overview, <https://www.vera.org/projects/immigration-court-helpdesk/overview> (last visited Dec. 20, 2018). This program grew out of the National Immigrant Justice Center’s pilot program, launched in 2013. See NIJC Immigration Court Helpdesk, *supra* note 123.
- 128 See EOIR, LEGAL ORIENTATION PROGRAM: COHORT ANALYSIS (Sept. 5, 2018), <https://www.justice.gov/eoir/file/1091801/download..> The Phase I report was released a mere nine days before Vera Institute of Justice published its anticipated analysis examining the impact of LOP on case time. See VERA INSTITUTE OF JUSTICE, LOP CASE TIME ANALYSIS, FISCAL YEARS 2013-2017 (Sept. 14, 2018), <https://www.tahirih.org/wp-content/uploads/2018/10/2018-51777-Doc-02-21-pgs.pdf>.
- 129 See Press Release, AILA, DOJ Reverses Course on Legal Orientation Program, For Now (Apr. 25, 2018) (“AILA and its partners are glad the program remains intact for now, however, we are wary of further investigations into the program’s effectiveness”), <http://www.aila.org/advo-media/press-releases/2018/doj-reverses-course-on-legal-orientation-program>.
- 130 Indeed, it is notable that Legal Orientation Program for Custodians of Unaccompanied Alien Children (“LOPC”), the only statutorily mandated portion of LOP, is arguably the only program that was not immediately threatened by DOJ’s intended suspension of LOP. See 8 U.S.C. § 1232(c)(4) (DHHS “shall” cooperate with EOIR “to ensure that custodians receive legal orientation presentations” and such presentations “shall” address various custodian responsibilities).
- 131 See Update Part 5, Section IV.A (2019 Updated Recommendation).
- 132 See Press Release, EOIR, Executive Office for Immigration Review Announces Final Rule on the Recognition of Organizations and Accreditation of Non-Attorney Representatives (Dec. 20, 2016), <https://www.justice.gov/eoir/pr/executive-office-immigration-review-announces-final-rule-recognition-organizations-and>. This rule went into effect in January 2017. *Id.*
- 133 *Id.* For more discussion about fraud and abuse prevention, see Part 5, Section III.C.1 *infra*.
- 134 See 81 Fed. Reg. 92,346-73.
- 135 See DOJ, EOIR Publishes Rules Regarding Legal Representation (Sept. 16, 2015), <https://www.justice.gov/eoir/notice-eoir-publishes-rules> (last modified Oct. 1, 2015).
- 136 See *id.*
- 137 See 79 Fed. Reg. 55,662; 80 Fed. Reg. 59,503.

Summary of Recommendations

2010 RECOMMENDATION	2019 UPDATE RECOMMENDATION	DISCUSSION <i>2010 Report</i> <i>2010 Executive Summary</i> <i>2019 Update</i>	AUTHORITY <i>(Existing, Regulation, or Legislation)</i> TIME <i>(Short Term or Long Term)</i> SCOPE ¹ <i>(Incremental, Restructuring, or Both)</i>
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Part 1: Department of Homeland Security

Increase use of prosecutorial discretion by DHS officers and attorneys to reduce the number of Notices to Appear served on noncitizens and to reduce the number of issues litigated.	Reaffirm recommendation. Training, guidance, support, and encouragement should be provided to ensure that DHS officers and attorneys properly exercise prosecutorial discretion and to help alleviate the backlog of cases by better balancing the goals of enforcement priorities, while still encouraging the use of prosecutorial discretion. The use of discretion should be emphasized at all levels of enforcement, including trial attorneys' ability to resolve matters in pretrial conferences, and judges' ability to prioritize cases to the top of the docket.	1-IV.A.1 ES-20 UD 1-III.3.A, IV.A.	Regulation Short Term Both
Give DHS attorneys greater control over the initiation of removal proceedings. In DHS local offices with sufficient attorney resources, establish a pilot program requiring approval of a DHS attorney prior to issuance of all discretionary Notices to Appear by DHS officers.	Reaffirm recommendation. Additionally, as suggested by the DHS Inspector General in a 2015 congressional hearing, DHS should collect and release data on how prosecutorial discretion is implemented. DHS should also enact the Inspector General's recommendation and create a mechanism for evaluating the use of prosecutorial discretion.	1-IV.A.2 ES-20 UD 1-III.F, IV.A	Regulation Short Term Both
To the extent possible, assign one DHS trial attorney to each removal proceeding, which would increase efficiency and facilitate the exercise of prosecutorial discretion in a manner consistent with DHS policies.	Reaffirm recommendation. Additional coordination, training, and oversight on how the field offices are applying priorities are key to ensuring nationwide consistency and fairness in the Department's efforts to alleviate the overburdened system.	1-IV.A.3 ES-20 UD 1-III.F, IV.A	Existing Long Term Both

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Part 1: Department of Homeland Security (continued)

Authorize USCIS asylum officers to review asylum claims that are raised in expedited removal proceedings. The asylum officer would be authorized either to grant asylum if warranted or refer the claim to the immigration court.	Reaffirm recommendation. Additionally, DHS should consider exemptions from the expedited removal proceedings for certain groups of people (e.g., immigrants coming from regions in the Northern Triangle where violence is particularly high).	1-IV.A.4 ES-20 UD 1-III.D.1, III.H.4, IV.A	Regulation Long Term Both
It may be possible to divert to the Asylum Division defensive asylum claims arising in removal proceedings in the immigration courts and thereby further reduce the burden on immigration courts and trial attorneys.	See above.	1-IV.A.4 ES-20 UD 1-III.D.1, III.H.4, IV.A	Legislation, Regulation Long Term Both
Cease issuing Notices to Appear to noncitizens who are prima facie eligible to adjust to lawful permanent resident status.	Reaffirm recommendation. Additionally, DHS should clarify which persons are meant to be included when demonstrating prima facie eligibility for relief.	1-IV.A.5 ES-20 UD 1- IV.A	Existing Short Term Both
Create a position within DHS to oversee and coordinate all aspects of DHS immigration policies and procedures, including asylum matters.	Reaffirm recommendation.	1-IV.B ES-21 UD 1-III.F, IV.A	Existing Long Term Both
Permit all eligible noncitizens to adjust to lawful permanent resident status while in the U.S. Alternatively, eliminate the three-year, ten-year, and permanent bars to reentry, which will encourage eligible noncitizens who have accrued unlawful presence in the U.S. to become lawful permanent residents by consular processing outside of the U.S.	Reaffirm recommendation. In addition ensure provisional unlawful presence waivers to have the intended effect of not separating families for periods that are longer than necessary.	1-IV.C.1 ES-21 UD 1-III.H.5, IV.C.1	Legislation Short Term Both
Amend the definition of “aggravated felony” to require that any conviction must be of a felony and that a term of imprisonment of more than one year must be imposed (excluding any suspended sentence).	Reaffirm recommendation.	1-IV.C.2 ES-22 UD 1-IV.C.2	Legislation Short Term Both

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Part 1: Department of Homeland Security (continued)

Eliminate the retroactive application of aggravated felony provisions.	Reaffirm recommendation.	1-IV.C.2 ES-22 UD 1-IV.C.2	Legislation Short Term Both
Amend the INA to require that a single conviction of a crime involving moral turpitude is a basis for deportability only if a sentence of more than one year is actually imposed. Alternatively, amend the INA to require a potential sentence of more than one year.	Reaffirm recommendation.	1-IV.C.3 ES-22 UD 1-III.E.1, IV.C.3	Legislation Short Term Both
Withdraw <i>In re Silva-Trevino</i> , 24 I&N Dec. 687 (AG 2008), and reinstate the categorical approach in removal and other immigration proceedings to determining whether a criminal conviction is of a crime involving moral turpitude, rather than holding open-ended hearings on the facts underlying past convictions.	Reaffirm recommendation.	1-IV.C.3.b ES-23 UD 1-III.E.1, IV.C.3	Existing Short Term Both
Curtail the use of administrative process by which DHS officers may order the removal of noncitizens who are alleged to be “aggravated felons” and are not lawful permanent residents. Prohibit use of this procedures for minors, the mentally ill, noncitizens who claim a fear of persecution or torture upon return to their countries of origin, or noncitizens with significant ties to the United States.	Reaffirm recommendation. Overuse of administrative removal with little oversight and extremely limited judicial review continues to raise serious due process concerns.	1-IV.D.1 ES-23 UD 1-IV.D.1	Existing, Regulation, Legislation Short Term Both
Authorize the immigration courts to review DHS determinations that the conviction was for an aggregated felony and that the noncitizen is not in any of the protected categories listed above.	Reaffirm recommendation. In light of the continued uncertainty about the definition of “aggravated felony” and the continued use of administrative removal even for persons in protected categories, additional oversight of DHS determinations is needed to ensure proper and uniform application of the definition.	1-IV.D.1 ES-23 UD 1-III.E.1, IV.D.1	Existing, Regulation, Legislation Short Term Both

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Part 1: Department of Homeland Security (continued)

Eliminate mandatory detention provisions or narrow them to target persons who are clearly flight risks or pose a threat to national security, public safety, or other persons.	Reaffirm recommendation.	1-IV.E.1 ES-25 UD 1-IV.D.2	Legislation Short Term Both
In any event, DHS should implement policies designed to avoid detention of persons who are not subject to mandatory detention, are not flight risks, and do not pose a threat to national security, public safety or other persons.	Reaffirm recommendation.	1-IV.E.1 ES-25 UD 1-IV.D.2	Existing Long Term Both
Curtail the use of the use of expedited removal for noncitizens apprehended at the border or within the United States by eliminating expedited removal for individuals who are already in the United States, unaccompanied minors, and the mentally ill.	Reaffirm recommendation. DHS should continue to refrain from using expedited removal against unaccompanied minors. Consider amending the statute so that unaccompanied minors expressly are exempt from expedited removal by statute. Provide training to DHS attorneys and officers that expedited removal should not be used against individuals already in the United States, unaccompanied minors, and the mentally ill.	1-IV.D.2 ES-23 UD 1- III.D.1, IV.D.2	Legislation Short Term Both
Further curtail the use of the use of expedited removal for noncitizens apprehended at the border or within the United States by permitting DHS officers to issue expedited removal orders only if they determine that individuals lack facially value travel documentation.	Reaffirm recommendation. We further recommend that Congress amend the statutory provision to include language expressly granting more authority to immigration judges, and less to enforcement officers.	1-IV.D.2 ES-23 UD 1-III.H.5, IV.D.2	Legislation Short Term Both

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Part 1: Department of Homeland Security (continued)

<p>Ensure proper treatment during expedited removal proceedings of noncitizens who fear persecution or torture upon return to their countries of origin by improving supervision of the inspection process at ports of entry and border patrol stations, including by expanding the use of videotaping systems to all major ports of entry and border patrol stations.</p>	<p>Reaffirm recommendation. Headquarters and local offices should commit to addressing the fact that many noncitizens have experienced trauma. Provide training to CBP officers to teach interviewing techniques geared toward traumatized individuals. Make appropriate inspections, including sensitivity to traumatized noncitizens, part of the evaluation of CBP officers.</p>	<p>1-IV.D.4 ES-24 UD 1-IV.D.2</p>	<p>Existing, Regulation Short Term Both</p>
<p>In addition, make a copy of any videotape or other recording of the interview of a noncitizen during expedited removal proceedings available to such noncitizen and his or her representative for use in his or her defense from removal.</p>	<p>Reaffirm recommendation. Opportunities for challenging expedited removal remain extremely limited. It is essential that noncitizens ordered removed through those procedures have access to all information relevant to their defense.</p>	<p>1-IV.D.4 ES-24 UD 1-III.D.1, IV.D.2</p>	<p>Existing, Regulation Short Term Both</p>
<p>Curtail the use of the use of expedited removal for noncitizens apprehended at the border or within the United States by expanding judicial review (through habeas proceedings) to allow a court to consider whether the petitioner was properly subject to expedited to removal provisions and to review challenges to adverse credible fear determinations.</p>	<p>Reaffirm recommendation. The lack of judicial review of expedited removal orders continues to be cause for significant concern, particularly in light of the expanded use of expedited removal proceedings. And the Third Circuit's recent decision in <i>Castro v. DHS</i> indicates that the limited habeas review currently authorized by statute does not provide protection for most individuals ordered removed through expedited removal proceedings.</p>	<p>1-IV.D.2 ES-23 UD 1-III.D.1, IV.D.2</p>	<p>Legislation Short Term Both</p>

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Part 1: Department of Homeland Security (continued)

<p>Improve and expand alternatives to detention and use them only for persons who would otherwise be detained. Review current alternatives to detention programs to determine whether they constitute custody for purposes of the INA; if so, DHS could extend these programs to mandatory detainees who do not pose a danger to the community or a national security risk and for whom the risk of flight, within the parameters of the programs, is minimal.</p>	<p>Reaffirm recommendation. Implement a true civil detention model by revising detention standards to fit the immigrant population, and ensure the standards apply to all people in DHS detention regardless of the type of detention facility. Continue to refine the Risk Classification Assessment to account for more factors to avoid the overuse of both detention and supervised releases.</p>	<p>1-IV.E.2 ES-25 UD 1- III.G.2, IV.E</p>	<p>Existing Long Term Both</p>
<p>Grant parole where asylum seekers have established their identities, community ties, lack of flight risk, and the absence of any threat to national security, public safety, or other persons. In addition, conduct parole determinations as a matter of course for asylum seekers who have completed the credible fear screening.</p>	<p>Reaffirm recommendation. Provide training programs for immigration judges and ICE officers regarding the factors that need to be considered in making parole decisions. Implement a policy favoring conditional parole without payment of bond. Instruct immigration judges and ICE officers that they must consider ability to pay in cases where bond is required for release. Codify the core requirements of the 2009 Parole Directive into regulations or, in the alternative, ensure that the 2009 Parole Directive remains in full force and must be followed.</p>	<p>1-IV.E.3 ES-25 UD 1-III.A.3, IV.D.2</p>	<p>Existing Short Term Both</p>
<p>Adopt policies to avoid detaining noncitizens in remote facilities located far from family members, counsel, and other necessary resources.</p>	<p>Reaffirm recommendation.</p>	<p>1-IV.E.4 ES-25 UD 1-III.G.1, IV.E</p>	<p>Existing, Regulation Long Term Both</p>
<p>Upgrade DHS's data systems and improve processes to permit better tracking of detainees within the detention system, and improve compliance with ICE's National Detention Standard for Detainee Transfers.</p>	<p>Reaffirm recommendation. ICE's Online Detainee Locator System is a welcome development, but could be improved to include more timely information. Train ICE officers that it is their obligation to inform the attorney on record of the immigrant's location.</p>	<p>1-IV.E.4 ES-25 UD 1-III.G.1, IV.E</p>	<p>Existing Long Term Both</p>

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Part 1: Department of Homeland Security (continued)

[No recommendation]	Adopt a presumption against detention, particularly in the case of families, children, and asylum seekers. Where detention is required, it must not be lengthy. Effort must be taken by government to satisfactorily address impediments to the release of families and children. Establish and adhere to clear standards of care that include unique provisions for families and children that do not follow a penal model.	UD 1-III.G.4, IV.E	Existing, Regulation Short Term Both
[No recommendation]	Only those families who must as a matter of law be detained, should be placed in a family residential center (“FRC”).	UD 1-III.G, IV.E	Existing Short Term Both
[No recommendation]	The FRC facility should be designed and operated as a non-secure facility where the families’ movement within the facility and on the grounds is left largely to the discretion of the parents.	UD 1-III.G.4, IV.E	Existing, Regulation Short Term Both
[No recommendation]	Families should be transferred to the community at the earliest opportunity permitted by law. In instances where families have no community ties, the time in the FRC should be used to find suitable community-based placements at the earliest opportunity. ICE should also consider resuming the pre-release casework effort that was in place to expedite this effort.	UD 1-III.G.3, III.G.4, IV.E	Existing Short Term Both
[No recommendation]	All other families in detention should be released to the community. Newly intercepted families should remain in the community. Only those parents objectively assessed by means of a validated risk assessment, normed specifically for this population to require some additional assurance for compliance with one or more conditions should be subject to a monetary requirement. Alternatively, only those parents objectively assessed by means of a risk assessment, normed specifically for this population to require some degree of supervision for compliance with reporting requirements should be assigned to electronic monitoring.	UD 1-III.G.4, III.G.5, III.G.6, IV.E	Existing, Regulation Short Term Both

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Part 1: Department of Homeland Security (continued)

[No recommendation]	Provide meaningful federal oversight of detention operations, through an on-site presence at facilities of federal officials authorized to intercede quickly and as often as necessary, and ensure that effective complaint mechanisms are in place. Track performance and outcomes and make reliable information readily available to the public. Put into place enforcement mechanisms to ensure accountability.	UD 1-III.G.2, IV.E	Existing, Regulation Long Term Both
[No recommendation]	Ensure that: (i) the federal immigration policies and practices of separating minor children from their parents at the border cease and not be reinstated; (ii) any separation of a child and a parent shall occur based on objective evidence, excluding the fact of unauthorized entry, of child endangerment applying well-defined criteria with due process protections for parent and child; and (iii) children who have already been separated from their parents under such policies have a safe and expedient procedure for being reunified with parents consistent with ensuring that the parents' and children's individual and independent legal claims are fully protected.	UD 1-III.H.3, IV.E	Existing Short Term Both
[No recommendation]	Rescind the policies of prosecuting all individuals who enter the United States without authorization at the southern border for the misdemeanor offense of illegal entry pursuant to 8 U.S.C. § 1325. End the practice of expedited mass prosecution of immigrants. Assure that every defendant charged with illegal entry is represented by counsel who has had an adequate opportunity to consult with the defendant, and that any guilty plea is knowing, intelligent, and voluntary. Exercise prosecutorial discretion and refrain from prosecuting asylum seekers for the offense of illegal entry.	UD 1-IV.E	Existing Short Term Both
[No recommendation]	Rescind the Interim Final Regulation "Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims" published on November 9, 2018. Ensure that all asylum seekers, regardless of manner of entry, are afforded their full right under the law to pursue asylum and any other benefits or humanitarian protections.	UD 1-III.H.4, IV.E	Existing Short Term Both

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Part 1: Department of Homeland Security (continued)

[No recommendation]	Uphold the asylum laws as currently established in the Immigration and Nationality Act and rescind the November 8, 2018, Presidential Proclamation that would deny asylum eligibility pursuant to INA sections 212(f) and 215(a) to those who enter the United States outside of an official Port of Entry.	UD 1-III.H.4, IV.E	Existing Short Term Both
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Part 2: Immigration Judges/Courts

[No Recommendation]	Consistent with our recommendations in Part 6 of the 2010 Report and Part 6 of this Update Report, we recommend that immigration courts be transferred into an independent court system established under Article I of the Constitution.	UD 2-I, II.B, IV.A	Legislation Long Term Restructuring
[No Recommendation]	Minimize political interference with immigration court operations and proceedings.	UD 2-I, III.A., IV.A	Existing Short and Long Term Both
[No Recommendation]	Rescind recent case production quotas and time-based metrics used to evaluate an immigration judge's performance or, at a minimum, carefully monitor the use of such metrics to determine the impact they have on judicial independence and due process.	UD 2-III.A.2, IV.A	Existing Short Term Both
[No Recommendation]	Enact legislation that expressly restores administrative closure and termination as tools that immigration judges may use in cases involving vulnerable populations, including unaccompanied children and the mentally impaired, or as necessary where justice requires.	UD 2-III.A.3, IV.A	Legislation Short Term Both

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Part 2: Immigration Judges/Courts (continued)

Adopt a new, single, consolidated code of conduct for immigration judges based on the ABA Code of Judicial Conduct, tailored to the immigration adjudication system.	EOIR published the Ethics and Professionalism Guide for Immigration Judges in 2011. Our updated recommendation is to study the effects of the Ethics and Professionalism Guide, determine whether there are any conflicts with state judicial and ethical Codes of Conduct and, if so, consider who decides which standards apply to immigration judges sitting in that state. We further recommend studying whether and how the Ethics and Professionalism Guide intersects and interacts with new performance standards implemented since 2017.	2-IV.B.2 ES-29 UD 2-III.A.2, IV.A	Existing Short Term Both
Establish a new, more independent and transparent system to manage complaints and the disciplinary process by establishing a new office in EOIR that would segregate the disciplinary function from other supervisory functions, creating and following publicly available procedures and guidelines for complaints and discipline, fully implementing a formal right of appeal/review for adverse disciplinary decisions, and allowing public access to statistical or summary reporting of disciplinary actions (individual disciplinary records themselves would not be made public).	Reaffirm recommendation. The disciplinary process should be more transparent and independent.	2-IV.B.4 ES-29 UD 2-III.A.2, IV.A	Legislation Short Term Incremental
Implement GAO recommendations that EOIR develop and maintain appropriate procedures to accurately measure case completion, identify and examine cost-effective options for acquiring the data, and acquire the necessary expertise to perform useful and reliable analyses of immigration judges' decisions.	Reaffirm recommendation. We recommend that improved data be collected to monitor the performance of immigration judges and immigration courts.	2-IV.C.5 ES-29 UD 2-III.A.2, IV.A	Existing Short Term Incremental

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Part 2: Immigration Judges/Courts (continued)

Implement judicial model performance reviews for immigration judges based on the ABA's Guidelines for the Evaluation of Judicial Performance and the Institute for Advancement of the American Legal System proposed model for judicial performance.	Reaffirm recommendation. We recommend adoption of a more robust and transparent review process for immigration judges, where immigration judges are evaluated not only on their command of substantive law and procedural rules, but also impartiality and freedom from bias, clarity of oral and written communications, judicial temperament, administrative skills and appropriate public outreach. We expressly oppose the implementation of strict, numerical performance metrics, such as those recently adopted by the administration, as a basis for evaluating immigration judge's job performance, as such an approach is highly arbitrary, likely to undermine judicial independence, and poses a significant threat to due process and the legitimacy of immigration court proceedings.	2-IV.B.3 ES-29 UD 2-III.A.2, IV.A	Regulation Short Term Both
Encourage immigration courts to hold prehearing conferences as a matter of course in order to narrow the issues and provide clearer guidance to noncitizens and their counsel on what evidence and testimony will be important.	Reaffirm recommendation. Use of case management tools, such as prehearing conferences, should be encouraged to improve efficiency of court proceedings, and immigration judges should be provided with the ability to exercise their discretion to fairly and efficiently manage their dockets.	2-IV.C.7 ES-30 UD 2-III.A.3, IV.A	Existing Short Term Both
In hiring immigration judges, add questions on applications, interviews and reference checks designed to evaluate a candidate's background, judicial temperament, and ability to demonstrate cultural sensitivity and treat all persons with respect.	Reaffirm recommendation. We also highlight the need for the hiring process to be insulated from the political process as much as practical. Finally, in conjunction with the overarching recommendation that the immigration courts be moved into an independent Article I court, we recommend that to the extent feasible, as much hiring as possible should be completed within the strictures of the new Article I court.	2-IV.A.1 ES-29 UD 2-III.B.1, IV.B	Legislation or Regulation Short Term Both
Allow more public input in the hiring process by permitting professional organizations to participate in screening candidates who reach final levels of consideration.	Reaffirm recommendation and reiterate that public involvement will ward against politicized hiring and make the hiring process more transparent.	2-IV.A.1 ES-29 UD 2-III.B.1, IV.B	Legislation or Regulation Short Term Incremental

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Part 2: Immigration Judges/Courts (continued)

[No Recommendation]	Until such time as an Article I immigration court can be established, we recommend that DOJ consider establishing standards and procedures for the Attorney General certification process through rulemaking. This would include procedures providing notice and an opportunity for the parties to brief the specific legal questions the Attorney General intends to review, and for amici to weigh in, before a decision is rendered. We further recommend that the Attorney General exercise his or her authority under 8 C.F.R. § 1003.1(h)(1) sparingly to clarify, not rewrite, immigration law and to refrain from using it as a political or ideological tool.	UD 2-III.B.2, IV.B	Regulation or Legislation Short Term Incremental
Limit use of video conferencing to procedural matters in which the noncitizen has given consent.	Reaffirm recommendation. VTC should be limited to use in non-substantive matters where the noncitizen has consented to its use.	2-IV.C.6.b ES-30 UD 2-III.B.3, IV.B	Existing Short Term Both
[No Recommendation]	Improve VTC technology and implementation to limit disruptions, improve reliability, and increase engagement in proceedings. At a minimum, VTC technology should reliably establish an uninterrupted connection between the court and the remote location broadcasting the respondent (often a DHS-affiliated detention facility), and provide the respondent with a more complete view of the courtroom so that he or she is better able to understand the proceedings. Additionally, respondents should be provided with a quiet location from which to engage with the Court. EOIR should further be attentive to the fact that use of VTC to adjudicate immigration removal proceedings is likely to disproportionately impact disadvantaged detained populations and should take precautions to ensure due process is met in those circumstances.	UD 2-III.B.3, IV.B	Existing Long Term Both
[No Recommendation]	EOIR should enhance its VTC program by collecting more reliable data on VTC hearings and using the information to assess any effects of VTC on hearing outcomes.	UD 2-III.B.3, IV.B	Existing Short Term Both

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Part 2: Immigration Judges/Courts (continued)

[No Recommendation]	Explore whether VTC might be effectively implemented in non-substantive hearings involving non-detained respondents seeking relief through other governmental agencies without the immigration court's direct involvement, but who nonetheless must appear in periodic status conferences before the immigration court.	UD 2-III.B.3, IV.B	Existing Short Term Both
[No Recommendation]	VTC should not be used for unaccompanied children, especially detained children. To the extent ORR facilities use VTC for proceedings involving children in ORR custody, such use of VTC should, at a minimum, be limited to cases where the child is represented and in which both the child and counsel consent to its use; if the child is unrepresented, VTC should not be used.	UD 2-III.B.3, IV.B	Existing Short Term Both
[No Recommendation]	Increase efforts to identify, certify, and expand access to qualified interpreters in immigration proceedings, particularly interpreters for uncommon languages and indigenous regional dialects, so that noncitizens' due process rights are protected.	UD 2-III.B.5, IV.B	Existing Short Term Both

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Part 2: Immigration Judges/Courts (continued)

Request additional immigration judges (approximately 100)	The 2010 recommendation is no longer applicable since more than 100 additional immigration judges have been hired since 2010. While we recognize the tremendous need for additional resources in the immigration court system, we support hiring additional immigration judges, beyond the level currently authorized by Congress, only if accompanied by significant reforms designed to ensure adequate and non-politicized vetting of immigration judge candidates, enhanced training of immigration judges, sufficient supporting resources, and increased independence of immigration judges. Accordingly, we recommend that additional immigration judges (beyond the level currently authorized by Congress) be hired only under either a restructured Article I court as discussed in Part 6 of this Update Report, or, at a minimum, in conjunction with a concrete plan to adopt and implement the reforms addressed in detail in this Part of the Update Report which strive to promote judicial independence, ensure due process, and provide the necessary procedures, resources, and infrastructure (including law clerks and courtrooms) to support immigration judges and immigration courts in enhancing their independence, fairness, efficiency, and professionalism.	2-IV.C.1 ES-28 UD 2-III.C.1, IV.C	Legislation Short and Long Term Both
Give immigration judges statutory protection against being removed or disciplined without good cause, in order to protect them from retribution for engaging in ethical and independent decision making.	Reaffirm recommendation, but reiterate that as many of the immigration judge positions as possible should be filled within the context of the Article I court.	2-IV.A.2 ES-30 UD 2-III.C.1, IV.C	Legislation Short Term Both
Increase number of law clerks to increase ratio to one clerk per judge, and increase number of support personnel.	Reaffirm recommendation.	2-IV.C.1 ES-28 UD 2-III.C.2, IV.C	Legislation Short Term Both

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Part 2: Immigration Judges/Courts (continued)

Increase administrative time available to immigration judges to allow increased participation in live training and opportunities to interact with other immigration judges on their courts.	Reaffirm recommendation, and stress the importance of judges speaking to one another regarding the types of issues faced in their cases, as well as any developments relevant to their handling of cases.	2-IV.C.3 ES-28 UD 2-III.C.1, IV.C	Existing Short Term Both
Provide additional opportunities for training of immigration judges, including training in assessing credibility, identifying fraud, changes to U.S. asylum and immigration law, and cultural sensitivity and awareness; provide sufficient funding to permit all judges to participate in regular, in-person trainings on a wide range of topics in immigration law; and designate an administrator to facilitate communication among immigration judges.	Reaffirm recommendation. In addition to the four issues listed in the 2010 recommendation, we also recommend that there be additional trainings and/or presentations by non-lawyers, such as psychiatrists and social workers, so that immigration judges have an understanding of the psychological and social effects of their decisions, and an increased awareness of implicit bias. These additional trainings may allow immigration judges to avoid desensitization and to gain an understanding of the potential impact of secondary trauma (also called vicarious trauma).	2-IV.C.4 ES-28 UD 2-III.C.2, IV.C	Existing Short Term Both
Significantly increase the number of Assistant Chief Immigration Judges to permit a more appropriate ratio of judges to supervisors, and expand their deployment to regional courts.	EOIR added nine ACIJs, most recently in October 2018. Because the influx of these new ACIJs is relatively recent, we recommend studying the effect of the increase in ACIJs, and if those results are positive, adding more ACIJs to regional courts. Ideally adding new ACIJs will occur under an Article I court. We also recommend that ACIJs handle cases, rather than simply serving as supervisors, so that they have a better understanding and appreciation of the challenges faced by immigration judges.	2-IV.B.1 ES-29 UD 2-III.C.2, IV.C	Existing Short Term Incremental
Require more formal, reasoned written decisions that are clear enough to allow noncitizens and their counsel to understand the bases of the decision and to permit meaningful BIA and appellate review.	Reaffirm recommendation.	2-IV.C.2 ES-30	Existing Short Term Both
[No Recommendation]	EOIR should fully implement its ECAS system across all immigration courts.	UD 2-III.C.3, IV.C	Existing Short Term Incremental

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Part 2: Immigration Judges/Courts (continued)

Give priority to completing the rollout of digital audio recording systems to facilitate fair and efficient proceedings.	Digital audio recording systems were rolled out in 2010, shortly after the 2010 Report was published. This recommendation is therefore moot.	2-IV.C.6.A ES-30	
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Part 3: Board of Immigration Appeals

Require three member panel review in all non-frivolous merits cases that lack obvious controlling precedent. Allow single-member review for purely procedural motions and motions unopposed by DHS.	Reaffirm recommendation.	3-IV.A ES-32 UD 3-II, III.A	Regulation Short Term Incremental
Extend deadline for issuance of single-member decisions from 90 to 180 days from receipt of appeal (i.e., the same deadline as for panel review).	Reaffirm recommendation for non-detained cases.	3-IV.A ES-33 UD 3-II, IIIA	Regulation Short Term Incremental
Finalize 2008 proposed rule that would make Affirmances Without Opinion discretionary rather than mandatory. Written decisions should address all non-frivolous arguments raised by the parties, thus providing sufficient information to facilitate review by federal appeals courts, to allow participants to understand the Board's decision, and to promote their confidence in the fairness of the decision.	Reaffirm recommendation. We also recommend the Board utilize more oral arguments, which are still extremely rare.	3-IV.B ES-32 UD 3-I, II, III	Regulation Short Term Incremental
[No Recommendation]	We recommend that, as part of its amicus briefing requests, EOIR post all underlying decisions at issue to provide an opportunity for meaningful public comment and briefing on the case before the Board renders its decision.	UD 3-III.A, III.E	Existing Short Incremental

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Part 3: Board of Immigration Appeals (continued)

Restore the Board's ability to conduct de novo review of immigration judge factual findings and credibility determinations.	Reaffirm recommendation.	3-IV ES-32 UD 3-II	Regulation Short Term Incremental
Issue more precedential decisions, expanding the body of law to guide immigration courts and practitioners.	Reaffirm recommendation. Additionally, we recommend that the Board establish a process for reconsidering a BIA precedent decision that has been overturned by one or more circuit courts, when presented with an appropriate case.	3-III.B ES-32 UD 3-I, II, III.B	Existing Short Term Incremental
Regulations should continue to require that the full Board authorize designation of an opinion as precedent.	Reaffirm recommendation. The 2008 proposed rule has not been implemented, and we continue to believe that this provision should not be finalized. Careful consideration by the Board as a whole as to whether a particular opinion offers needed clarification in the law is a necessary step to fostering greater uniformity in immigration adjudication.	3-III.B ES-33 UD 3-III.B.	Regulation Short Term Both
[No Recommendation]	We recommend that EOIR increase its efforts to hire Board members from diverse professional backgrounds, including practitioners with experience representing noncitizens and individuals reflecting a broader mix of racial, ethnic, gender, gender identity, sexual orientation, disability, religious, and geographically diverse backgrounds.	UD 3-III.C	Existing Short Incremental
Increase resources available to the Board, including additional staff attorneys and additional Board members.	Reaffirm recommendation.	3-IV.C ES-34 UD 3-I, II, III	Legislation Short Term Incremental
Apply new code of conduct proposed for immigration judges, based on the ABA Code of Judicial Conduct, to Board members as well.	EOIR announced in 2011 its publication of the Ethics and Professionalism Guide for Immigration Judges. We recommend that the guide apply to Board Members as well as immigration judges.	3-IV ES-34 UD 3-II	Existing Short Term Both
[No Recommendation]	Continue to implement an integrated, system-wide electronic filing and case management system, by expanding the current pilot program nationwide. Implementing this system will require adequate funding from Congress.	UD 3-III.D	Existing Long Term Incremental

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Part 3: Board of Immigration Appeals

[No Recommendation]	We recommend that DOJ amend the certification regulation at 8 C.F.R. § 1003.1(h)(2) to establish a procedure for notice of intent by the Attorney General to certify a case that provides for an opportunity for public comment and briefing on the case before a decision is rendered and for publication of any underlying decisions at issue so that such opportunity for public comment and briefing is meaningful.	UD 3-III.E	Regulations Short Incremental
Make non-precedential opinions available to noncitizens and their representatives.	Reaffirm recommendation.	3-III.F ES-32 UD 3-III.F	Existing Short Term Incremental
[No Recommendation]	We recommend that EOIR amend its regulations to: (a) eliminate the automatic termination of voluntary departure when an applicant petitions for judicial review under 8 C.F.R. § 1240.26(i); and (b) automatically stay implementation of a removal or deportation order effective either until an order from the circuit court ruling on a motion or request for a stay, or the expiration of the appeal period, whichever is earlier.	UD 3-III.F	Regulations Short Term Incremental
[No Recommendation]	The BIA Practice Manual should give Board Members authority to relax the timelines for filing appeals with the BIA for petitioners in detention or without representation, in the interest of fairness. For these same reasons, we also encourage the Board to excuse the lack of a timely brief for pro se litigants.	UD 3-III.F	Existing Short Term Incremental

Part 4: Judicial Review

Enact legislation to restore courts' authority to review discretionary decisions under the abuse of discretion standard in effect prior to 1996 legislation.	Reaffirm recommendation.	4-IV.A. ES-36 UD 4-II, IV	Legislation Short Term Both
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Part 4: Judicial Review

Require that courts apply a presumption in favor of judicial review and specifically reject attempts to insulate more and more actions by labeling them as discretionary.	Recommend that Congress enact legislation confirming that courts of appeals have jurisdiction to review BIA decisions regarding sua sponte reopening.	4-IV.A. ES-36 UD 4-II, III, IV	Legislation Short Term Both
Amend the INA to permit the courts of appeals to remand cases for further fact finding under the standard provided in the Hobbs Act for review of other agency actions — i.e., where “the additional evidence is material” and “there were reasonable grounds for failure to adduce the evidence before the agency.” See 28 U.S.C. § 2347(c).	Reaffirm recommendation.	4-IV.B ES-36 UD 4-II, IV	Legislation Long Term Both
Extend the current 30-day deadline to file a petition for review with the court of appeals to 60 days, with the possibility of a 30-day extension where the petitioner is able to show good cause or excusable neglect.	Reaffirm recommendation. In addition, courts of appeals should consider enacting rules similar to the Ninth and Second Circuits’ automatic temporary stays by operation of law on filing a stay motion.	4-IV ES-37 UD 4-II, III, IV	Legislation Short Term Both
Amend BIA regulations to require each final removal order in which the government prevails to include notice of the right to appeal, the applicable circuit court, and the deadline for filing an appeal.	Reaffirm recommendation. In addition, we recommend that the final removal order inform petitioners of the need to file a motion for stay of removal.	4-IV ES-37 UD 4-II, IV	Regulation Both Both
[No recommendation]	Consider establishing or expanding pro bono programs in the courts of appeals to provide pro bono representation to pro se appellants in immigration cases, where such representation would assist the court in disposing of the appeal.	UD 4-III, IV	Existing Short and Long Term Both

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Part 5: Representation

<p>Establish a right to government-funded counsel in removal proceedings for indigent noncitizens who are potentially eligible for relief from removal and cannot otherwise obtain representation. Apply this right at all levels of the adjudication process, including immigration court adjudications, appeals at the BIA and federal appellate courts, and habeas petitions challenging expedited removal.</p>	<p>Reaffirm recommendation and further support the appointment of counsel at federal government expense to represent all indigent persons in removal proceedings before EOIR, and if necessary to advise such individuals of their right to appeal to the federal Circuit Courts of Appeals. Unless and until the federal government provides counsel for all indigent persons in removal proceedings before EOIR, we encourage state, local, territorial, and tribal governments to provide in removal proceedings legal counsel to all indigent persons in removal proceedings in their jurisdictions who lack pro bono counsel or the financial means to hire private counsel, prioritizing government-funded counsel for detained individuals in removal proceedings.</p>	<p>5-IV.A.1 ES-40 UD 5-I, III.A, IV.A</p>	<p>Legislation Long Term Both</p>
<p>Provide representation at government expense for unaccompanied minors and noncitizens with mental disabilities and illnesses, at all stages of the adjudication process, whether or not the proceeding may necessarily lead to removal.</p>	<p>Reaffirm recommendation. We further encourage evaluation of current gaps in coverage for providing representation to vulnerable noncitizens and support adoption of comprehensive nationwide programs to provide more uniform, complete representation to all noncitizens in vulnerable populations, including all noncitizen children and immigrants suffering from severe mental disabilities or illnesses. Finally, we recommend that Congress pass laws to stabilize and protect programs that provide access to counsel to vulnerable populations to avoid their disruption (through defunding or other executive action) in volatile political climates.</p>	<p>5-IV.A.1 ES-40 UD 5-III.A.2, III.A.3</p>	<p>Legislation Long Term Both</p>
<p>[No recommendation]</p>	<p>EOIR should activate the National Qualified Representative Program (“NQRP”) at every detained-docket immigration court as soon as practicable. Further, consistent with the ABA Model Rules of Professional Conduct, NQRP-eligible noncitizens should be provided with a guardian ad litem to assert the noncitizen’s rights in cases in which counsel may be subject to conflicting instructions or ethical obligations.</p>	<p>UD 5-III.A.2, III.A.3</p>	<p>Existing Long and Short Term Incremental</p>

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Part 5: Representation (continued)

Where representation at government expense is required (as proposed above), require it to be provided by an attorney in proceedings raising substantial questions of law, such as appeals to the BIA where a significant legal issue is presented, all appeals to the federal appellate courts, and in the preparation of habeas petitions challenging expedited removal orders. In other matters, in addition to attorneys, second-level accredited representatives would continue to be able to represent the noncitizen.	Reaffirm recommendation.	5-IV.A.1 ES-40 UD 5-III.A, IV.A	Regulation Long Term Both
Eliminate the “no expense to the Government” limitation of section 292 of the INA in order to limit controversy over whether the provision of government-funded representation is permitted under current law.	Reaffirm recommendation.	5-IV.A.1 ES-40 UD 5-III.A.3	Legislation Long Term Both
Expand and improve the EOIR pro bono program to facilitate and encourage attorney participation.	Reaffirm recommendation.	5-IV.B.2c ES-42 UD 5-III.B.1, IV.B.1	Existing Short Term Incremental
[No recommendation]	Immigration judges should facilitate pro bono representation for vulnerable pro se respondents. More broadly, immigration judges should promote justice by encouraging lawyers to provide pro bono legal services in the immigration setting, consistent with the ABA Model Code of Judicial Conduct.	UD 5-III.B.1, IV.B.1	Existing Short Term Incremental
[No recommendation]	Circuit Courts should adopt programs similar to the Ninth Circuit’s robust pro bono program and immigration resource library (including an immigration law outline and additional assistance through the Immigration Legal Resource Center) to assist pro se litigants in immigration appeals.	UD 5-III.B.1, IV.B.1	Existing Short Term Incremental

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Part 5: Representation (continued)

Expand the Legal Orientation Program (“LOP”) to provide services for all detainees.	Reaffirm recommendation. LOP should be Congressionally mandated and expanded to additional facilities to provide greater coverage to those in detention.	5-IV.A.2 ES-4 UD 5-III.B.2, IV.B.2	Legislation Long Term Both
Expand LOP in order to reach non-detained noncitizens in removal proceedings.	Reaffirm recommendation. Congress should statutorily authorize and increase funding of the ICH which will allow for expanded access to legal guidance for non-detained immigrants.	5-IV.A.2 ES-4 UD 5-III.B.2, IV.B.2	Legislation Long Term Both
Modify the LOP’s current screening system so that it screens all indigent persons (not only detainees) in removal proceedings and refers them to individuals or groups who can represent them in adversarial proceedings, using a set of standards developed by EOIR. The system would also screen noncitizens to determine whether they belong to one of the groups entitled to representation. Qualifying cases could be referred to charitable legal programs or pro bono counsel. Where these services were unavailable, government-paid counsel would be appointed.	Reaffirm recommendation.	5-IV.A.3 ES-41 UD 5-III.B.2, IV.B.2	Legislation or Regulation Long Term Both
Establish an administrative structure for the enhanced LOP to enable it to provide counsel at government expense for noncitizens in some cases.	Reaffirm recommendation and stress that the expansion of LOP should complement, rather than detract from the overarching goal of direct government-funded representation to all indigent immigrants who lack pro bono counsel or the financial means to hire private counsel.	5-IV.A.3 ES-41 UD 5-III.B.2, IV.B.2	Legislation or Regulation Long Term Both
Have EOIR create a pro se litigant guide in various languages and distribute it to court clerks, charitable organizations involved in immigration matters, community organizations, pro bono providers, and churches.	Reaffirm recommendation.	5-IV.B.2.b ES-41 UD 5-IV.B.2	Regulation Short Term Incremental

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2010 RECOMMENDATION	2019 UPDATE RECOMMENDATION	DISCUSSION <i>2010 Report</i> <i>2010 Executive Summary</i> <i>2019 Update</i>	AUTHORITY <i>(Existing, Regulation, or Legislation)</i> TIME <i>(Short Term or Long Term)</i> SCOPE ¹ <i>(Incremental, Restructuring, or Both)</i>
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Part 5: Representation (continued)

Permit recognized nonprofit agencies to charge “reasonable and appropriate fees,” as opposed to “nominal charges,” for their services.	EOIR should monitor progress under the new regulations relating to recognized organizations and accredited representatives program to ensure they are meeting the dual goals of improving access to qualified non-lawyer representation and protecting non-citizens from unscrupulous practices.	5-IV.B.2.a ES-41 UD 5-III.B.3, IV.B.3	Existing Short Term Incremental
[No recommendation]	To further deter unscrupulous practices and protect against inadequate, even if well-intentioned, legal guidance and representation, we recommend that EOIR require recognized organizations to have structures in place to promote attorney supervision, mentoring, and support. We also recommend that accredited representatives be required to participate in continuing education relating to immigration law (preferably requiring participating in at least two legal trainings annually).	UD 5-III.B.3, IV.B.3	Existing Short Term Incremental
Strictly enforce legal prohibitions against the unauthorized practice of law, and put in place mechanisms to ensure that noncitizens are not deprived of substantive and procedural rights as a consequence of the unauthorized practice of law.	Reaffirm recommendation. EOIR should continue to investigate and prosecute fraud and unauthorized practice through various mechanisms, including the Fraud and Abuse Prevention Program, the departmental working group on notarios, and the Attorney Discipline System. EOIR should issue the rule concerning ineffective assistance of counsel in immigration proceedings. Additionally, we recommend the creation of a centralized reporting system to identify and publicize those engaged in fraud along with the publication of a guide to assist victims of fraud with information, support, and services.	5-IV.B.1.b. ES-42 UD 5-III.C.1; IV.C.1	Existing Short Term Both
Have courts and immigration officials continue to follow EOIR’s Fraud Program guidelines, monitor immigration cases for indications that fraudulent operators are at work, and prosecute them to the full extent of the law.	Reaffirm recommendation.	5-IV.B.1.b. ES-42 UD 5-III.C.1; IV.C.1	Existing Short Term Both

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Part 5: Representation (continued)

Require immigration judges to consult with local bar associations and other local stakeholders in determining the criteria for inclusion on EOIR's pro bono service providers list.	Given that EOIR published a final rule, our 2010 Recommendation suggesting that immigration judges take certain action in the interim is moot.	5-IV.B.2.d ES-42 UD 5-III.C.2; IV.C.2	Regulation Short Term Incremental
Amend EOIR's Rules of Conduct to allow for civil monetary penalties to be imposed by immigration judges against both private and government attorneys.	Reaffirm recommendation.	5-IV.B.1.a ES-42 UD 5-III.C.3; IV.C.3	Regulation Short Term Incremental

Part 6: System Restructuring

Create Article I court with trial and appellate divisions, headed by Chief Trial Judge and Chief Appellate Judge, respectively. President appoints Chief Appellate Judge, other appellate judges, Chief Trial Judge, and possibly Assistant Chief Trial Judges, with advice and consent of Senate, from among persons screened and recommended by a Standing Referral Committee. Other trial judges appointed by Chief Trial Judge or Assistant Chief Trial Judges, also using Standing Referral Committee. Fixed terms of 12-15 years for appellate judges, 8-10 years for trial judges. Judges removable by appointing authority only for incompetency, misconduct, neglect of duty, malfeasance, or disability. Existing judges can serve out the remainder of the new fixed terms (which are deemed to have begun at the time of their prior appointment to current positions) and are eligible.	Reaffirm recommendation in part. We support the creation of an Article I court system for the entire immigration judiciary, but suggest that the specific features regarding qualifications, selection, tenure, removal, administration, supervision, discipline and judicial review to be revisited in conjunction with other stakeholders; provided that, with respect to judicial review, final decisions of the new court should be subject to review in regional federal courts of appeals, with the scope of review being no less broad than under current law regarding review of BIA decisions.	6-III.A.1 ES-9, 43 UD 6-III, IV, V	Legislation Long Term Restructuring
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¹ Scope of reform indicates whether the recommendation is an incremental reform, applies only in conjunction with the system restructuring proposal, or applies in both cases.

2010 RECOMMENDATION	2019 UPDATE RECOMMENDATION	DISCUSSION <i>2010 Report</i> <i>2010 Executive Summary</i> <i>2019 Update</i>	AUTHORITY <i>(Existing, Regulation, or Legislation)</i> TIME <i>(Short Term or Long Term)</i> SCOPE ¹ <i>(Incremental, Restructuring, or Both)</i>
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Part 6: System Restructuring

In the alternative, if Article I court is not established, create independent agency for both trial and appellate functions.	We now view an Article I court system for the entire immigration judiciary as much superior to an independent agency in the Executive Branch.	6-III.A.2 ES-43 UD 6-IV.B	Legislation Long Term Restructuring
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¹ Scope of reform indicates whether the recommendation is an incremental reform, applies only in conjunction with the system restructuring proposal, or applies in both cases.



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